



Summer 2020

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### **Recommended Citation**

Jacques Chouinard, *Scooting Under the Influence: Criminal Liability in the Age of Micro-Transit*, 50 N.M. L. Rev. 488 (2020).  
Available at: <https://digitalrepository.unm.edu/nmlr/vol50/iss3/8>

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# SCOOTING UNDER THE INFLUENCE: CRIMINAL LIABILITY IN THE AGE OF MICRO-TRANSIT

Jacques Chouinard\*

*Over the past two years, dockless electric scooters have become a staple of modern urban transit. Dockless electric scooters and other micro-transit devices present a unique challenge in the realm of criminal liability. Considering that electric scooters are lightweight, low-speed devices with an ambiguous regulatory status, how will driving under the influence statutes be enforced when scooter riders inevitably “scoot” while intoxicated? This question requires rapid and innovative answers; scooter riders in a number of jurisdictions have already been charged under existing driving under the influence statutes with varying levels of success.*

*This comment seeks to provide those answers by examining the current and historical state of driving under the influence laws as applied to non-automobile transportation devices. Concluding that the current body of law in this area is ambiguous, inequitable, and antiquated, the comment then proposes a two-part answer to the question of intoxicated scooter riders’ criminal liability. The legislature should first create a statutory definition that affords legal status to micro-transit devices, including electric scooters. Then, the legislature should create a new statutory crime addressing this issue. The statute should provide proportional criminal penalties that serve as more effective deterrents. This approach is preferable to a judicial remedy, as the slow pace of the judiciary cannot match the rapid growth of the micro-transit industry. Finally, the Appendix to this comment provides model statutes that legislators can use as a guide in drafting new and effective rules concerning criminal liability in the micro-transit context.*

## INTRODUCTION

Are intoxicated electric scooter operators guilty of driving under the influence? Not long ago, the answer to this question would have been a legal curiosity. However, dockless electric scooters have since become ubiquitous in urban centers across the United States.<sup>1</sup> A dockless electric scooter is a two wheeled,

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\* University of New Mexico, Class of 2021. I would like to thank Professor Carol M. Suzuki, Professor J. Walker Boyd, and the staff of the New Mexico Law Review for their valuable insights during a lengthy writing process. I would also like to thank Chris A. Dodd at Freedman, Boyd, Hollander, Urias, & Ward,

electrically powered device with handlebars and a floorboard designed to be ridden from a standing position.<sup>2</sup> The rapid and loosely regulated distribution of electric scooters by ridesharing companies, in addition to the commercial availability of electric scooters, has led to charges for driving under the influence in multiple jurisdictions.<sup>3</sup> Currently, New Mexico law is silent with regards to the regulatory status of dockless electric scooters and other micro-transit devices.

Part I of this comment examines how New Mexico law approaches non-automobile vehicles in the context of DUI with an emphasis on statutory and judicial inconsistency. The leading authority addressing the definition of the term “vehicle” as used in the state’s driving under the influence (“DUI”) statute is *State v. Saiz*.<sup>4</sup> There, a defendant was convicted under the state’s driving under the influence statute after drunkenly operating a moped.<sup>5</sup> On appeal, the court held that *any* vehicle was subject to the broad language of New Mexico’s DUI statute<sup>6</sup>—including mopeds—and affirmed the conviction.<sup>7</sup> The court broadly construed the term “vehicle” as defined by the Motor Vehicle Code to include any non-human powered device used to move a person along a road.<sup>8</sup>

Part I also discusses how, in the intervening period, the New Mexico legislature enacted a statutory carve out for a type of alternative transportation device referred to as an electric personal assistive mobility device (“EPAMD”). EPAMDs share some similarities with modern electric scooters, but the statutory definition of EPAMD applies clearly to only one device: the Segway Personal Transporter. The statutory carve out exempted EPAMDs from the provisions of the Motor Vehicle Code and afforded EPAMD operators the same rights and responsibilities as pedestrians.<sup>9</sup> This carve out created ambiguity between judicial and legislative approaches to non-automobile devices in the DUI context.

P.A. whose advocacy and persistence inspired this Comment. Finally, I would like to thank my family for their endless patience and support.

1. See Samantha Raphelson, *Dockless Scooters Gain Popularity and Scorn Across the U.S.*, NATIONAL PUBLIC RADIO, (Aug. 29, 2018, 4:29 PM), <https://www.npr.org/2018/08/29/643058414/dockless-scooters-gain-popularity-and-scorn-across-the-u-s> [<https://perma.cc/JE78-8MQD>].

2. See CAL. VEH. CODE § 407.5 (West 2008) (This statute defines a “motorized scooter,” which is the functional equivalent of “dockless electric scooter” for the purposes of this comment).

3. See, e.g., Matthew Reisen, *Woman Riding on Electric Scooter Charged with DWI*, ALBUQUERQUE JOURNAL (May 30, 2019, 11:39 PM), <https://www.abqjournal.com/1322102/woman-on-electric-scooter-charged-with-dwi.html> [<https://perma.cc/W4XZ-24K3>];

*Man Charged with DUI on Electric Scooter in Tempe*, KTAR.COM (Feb. 5, 2019, 3:09 PM), <https://ktar.com/story/2424957/man-charged-with-dui-on-electric-scooter-in-tempe> [<https://perma.cc/BZ9Q-8JLZ>]; *Police: Man Arrested After Riding E-Scooter Drunk Down 16th Street Mall*, CBS4 DENVER (Oct. 2, 2018, 3:00 PM) <https://denver.cbslocal.com/2018/10/02/man-arrested-scooter-drunk-16th-street> [<https://perma.cc/SDF4-2Q9J>]; Laura J. Nelson, *Another First for Scooters in L.A.: A Conviction for Scooting Under the Influence*, LOS ANGELES TIMES (Sep. 26 2018, 4:25 PM), <https://www.latimes.com/local/lanow/la-me-ln-scooter-dui-20180926-story.html> [<https://perma.cc/R87Z-DS9U>].

4. 2001-NMCA-035, 103 N.M. 333, 24 P.3d 365.

5. *Id.* at ¶ 1, 24 P.3d at 365.

6. N.M. STAT. ANN. § 66-8-102 (2016).

7. *Saiz*, 2001-NMCA-035, ¶¶ 8–9, 24 P.3d at 367.

8. *Id.* ¶ 3, 24 P.3d at 366 (citing N.M. STAT. ANN. § 66-8-419(B) (1990)).

9. N.M. STAT. ANN. § 66-3-1102 (C), (D) (2007).

New Mexico is not alone in grappling with how alternative transportation devices fit into existing statutory frameworks. Courts in Idaho,<sup>10</sup> Kentucky,<sup>11</sup> Michigan,<sup>12</sup> Minnesota,<sup>13</sup> and North Carolina<sup>14</sup> have applied, or declined to apply, DUI statutes to non-automobile devices. Part II discusses those decisions to illustrate the difficulty facing state judiciaries in defining new types of transportation devices.

Part III analyzes the implications of applying current DUI penalties to electric scooters. In particular, this section will demonstrate that current DUI penalties are neither sufficiently deterrent nor proportionate when applied to intoxicated scooter operators.

Part IV details the need for a new solution to the problem of operating scooters under the influence. Part IV then proposes a statutory definition for micro-transit devices that covers electric scooters and similar lightweight, low-speed devices. Further, Part IV contemplates the new crime of operating a micro-transit device under the influence of alcohol or drugs and provides a framework for developing proportional, deterrent penalties. Part IV also addresses the feasibility of creating new statutory frameworks for dockless electric scooters and briefly details current legislative efforts in this arena.

Finally, Part V illustrates why a legislative remedy is the preferable solution to this problem by showing that courts are ill-equipped to develop a body of law governing new transportation devices.

## BACKGROUND

### I. New Mexico's Approach to Driving Under the Influence.

#### A. Current Statutory Provisions.

Driving under the influence of alcohol or drugs ("DUI") is a statutory crime in all fifty United States.<sup>15</sup> New Mexico's Motor Vehicle Code<sup>16</sup> defines the offense as the unlawful operation of a vehicle under the influence of drugs or alcohol.<sup>17</sup> The term "vehicle" is also statutorily defined:

[A vehicle is] every device in, upon or by which any person or property is or may be transported or drawn upon a highway, including any frame, chassis, body or unitized frame and body of any vehicle or motor vehicle, except devices moved exclusively

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10. See *State v. McKie*, 417 P.3d 1001 (Idaho Ct. App. 2018); *State v. Trusdall*, 155 Idaho 965 (Idaho Ct. App. 2014).

11. See *Adams v. Commonwealth*, 275 S.W.3d 209, 210 (Ky. Ct. App. 2008).

12. See *People v. Lyon*, 872 N.W.2d 245 (Mich. Ct. App. 2015).

13. See *State v. Greenman*, 825 N.W.2d 387 (Minn. Ct. App. 2013); *State v. Brown*, 801 N.W.2d 186 (Minn. Ct. App. 2011).

14. See *State v. Crow*, 623 S.E.2d 68 (N.C. Ct. App. 2005).

15. See HEINONLINE, 50 STATE SURVEYS: DRUNK DRIVING (8th ed. 2019), <https://heinonline-org.unmlawlibrary.idm.oclc.org/HOL/NSSL?collection=nssl&law=DRUNK%20DRIVING&edition=8> (last visited Mar. 29, 2020).

16. N.M. STAT. ANN. §§ 66-1-1 to -13-13 (2019).

17. N.M. STAT. ANN. §§ 66-8-102(A), (B) (2016).

by human power or used exclusively upon stationary rails or tracks.<sup>18</sup>

These statutes seem straightforward under facial scrutiny. However, whether a device constitutes a vehicle for the purposes of Section 66-8-102 has not always been clear. New Mexico courts have had to determine which devices actually fit the definition of a vehicle in the DUI context.

*B. State v. Saiz and the New Mexico Motor Vehicle Code.*

In 2001, the New Mexico Court of Appeals affirmed Nestor Saiz's DUI conviction under Section 66-8-102.<sup>19</sup> At the time of his arrest, Saiz was operating a moped.<sup>20</sup> On appeal, Saiz argued that a moped, as defined by the New Mexico Motor Vehicle Code, was not a vehicle and was exempt from the provisions of Section 66-8-102.<sup>21</sup>

*Saiz* was a matter of first impression in New Mexico and required the court to interpret the statutory definitions of the terms "moped" and "vehicle" in relation to the state's DUI statute.<sup>22</sup> Since Section 66-8-102 forbids New Mexicans from driving any vehicle while intoxicated, the court first had to determine whether or not a moped was a vehicle under the statute.<sup>23</sup> The New Mexico Motor Vehicle Code defined a moped as a "two-wheeled or three-wheeled vehicle with an automatic transmission and a motor having a piston displacement of less than fifty cubic centimeters, that is capable of propelling the vehicle at a maximum speed of not more than thirty miles per hour on level ground. . . ." <sup>24</sup> The court held that this definition was consistent with the statutory definitions of vehicles and motor vehicles.<sup>25</sup> Further, the court reasoned that the definition of vehicle was broader than that of motor vehicle; motor vehicles are essentially a subset of the broader category of vehicles.<sup>26</sup> For the purposes of the Motor Vehicle Code, Saiz's moped was a vehicle because it was a device that transported a person along a highway and was not moved exclusively by human power.

The remainder of the court's analysis flowed from this foundation. The court construed Section 66-8-102 in concert with the definitional statutes for mopeds and vehicles: Section 66-8-102 applies to operators of *any* type of vehicle; a moped is a vehicle when the statutory definitions of those terms are read together; therefore, an operator of a moped is subject to Section 66-8-102's prohibition of driving under the influence.

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18. N.M. STAT. ANN. § 66-1-4.19(B) (2017).

19. See 2001-NMCA-035, ¶ 1, 130 N.M. 333, 24 P.3d 365.

20. *Id.*

21. *Id.*

22. *Id.* ¶¶ 2, 4, 24 P.3d at 366.

23. *Id.* ¶¶ 2-4, 24 P.3d at 366.

24. *Id.* ¶ 3, 24 P.3d at 366 (citing N.M. STAT. ANN. § 66-1-4.11(F) (1998)).

25. *Id.* (citing N.M. STAT. ANN. § 66-1-4.19(B) (2017); N.M. STAT. ANN. § 66-1-4.11(I) (1998) (defining motor vehicles as "every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from batteries or from overhead trolley wires, but not operated upon rails")).

26. *Id.*

Saiz also argued that the regulatory statute governing mopeds exempted moped operators from Section 66-8-102's criminal penalties.<sup>27</sup> The regulatory statute stated, in pertinent part, "Except as provided in Subsections A and B of this section, none of the provisions of the Motor Vehicle Code relating to motor vehicles or motorcycles . . . shall apply to a moped."<sup>28</sup> Saiz argued that this exemption precluded his conviction, but the court disagreed. Construing the statutory definitions of vehicle, motor vehicle, and moped in concert with the moped regulatory provision, the court reasoned that Section 66-3-1101 only exempted mopeds from the provisions of the Motor Vehicle Code that regulated *motor* vehicles.<sup>29</sup> Unfortunately for Saiz, Section 66-8-102 applied to *all* vehicles, not just those that fit the definition of motor vehicle.<sup>30</sup> Drawing on its prior reasoning, the court held that mopeds were within the larger set of vehicles and affirmed Saiz's conviction.

*State v. Saiz* illustrates the classic method of statutory construction employed by New Mexico appellate courts. The court drew on the plain language of the statutory framework and construed the statutes so that they remained harmonious and logically consistent.<sup>31</sup> Further, the court ensured that its interpretation remained consistent with the policy aims of Section 66-8-102.

### C. *The Motor Vehicle Code's Policy Aims.*

The Motor Vehicle Code's policy aims were well articulated by the court in *State v. Richardson*, another case that analyzed the applicability of Section 66-8-102 to alternative means of transportation.<sup>32</sup> On August 27, 1990, James Richardson made the unfortunate decision to drink ten beers, get in a large tractor with a mower attachment, and attempt to mow weeds along an unpaved road in Chaves County, New Mexico.<sup>33</sup> After demolishing a fence and uprooting a mailbox, Richardson was arrested, charged with DUI under Section 66-8-102(A), and convicted.<sup>34</sup> Utilizing the same method of statutory construction employed in *Saiz*, the Court of Appeals held that a tractor fit the definition of a motor vehicle, subjecting tractor drivers to the provisions of Section 66-8-102.<sup>35</sup> The court reasoned that statutory construction must give effect to the statute's underlying public policy.<sup>36</sup> According to the court, the underlying policy goal of Section 66-8-102 "is to prevent individuals who, either mentally or physically, or both, are unable to exercise the clear judgment and steady hand necessary to handle a vehicle with safety both to the individual and the public."<sup>37</sup> Exempting tractors from Section 66-8-102 would be contrary to the statute's policy goals. Allowing tractor drivers to drive while intoxicated would

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27. *Id.* ¶ 6, 24 P.3d at 366.

28. *Id.*, 24 P.3d at 367 (citing N.M. STAT. ANN. § 66-3-1101 (1981)).

29. *Id.* ¶ 7, 24 P.3d at 367.

30. *Id.*

31. *Id.*

32. 1992-NMCA-041, 113 N.M. 740, 832 P.2d 801.

33. *Id.* ¶ 2, 832 P.2d at 801.

34. *Id.*

35. *See id.* ¶¶ 6–11, 832 P.2d at 802–04.

36. *Id.* ¶ 8, 832 P.2d at 803.

37. *Id.* (internal citations omitted).

create clear dangers to the public, and those dangers were much the same as those created by drunk drivers of other large motor vehicles.<sup>38</sup>

New Mexico courts have also given effect to the policy goals of Section 66-8-102 by interpreting driving under the influence as a strict liability crime. Strict liability crimes require a clear legislative intent that no *mens rea* is necessary for the crime.<sup>39</sup> Strict liability crimes demonstrate that the legislature found an overly compelling public interest in prohibiting a particular course of conduct, regardless of material intent. In *State v. Harrison*, the court explicitly articulated the compelling public interest served by Section 66-8-102: “Obviously, the public’s interest in deterring individuals from driving while intoxicated is compelling. This is due to the dangers of the practice, not only to those who operate motor vehicles while under the influence, but also to those innocent individuals who are killed as a result of DWI accidents.”<sup>40</sup> The court further reasoned that the risk from driving under the influence is amplified because such conduct is not only harmful to drunk drivers themselves, but to the public generally.<sup>41</sup>

New Mexico courts have consistently held that the policy goals of Section 66-8-102 are to protect the public and individuals from the dangers of drunk driving.<sup>42</sup> This interpretation is evidenced by the broad construal of statutory definitions that bring non-automobile vehicles under the auspices of Section 66-8-102. Further, courts have given effect to the legislature’s intent in prohibiting driving under the influence by interpreting the offense as a strict liability crime.

#### D. Section 66-3-1102 and the Emergence of EPAMDs.

New Mexico courts had ostensibly settled how Section 66-8-102 applies to non-automobile transportation devices. Shortly after *State v. Saiz* was decided, however, the New Mexico state legislature created a new statute defining “electric personal assistive mobility devices.” That statute raises questions about courts’ interpretation of the terms “vehicle.”<sup>43</sup> For nearly twenty years, this inconsistency has not been an issue. Yet the emergence of dockless electric scooters has created a renewed need for reconciliation here. Electric scooters *resemble* EPAMDs but are distinct, and neither device is clearly contained within the statutory definition of “vehicle.”

Understanding the origins of this inconsistency requires a trip back to the year 2001. Dean Kamen, a brilliant and somewhat eccentric inventor, debuted the Segway Personal Transporter (PT) on *Good Morning America*.<sup>44</sup> The Segway was a “technological marvel”; it was ridden from a standing position and utilized advanced gyroscopic and computer technology to allow riders to control the device simply by

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38. *Id.*

39. *State v. Harrison*, 1992-NMCA-139, ¶ 18, 115 N.M. 73, 846 P.2d 1082, 1086 (defining strict liability in the context of driving under the influence).

40. *Id.* ¶ 19, 846 P.2d at 1086.

41. *Id.*

42. *See id.*; *see also State v. Saiz*, 2001-NMCA-035, ¶ 1, 130 N.M. 333, 24 P.3d 365..

43. *See* N.M. STAT. ANN. § 66-3-1102 (2007).

44. Jordan Golson, *Well, That Didn’t Work: The Segway is a Technological Marvel. Too Bad It Doesn’t Make Any Sense*, WIRED (10:00 AM, Jan. 6, 2015), <https://www.wired.com/2015/01/well-didnt-work-segway-technological-marvel-bad-doesnt-make-sense> [<https://perma.cc/P4DH-52NK>].

shifting their body weight forward and back.<sup>45</sup> The Segway PT was hailed as revolutionary and was expected to completely reshape modern urban transit.<sup>46</sup> Segway lobbyists spread out across the country, working to convince state and federal legislators to create a regulatory environment that would allow Segways onto sidewalks, bike paths, and roads.<sup>47</sup> These lobbying efforts worked; state legislatures across the country created new statutory frameworks that defined and regulated a new device called an “electric personal assistive mobility device.”<sup>48</sup> The statutory definition of EPAMDs was essentially uniform: an EPAMD was a “self-balancing device having two non-tandem wheels designed to transport a single person by means of an electric propulsion system” with a maximum speed of twenty miles per hour.<sup>49</sup> In other words, an EPAMD was a statutory creation that solely described the Segway PT. The regulations governing EPAMDs generally exempted them from licensure and registration requirements, with some states going so far as to grant EPAMD operators the same status as pedestrians.<sup>50</sup> New Mexico’s statute was particularly kind to these devices as it included language implying that Segway PTs and their operators were exempt from all other provisions of the state’s Motor Vehicle Code.<sup>51</sup>

The regulatory landscape seemed clear for a transit revolution led by Segway riders across the country. The revolution, however, never came. The Segway PT was expensive, heavy, and awkward; cities and the people who lived in them were reluctant to embrace the device.<sup>52</sup> In an instance emblematic of the company’s misfortune, President George W. Bush was photographed falling off a Segway while on vacation in Maine.<sup>53</sup> President Bush, unlike the company, was unharmed.<sup>54</sup> As sales expectations failed to materialize, Segway struggled to actualize its vision.<sup>55</sup> The Segway PT faded into obscurity, relegated to the mundane world of guided tours and security patrols.<sup>56</sup> The statutes regulating EPAMDs remained on the books, legal reminders of a failed experiment in human transportation.

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45. *Id.*

46. See Matt MacFarland, *Segway Was Supposed to Change the World. Two Decades Later, It Just Might*, CNN BUSINESS, (1:04 PM, Oct. 30, 2018), <https://www.cnn.com/2018/10/30/tech/segway-history/index.html> [<https://perma.cc/F9LT-VMB6>].

47. See Jim VandeHei, *Lobbying to Put the Segway on the Profit Path*, THE WASHINGTON POST (Feb. 24, 2003), <https://www.washingtonpost.com/archive/politics/2003/02/24/lobbying-to-put-the-segway-on-profit-path/6a87b91b-e3b3-45eb-8c80-3b4347d55710> [<https://perma.cc/YL4Z-UX2L>].

48. See, e.g., CONN. GEN. STAT. § 14-289h (2002) (defining electric personal assistive mobility devices); MINN. STAT. § 169.212 (2002) (also defining electric personal assistive mobility devices); 2002 N.M. Laws, Ch. 38, §1 (codified at N.M. STAT. ANN. § 66-3-1102) (defining and setting baseline regulations for electric personal assistive mobility devices); OR. REV. STAT. § 814.550 (2003).

49. See *id.*; see also N.M. STAT. ANN. § 66-1-4.5(A) (2007).

50. See, e.g., 625 ILL. COMP. STAT. 5/11-1005.1 (2003); MINN. STAT. § 169.212; N.M. STAT. ANN. § 66-3-1102.

51. N.M. STAT. ANN. § 66-3-1102(D) (2007) (“Except as provided in this section, no other provisions of the New Mexico Motor Vehicle Code shall apply to electric personal assistive mobility devices.”).

52. See Golson, *supra* note 44.

53. *Bush Fails the Segway Test*, BBC NEWS (11:40 AM, June 14, 2003), <http://news.bbc.co.uk/2/hi/americas/2989000.stm> [<https://perma.cc/DU9Z-24X7>].

54. *Id.*

55. See MacFarland, *supra* note 46.

56. Golson, *supra* note 44.

## II. Jurisdictional Applications of DUI Statutes to Non-Automobile Devices.

Even before the Segway tried and failed to dominate urban transportation, courts grappled with the application of DUI statutes to non-automobile devices. This section discusses national trends in how state and federal courts have applied DUI statutes to such devices, extending beyond *State v. Richardson*<sup>57</sup> and *State v. Harrison*.<sup>58</sup> Courts are inclined to extend the scope of DUI statutes to include non-automobile devices, although this is not a uniform rule. As devices stray from the traditional notion of a vehicle as a car or truck, judicial uniformity varies.

### A. Farm Tractors.

Recalling *State v. Richardson*, the New Mexico Court of Appeals has held that farm tractors are vehicles in the context of DUI.<sup>59</sup> The court noted that the New Mexico Motor Vehicle Code defined farm tractors as “every *motor vehicle* designed and used primarily as a farm implement for drawing plows, mowing machines, and other implements of husbandry.”<sup>60</sup> The court further reasoned that the DUI statute was not limited to vehicles with a specific function but rather included all vehicles.<sup>61</sup> The court held that farm tractors were vehicles for the purposes of the DUI statute because the statute’s policy goals were served by defining tractors as vehicles.

Appellate courts in several other states have utilized similar reasoning in determining that farm tractors are vehicles for the purpose of DUI statutes.<sup>62</sup> Further, some of those courts have held that tractors are motor vehicles in the context of DUI, even when tractors are exempted from motor vehicle regulations by other statutory provisions.<sup>63</sup> This judicial reasoning is in line with the underlying policy of DUI statutes; farm tractors are large vehicles that can become serious threats to public safety when their operators are intoxicated.

### B. Utility Type Vehicles.

A utility type vehicle (“UTV”) is a four-wheeled vehicle akin to a golf cart that is designed to handle off-road terrain.<sup>64</sup> In *State v. Trusdall*, an Idaho court considered whether an intoxicated UTV operator could be convicted under the state’s DUI statute.<sup>65</sup> There, Trusdall was arrested and charged after police found her doing donuts in a church parking lot in her Polaris Ranger, a type of UTV.<sup>66</sup> Trusdall had a half-empty beer in the vehicle and was accompanied by six unhelmeted children.<sup>67</sup>

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57. 1992-NMCA-041, 113 N.M. 740, 832 P.2d 801.

58. 1992-NMCA-139, 115 N.M. 73, 846 P.2d 1082.

59. See *Richardson*, 1992-NMCA-041, ¶ 14,832 P.2d at 804.

60. *Id.* ¶ 3, 832 P.2d at 802 (citing N.M. STAT. ANN. § 66-8-102(A)) (original emphasis retained).

61. *Id.* ¶ 10, 832 P.2d at 803.

62. See, e.g., *State v. Laker*, 939 N.E.2d 1111, 1114 (Ind. Ct. App. 2011); *Nemeth v. Commonwealth*, 944 S.W.2d 871, 872 (Ky. Ct. App. 1997); *City of Wauseon v. Badenhop*, 459 N.E.2d 867, 870 (Ohio 1984); *State v. Sohn*, 535 N.W.2d 1, 5 (Wis. Ct. App. 1995).

63. See *Laker*, 939 N.E.2d at 1114; see also *Sohn*, 193 N.W.2d at 5.

64. See IDAHO CODE § 67-7101(17) (2019).

65. See 155 Idaho 965, 968 (Idaho Ct. App. 2014).

66. *Id.* at 967–68.

67. *Id.* at 968.

The district court dismissed Trusdall's charges, reasoning that the UTV was not a motor vehicle for the purposes of Idaho's general DUI statute; further, Idaho had a UTV-specific DUI statute which precluded prosecution under the general statute.<sup>68</sup>

The appellate court reversed.<sup>69</sup> The court held that a UTV was a motor vehicle for the purposes of the general DUI statute.<sup>70</sup> The court relied on Idaho's statutory definition of a vehicle as "[a] device in, upon, or by which any person or property may be transported or drawn upon a highway . . ." <sup>71</sup> in conjunction the state's definition of motor vehicles which included motorized devices.<sup>72</sup> Construing these definitions in light of the state's DUI statute, the court reasoned that UTVs fit the definitions of vehicles and motor vehicles because UTVs are motorized and can transport people on a highway.<sup>73</sup>

*Trusdall* demonstrates how prohibition of intoxicated operation of UTVs—devices with distinct similarities to automobiles—serves the policy goals of DUI statutes and allows for statutory construction that defines UTVs as motor vehicles.

### C. Mopeds.

Mopeds provide an excellent example of how courts have attempted to reconcile state DUI statutes with alternative, non-automobile transportation devices. A moped is commonly defined as "a lightweight, low-powered motor bike that can be pedaled."<sup>74</sup> In other words, mopeds are hybrid devices propelled by human or motor power. Mopeds are unique in that they do not fit the general mold of an automobile or motorcycle but are allowed on public roads. Mopeds are subject to licensure requirements and operational restrictions in some jurisdictions.<sup>75</sup> Thus, mopeds straddle the line between vehicle and non-vehicle transportation device.

Courts tend to classify mopeds as motor vehicles for the purposes of DUI, although this trend is not completely uniform. In *Adams v. Commonwealth*, a Kentucky court affirmed a DUI conviction for a moped rider. The court reasoned that a moped was a motor vehicle under the state's DUI statute because a moped is a means of transporting a person and is self-propelled.<sup>76</sup> The court further noted that several other states consider mopeds to be vehicles in the DUI context even though those states exempt mopeds from other regulatory provisions.<sup>77</sup> The Kentucky

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68. *Id.*

69. *Id.* at 972.

70. *Trusdall*, 155 Idaho at 968 (citing IDAHO CODE § 18-8004).

71. *Id.* at n.2.

72. *Id.* at 969 (citing IDAHO CODE § 49-123(2)(g)).

73. *Id.* at 970.

74. *Moped*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/moped> [<https://perma.cc/2FRM-XQT5>].

75. *See, e.g.*, DEL CODE ANN. tit. 21, § 4198M; N.M. STAT. ANN. § 66-3-1101 (1981); N.C. GEN. STAT. § 20-140.4 (2016).

76. *See Adams v. Commonwealth*, 275 S.W.3d 209, 210 (Ky. Ct. App. 2008).

77. *Id.* (citing *State v. Saiz*, 2001-NMCA-035, ¶ 6, 130 N.M. 333, 24 P.3d 365, 367; *State v. Singleton*, 460 S.E.2d 573, 575 (S.C. 1995)).

court's reasoning reflects the majority approach taken by courts in applying DUI statutes to mopeds.<sup>78</sup>

One court has disagreed with the majority approach to mopeds. Interpreting Washington state law, the Ninth Circuit Court of Appeals reversed a DUI conviction where the defendant was operating a moped.<sup>79</sup> In a familiar exercise of statutory construction, the court interpreted Washington's statutory definition of vehicle in concert with the state's moped regulations and DUI statutes.<sup>80</sup> The court examined the history of the moped, noting that a rise in moped popularity corresponded with legislative efforts to classify and regulate the devices.<sup>81</sup> The court noted that the Washington legislature did not classify mopeds as vehicles, in contrast to other devices that were explicitly included in the statutory definition.<sup>82</sup> Moreover, in subsequent amendments to the state's moped regulations, "[the legislature] did not choose to bring moped within the full definition of motor vehicles, as it did with bicycles, when it amended the [statutory definition of vehicle]."<sup>83</sup> The court reasoned that the legislature did not demonstrate clear intent that mopeds should be covered by the state's DUI statute, exempting mopeds from the strictures of the statute.<sup>84</sup>

#### D. *Electric Personal Assistive Mobility Devices.*

As discussed above, the electric personal assistive mobility device (EPAMD) is a statutory definition created in response to the Segway PT. In *State v. Greenman*, the Minnesota Court of Appeals affirmed a district court's dismissal of DUI charges against a man arrested for riding a Segway PT while intoxicated.<sup>85</sup> The court analyzed Minnesota's EPAMD regulatory statute to determine how it interacted with the DUI statute. First, the court reasoned that a Segway PT fit the definition of an EPAMD because the Segway PT was a "two-wheeled, self-balancing, battery powered device designed for use in places a car or bicycle cannot go."<sup>86</sup> The defendant's Segway was excluded from the provisions of the state's motor vehicle regulations because the definition of motor vehicle specifically excluded EPAMDs.<sup>87</sup> The court noted that EPAMD operators were granted the "rights and responsibilities of a pedestrian" by other traffic regulations and that EPAMDs were required to operate on sidewalks and in bike paths.<sup>88</sup> The court held that a Segway was not a vehicle in the context of DUI because vehicles were defined as devices

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78. See Gregory J. Swain, Annotation, *Operation of Mopeds and Motorized Recreational Two-, Three-, and Four-Wheeled Vehicles as Within Scope of Driving While Intoxicated Statutes*, 32 A.L.R. 5th 659, §§ 3[a], 3[b] (2019).

79. *United States v. Dotson*, 34 F.3d 882, 886 (9th Cir. 1994).

80. See *id.* at 883–85.

81. See *id.* at 885.

82. *Id.*

83. *Id.* at 886.

84. See *id.*

85. 825 N.W.2d 387, 389 (Minn. Ct. App. 2013).

86. *Id.* at 391.

87. See *id.* (citing MINN. STAT. ANN. § 169.011).

88. *Id.* (citing MINN. STAT. ANN. § 169.212).

that transported people along highways; by confining EPAMDs to sidewalks and bike paths, the legislature demonstrated its intent that EPAMDs were not vehicles.<sup>89</sup>

The Minnesota court's holding in *Greenman* may be the only such holding in the United States. A broad survey of American case law and legal encyclopedias reveals no analogous decisions. However, *Greenman* shows that courts will not automatically extend the provisions of DUI statutes to non-automobile transportation devices with unclear regulatory status.

#### E. *Electric Scooters.*

Much like EPAMDs, precedent surrounding electric scooters is scant. However, in 2005, Kevin Crowe was arrested in Hyde County, North Carolina, after he and a companion were seen operating "stand up scooters" in a disorderly fashion.<sup>90</sup> The court described the scooters as "skateboard[s] with handlebars on the front" with two wheels arranged in a tandem fashion driven by an electric motor.<sup>91</sup> In other words, the defendant was operating an early version of the modern dockless electric scooter. The defendant was charged and convicted under North Carolina's DUI statute and sentenced to a year of probation.<sup>92</sup>

On appeal, the court interpreted North Carolina's definition of vehicle to include the defendant's "stand up scooter."<sup>93</sup> The court reasoned that the scooter was a device which drew the defendant along a highway, fitting the statutory definition of vehicle.<sup>94</sup> Further, the court noted that the scooter did not fit the listed exceptions to that definition. First, the statute provided an exemption for devices used to enhance mobility. The court rejected the defendant's argument that the scooter served this function, stating that the defendant was a healthy 25-year-old man who required no mobility enhancement.<sup>95</sup> Second, and more relevant for the purpose of this comment, the statute excluded EPAMDs from the definition of "vehicle."<sup>96</sup> The defendant argued that his scooter fell under the North Carolina definition of an EPAMD (which was functionally equivalent to New Mexico and Minnesota EPAMD definitions).<sup>97</sup> The court also rejected this argument, holding that the scooter was not an EPAMD because it was not self-balancing and its wheels were arranged in a tandem fashion.<sup>98</sup> Thus, the "standing scooter" fit neither exception to the definition of "vehicle" and was subject to the provisions of North Carolina's DUI statute.<sup>99</sup>

Notably, the court also discussed the underlying policy of North Carolina's statute and commented on the legislature's responsibility in this realm. The court noted that the defendant's conduct could have subjected himself, other pedestrians,

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89. *Id.* at 392.

90. *See State v. Crowe*, 623 S.E.2d 68, 69 (N.C. Ct. App. 2005).

91. *Id.*

92. *Id.*

93. *See id.* at 70–71.

94. *Id.* at 71 (citing N.C. GEN. STAT. § 20-4.01(49)).

95. *Crowe*, 623 S.E.2d at 71.

96. *Id.*

97. *See id.* at 72.

98. *Id.* at 71.

99. *Id.* at 72.

and drivers to a “high degree of danger.”<sup>100</sup> This created a situation that the prohibition on DUI was expressly designed to prevent.<sup>101</sup> The court further opined that it believed “the decision as to whether to exclude scooters [from the definition of vehicle] is best left in the hands of the General Assembly.”<sup>102</sup> *Crowe* is an explicit example of how legislatures can and should solve the problem of applying DUI statutes to non-traditional transportation devices.

## ANALYSIS & PROPOSAL

### III. Applying Current DUI Penalties to Electric Scooters is Ineffective and Disproportionate.

The policy aims of New Mexico’s DUI statute,<sup>103</sup> as established in numerous appellate decisions, are to protect the public from the hazard of intoxicated drivers and to protect individuals from harming themselves while driving drunk.<sup>104</sup> This policy is executed by imposing criminal penalties on drivers convicted under the statute.<sup>105</sup> A first-time conviction under Section 66-8-102 can yield significant punishment; possibilities include 90-days of imprisonment, a \$500 fine, one year of probation, community service, and attendance of drug or alcohol rehabilitation programs.<sup>106</sup> Further, a first time DUI conviction requires defendants to obtain an ignition interlock device at their own cost<sup>107</sup> and may result in driver’s license revocation for one year.<sup>108</sup> These penalties understandably escalate for aggravating circumstances and subsequent convictions.<sup>109</sup>

The deterrent effect of Section 66-8-102 seems to be working, at least in part; in 2018, 38 fewer people died on New Mexico roads in alcohol-related crashes than in 2017.<sup>110</sup> These circumstances, however, raise a question: would road deaths and injuries be significantly decreased by imposing the same harsh penalties on electric scooter operators?

The answer to this question is beyond the scope of this comment as it would involve significant amounts of data collection and analysis on the transportation habits of large populations. However, a facial legal analysis demonstrates the disproportionality in applying current DUI laws to electric scooters and other micro-transit devices. The degree of risk posed by a certain course of conduct is inherently

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100. *Id.*

101. *Id.*

102. *Id.*

103. N.M. STAT. ANN. § 66-8-102 (2016).

104. *See generally* State v. Johnson, 2001-NMSC-001, 130 N.M. 6, 15 P.3d 1233; State v. Richardson, 1992-NMCA-041, 113 N.M. 740, 832 P.2d 801; State v. Harrison, 1992-NMCA-139, 115 N.M. 73, 846 P.2d 1082.

105. *See* N.M. STAT. ANN. § 66-8-102(E)-(T) (2016).

106. N.M. STAT. ANN. § 66-8-102(E) (2016).

107. N.M. STAT. ANN. § 66-8-102(O) (2016).

108. N.M. STAT. ANN. § 66-5-29(C) (2007).

109. *See* N.M. STAT. ANN. § 66-8-102 (2016).

110. ASSOCIATED PRESS, *DWI Traffic Deaths Down in New Mexico for 2018*, ALBUQUERQUE JOURNAL (Jan. 11, 2019, 8:26 AM), <https://www.abqjournal.com/1267121/dwi-traffic-deaths-down-in-new-mexico-for-2018.html> [<https://perma.cc/HRW7-TGLA>].

tied to the severity of the criminal punishment. Indeed, a fundamental principle of American law holds that punishment must be proportionate to the crime.<sup>111</sup>

In the case of electric scooters, the punishment imposed by Section 66-8-102 is disproportionate to the act of operating a scooter while intoxicated for two main reasons. First, the license revocation and ignition interlock penalties do nothing to deter the use of electric scooters. The New Mexico Motor Vehicle Code does not define electric scooters, much less require a driver's license for their operation. License revocation does nothing to legally prevent convicted defendants from operating scooters. The same rationale applies to the interlock requirement: interlocks are not applicable to electric scooters and do nothing to prevent people from drinking and operating scooters. These penalties do not prevent people from operating scooters while intoxicated in the post-conviction setting, showing that the interlock and license revocation penalties are not logically tied to preventing intoxicated scooter operation.

In order to illustrate the second reason for Section 66-8-102's disproportionality, consider a hypothetical. Imagine that a young woman was charged with DUI after scooting around a large urban center after a night out. She was convicted and subjected to the full range of penalties imposed by Section 66-8-102. The purpose of this conviction would be, ostensibly, to deter the young woman and others like her from operating scooters while intoxicated. This may serve the compelling public safety rationales underlying a strict liability crime like driving under the influence. However, the criminal and administrative penalties imposed by a conviction under Section 66-8-102 are disproportionate to the risks created by electric scooter operators. These risks pale in comparison to the those posed by the larger, faster devices and automobiles contemplated by the statute.

Consider the differences between the size and speed of electric scooters and other devices subject to DUI statutes. A review of commercially available dockless electric scooters shows that these devices are small, light, and limited to low speeds. They tend to weigh between thirty and forty pounds and are have maximum speeds between fifteen and twenty miles per hour.<sup>112</sup> In contrast, even small automobiles routinely weigh in excess of 2,000 pounds and can reach highway speeds in short order. The Honda Fit, for example, is one of the smallest commercially available cars<sup>113</sup> yet weighs nearly 2,500 pounds and can reach 84 miles per hour in 16 seconds.<sup>114</sup> Had the young woman above chosen to drive a 2,000 pound car instead of a small electric scooter, her risk of injuring others or destroying property would have been exponentially greater.

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111. WAYNE R. LAFAVE, CRIMINAL LAW § 2.14(f) (3d ed. 2000).

112. See, e.g., *Ninebot Kickscooter by Segway ES4*, SEGWAY, <https://store.segway.com/segway-ninebot-kickscooter-es4> [<https://perma.cc/UPG8-62HS>]; *INOKIM QUICK 3-Super Electric Scooter*, INOKIMUSA, <https://inokimusa.com/models/quick-3-super/#quick> [<https://perma.cc/JHR7-GBM4>]; *Hiboy MAX Electric Scooter*, AMAZON, <https://www.amazon.com/dp/B07V8H6LPX> (last visited Oct. 23, 2019).

113. See Joel Patel, *15 Smallest Cars on the Market*, U.S. NEWS & WORLD REPORT (July 9, 2019), <https://cars.usnews.com/cars-trucks/smallest-cars-on-the-market>.

114. Michael Cantu, *2018 Honda Fit Sport First Test Review: Where Practicality and Fun Meet*, MOTORTREND (May 2, 2018), <https://www.motortrend.com/cars/honda/fit/2018/2018-honda-fit-sport-first-test-review> [<https://perma.cc/NTE5-W5EC>].

The size and weight imbalances between electric scooters and other devices illustrate the disproportionate nature of imposing DUI penalties on scooter operators. In *State v. Richardson*,<sup>115</sup> DUI statutes logically extended to large vehicles such as farm tractors. The size and weight of farm tractors create obvious hazards to their own operators and other road users; even a small tractor can weigh 1,500 pounds.<sup>116</sup> Similarly, utility type vehicles also share significant physical characteristics with automobiles. A typical UTV is the Polaris Ranger, which was the vehicle operated by the defendant in *State v. Trusdall*.<sup>117</sup> A Polaris Ranger weighs approximately 1,400 pounds and has a top speed of 62 miles per hour.<sup>118</sup> While mopeds are smaller vehicles, they have a statutorily mandated top speed of 30 miles per hour<sup>119</sup>—nearly double the top speed of most dockless electric scooters. The risk of injury or death in vehicle collisions greatly increases for vehicles travelling faster than 20 miles per hour, demonstrating the increased risk posed by mopeds and other high-speed devices.<sup>120</sup>

In contrast with each of these devices, electric scooters are physically incapable of inflicting the same level of harm because of their small size and slow speeds. Imposing DUI penalties intended for far more dangerous vehicles on electric scooter operators demonstrates the penalties' disproportionality.

A more analogous device to electric scooters is the Segway PT. The current iteration of Segway's original personal transporter is the Segway PT i2 SE.<sup>121</sup> The device weighs approximately 105 pounds, including its batteries,<sup>122</sup> and has a top speed of 12.5 miles per hour with a maximum rider weight of 260 pounds.<sup>123</sup> While the Segway PT is over twice the weight of most dockless electric scooters, the PT's top speed is considerably lower: 12.5 miles per hour is a brisk run, while 18 or 20 miles per hour exceeds the physical limits of most human beings. The Minnesota Court of Appeals decision in *State v. Greenman*<sup>124</sup> is borne out by these figures: the policy concerns underlying DUI statutes address public safety, and a slow-moving, relatively light-weight device poses much less risk to the public than other large, high-speed vehicles. The penalties for operating electric scooters while intoxicated

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115. 1992-NMCA-041, 113 N.M. 740, 832 P.2d 801.

116. See *Compact Tractor Spec Guide*, COMPACT EQUIPMENT (June 13, 2013), <https://compactequip.com/tractors/compact-tractor-spec-guide> [<https://perma.cc/5YYD-9R46>].

117. 155 Idaho 965, 967 (Ct. App. 2014).

118. *UTV Shootout: Kawasaki Mule PRO-FXT vs. Polaris Ranger CP 900*, DIRTWHEELS MAGAZINE (July 24, 2015), <https://dirtwheelsmag.com/utv-shootout-kawasaki-mule-pro-fxt-vs-polaris-ranger-xp-900> [<https://perma.cc/LS53-DSC5>].

119. N.M. STAT. ANN. § 66-3-1101(D) (1981).

120. Cf. Lena Groeger, *Unsafe at Many Speeds*, PROPUBLICA (May 25, 2016), <https://www.propublica.org/article/unsafe-at-many-speeds> [<https://perma.cc/CF84-KSKW>] (detailing studies establishing that risk of injury and death for pedestrians increases greatly as vehicle speeds rise above 20 miles per hour).

121. See SEGWAY, INC., USER MANUAL: SEGWAY PERSONAL TRANSPORTER (2019), [https://www.segway.com/wp-content/uploads/2019/09/24010-00001\\_ab\\_pr\\_se\\_user\\_manual.pdf](https://www.segway.com/wp-content/uploads/2019/09/24010-00001_ab_pr_se_user_manual.pdf) [<https://perma.cc/8265-TJ8N>].

122. *Id.* at 13, 86.

123. *Id.* at 12.

124. 825 N.W.2d 387 (Minn. Ct. App. 2013).

should be proportional to the lower risk of harm.<sup>125</sup> Current statutory penalties for DUI are not proportional to the risk of harm posed by intoxicated scooter operators and do not act as effective deterrents.

#### IV. A New and Necessary Remedy.

##### A. *The Need.*

New Mexico's driving under the influence statute was written and enacted in 1953, decades before the rise of dockless electric scooters and other alternative forms of urban transport.<sup>126</sup> The statute has been amended twenty-five times since its initial passage; no single amendment considers alternative forms of transit, instead retaining the broad prohibition on the operation of vehicles while intoxicated.<sup>127</sup> Further, the statutory definition of vehicle was not created until 1990 and has not been amended since 2005.<sup>128</sup> In 2001, *State v. Saiz* provided a judicial interpretation of the term "vehicle" in the context of DUI in New Mexico.<sup>129</sup> The legislature then established the state's electric personal assistive mobility device statute in 2002, quickly creating ambiguity between the holding in *Saiz* and the updated Motor Vehicle Code.<sup>130</sup>

New Mexico law regulating driving under the influence as applied to non-automobile devices requires an update. The emergence of dockless electric scooters in cities like Albuquerque<sup>131</sup> and Las Cruces<sup>132</sup> has created a need for clarification regarding the status of these devices in relation to the state's DUI statute. As early as six days after dockless electric scooters were distributed in Albuquerque, a woman was arrested and charged with DUI after operating a scooter while intoxicated.<sup>133</sup> The DUI charges were dismissed in that case after the defendant pled to a lesser charge,<sup>134</sup> but the incident demonstrates the need for legal clarification. The likely reoccurrence of such conduct underscores the need for action. Doing nothing here, or simply exempting scooter operators from criminal liability under the state DUI

125. Cf. LAFAYE, *supra* note 111, at §2.14(f).

126. See 1953 N.M. Laws 357-58.

127. See N.M. STAT. ANN. § 66-8-102 (2019).

128. See N.M. STAT. ANN. § 66-1-4.19 (2019).

129. 2001-NMCA-035, ¶ 4, 130 N.M. 333, 24 P.3d 365, 366.

130. See 2002 N.M. Laws 231-32.

131. Jessica Dyer, *Rental E-Scooters Are Hitting Albuquerque Streets*, ALBUQUERQUE JOURNAL (May 24, 2019, 1:53 PM), <https://www.abqjournal.com/1320035/e-scooters-hit-albuquerque-streets.html> [https://perma.cc/WP4T-DVGL].

132. Portia Baudisch, *NMSU Brings Electric Scooters to Campus*, CBS4 LAS CRUCES (Jan. 18, 2019), <https://cbs4local.com/news/local/nmsu-brings-electric-scooters-to-campus> [https://perma.cc/HD9Y-LPSJ].

133. See Matthew Reisen, *Woman Riding on Electric Scooter Charged with DWI*, ALBUQUERQUE JOURNAL (May 30 2019, 11:39 PM), <https://www.abqjournal.com/1322102/woman-on-electric-scooter-charged-with-dwi.html> [https://perma.cc/SE5M-7GYT].

134. See Jeannie Nguyen, *Albuquerque Woman Caught Driving Drunk on E-Scooter Dodges DWI Conviction*, KRQE.COM (Sept. 23, 2019, 5:30 PM), <https://www.krqe.com/news/albuquerque-metro/albuquerque-woman-caught-driving-drunk-on-e-scooter-dodges-dwi-conviction> [https://perma.cc/3QJE-49RT].

statute, would fail to deter conduct that could put the public at risk. Dockless electric scooters require a more thoughtful regulatory approach.

*B. The Proposal.*

The proper venue in which to address this problem is the legislature. The New Mexico legislature should formulate a statutory scheme that accounts for the risks posed by intoxicated scooter operators while adhering to principles of proportionality. The proposal is two-fold: first, the legislature should define dockless electric scooters and other micro-transit devices; second, the legislature should create a new class of criminal penalty directed at preventing intoxicated scooter operation. The Appendix attached to this comment contains model statutes for both provisions.

Using this comment's model definition as a guide, the legislature should craft a flexible statutory definition that includes dockless electric scooters while allowing for the emergence of similar devices. A flexible definition accounts for future devices; one of the pitfalls of New Mexico's EPAMD definition is that it is narrowly tailored to only include the Segway PT device.<sup>135</sup> The rapid emergence of dockless electric scooters demonstrates how modern transit solutions are unlikely to fit into existing statutory molds. Lawmakers can avoid this legal uncertainty by allowing for some flexibility in the definition of electric scooters and other lightweight, low-speed devices. For the purposes of the statutory definition, these devices would be termed "micro-transit devices" in order to preclude a narrow application of the definition to electric scooters alone. New Mexico's statutory definition of EPAMDs provides a template of sorts; simple modifications removing the non-tandem wheel requirement and imposing a weight restriction would create a flexible statute covering electric scooters and similar micro-transit devices. Crafting a new definition entirely from scratch is simply unnecessary.

Once dockless electric scooters have a statutory definition, the legislature could turn to creating a proportional criminal penalty that effectively deters intoxicated scooter operation. Like the definition portion, legislators need not reinvent the wheel. Section 66-8-102 provides statutory language that could be modified to create a criminal penalty more in-line with the risks posed by intoxicated scooter operators. A new micro-transit device statute could retain Section 66-8-102's core prohibitory substance<sup>136</sup> while changing the phrases "to drive a vehicle" and

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135. See N.M. STAT. ANN. § 66-1-4.5(A) (2007).

136. The substantive portion of the Section 66-8-102 reads as follows:

A. It is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state.

B. It is unlawful for a person who is under the influence of any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within this state.

C. It is unlawful for:

(1) a person to drive a vehicle in this state if the person has an alcohol concentration of eight one hundredths or more in the person's blood or breath within three hours of driving the vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle; or

(2) a person to drive a commercial motor vehicle in this state if the person has an alcohol concentration of four one hundredths or more in the person's blood or breath within three hours of driving the commercial motor vehicle and the alcohol concentration results from alcohol consumed before or while driving the vehicle.

“safely driving a vehicle” to “to operate a micro-transit device” and “safely operating a micro-transit device” (these changes are present in the Appendix’s model statute). The legislature could also retain a modified version of the language creating aggravating circumstances for the crime, particularly those circumstances that involve infliction of bodily harm. These actions would create a new class of crime called operating a micro-transit device while intoxicated.

After the core prohibition, the new criminal statute would substantially depart from the language of Section 66-8-102. The model statute shown in the Appendix serves as a basic outline. The penalties imposed by the new statute should be proportional to the potential harm. The easiest penalties to eliminate would be the ignition interlock<sup>137</sup> and mandatory license revocation<sup>138</sup> penalties that accompany DUI convictions. These penalties are disproportionate and do nothing to prevent people from operating scooters while intoxicated. The legislature would also need to consider penalties involving fines, jail time, or probation. It seems intuitive that proportional penalties would involve lower fines and less jail or probation time given the lower risk posed by intoxicated scooter operators. The exact figures here would be subject to debate and legislative review. Ideally, the legislature would be able to determine the appropriate category in which the new crime would fall. Since penalties correlate with the severity of a crime,<sup>139</sup> operating an electric scooter while intoxicated should be a petty misdemeanor as defined in the New Mexico Criminal Code.<sup>140</sup> The statute should allow for elevation of the crime to misdemeanor or felony status to account for aggravating circumstances such as the infliction of bodily harm or prior convictions. These measures would create proportional criminal penalties for operating a scooter while intoxicated. Moreover, these measures would protect public safety by deterring the hazardous conduct of intoxicated scooter operation.<sup>141</sup>

### C. *The Proposal’s Feasibility.*

A new statutory framework would be feasible and relatively uncontroversial. Dockless electric scooters may be the subject of strong and discordant personal opinions,<sup>142</sup> but current legislative efforts around electric scooters have enjoyed bipartisan support. In 2019, bipartisan legislation setting

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137. N.M. STAT. ANN. § 66-8-102(O) (2016).

138. N.M. STAT. ANN. § 66-5-29 (C) (2007).

139. *Cf. Seven Rivers Farm, Inc. v. Reynold*, 1973-NMSC-039, ¶¶ 33–35, 508 P.2d 1276, 1281 (citing *Cheff v. Schnackenberg*, 384 U.S. 373 (1966)).

140. *See* N.M. STAT. ANN. § 30-1-6 (1963).

141. It is worth noting that electric scooters riders may benefit from other regulatory provisions, including licensure and helmet requirements. However, these considerations extend beyond the sphere of pure criminal liability and the boundaries of this comment. Scooter licensure, along with broader regulatory measures for micro-transit devices, deserve consideration at another time.

142. *Compare* John Burgoyne, *The Case for Electric Scooters*, U.S. NEWS & WORLD REP. (Sept. 5, 2019, 8:30 AM), <https://www.usnews.com/news/cities/articles/2019-09-05/commentary-the-case-for-electric-scooters> with Laura Newberry, *Must Reads: Fed-up Locals Are Setting Electric Scooters on Fire and Burying Them at Sea*, L.A. TIMES (Aug. 10, 2018, 4:00 AM), <https://www.latimes.com/local/lanow/la-me-ln-bird-scooter-vandalism-20180809-story.html> [<https://perma.cc/8FYV-WAG4>].

baseline regulatory provisions passed into law in Florida,<sup>143</sup> New Jersey,<sup>144</sup> Tennessee,<sup>145</sup> and Wisconsin.<sup>146</sup> Electric scooter regulatory bills have also been introduced in other states and continue to move through the legislative process.<sup>147</sup> The bipartisan nature of these bills shows that legislators have recognized a need for solutions to the problems posed by electric scooters and are willing to formulate solutions.

No current legislative effort answers the question of whether DUI statutes will apply to dockless electric scooters. If New Mexico was to pass such a bill, it would serve as a national example in determining the potential criminal liability of electric scooter riders. Legislators in New Mexico and across the country have clearly recognized that dockless electric scooters will require new regulatory frameworks. Prompt legislative action will make New Mexico one of the first states to develop a body of law addressing DUI as applied to the burgeoning micro-transit industry.

#### V. Legislative Action is Preferable to a Judicial Approach.

Application of current DUI penalties to dockless electric scooter operators is disproportionate and illogical. Without legislative action, the judiciary will be left to sort out how scooters and other micro-transit devices fit into existing statutory frameworks. As discussed in the background section of this comment, the litany of cases subjecting or exempting other non-automobile devices to DUI statutes has centered around statutory construction and judicial interpretation of terms like “vehicle” and “motor vehicle.” In those cases, courts were able to interpret DUI statutes, statutory definitions of various devices, and basic regulations of those devices *in pari materia*. New Mexico courts have utilized a similar analytic framework. In *State v. Saiz*, the court was able to draw on the state’s DUI statute, the statutory definitions of “vehicle” and “moped,” and the regulatory statute for mopeds in order to determine whether moped operators were subject to DUI penalties.<sup>148</sup> However, no statutory definition for dockless electric scooters exists in New Mexico law, nor is there any baseline regulatory statute for these devices.

The only statutory provisions that could conceivably cover dockless electric scooters are the definition<sup>149</sup> and regulatory statute<sup>150</sup> for electric personal assistive mobility devices. Even these statutes do not explicitly define electric scooters and have some key differences. For example, the definition of an EPAMD mandates the device have two non-tandem wheels,<sup>151</sup> while electric scooters have wheels arranged

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143. See H.B. 453, 2019 Leg., Reg. Sess. (Fla. 2019).

144. See N.J. STAT. ANN. § 39:1-1 (2019); see also N.J. STAT. ANN. § 39:4-14.1.

145. S.B. 1107, 111th Gen. Assembly, Reg. Sess. (Tenn. 2019).

146. S.B. 152, 2019 Leg., Reg. Sess. (Wis. 2019).

147. *E.g.*, Assemb. B. 1286, 2019 Leg., Reg. Sess. (Cal. 2019); H.B. 282, 54th Leg., Reg. Sess. (N.M. 2019); S.B. S05294A, 2019 Leg., Reg. Sess. (N.Y. 2019).

148. See 2001-NMCA-035, ¶¶ 6–8, 130 N.M. 333, 24 P.3d 365.

149. N.M. STAT. ANN. § 66-1-4.5(A) (2007).

150. N.M. STAT. ANN. § 66-3-1102 (2007).

151. See N.M. STAT. ANN. § 66-1-4.5(A).

in a tandem fashion. While EPAMDs have been judicially<sup>152</sup> and statutorily<sup>153</sup> exempted from other motor vehicle regulations, the statutes regulating EPAMDs are an inexact fit for dockless electric scooters and other micro-transit devices. This creates a situation where the judiciary would have to fit a scooter-shaped problem into a Segway-shaped box; the solution is just as inelegant as the visual.

Further, a judicial definition confining electric scooters within the New Mexico Motor Vehicle Code could result in a full application of the DUI statute to electric scooters. As of this writing, the broad holding in *State v. Saiz* has not been overruled and remains the controlling authority interpreting the term “vehicle.”<sup>154</sup> Principles of *stare decisis* create high barriers for reversing this precedent. New Mexico courts consider four factors prior to overruling precedent: (1) whether a precedent is unworkable; (2) the reliance on precedent; (3) the development of new legal principles; and (4) whether factual circumstances have changed in the intervening period so as to “[rob] the old rule” of its justification.<sup>155</sup> While the broad definition of “vehicle” articulated in *Saiz* arose before the advent of dockless electric scooters, the central holding of the case is not so unworkable to warrant overruling it. Defining electric scooters as vehicles within the purview of the state’s DUI statute creates disproportionate penalties, but is not so absurd so as to be considered legally unworkable. Moreover, no new legal principles have emerged regarding electric scooters; rather, the issue here is a distinct lack of scooter-specific law. Finally, while the emergence of electric scooters in New Mexico cities represents a change in factual circumstances, that change does not indicate that the urban transit landscape is fundamentally different from the circumstances in *Saiz*. Dockless electric scooters do not rob the court’s interpretation of the term “vehicle” of its underlying justification.

The North Carolina Court of Appeals decision in *State v. Crowe*<sup>156</sup> is instructive. There, the court was called to determine the applicability of the North Carolina DUI statute to an early form of the dockless electric scooter.<sup>157</sup> The court held that electric scooters were vehicles under the statutory definition of the term and were not covered by the statutory exemption of EPAMDs from other code provisions.<sup>158</sup> Thus, electric scooters were covered by the state’s DUI statute.<sup>159</sup> The court reasoned that defining the criminal liability of scooter operators was the express responsibility of the legislature, stating:

Here, in a situation in which the legislature has allowed a limited number of very specific exceptions to a statute, it would be inappropriate for this Court to create another. The legislature may choose to make an exception for electric scooters such as the one

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152. See *State v. Greenman*, 825 N.W.2d 387 (Minn. Ct. App. 2013).

153. N.M. STAT. ANN. § 66-3-1102(D).

154. See 2001-NMCA-035, 130 N.M. 333, 24 P.3d 365.

155. *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 34, 125 N.M. 721, 965 P.2d 305, 315.

156. 623 S.E.2d 68 (N.C. Ct. App. 2005).

157. See *id.* at 70.

158. *Id.* at 72–73.

159. *Id.* at 73.

in this case. Until that time, we apply the statutory scheme as it has been enacted.<sup>160</sup>

Ultimately, courts are responsible for interpreting statutory provisions, while the legislature is responsible for creating new ones. As the court noted in *Crowe*, this notion applies to electric scooters. The legislative proposal detailed in Part IV would be preferable to a slow and inefficient slog through the courts.

### CONCLUSION

Dockless electric scooters are likely to become staples of modern life by providing an accessible, convenient, and inexpensive means of urban transportation.<sup>161</sup> As they become more commonplace, the issue of intoxicated scooter operators will continue to frustrate judges and advocates working in the criminal justice system. Applying current regulatory frameworks to dockless electric scooters is disproportionate and does little to actually deter drunk electric scooter riders from taking to the streets. Further, New Mexico courts' current interpretation of the term "vehicle" is overly broad and fails to account for the novelty of micro-transit devices.

The policy aims underlying the prohibition on DUI would be better served by a completely new approach. A legislative solution defining electric scooters and other micro-transit devices allows for the creation of a new class of crime called operating a micro-transit device under the influence. This new class of crime should be proportional to the lower risk posed by operators of electric scooters while also providing sufficient deterrent effect. Such action by the New Mexico legislature will put the state at the forefront of determining criminal liability in the context of electric scooters and other micro-transit devices. The proposals and rationales outlined in this comment are meant to inform that process.

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160. *Id.*

161. See Patrick McGeehan, *Riding While Drunk and Other Dangers of the Electric Scooter Craze*, N.Y. TIMES (Nov. 6, 2019, 8:10 AM), <https://www.nytimes.com/2019/11/06/nyregion/lime-scooter-hoboken.html> [<https://perma.cc/X3J5-2WKN>].

**APPENDIX: MODEL STATUTES****Model Statutory Definition of Micro-Transit Devices:**

“Micro-transit device” means any self-propelled device weighing not more than 50 pounds designed to transport a single person at a maximum speed of 20 miles per hour across a paved level surface when powered solely by its own propulsion system.

**Model Statute for Operating a Micro-Transit Device Under the Influence:**

A. It is unlawful for a person who is under the influence of intoxicating liquor to operate a micro-transit device within this state.

B. It is unlawful for a person who is under the influence of any drug to a degree that renders the person incapable of safely operating a micro-transit device to operate a micro-transit device within this state.

C. Operating a micro-transit device under the influence of intoxicating liquor occurs when:

A person operates a micro-transit device within this state, and the person has an alcohol concentration of eight one hundredths or more in the person’s blood or breath within three hours of operating the micro-transit device and the alcohol concentration results from alcohol consumed before or while driving the device.

D. Aggravated operating a micro-transit device under the influence consists of:

(1) causing bodily injury to a human being as a result of the unlawful operation of a micro-transit device while under the influence of intoxicating liquors or drugs.

(2) causing damage to private or public property, not including the micro-transit device itself, as a result of the unlawful operation of a micro-transit device while under the influence of intoxicating liquors or drugs.

(3) operating a micro-transit device while intoxicated subsequent to a prior conviction under this Section.

E. A first-time conviction pursuant to subsections A or B is a petty misdemeanor.

F. A conviction pursuant to subsection D is a misdemeanor or felony depending on the severity of the aggravating circumstances.

G. A conviction pursuant to this section shall be punishable by imprisonment and fines of appropriate length and amounts as determined by the New Mexico Criminal Sentencing Act.