The co-opting of bike culture by "scooter-share" companies

A look at this new, loosely regulated yet inherently dangerous industry and the law effective January 2021

By Shaana A. Rahman

"It's easier to ask forgiveness than it is to get permission."[1] Sadly, this has become the mantra of most "gig" companies, and the most recent additions to this party are the so-called electric scooter-share ("e-scooter") companies. In 2017, Bird Rides, Inc. began distributing electric scooters in Santa Monica, and other companies soon followed, all invading major cities without so much as a nod to the legality or efficacy of doing so.

In 2018, just a year after Bird flooded city streets with e-scooters, ridership topped 38.5 million trips in the United States alone.[2] By 2019, that number more than doubled to 85 million trips. Bird, one of the two largest e-scooter share companies was recently valued at over $2 billion. Armed with internal studies and position papers, these companies began a post-roll out public relations campaign in an effort to quell the almost immediate backlash from pedestrian and disability access advocates.

What followed was a slow adoption by the e-scooter share companies of bicycle infrastructure and benefits, all of which had required the cycling community to commit decades to advocacy, education, and redirection of public entity resources to achieve. This article seeks to explore the relative recent history of e-scooters for commercial use and the overall impact it has had on the shared use of infrastructure resources.

The greenwashing of e-scooters

Early on companies like Bird began reaching out to bicycle and pedestrian advocacy groups to gain their support. To do that, e-scooter sharing companies

offered small non-profits thousands of dollars of sponsorship money in exchange for a "thumbs-up" for e-scooters. Positioning themselves as in alignment with two communities the influx of e-scooters disrupted, was paramount to gaining acceptance and leeway with municipalities. Companies like Bird relied heavily on the positive environmental impacts of e-scooters for what it termed "the last mile" of travel, meaning e-scooters were generally thought to be used in conjunction with other modes of transport, including walking, public transportation, or vehicle rideshare with the last or shortest part of a trip involving the use of an e-scooter.

Scientific research has cast plenty of doubt on the lofty green ideals of e-scooters. In 2019 researchers in North Carolina concluded that while dockless scooters produce about half the emissions of a standard motor vehicle, they generally produce more greenhouse-gas emissions per passenger mile than a diesel bus with high ridership, an electric moped, bicycles (including electric bicycles) or walking. An important finding of the study from a survey of riders in Raleigh, North Carolina, was only 34% of users would have otherwise used a car or car ride-sharing versus an e-scooter, and the remainder would have biked, walked, taken a bus or skipped the trip.[3]

A more recent study conducted in Provo, Utah, suggests e-scooters overall have a more negative "life cycle impact" on the environment than some of the transportation modes they are replacing. The Utah study, similar to the North Carolina study, concluded that while an e-scooter has less impact on climate change than personal cars, it is worse than that of buses with high ridership or electric bicycles.

Part of the very real carbon footprint of e-scooters stems from the relative disposability of e-scooters, with an average lifespan of two years. The frequent incidences of the demise of Bird's e-scooters was quickly made the subject of an Instagram account with the handle @birdgraveyard devoted to pictures and videos of a Bird or Lime (a competitor to Bird) scooter that had "died" with the intent of honoring its death. As of this writing @birdgraveyard has close to 100,000 followers and plenty of photographs of abandoned, broken e-scooter's littering public sidewalks. Another source of environmental impact comes from the fact that 43% of the emissions attributable to e-scooters comes from vehicles used to collect them each day for charging and storage.[4]

Despite these studies, Bird's website still touts the scooters as "environmentally friendly" and a "carbon-free alternative to cars" claiming it is "passionate about vibrant communities that have less traffic, cleaner air, and safer streets."[5] Lime

advertises the use of its e-scooters will reduce "dependence on personal automobiles for short distance transportation and leave future generations with a cleaner, healthier planet." Based on the available science, there is scant support for such claims.

The ineffective regulation of e-scooter use

A brief glance at Bird's website will leave you with the feeling that riding an e-scooter is akin to being wrapped in a soft, warm blanket, a world in which your safety is Bird's paramount concern. However, studies have found a high incidence of injuries related to scooter usage since the inception of scooter-share companies, with a particularly heavy incidence of head and limb trauma. There is some evidence that the rate of injury for e-scooters may be higher than that of motorcycles and personal vehicles. There are a multitude of factors associated with e-scooter injuries, which include rider inexperience, failure to obey traffic rules, the low rate of helmet usage, lack of directional signals on scooters, alcohol, and roadway infrastructure issues.[6]

Overall, the e-scooter injuries treated in emergency departments through the U.S. nearly doubled between 2018 and 2019.[7] Despite the incidence of head injury with e-scooter usage, as discussed below, in 2018 California Governor Jerry Brown signed into law a bill removing the helmet requirement, relegating helmet usage to riders under the age of 18.[8]

After a string of nationwide class actions, many of which involved malfunctions to the third-party non-commercial scooters[9,10]; branded as Bird scooters, Bird began to publicize the safety of e-scooters. In 2018 Bird appointed a former member of the National Highway Safety Administration as its chair to the Bird Global Safety Advisory Board. A position paper from the Board was soon put forth asserting "the viability and benefits of shared e-scooters are clear" in that they represent "a cleaner, more economical and convenient transportation option that is replacing short car trips." Not surprisingly Bird's report "did not find a disproportionate risk" of riding e-scooters. Bird's "key findings" were based on both Bird's internal ("secret") data and "independent research," including the finding that e-scooter injury rates were similar to bicycling. Bird asserted: "riding a Bird is as safe as, or safer than, bicycling."

The Bird report also asserted that "bike-friendly cities" have fewer e-scooter injuries. Bird's Board also used its report to showcase its new Bird Zero e-scooter, moving away from the Segway scooters it launched with, after a series of lawsuits related to failures of the Segway. Ultimately, in addition to the safety of e-scooters, Bird's call to action included a sunny adoption of Vision Zero[11] and a call for cities to design safer streets, reduce vehicle speeds, and maintain safe street conditions.[12]

The industry argument that better roadway infrastructure, including education of motor vehicle drivers on sharing the road with e-scooters would lessen scooter-related injuries does not follow the emerging research on e-scooter injuries. At least one limited study conducted by Austin Public Health in 2018, revealed only 10% of riders who were injured sustained injuries in a collision with a motor vehicle contrasted with 37% of injured e-scooter reporting that excessive e-scooter speed contributed to their injuries.[13]

What is ultimately lacking in Bird's vision of the future is how cash-strapped cities should augment their infrastructure to accommodate a private business venture for a transportation alternative that no one knew we needed until Bird told us so.

Old laws for a new problem

As motorized scooters predated the "share" companies, California lawmakers already had numerous statutes on the books to structure the legal uses and restrictions of motorized scooters, many of which date back to the early aughts, and which were similar to those statutes applicable to bicycles.[14] California Vehicle Code section 21229 requires operators of motorized scooters to travel within a class II bicycle lane, where one exists, with some exceptions, while Vehicle Code section 21230 allows motorized scooters to operate on a bicycle path, trail or bikeway, unless a local agency prohibits such action by local ordinance. At the time of the adoption, the use of e-scooters was extremely limited, and did not pose the potential of conflict between bicycles and scooters. Although these statutes were in effect well before 2017, the initial predominant usage of e-scooters was on public sidewalks, creating conflicts and hazards to and with pedestrians and other vulnerable users. Additionally, precious Class II bikeways and paths were being inundated by e-scooters.

Recognizing the negative public perception brewing over the sidewalk usage, in 2018 Bird sponsored California Assembly Bill 2989, which aimed to amend the current motorized scooter operation restrictions of Vehicle Code section 21235. The proposed changes included removing the requirement for helmets for all users, and limiting helmet use to only those under 18 years old, increasing the speed of scooter operation from 15 to 20 miles per hour, augmenting the prohibitions against operating scooters on sidewalks, removing the requirement for users over 18 to wear helmets and expanding the scope of roadway on which scooters could operate.

The City of Santa Monica, the home base of Bird, was vigorously opposed to the bill, noting that the scooters posed "a significant public safety hazard when not ridden or parked in compliance with existing law."[15] Ultimately, the issue of whether or not motorized scooters can operate outside of a Class II or Class IV bikeway on a highway with a speed limit up to 35 miles per hour was left to local municipalities to figure out. The helmet requirement was gutted to be applicable to only those under 18, the prohibition

against use of scooters on sidewalks remained as did the 15 mile per hour speed limit for motorized scooters, but the proposed changes and astute sponsorship of the bill by Bird and the legislative analysis adopting much of the Bird marketing points about environmental and health benefits, suggests the industry's PR efforts have been successful.

There has been virtually no discussion on a legislative level as to the impact on cyclists in sharing discrete resources like Class II and IV bikeways with e-scooters.

Bird's rental agreement – waivers!

In exchange for the $1 cost of renting a Bird e-scooter, a click-through link of Bird's 18,404-word rental agreement, stretching for 261 cell phone screen pages, if one was so inclined to thoroughly review the document, mandates that the Bird user waive their legal rights and remedies.

The agreement includes an assumption of the risk provision, waiver of the user's rights for Bird to use the rider's photographs, videos or other recordings, choice of law, a waiver of jury trial in favor of binding arbitration, a class action waiver, and an indemnity provision, protecting Bird and "any Municipality" who has contracted to provide Bird Services, from all claims for negligence, breach of contract and/or breach of express or implied warranty. The agreement also alerts the user that "[a]ll of Bird Services, Vehicles, and related equipment are provided "as is" and "as available," and Rider relies on them at Rider's own risk," and tasks the user with performing a safety check of the scooter, placing the onus of the provision of a reasonably safe scooter, on the user, rather than on the billion-dollar corporation. Bird does take the time to highlight some potential dangers in the agreement such as "traffic" and "vehicle or component malfunction."[16]

The CAOC-sponsored bill, AB 1286

The results of these waivers have been predictable – there is a consumer hurdle to suing Bird, with the absence of jury trials giving Bird the cover it needs to continue to pretend that e-scooters are safe and reasonably free from defect, not unlike the protections for all corporations who use mandatory arbitration clauses and class action waivers as a shield. However, in 2019 the Consumer Attorneys of California sponsored AB 1286, which caused a chill down the spines of e-scooter share companies. AB 1286 was intended to require "shared mobility service providers" to enter into an agreement, or obtain a permit, from a city or county, requiring the provider to maintain a policy of insurance of not less than $5,000,000; prohibit a user agreement from containing user waivers, releases or other limitations on a user's legal rights, remedies or forum; and require cities and counties to adopt operation, parking, maintenance, and safety rules regarding the use of shared mobility devices, and require the companies to comply with the rules.[17]

The new, watered-down law

Predictably, Bird, Lime, Uber and the California Chamber of Commerce all launched opposition to the bill. The heads of industry asserted that the insurance requirement was essentially unfair since insurance is really expensive. Ultimately, the industry influence succeeded, resulting in the tepid version of Civil Code section 2505, which became effective on January 1, 2021. Section 2505 kept the requirements that the share companies enter into an agreement with or obtain a permit from a city or county before distribution of its scooters but reduced the insurance coverage requirements to $1,000,000 per occurrence and $5,000,000 aggregate with the provision that the "insurance shall not exclude coverage for injuries or damages caused by the shared mobility service provider to the shared mobility device user." The statute also contains the requirements on cities and counties to create and adopt rules related to the usage of the devices. The statute is silent on the prohibition on the waiver of constitutional right to a jury trial.

Conclusion

While there is a compelling argument to be made that increasing multi-modal transportation to shift away from gas-powered vehicles is beneficial, the methods by which Bird and its brethren conduct business suggests a complete disregard for the users of its product, and the impact e-scooters have on other roadway users and pedestrians. Mandatory arbitration provisions, confidentiality clauses, claims of proprietary data to thwart claims of unfair business practices, and the money and power to influence favorable legislation put these companies in a position to either effectuate change for the common good of all roadway users, or make their dimes on the backs of human misery. Time will tell.


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Endnotes

[1] Rear Admiral Grace Murray Hopper, as quoted in U.S Navy's Chips Ahoy magazine (July 1986)
[2] NACTO, *Shared Micromobility in the U.S.*: 2018
[3] MIT Technology Review, *Sorry, scooters aren't so climate-friendly after all*, James Temple (August 2019)
[4] *Considering the Potential Health Impacts of Electric Scooters: An Analysis of User Reported Behaviors in Provo, Utah*, Jeffrey Glenn, Madeline Bluth, Mannon Christianson, Jamie Pressley, Austin Tayler, Gregory S. Macfarlane and Robert A. Chaney, International Journal of Environmental Research and Public Health (August 2020)
[5] Bird.com/impact/
[6] *Considering the Potential Health Impacts of Electric Scooters: An Analysis of User Reported Behaviors in Provo, Utah*, Jeffrey Glenn, Madeline Bluth, Mannon Christianson, Jamie Pressley, Austin Tayler, Gregory S. Macfarlane and Robert A. Chaney, International Journal of Environmental Research and Public Health (August 2020)
[7] JAMA Network Open, *Estimated Incidence of Electric Scooter Injuries in the US From 2014 to 2019*, Kevin Xavier Farley, Matthew Aizpuru, MD, Jacob M. Wilson, MD. (August 2020)
[8] Cal. Vehicle Code section 21235
[9] At its inception, BIRD's fleet was comprised of Segway e-scooters which had previously been sold to individual end-user consumers, not for commercial use. In 2019, BIRD alleged it would phase out the Segway in favor of its purported custom-built scooter, Bird Zero.
[10] Segway Ninebot ES2 User Manual (2018)
[11] Vision Zero is a strategy to eliminate all traffic fatalities and severe injuries. It's a global initiative and has been adopted by numerous cities across the United States. Visionzeronetwork.org
[12] BIRD, *A Look at e-Scooter Safety, Examining risks, reviewing responsibilities, and prioritizing prevention* (April 2019.)
[13] Austin Public Health, *Dockless Electric Scooter-Related Injuries Study*, (September-November 2018, published 2019)
[14] See, Cal. Vehicle Code sections 407.5; 21221, 21224, 21225, 21227, 21228, 21229, 21230 and 22411.
[15] Assembly Committee on Transportation Hearing Notes AB 2989 April 17, 2018
[16] Bird Rental Agreement, Waiver of Liability and Release, (August 1, 2018)
[17] Assembly Committee on Privacy and Consumer Protection, Hearing AB 1286 April 8, 2019