REPORT TO THE GOVEROR AND LEGISLATURE

Cooper Jones Active Transportation Safety Council

Discussion Paper Title: *Whose Mobility Matters Series. Allowing the "Due Care" Standard to Apply to People Who Walk on Roadways*

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Abstract:

This discussion paper describes the reasons to consider changing the language in RCW 46.61.250 to match the language currently used in RCW 46.61.245 which requires drivers to apply the "due care" standard to their driving behavior. The due care standard means essentially, "…the care a reasonably careful person would exercise under the same or similar circumstances."

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Disclaimer:
This document presents recommendations for improving safety for active transportation users and represents the views and opinions of the Cooper Jones Active Transportation Safety Council (ATSC), RCW 43.59.155. It is not intended to represent or imply the endorsement or support from state agencies or other entities with an interest in active transportation.

Whose Mobility Matters Series

Issue One: Allowing the "Due Care" Standard to Apply to People Who Walk on Roadways

Prepared by

Cooper Jones Active Transportation Safety Council

For

Washington State Legislature

November 30, 2020

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I. Introduction – Purpose of this Discussion Paper

"Whose mobility matters? Who has the ability to move around our communities reliably, and without fear?" Mobility access is so much bigger that pedestrian or cyclist deaths caused by reckless driving. It's interwoven with the way we build our communities and whose mobility we choose to prioritize." – Anna Zivarts, Disability Rights Washington

This quote demonstrates the effect that the current transportation system's emphasis on vehicles has on people who walk and/or roll and how they need to be prioritized as much, if not more, than drivers of vehicles. (Note: The phrases "people who walk," and "people who walk or roll" used in this document are intended to be inclusive of people who walk, people who bicycle, people who use wheelchairs and other mobility-assist devices, and people who use small-wheeled devices for transportation like scooters.)

The purpose of this discussion paper is to describe the reasons to consider changing the language in RCW 46.61.250 to match the language currently used in RCW 46.61.245 which requires drivers to apply the "due care" standard to their driving behavior. The due care standard means essentially, "…the care a reasonably careful person would exercise under the same or similar circumstances." (*Washington Pattern Jury Instructions-Civil Chapter 10. Negligence and Ordinary Care)*

II. Who is making the recommendations for the expansion of automated enforcement technologies?

In 2019 the Washington State Legislature passed Substitute Senate Bill 5710, creating the Cooper Jones Active Transportation Safety Council (ATSC).

The purpose of the ATSC is to review and analyze data to identify patterns and programs related to fatalities and serious injuries involving people who walk and/or roll and to identify points at which the transportation system can be improved, including privately owned areas of the system (e.g., parking lots).

The council may also:

a) Monitor progress on implementation of existing recommendations from the Pedestrian Safety Advisory Council and Cooper Jones Bicyclist Safety Advisory Council. (Both groups ended on June 30, 2019).

b) Seek opportunities to expand consideration and implementation of the principles of systematic safety, including areas where data collection may need improvement.

III. Proposed recommendation from ATSC

This recommendation proposes rewriting RCW 46.61.250 so that people who walk have the same "due care" standard for avoiding crashes that drivers presently have described in RCW 46.61.245. Current state law holds drivers to the "due care" or "ordinary care" standard in RCW 46.61.245 while, at the same time, RCW 46.61.250 details a lengthy set of instructions and responsibilities that people who walk are responsible for following in order to avoid crashes with vehicles.

"Due care" or "ordinary care" refers to the conduct that a reasonable person will exercise in a particular situation, in looking out for the safety of others. Changing 46.61.250 to extend the "due care" or "ordinary care" standard to people who walk provides for an equitable way to balance responsibilities between modes. (*Washington Pattern Jury Instructions-Civil Chapter 10. Negligence and Ordinary Care)*

Key considerations regarding changing to "due care" standard for people who walk include:

- Public health recommendations to avoid transmission of viruses – like the six-foot "social distancing" recommendation for COVID-19 – often require people who walk to leave sidewalks in order to protect themselves and others.
- The experiences we all shared with a reduction in travel during the "Stay Home, Stay Healthy" order allowed us to demonstrate what cities, towns, and neighborhoods could look like if we walked and biked more and used our vehicles a lot less.
- Municipalities need authority to close streets to increase safety for people who walk or roll. This can allow for creation of more walkable cities as well as spur economic development.
- To comply with current law, if people who walk encounter a stretch of sidewalk that is impassable or unsafe, they need to cross to the other side of the roadway in order to continue walking on a sidewalk.
- Individuals with disabilities and older adults – especially those who cannot or do not drive – are more reliant on infrastructure such as sidewalks so are disproportionately affected by requirements to stay on sidewalks even when those sidewalks are unsafe.
- In rural areas, where there is already limited access to sidewalks, complying with state law that instructs people who walk to leave the roadway when practicable to

avoid a crash is often impossible due to lack of shoulders or other physical barriers like steep embankments or bodies of water directly abutting the roadway.

- People are already leaving the sidewalk – sometimes to avoid unsafe sidewalks, sometimes to avoid areas where overgrown vegetation obscures vision, sometimes to feel safer because the sidewalk is not well lighted.
- Current state law disproportionately effects neighborhoods with concentrations of people who are poor, BIPOC (Black, Indigenous, and People of Color), people with disabilities, and older adults because their neighborhoods are least likely to have safety facilities such as sidewalks and bike paths.
- Violations of RCW 46.61.250 rarely result in citations, but it is the kind of law that could be disproportionately applied in neighborhoods with concentrations of people who are poor or BIPOC to the exclusion of possible enforcement in neighborhoods which are mostly white or more well-off economically.

Safe Systems Approach to Transportation Planning

In the Safe Systems Approach to transportation plan practiced by Vision Zero, there is an emphasis on identifying problems before they occur and then trying to prevent them. The Washington State Highway Safety Plan, 2019 Update, called "Target Zero" calls for an elimination of traffic fatalities and serious injuries by 2030, including people who walk and/or roll.

But current policy and funding practices favor improving mobility for vehicles over other users of the transportation system. More than 25 percent of the state's driving-age population either does not have a valid driver's license, does not drive, or does not have access to a vehicle. These individuals get around by walking and/or rolling. In some cases, there is a simple lack of knowledge about how to ensure safety, especially as it relates to active transportation. This can be especially true for people moving here from other countries where rules and practices may be different.

Vision Zero and Target Zero – two approaches to ending traffic safety-related deaths and injuries

Washington State's Highway Safety Plan is called Target Zero, as it has as a goal the elimination of all traffic-related deaths and injuries by 2030. Target Zero is a comprehensive – but traditional – approach to traffic safety that emphasizes identification of needs and then allocates resources to address those needs.

Like Target Zero, Vision Zero seeks to eliminate traffic-related deaths and injuries. But it emphasizes anticipating where problems might happen and then implementing fixes before adverse events occur. The Vision Zero Network referred to in this section is a national organization focused on advancing systemic safety approaches.

There are also cases where state and local policy actively favor vehicular travel over all other modalities. When this occurs, it limits potential for developing safe transportation options for people who walk and/or roll.

Vision Zero experiences around the world provide guidance about what happens when planning considers vulnerable users first in designing safety solutions

A central tenet of Vision Zero, which has been successful in reducing fatalities and serious injuries among people who walk and/or roll in Canada and many European countries, is that different users of the transportation system share responsibility, but not equally. The design features promoted by Vision Zero recognize the disproportionate potential for harm between drivers of a vehicle and people who walk and/or roll. Transportation systems need to be designed and built to reduce the chances for conflict between vehicles and people who walk and/or roll and to reduce the potential for harm from the crashes that do happen. According to the most recently published information from the European Commission, fatalities in European Union countries for people who walk and/or roll declined by 36 percent between 2007 – 2016. During that same period, overall traffic fatalities were reduced by almost 41 percent. This demonstrates that safety improvements made for people who walk and/or roll benefit the entire transportation system. (European Commission, 2018)

Vision Zero acknowledges that users of transportation systems are likely to make errors. But the approach does not accept the inevitability of crashes, fatalities, and injuries both serious and not. Figure 1, below, contrasts the traditional approach to highway safety planning with the Vision Zero approach to preventing crashes from occurring in the first place.

Figure 1

Vision Zero Network. *What is Vision Zero?*

Vision Zero is currently being utilized widely in Washington state. For instance, the City of Seattle uses a comprehensive set of data analytics to identify the causes of crashes and then finds other areas in the city that have those same characteristics and makes improvements to all of the affected areas. The WSDOT City Safety Program now requires cities to develop a Local Road Safety Report with a systemic approach to reducing fatal and serious injury collisions on the citywide transportation network in order to be eligible for grant funding.

Current best practices in transportation planning and engineering – influenced by Vision Zero and other advancements - emphasize that by planning and designing streets for the most vulnerable users – people who walk and/or roll, older adults, and BIPOC populations – a higher level of safety will be achieved for all users of the transportation network. In the past, planning processes often failed to consider the needs of people who walk and/or roll. For example, roundabouts at intersections help traffic flow while at the same time reducing the number of crashes between vehicles and between vehicles and people who walk and/or roll.

The limitation to the traditional traffic safety planning approach is that the information that powers most of the decision-making is event-based, e.g., the number of fatalities or serious injuries that occur at a given location. Because crashes involving people who walk and/or roll tend to be spread out over a large geographic area, event-based data has limited utility for planning reductions in fatalities and injuries for individuals who walk and/or roll. This is because:

- There are limits to the predictive value of event-based data due to the relatively random nature of crashes involving people who walk and/or roll.
- In order to have event-based data, terrible events need to occur.
- Roadways where people who , and/or roll face elevated exposure to harm, may not be prioritized because there are roadways with higher numbers of crashes involving vehicles.

The importance of language equality in traffic safety planning.

RCW 46.61.245 and RCW 46.61.250, when taken together (See Appendix 1), communicate that people who walk have a greater responsibility to avoid crashes than drivers. This imbalance exists despite the fact that the potential for harm exists solely on the side of the drivers and vehicles.

IV. Three problematic elements in current law, RCW 46.61.250 - Pedestrians on Roadways

A. "Unlawful" for people who walk to be on the roadway where sidewalks have been provided.

There are multiple concerns regarding classifying people who walk in the roadway as "unlawful"

- ***Many sidewalks are unusable.***

  Whether due to crumbling concrete, sidewalk panels being pushed up by tree roots, or frost heaves that make the sidewalk surface uneven, sidewalks that are not in peak condition represent significant risk for people falling and injuring themselves and for violation of the Americans with Disabilities Act (ADA).

  - There are nearly 2,300 miles of sidewalk in Seattle. According to a 2017 SDOT assessment, 46% of Seattle's sidewalks were considered to be in "fair" to "very poor" condition, and there were an estimated 155,000 recorded observations of obstructions or sidewalk issues. (Brown, M. and Forbes, N., 2020)
  - People who may experience any difficulty walking are especially affected. These include elderly individuals, people with mobility disabilities, or people using mobility devices. For elderly individuals, unintentional injuries – especially falls – are the third largest cause of death in Washington State. (Washington State Department of Health, Death Data Dashboards, 2020)

Sidewalk cracked by tree roots, Seattle

  - To comply with current law, if people who walk encounter a stretch of sidewalk that is impassable or unsafe, they would need to cross to the other side of the roadway in order to continue walking on a sidewalk.

- Individuals with disabilities and older adults – especially those who cannot or do not drive – are more reliant on infrastructure such as sidewalks so are disproportionately affected by requirements to stay on sidewalks even when those sidewalks are unsafe.

- ***Some sidewalks are much too narrow to be used safely.***

  Utility poles are often installed so that they encroach on sidewalks. Additionally, vegetation growth – generally from private owners – can block passage on sidewalks. There are also sidewalks that are blocked by A-frame of sandwich board-style signs advertising for businesses or where garbage cans and other trash are deposited. In each of these situations, people who walk would likely make the choice to go into the roadway to get around the obstacle in the sidewalk rather than try to use the blocked or narrowed sidewalk.

  In the example to the right, on Dexter Ave. in Seattle, there is a highly used bike lane headed to/from downtown that runs parallel to street parking. This runs parallel to Dexter Ave, another heavily used street that takes one from SLU to Fremont. Many people who walk avoid this area to walk on the Westlake cycle track that also has sidewalks.

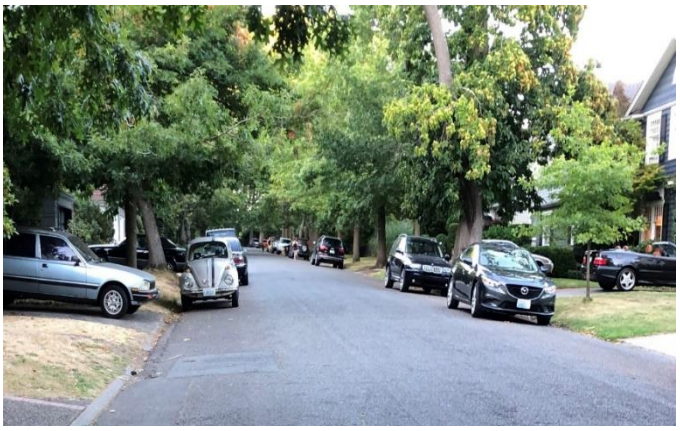
Sidewalk blocked by objects, Seattle

  - For people who walk and/or roll, it is more than one block before the next curb cut. And that curb cut is actually an entrance/exit for a parking garage.
  - Specific to public health recommendations to avoid COVID-19 disease transmission, six-feet “social distancing” requirements often require people who walk to leave sidewalks in order to protect themselves and others.
  - The experiences we all shared with a reduction in travel during the “Stay Home, Stay Healthy” order allowed us to demonstrate what our

cities, towns, and neighborhoods could look like if we walked and biked more and used our vehicles a lot less.

- ***Just because you're in a city doesn't mean you have sidewalks.***

  The street in the image to the right is typically full of pedestrians. It is difficult to social distance in this space. For people who walk there are often limited options for moving out of the way of a vehicle.

  Bigelow Ave N and Comstock, Seattle, WA

  Currently, people who walk need to frequently halt their journeys to allow vehicles to pass, thus extending their time exposed on the road. Additionally, the lack of streetlights makes this street difficult to walk along at night.

- ***Sometimes the roadway seems much safer to walk in, especially at night.***

  Our streets need to provide conditions that protect people who walk and/or roll from crime and vehicle collisions, while creating a feeling of safety. Safety considerations factor heavily into people's decisions about what type of transportation to use. (Loukaitou-Sideris, 2004, and Trost, SG, 2002) People are less likely to walk when they feel unsafe due to dangerous traffic conditions or the risk of crime. (Zhu, X. and Lee, C., 2008) Dimly lit streets secluded public spaces, poorly maintained or narrow sidewalks, and unmarked street crossings all create an unwelcoming and potentially dangerous atmosphere for people walking. (Hess, PM, 1999) The sizable percentage of people who does not have access to a vehicle is disproportionately exposed to these risks.

  - When walking alone, women commonly leave the sidewalk or cross the street to avoid a potential encounter. This likely applies to people from other targeted groups as well. People avoiding a perceived threat of violence

- People are already leaving the sidewalk while walking – sometimes to avoid unsafe sidewalks, sometimes to avoid areas where overgrown vegetation obscures vision, sometimes to feel safer because the sidewalk is not well lighted.
- Violations of *RCW 46.61.250* rarely result in citations, but it is the kind of law that could be disproportionately applied in neighborhoods with concentrations of people who are poor or BIPOC to the exclusion of possible enforcement in neighborhoods which are mostly white or more well-off economically.

- ***Snow removal.***

  During the winter, snow is often plowed from streets onto the sidewalk or at the edge of the roadway. This practice creates very dangerous circumstances for people who walk. Not only does the snow make sidewalks unsafe or unavailable, it also pushes people who walk even farther out into the roadway.

  Seattle, Winter 2018

  Even if plowed snow is not stacked onto sidewalks or road shoulders, its presence makes use of sidewalks or shoulders very difficult. Often, people who walk choose to be in the roadway because there is less resistance to movement. With current law, that decision would be unlawful.

There are many reasons why someone would want to walk in the roadway instead of on a sidewalk:

- ***Cities should be allowed to give pedestrians permission to use roadway.***

  Some areas like the Pike Street Market in Seattle are actually public streets that have been taken over by people who walk. And Pike Street Market has specific signing installed by the City of Seattle that advises drivers they need to yield to people who walk. Yet, by the statute, people who walk should not even be on that roadway.

- Seattle will be submitting proposed legislation that would permit municipalities to use signage to designate areas where drivers must yield to pedestrians on the roadways. This request will likely focus on areas where there are 25 mph or less speed limits and business-access streets

Bellingham city street without sidewalks

- Cities often close sections of roadways to allow intense use by people who walk and/or roll. The law, as currently written, has prompted more than one city legal department to urge caution about designating public roadways for use by people who walk and/or roll. So cities need authority to close streets to increase safety for people who walk and/or roll. This can allow for creation of more walkable cities as well as spur economic development.

- The Seattle School Traffic Safety Commission has interest in implementing "School Streets" at several Seattle School District elementary schools. A School Street is a road outside a school with a temporary restriction enacted by a local jurisdiction – in this case the City of Seattle - on motorized traffic at school drop-off and pick-up times. Once the designated drop-off and pick-up times are finished, the temporary restrictions are removed. In places where School Streets have been implemented, the restrictions apply to both school-related traffic and through traffic. The result is a safer, healthier and pleasant environment for everyone. Under current law, this would not be legal, but would be allowable if the proposed revisions to *RCW 46.61.250* was adopted.

Adams Elementary School and 28th Ave., NW, Seattle, WA

- ***Other implications of the word "unlawful."***

  The word "unlawful" also calls into question:

  - Someone walking onto the roadway to get into their parked vehicle through the driver's side door.
  - People avoiding construction affecting the sidewalk or side of the road by walking into the roadway.
  - How equitably the statute is enforced across all populations.

B. People who walk are encouraged to leave the roadway to avoid collisions, but that is often very difficult.

- ***With many roadways, there literally is nowhere to go.***

  The overwhelming majority of roadways in Washington State do not have sidewalks. There are roadways where there is a canyon or body of water just beyond the shoulder. The areas on both sides of a roadway are often used as stormwater collectors, meaning that people who walk would be stepping – or perhaps falling – into a deep ditch if they tried to leave the shoulder to avoid a vehicle.

Rural Thurston County

  Further, there are hundreds of miles of state highway, county roads, and tribal roads that have little – if any – shoulder. But people still walk along these roads to get to essential destinations such as grocery stores, services, or employment, as well as to social relationships. The requirement to move out of the way of a vehicle is often unreasonable in these circumstances.

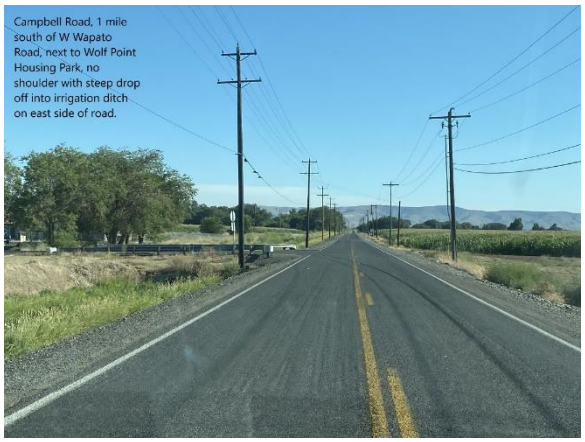
  Instead, what should happen is that drivers should execute due care when coming upon a individuals who walk and/or roll and follow the directions laid out by RCW 46.61.110 - Overtaking on the left. *(Effective on January 1, 2020.)*

The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to those limitations, exceptions and special rules hereinafter stated:

(1) The driver of a vehicle overtaking other traffic proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken traffic.

Yakima County, no escape for walkers

(2) The driver of a vehicle approaching a pedestrian or bicycle that is on the roadway or on the right-hand shoulder or bicycle lane of the roadway shall pass to the left at a safe distance to clearly avoid coming into contact with the pedestrian or bicyclist and shall not again drive to the right side of the roadway until safely clear of the overtaken pedestrian or bicyclist.



Yakima County, no escape for walkers

*(3) Except when overtaking and passing on the right is permitted; overtaken traffic shall give way to the right in favor of an overtaking vehicle on audible signal and shall not increase speed until completely passed by the overtaking vehicle. [**2005 c 396 § 1; 1965 ex.s. c 155 § 17.**]*

- ***It is common for people of color - or people who are economically disadvantaged - to live in areas without sidewalks, either under-developed urban or suburban areas, or rural areas.***

According to Emiko Atherton, former Director of the National Complete Streets Coalition, people of color disproportionately live in communities that are cut off from adequate public transportation and safe design. She said

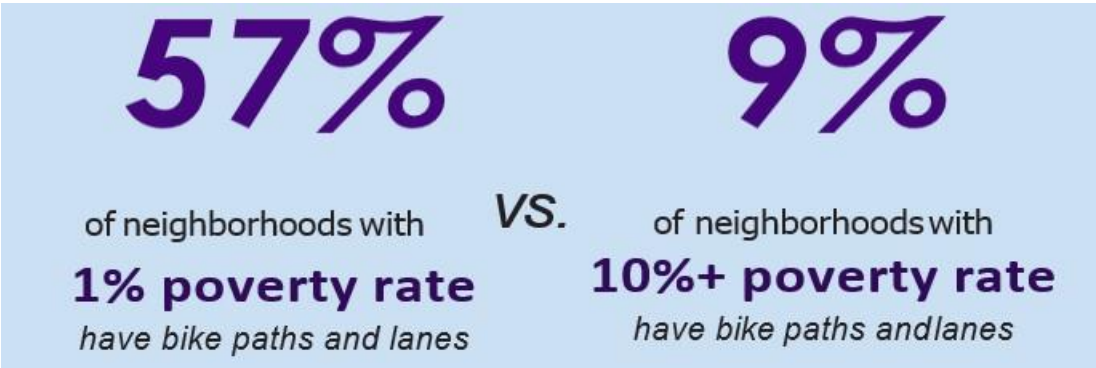
these populations are at a disproportionately higher risk of crashes and they also experience reduced access to all manner of services. "These communities are also cut off from opportunities, like jobs or healthcare or other factors that lead to economic [im]mobility," Atherton says. (Cummins, E., 2018)

In many areas in our state, the parts of cities with the lowest housing prices are also the areas with the highest proportions of BIPOC populations. People who live in poverty take about 50 percent more walking trips than those with higher incomes. And black and Hispanic Americans are nearly twice as likely as non-Hispanic white people to live in poverty. (FHWA, 2014)

- ***Safety in underserved communities***

Among people who walk and/or roll, certain demographic groups have higher fatality rates per capita than the population as a whole, for example, people living in census tracts with high poverty rates (WSDOT Gray Notebook #69, 2018).

One study showed significantly fewer pedestrian trails available to residents of 10 census tracts with high poverty rates as compared with neighboring tracts (Wilson, D, Kirtland, K, Ainsworth, B, and Addy, C, 2004). A second study that same year showed that 57 percent of neighborhoods with 1 percent poverty rate had bike paths and lanes while only 9 percent of neighborhoods with 10 percent or higher poverty had similar bicycle infrastructure. (Powell, L, Slater, S, Chaloupka, F, 2004.)



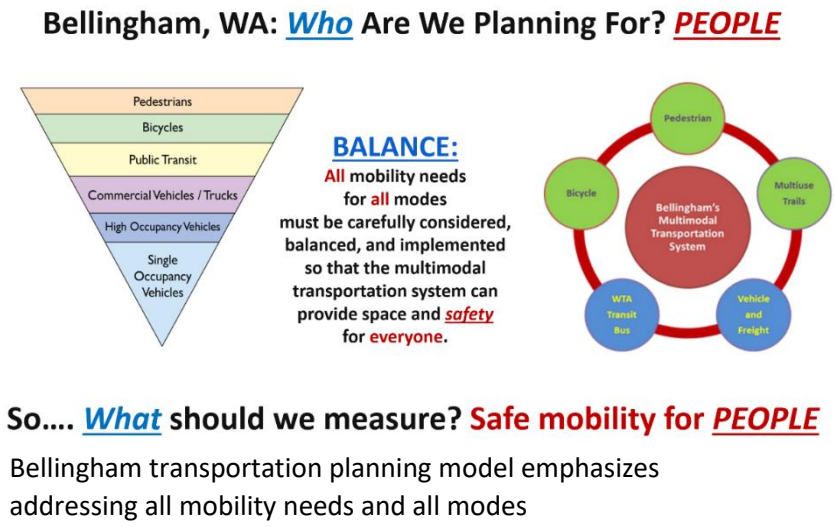
Current state law disproportionately effects neighborhoods with concentrations of people who are poor, BIPOC, people with disabilities, and

older adults because their neighborhoods are least likely to have safety facilities such as sidewalks and bike paths.

- The needs and realities of older adults are often not adequately considered by people who plan roadways, according to Angie Schmitt, author of *Right of Way: Race, Class, and the Silent Epidemic of Pedestrian Deaths in America.* She says the guidance used by traffic engineers for the walk phase of a traffic light is timed for people to walk at 3.5 feet per second. That would mean a walk cycle of about 15 seconds for a 60-foot wide road. But many older people may walk closer to three feet per second and those with mobility aids like walkers or canes might move as slowly as 2.5 feet per second.

  "In crossing a 60-foot wide street, older people – or anyone who moves more slowly than the presumed average walking speed – will require closer to 24 seconds to cross. If they're only given 15 seconds, they're left stranded in the middle of the road," according to a 2009 article in AARP: The Magazine in March 2009. (Beck, 2009)

- In Washington, there are recent examples of cities specifically trying to address these historical inequities. For instance, as much as 75 percent of projects to improve safety for people who walk and/or roll in Bellingham have been strategically and intentionally focused to provide sidewalks, crossings, and bicycle infrastructure in lower income neighborhoods. Many other cities have taken similar approaches in recent years.



- The Pedestrian Safety Advisory Council in 2018 included a recommendation in its annual report to confront a statewide history of failure to invest in infrastructure that reduces crash exposure for people

who walk and/or roll in lower income communities and communities with a high percentage of people of color.

C. Current law is too rigid regarding instructions for people who walk while providing no guidance to drivers.

- ***People who walk are required to face oncoming traffic as they walk.***
  - While generally practiced by most people who walk, there are times when this is not practical.
  - Walking at night when the oncoming vehicles have their lights on can cause temporary blindness for people who walk and cause them to be disoriented.
  - Incomplete sidewalks – individuals can be walking on a sidewalk and then the sidewalk comes to an end with no safe route to use going forward. Further, safe crossings are often not available to get to a sidewalk on the other side of the road.
  - On roads with sharp curves, people who walk may choose to walk on the opposite side to be visible.
  - Due to a number of different factors, there may only be a shoulder available on one side of the road.

- ***Crossing the road multiple times.***

  Sometimes, following the letter of the law would require people who walk to cross a busy road multiple times. Most people who walk exercise their "agency to make safe decisions" and walk on the sidewalk on the same side of the road as their destination. Where sidewalks are not available, "desire lines" can often be seen worn into the vegetation on the edge of a roadway, clearly displaying evidence of an unmet need for a sidewalk and/or a shoulder to walk on.

V. Advantages of the recommended change to "due care" standard for people who walk

- The proposed change has the potential to create an environment where people who walk are viewed as equally deserving of use of roads and that they have valid mobility needs that are just as important as people travelling in vehicles.

- Changing *RCW 46.61.250* could alter the methodology used by planners, engineers, and public works departments for prioritizing projects. The most advantageous shift would be away from concentration on hot spots where there have been multiple fatality or serious injury crashes to systematic and intentional design changes that reduce the likelihood of crashes occurring in locations with similar risk characteristics. The City of Bellingham has adopted this approach for prioritizing work.

- As the law changes, so will instruction about the law to people learning to drive. Novice drivers – and individuals who participate in driver improvement programs as a means of deferring payment of fines for traffic violations – could receive instruction that the law says that drivers and people who walk and/or roll both have a "due care" standard regarding their responsibilities on the road. This would result in long-term societal/cultural change in road safety perspective.

VI. The change to a "due care" standard will likely not affect several current behaviors and/or expectations.

- ***The proposed change will not affect the need for parents/guardians to continue to be actively involved in making decisions for children younger than 12 about being in the roadway.***

  The Cooper Jones Active Transportation Council believes that parents/guardians should be directly involved in making decisions about children younger than 12 years old leaving sidewalks to be in the roadway and teaching the children how to walk safely through their cities and towns. This could include the following situations (although, because this is not an exhaustive list, there could be other scenarios as well):

  - Walking or biking routes to school;
  - Walking or bicycling with children to teach safety practices such as looking both ways before crossing a road or using hand signals to communicate an intention to turn a bicycle.
  - Participating in activities like "Walking School Bus" where groups of adults and students walk together to and from school.
  - Being on roadways currently closed by a local jurisdiction for use by people who walk and/or roll.

- Playing in the street, e.g., basketball hoops that are set up entirely, or in part, in the street near a child's home. Even though the sidewalk and planting strip in this picture are on the public right of way, kids still play basketball on streets like this.

Basketball hoop in planting strip near houses on Seattle street

- ***Changing to a "due care" standard will not affect "mid-block crossing" between controlled intersections.***

  There is an RCW that specifically discusses mid-block crossing. This can be very dangerous behavior. But it is behavior that occurs now with the current restrictive language in the RCW. The change to a "due care" standard certainly is not going to cause people to cross mid-block. And, there may be public education opportunities that present themselves if a "due care" standard is adopted. In some cases, the solution to mid-block crossing is to provide more opportunities to cross the road. In some cases, the solution to mid-block crossing is to design roads with more frequent safe crossings.

  Many critics of these so-called "jaywalking" laws have called for their elimination because, nationwide, the laws are enforced disproportionately. BIPOC populations and people in poverty receiving significantly higher percentages of citations than white populations. For example, in Seattle, black residents received 26 percent of the city's jaywalking tickets in 2016, despite making up just seven percent of the population, according to a *Seattle Times* investigation. (Seattle Times, 2017) The argument for jaywalking laws is that they increase safety. However, according to Angie Schmitt in *Right of Way*, "In the United Kingdom…there is no equivalent violation to jaywalking, but the pedestrian safety record there puts the U.S. data to shame."

- ***Changing RCW 46.61.250 will not change the exposure to risk for people who walk and/or roll while under the influence of alcohol or other drugs.***

  The proposed change to a "due care" standard for people who walk and/or roll will not change the fact that it is not safe or legal now for people who walk and/or roll into active lanes of traffic or in front of a moving vehicle, and it still will not be if this recommendation is adopted. Whether they are under the influence of alcohol and/or other drugs or not, people who walk and/or roll will need to exercise "due care" and "yield to moving vehicles" that are too near to

stop just as drivers will need to exercise “due care” to not put people who walk and/or roll in danger.

Recognizing that the problem of people who walk and/or roll - but are under the influence of alcohol and/or other drugs - is likely to continue could also lead to creative community-level interventions. These could include: physically separating walking and bicycling areas from roadways, establishing free access to ride share programs, intensified enforcement of over-service regulations for alcohol-serving and selling establishments – and marijuana retail stories – located near areas where fatality and/or injury crashes have occurred involving people who walk and/or roll, but who are also under the influence of alcohol or other drugs.

- ***The proposed change will not change how well drivers are able to see pedestrians walking along the road, especially if they are distracted or travelling faster than the posted speed.***

  Drivers’ ability to see and avoid pedestrians walking along a road is the same whether the person is walking toward the driver or away from them. A driver’s ability to see a person on foot depends on the driver’s attentiveness, plus light and weather conditions, not whether they are looking at a person facing them or facing away.

  While it sometimes may help pedestrians stay safe by walking toward vehicles, not always. People on foot should legally be allowed to determine which side of the road is safest for them. Because for drivers, their ability to see pedestrians is the same whether they are looking at them from the back or front.

- ***And, ultimately, the proposed change will not change the kinetic energy involved in a collision between 3,000 pound-plus metal machines travelling at speed and the fragility of human beings.***

  Just having a law change will not change the laws of physics and the simple fact that the human body cannot withstand much stress before it breaks. The most important role drivers can play in ensuring the safety of people who walk and/or roll is to obey speed limits and pay full attention to their driving and the environment around them. Because a moment’s distraction could cause them to miss a person legally entering a street crossing. Getting drivers to pay full attention will require changes in driving behaviors, as well as the ways that driving skills are taught and traffic law are enforced.

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Appendix 1 – RCWs that may need to be changed to accommodate a change to a "due care" standard for people who walk on roadways.

RCW 46.61.245 - Drivers to exercise care.

(1) Notwithstanding the foregoing provisions of this chapter every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any obviously confused or incapacitated person upon a roadway.

(2)(a) If a person is found to have committed an infraction under this section within a school, playground, or crosswalk speed zone created under RCW 46.61.440, the person must be assessed a monetary penalty equal to twice the penalty assessed under RCW 46.63.110. The penalty may not be waived, reduced, or suspended.

(b) Fifty percent of the moneys collected under this subsection must be deposited into the school zone safety account.

[2010 c 242 § 2; 1965 ex.s. c 155 § 36.]

NOTES:

Rules of court: *Monetary penalty schedule—IRLJ 6.2.*

Effective date—2010 c 242: See note following RCW 46.61.275.

Blind pedestrians: Chapter 70.84 RCW.

RCW 46.61.250 - Pedestrians on roadways—Pedestrians and personal delivery devices on highways *(as amended by 2019 c 214)*.

(1) Where sidewalks are provided it is unlawful for any pedestrian to walk or otherwise move along and upon an adjacent roadway. Where sidewalks are provided but wheelchair access is not available, ((~~disabled~~)) persons with disabilities who require such access may walk or otherwise move along and upon an adjacent roadway until they reach an access point in the sidewalk.

(2) Where sidewalks are not provided, any pedestrian walking or otherwise moving along and upon a highway, and any personal delivery device moving along and upon a highway, shall, when practicable, walk or move only on the left side of the roadway or its shoulder facing traffic which may approach from the opposite direction and upon meeting an oncoming vehicle shall move clear of the roadway.

[2019 c 214 § 14; 1990 c 241 § 6; 1965 ex.s. c 155 § 37.]

NOTES:

Effective date—2019 c 214: See note following RCW 46.75.010.

RCW 46.61.250 - Pedestrians on roadways *(as amended by 2019 c 403). (Effective January 1, 2020.)*

(1) Where sidewalks are provided and are accessible, it is unlawful for any pedestrian to walk or otherwise move along and upon an adjacent roadway. Where sidewalks are provided but wheelchair access is not available, ((~~disabled~~)) persons with disabilities who require such access may walk or otherwise move along and upon an adjacent roadway until they reach an access point in the sidewalk.

(2) Where sidewalks are not provided ((~~any~~)) or are inaccessible, a pedestrian walking or otherwise moving along and upon a highway shall ((~~,~~)):

(a) When ((~~practicable~~))shoulders are provided and are accessible, walk ((~~or move only~~)) on the ((~~left side of the roadway or its~~)) shoulder ((~~facing traffic which may approach from the opposite direction and~~))of the roadway as far as is practicable from the edge of the roadway, facing traffic when a shoulder is available in this direction; or

(b) When shoulders are not provided or are inaccessible, walk as near as is practicable to the outside edge of the roadway facing traffic, and when practicable, move clear of the roadway upon meeting an oncoming vehicle ((~~shall move clear of the roadway~~)).

(3) A pedestrian traveling to the nearest emergency reporting device on a one-way roadway of a controlled access highway is not required to travel facing traffic as otherwise required by subsection (2) of this section.

[**2019 c 403 § 9; 1990 c 241 § 6; 1965 ex.s. c 155 § 37.**]

NOTES:

Rules of court: *Monetary penalty schedule—IRLJ 6.2.*

Reviser's note: *RCW 46.61.250* was amended twice during the 2019 legislative session, each without reference to the other. For rule of construction concerning sections amended more than once during the same legislative session, see RCW **1.12.025**.

Finding—Intent—Effective date—2019 c 403: See notes following RCW **46.04.071**.

RCW 4.22.005 - Effect of contributory fault.

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any *contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery.* This rule

applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

RCW 4.22.015 - "Fault" defined.

"Fault" includes *acts or omissions*, including misuse of a product, that are *in any measure negligent or reckless toward the person or property of the actor or others,* or that subject a person to strict tort liability or liability on a product liability claim. The term *also* includes breach of warranty, *unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages*.

Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

RCW 4.22.070 - Percentage of fault—Determination—Exception—Limitations.

(1) *In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages* except entities immune from liability to the claimant under Title 51 RCW. *The sum of the percentages of the total fault attributed to at-fault entities shall equal one hundred percent*. The entities whose fault shall be determined *include the claimant or person suffering personal injury* or incurring property damage, defendants, third-party defendants, entities released by the claimant, entities with any other individual defense against the claimant, and entities immune from liability to the claimant, but shall not include those entities immune from liability to the claimant under Title 51 RCW…

RCW 5.40.060 - Defense to personal injury or wrongful death action—Intoxicating liquor or any drug.

(1) Except as provided in subsection (2) of this section, it is a complete defense to an action for damages for personal injury or wrongful death that the person injured or killed was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and that such condition was a proximate cause of the injury or death and the trier of fact finds such person to have been more than fifty percent at

fault. The standard for determining whether a person was under the influence of intoxicating liquor or drugs shall be the same standard established for criminal convictions under RCW 46.61.502, and evidence that a person was under the influence of intoxicating liquor or drugs under the standard established by RCW 46.61.502 shall be conclusive proof that such person was under the influence of intoxicating liquor or drugs.

(2) In an action for damages for personal injury or wrongful death that is brought against the driver of a motor vehicle who was under the influence of intoxicating liquor or any drug at the time of the occurrence causing the injury or death and whose condition was a proximate cause of the injury or death, subsection (1) of this section does not create a defense against the action notwithstanding that the person injured or killed was also under the influence so long as such person's condition was not a proximate cause of the occurrence causing the injury or death.

[1994 c 275 § 30; 1987 c 212 § 1001; 1986 c 305 § 902.]

NOTES:

Retroactive application—1994 c 275 § 30: "Section 30 of this act is remedial in nature and shall apply retroactively." [1994 c 275 § 31.]

Short title—Effective date—1994 c 275: See notes following RCW 46.04.015.

Preamble—Report to legislature—Applicability—Severability—1986 c 305: See notes following RCW 4.16.160.

Appendix 2 – Standard Jury Instructions Regarding Finding of Fault

Our PEMCO partners also provided instructions that would likely be used by a judge in directing a jury in a civil action about how to do its work.

WPI 70.01 General Duty—Driver or Pedestrian

It is the duty of every person using a public street or highway *[whether a pedestrian or a driver of a vehicle]* to exercise ordinary care to avoid placing *[himself or herself or]* others in danger and to exercise ordinary care to avoid a collision.

NOTE ON USE

This instruction defines the common law duty of persons on public streets, roads, and highways. It is to be used, if appropriate, along with those instructions that define more specific duties. It should be followed by an instruction defining ordinary care, either WPI 10.02

(Ordinary Care—Adult—Definition), or WPI 10.05 (Ordinary Care—Child—Definition). Use the first bracketed phrase if the instruction is intended to be applied to a pedestrian.

WPI 12.01 Voluntary Intoxication

A person who becomes intoxicated voluntarily is held to the same standard of care as one who is not so affected. [Whether a person is intoxicated at the time of an occurrence may be considered by the jury, together with all the other facts and circumstances, in determining whether that person was negligent.]

Limitation

Use this instruction only if there is sufficient evidence to take the issue of voluntary intoxication to the jury. Use this instruction whether the intoxication was produced by alcohol or any drug. Use WPI 16.03 (Intoxication of Person Injured or Killed—Defense) when the intoxication of the person injured or killed is asserted as a defense pursuant to RCW 5.40.060.

WPI 10.02 Ordinary Care—Adult—Definition

Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

NOTE ON USE

Use WPI 10.01 (Negligence—Adult—Definition) with this instruction.

When a duty is established by statute, ordinance, or administrative rule, see WPI Chapter 60

(Statutory Violations).

COMMENT

See the Comment to WPI 10.01 (Negligence—Adult—Definition). See also La Moreaux v. Fosket, 45 Wn.2d 249, 255, 273 P.2d 795 (1954).

The ordinary care standard for adults also applies to legal entities such as corporations and government bodies. See, e.g., Gildon v. Simon Prop.Gr., Inc., 158 Wn.2d 483, 487, 496–97, 145 P.3d1196 (2006); Harvey v. Snohomish County, 157 Wn.2d 33, 39–42, 134 P.3d 216 (2006). *[Current as of September 2018.]*

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WPI 11.01 Contributory Negligence—Definition

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

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WPI 11.07 Determining the Degree of Contributory Negligence

If you find contributory negligence, you must determine the degree of negligence, expressed as a percentage, attributable to the person claiming injury or damage. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Limitations:

Use this instruction with WPI 11.01 (Contributory Negligence—Definition).

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WPI 12.06 Duty of Seeing

Every person has a duty to see what would be seen by a person exercising ordinary care.

NOTE ON USE

See the following Comment for a summary of issues raised by this instruction. Use WPI 10.02

(Ordinary Care—Adult—Definition) with this instruction.

COMMENT

Caution regarding overemphasizing one party's theory. Caution should be used in giving this instruction. It is reversible error to give this instruction if the instructions as a whole “so repetitiously cover a point of law as to generate a gross overweighting in favor of one party.” Samuelson v. Freeman, 75 Wn.2d 894, 897, 454 P.2d 406 (1969); Hinkel v. Weyerhaeuser Co., 6 Wn.App. 548, 553, 494 P.2d 1008 (1972).

For example, in Cornejo v. State, 57 Wn.App. 314, 788 P.2d 554 (1990), the court held that it was reversible error to give this instruction because it unfairly emphasized one party's theory of the case. The court found the instruction “palpably unfair” because it turned the jury's attention away from the clear evidence of the defendant's negligence, toward the question of the plaintiff's contributory negligence on which there was minimal evidence. Cornejo v. State, 57 Wn.App. at 321. The court also noted that while in some cases the giving of the instruction may be regarded as a “harmless redundancy,” in *Cornejo* it was not. Cornejo v. State, 57 Wn.App. at 321.

WPI 70.06 Right to Assume Others Will Obey Law—Streets or Highways

Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

Limitation

This instruction is described as being somewhat problematic if the contention in the case was that one party was indeed not using ordinary care or obeying the rules of the road. In Kelsey v. Pollock, 59 Wn.2d 796, 370 P.2d 598 (1962), the court held that it was reversible error to refuse to give this instruction. The defendant in *Kelsey* presented evidence that the favored driver failed to look at all before entering the intersection, thus this fact became a factual issue relating to proximate cause of the collision. See also Torrez v. Peck, 57 Wn.2d 302, 356 P.2d 703 (1960).

Appendix 3 – November 2020 Membership of the Cooper Jones Active Transportation Safety Council

Members identified in legislation

Association of Washington Cities - Jon Pascal, City of Kirkland Councilmember

Bicycle rider or other roadway user advocacy group - Alexandra Alston, WA Bikes

Coroner - David Delgado, King County Medical Examiner's Office

Department of Health (DOH) - Will Hitchcock

Family member of a victim - David Jones, Spokane

Law enforcement - Officer Eric Edwards, Richland Police Department, and, Officer Paul Taylor, Spokane Police Department

Traffic engineer - Dongho Chang, City of Seattle

Walker (pedestrian) advocacy group - Julia Reitan, Feet First

Washington State Department of Transportation (WSDOT) - Barb Chamberlain

Washington Traffic Safety Commission (WTSC) - Pam Pannkuk

Members identified by WTSC:

A representative from one of Washington's 29 federally recognized tribes - Portia Shields, Yakama Nation

Commission on Asian Pacific American Affairs - Harold Taniguchi

City Planner - Chris Comeau, City of Bellingham

Disability population(s) representative - Anna Zivarts, Rooted in Rights

Economic Diversity/Low income populations – Kirsten York, Community Action Council of Lewis, Mason, and Thurston Counties

Legislator or Legislative Staff - Rep. Shelley Kloba

Public Health Practitioners - Jennifer Arnold, Spokane Regional Health District, and, Dr. Amy Person, Benton-Franklin Counties Health District

Safe Routes to Schools - Charlotte Claybrooke

Target Zero Managers – Eastern and Western Washington - Annie Kirk, Seattle, Western Washington, and, Eveline Roy, Wenatchee, Eastern Washington

Traffic engineers - Katherine Miller, City of Spokane, and, Josh Diekmann, City of Tacoma

Transit Representative - Kerri Wilson, Intercity Transit, Olympia

Legal protections for the Cooper Jones Active Transportation Safety Council (ATSC)

Per RCW 43.59.155(6)(a) information and documents prepared by or for the council are inadmissible and may not be used in a civil or administrative proceeding. Confidential information is not disclosable. No person in attendance at meetings of the Cooper Jones Active Transportation Safety Council (ATSC) or any sub-grouping of the ATSC, nor persons who participated in the compiling of information or documents specifically for the ATSC, shall be permitted to testify in any civil action as to the content of such meetings, information, or documents specific to the activities of the council.