KEEPING DUI IMPLIED CONSENT LAWS IMPLIED

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I. INTRODUCTION

An English-speaking deputy sheriff arrives at the scene of a vehicle accident in the middle of an onion field in a rural county. First she smells alcohol and then sees a Hispanic farm worker with a bleeding forehead. The deputy asks, "Sir, are you alright?" The man answers, "Habla solo Espanol. No English." The deputy struggles and tries to think of the best solution to a tricky situation—how to communicate a field sobriety test, gather the necessary evidence, and protect the suspect's due process rights. The Oregon Supreme Court recently decided a similar case.[1]

As of July 1, 2011, the United States Census Bureau estimates that more than half of the nation's population younger than age one are minorities.[2] As the American population changes from primarily English-speaking to a more language-diverse culture, laws aimed at informing criminal suspect of their rights are changing in some states. Driving-under-the-influence (DUI) law is continually evolving. Specifically, states are changing rules regarding whether a police officer, when giving an implied consent advisory, must communicate the advisory in the defendant's native language in order to assure the suspect understands the advisory.

This Comment will examine the history of DUI law, survey current trends in the states, summarize the status of implied consent in Oregon, and compare Oregon with divergent approaches of other states. DUI law is inherently difficult: police officers must balance road safety against the suspect's right to be informed, in a situation where the suspect is already somewhat incapacitated. Language

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1. State v. Cabanilla, 273 P.3d 125 (Or. 2012).

2. U.S. CENSUS BUREAU, CB 12–90, MOST CHILDREN YOUNGER THAN AGE 1 ARE MINORITIES (May 17, 2012), *available at* http://www.census.gov/newsroom/releases/archives/population/cb12-90.html.

barriers compound this problem, making the goal of comprehension even more difficult to attain. States have responded to this problem with three basic approaches:

1) Require police officers to have suspects fully comprehend all the advisements,

2) Require police officers to take reasonable measures to have suspects reasonably comprehend advisements, or

3) Require police officers merely recite the advisement.

These three approaches could be considered notches on a continuum—the first notch is the most due process protective and the third notch is the least due process protective. After analyzing real-life ramifications of each approach, the third approach, not requiring the suspect to comprehend the advisement, is the clearest winner because it acknowledges the premise of DUI laws: *implied* consent. The Oregon Supreme Court clearly chose the third notch, saying: "under the law, a driver *[has already] consented to the test.*"[3]

II. HISTORICAL CONTEXT OF DUI LAW

All 50 states have an implied consent statutory scheme. Under this scheme, when a driver turns his vehicle onto a public road, the driver has automatically consented to being tested for intoxicants by blood or breath. However, those who have *legally* consented may still *physically* refuse to submit to these tests. In most states, if a suspect physically refuses, law enforcement cannot force the test. If these laws could be skirted so simply, they would have little deterrent or enforcement value; thus, the triers of fact are allowed to consider evidence that a person refused to submit to such a test as evidence that the person believed he would fail the test due to intoxication. However, prosecutors understandably prefer a clear breathalyzer result to eliminate doubt. To combat this evidence-gathering problem, many legislatures enacted laws requiring officers to give advisements of the consequences of physical refusal. The logic is parental in nature: if reminded of the dire consequences of disobedient behavior, the suspect will cooperatively consent to avoid the aforementioned consequences. So, in the context of the implied consent statutory scheme where a driver has already legally consented to the test, the advisement is merely an enforcement tool.

Currently, some advocates are attempting to make the

3. *Cabanilla*, 273 P.3d at 131 (emphasis added).

advisement tool a pseudo due process right. These advocates have a sympathetic argument—after all, America is home to all, and due process is a foundational principle. Naturally, law enforcement officers do not want to be accused of coercing sober drivers into taking a breathalyzer test; lack of communication and understanding can lead to the violation of many constitutional rights without the suspect's knowledge. Although these are legitimate concerns, due process safeguards already exist in DUI law, evidence law, and civil procedure. Given the policy decisions behind DUI laws, this Comment will argue that the balance should favor protection of human life over the ancillary due process concern of comprehension and implied consent law should remain implied.

Implied consent laws have always been controversial. In the early days of motor vehicles, many states struggled to enforce DUI laws.[4] As a result, intoxicated drivers caused death, serious injury, and millions of dollars in property damage.[5] Victims' rights groups joined forces to lobby state legislatures in the 1950s and 1960s for a series of state-law reforms. Implied consent laws faced fierce resistance from the defense bar upon enactment.[6] Today, every state has enacted a form of implied consent law,[7] but these laws remain

4. *Id.*

5. *Id.*

6. *See generally* Robert Clough, *Walking the Line: The Oregon Supreme Court, Field Sobriety Tests, and the Right Against Self-Incrimination*, 32 WILLAMETTE L. REV. 677 (1996).

7. *See, e.g.*, ALA. CODE §32–5–192 (2012); ALASKA STAT. §28.35.035; ARIZ. REV. STAT. ANN. § 28–1321 (West 2012); ARK. CODE ANN. §5–65–204(E) (West 2012); CAL VEH. CODE §13353 (West 2012); COLO. REV. STAT. ANN. § 42–4–1301.1 (West 2012); CONN. GEN. STAT. § 14–227B; DEL. CODE ANN. tit. 21, § 2742 (West 2012); FLA. STAT. ANN. § 316.1932 (West 2012); GA. CODE ANN. § 40–5–67.1 (West 2012); HAW. REV. STAT. § 291E–11 (2011); IDAHO CODE ANN. § 18–8002(3) (West 2012); 625 ILL. COMP. STAT. 5/11–501.1 (2012); IND. CODE ANN. § 9–30–6–2 (West 2012); IOWA CODE ANN. 321J.6 (West 2012); KANS. STAT. ANN. §8–1001 (West 2012); KY. REV. STAT. ANN. 189A.105 (West 2012); LA. REV. STAT. ANN. ch. § 32:661 (2012); ME. REV. STAT. ANN. tit. 29–A, § 2521 (2012); MD. CODE ANN., TRANSP. § 16–205.2 (West 2012); MASS. GEN. LAW ANN. 90 § 24 (West 2012); MICH. COMP. LAWS ANN. § 257.625A (West 2012); MINN. STAT. ANN. § 169A.51 (West 2012); MISS. CODE. ANN. § 63–11–5 (West 2012); MO. ANN. STAT. § 577.041 (West 2012); MONT. CODE ANN. §61–8–401(3) (2012); NEB. REV. STAT. § 60–6,197 (2012); NEV. REV. STAT. ANN. § 484C.160 (West 2012); N.H. REV. STAT. ANN. § 265–A:8 (2012); N.J. STAT. ANN. § 39:4–50.2 (West 2012); N.M. STAT. ANN. § 66–8–108 (West 2012); N.Y.VEH. AND TRAF. LAW §1194(2)(F) (McKinney 2012); N.C. GEN. STAT. ANN. § 20–16.2 (West 2012); N.D. CENT. CODE ANN. § 39–20–01 (West 2012); OHIO REV. CODE ANN. § 4511.191 (West 2012); OKLA. STAT. ANN. tit. 47, § 751(West 2012); OR. REV. STAT. ANN. §813.100 (West 2012); 75 PA. CONS. STAT. ANN. § 1547 (West 2012); R.I. GEN. LAWS ANN. § 31–27–2.1 (West 2012); S.C. CODE ANN. § 56–5–2950 (2012); S.D. CODIFIED LAWS § 32–23–10 (2012); TENN. CODE ANN. § 55–10–406 (West 2012); TEX. TRANSP. CODE ANN. § 724.015 (West 2012); UTAH CODE ANN. § 41–6A–

constitutionally controversial because of their tense relationship with due process.

However, in *South Dakota v. Neville*, the United States Supreme Court determined that implied consent laws were constitutional.[8] In *Neville*, the South Dakota legislature found a legitimate state interest in protecting human life on South Dakotan highways and roads, and constructed an implied consent law to prevent loss of life and property.[9] The statutory scheme, similar to most other states, required implied consent for sobriety testing for every driver on South Dakotan roads.[10] The Supreme Court held that, because the defendant was not required to be apprised of the consequences of refusing to submit to a chemical test, there was no due process violation for implied consent.[11]

III. INITIAL EXPERIENCE AMONG THE 50 STATES

As noted, initial implied consent laws were not flawless. The first states to enact the law were embarrassed when law enforcement officers forced unwilling drivers to undergo the tests such as blood draw.[12] Instead of forcing the tests, most states enacted a section requiring law enforcement officers advise suspects of their "rights and consequences" regarding the blood or breathalyzer test. This way, law enforcement could avoid more messy situations. The exact statutory language of the provision varied slightly.[13] Some statutes provide a script for the officer; many states direct the state law enforcement agency to compose the exact language of the advisement.[14] In Oregon, legislative history of the advisement law reveals that legislators aimed to develop a "simplified procedure" to facilitate enforcement of DUI law, and one standard form in English

520 (West 2012); VT. STAT. ANN. tit. 23, § 1202 (West 2012); VA. CODE ANN. § 18.2–268.3 (West 2012); WASH. REV. CODE ANN. § 46.20.308 (West 2012); W. VA. CODE ANN. § 17C–5–4 (West 2012); WIS. STAT. ANN. § 343.305(4) (West 2012); WYO. STAT. ANN. § 31–6–102 (West 2012).

8. South Dakota v. Neville, 459 U.S. 553 (1983).

9. *Id.*

10. *Id.*

11. *Id.*

12. Clark v. State, 764 S.W.2d 458, 460–61 (Ark. 1989) (describing a forced-testing situation where the suspect was crying out, aggravated, and "real upset" while hospital personnel drew blood).

13. *See supra* note 4.

14. *Id.*

was the simplest procedure found.[15]

The consequences for refusing to take the test vary among the states, ranging from immediate suspension of the driver's license to incarceration.[16] In Oregon, the refusal is considered a specific-fine traffic violation ($650) and driving privileges are subject to suspension.[17] In Alaska, if a defendant is convicted of refusing to take a breath test, the defendant is sentenced to 72 hours imprisonment, six months of ignition interlock device if the defendant regains driving privileges, and a minimum $1500 fine.[18] Vermont only has a six month license suspension as a consequence of refusal; refusal is only a crime if the defendant had a previous DUI conviction or caused seriously injury.[19]

IV. THREE APPROACHES

The question debated around the country is whether suspects have the right to *comprehend* the rights and consequences of the advisement. The issue surfaces most often in cases where law enforcement faces a language barrier.

Three approaches have emerged. The first and most due process protective approach requires suspects to fully comprehend the advisement. The second and only somewhat due process protective requires law enforcement to reasonably accommodate suspects' comprehension. The third and least due process protective requires law enforcement to recite the advisement, but the suspect need not comprehend. As the following analysis will reveal, the third approach is most logical in light of the policy underlying implied consent law. States following the first and second categories should reform their laws to comport with the third.

States using the first, most due process protective approach prohibit law enforcement from arresting a suspect unless the rights and consequences of refusal are communicated in the suspect's language. The premise is that the consequences of refusing a breathalyzer test are as dire as those that warrant *Miranda* warnings

15. Cabanilla, *supra* note 1, at 132 (quoting Public Hearing on S. 203 before the S. Judiciary Comm., 1985 Leg. 63rd Sess., (Or. 1985), March 28, 1985, Tape 69, Side B (statement of Sen. James M. Simmons)).

16. *See supra* note 4.

17. OR. REV. STAT. ANN. §813.100 (West 2012).

18. ALASKA STAT. §28.35.032(g)(1)(A) (West 2012) (mandating consequences of increasing severity where the defendant has prior DUI convictions).

19. VET. STAT. ANN. tit. 23, § 1202(d) (West 2012).

and should be treated with the same level of care. Some state legislative bodies have recognized that law enforcement might not be able to clearly communicate with every person suspected of driving while under the influence. In those states, Courts choose to let non-comprehending suspects avoid collection of evidence.

Some of these states answered the comprehension problem with paperwork: every time a person is required to take a sobriety test, the law enforcement officer must have the suspect sign a form acknowledging his or her rights and consequences of refusal. For example, a Pennsylvania court held that evidence must be suppressed where an exclusively Polish-speaking defendant did not understand the English advisement:

> The officer did not testify that he believed petitioner understood the implied consent law provisions. Petitioner testified, with the aid of his Polish-speaking attorney, that he did not understand what the officer told him. Therefore, we conclude that petitioner has met his burden of establishing that he was incapable of making a knowing and conscious refusal.[20]

However, paperwork is not foolproof. In a colorful Alaska case, a prosecutor failed to show adequate consent where a suspect took the form from the officer's hand, chewed it, and spit it back at the officer.[21] Case after case reveals a consistent struggle between a clean, objective test interacting with less-than-logical, intoxicated people. Some state courts are cognizant of this underlying issue, and do not require a suspect to sign or understand the form, as long as the officer made reasonable efforts to explain the consequences. These states requiring reasonable comprehension states use the nature of the implied consent law to justify their methods.[22]

Some other states requiring full comprehension have required officers to inform the suspect by written advisement in a language the suspect understands. New Jersey, perhaps the most due process protective state in this area, clearly requires full comprehension of the arrestee:

> Relying on the plain language of section 50.2(e), the Legislature's

20. Warenczuk v. PennDOT, 9 Pa. D. & C.4th 417, 419 (1991).
21. Suiter v. State, 785 P.2d 28, 30–31 (Alaska Ct. App. 1989).
22. Hoban v. Rice, 267 N.E.2d 311, 312–13 (Ohio 1971).

> reasons for adding that section, and prior case law on point, we find that to "inform," within the meaning of the implied consent and refusal statutes, is to convey information in a language the person speaks or understands.[23]

The New Jersey Court looked deeply into the meaning of "inform":

> By its own terms, therefore, the statute's obligation to "inform" calls for more than a rote recitation of English words to a non-English speaker. Knowledge cannot be imparted in that way. Such a practice would permit Kafkaesque encounters in which police read aloud a blizzard of words that everyone realizes is incapable of being understood because of a language barrier. That approach would also justify reading aloud the standard statement to a hearing-impaired driver who cannot read lips. We do not believe that the Legislature intended those absurd results. Rather, its directive that officers "inform," in the context of the implied consent and refusal statutes, means that they must convey information in a language the person speaks or understands.[24]

The New Jersey court examined the semantics of "inform," but it failed to look broadly at the context of the law. The context shows that New Jersey, like all other states, enacted an *implied* consent law. Perhaps if the court had looked into the etymology and semantics of "implied" they would have arrived at the proper result: when the suspect drove onto the road, the suspect had *already consented* to the sobriety test—refusing to take the test is a per se violation, regardless of the language of the defendant. The policy requiring the officer to inform the suspect of the consequences of her refusal was not intended to uphold the due process rights of the suspect, but to encourage compliance with the test. To circumvent this policy, the court elevated dicta from another case to law, overriding the whole purpose of the statutory scheme of the implied consent law. The court stated:

> The standard statement was a procedural safeguard to help ensure

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23. State v. Marquez, 998 A.2d 421, 434–39 (N.J. 2010). *See also, e.g.,* State *ex rel.* Town of Middletown v. Anthony, 713 A.2d 207, 212–13 (R.I. 1998); City of Norfolk v. Brown, 243 S.E.2d 200, 201 (Va. 1978) ("[T]he purpose of s 29-44(c) is to insure that a refusal is knowing and intelligent.").

24. *Marquez*, 998 A.2d at 434.

> that defendants understand the mandatory nature of the breathalyzer test, but also encouraged [law enforcement] to revise the statement *to further ensure that suspects understand that an ambiguous or conditional answer to a request to submit to a breathalyzer test will be deemed a refusal*.[25]

Further, the court stated, "the Legislature's chosen safeguard was meant to help ensure that defendants understood that fact—even though they had already impliedly consented to the test. To read the statement in a language a driver does not speak is inconsistent with that end."[26] Legislating from the bench, the New Jersey court declared that understanding the consequences of refusal was only slightly less important than encouraging test-taking and helping law enforcement. The New Jersey court, acknowledged the logistical issues inherent in translating the advisement into every language, but punted the problem to the executive branch stating "we defer to the executive branch agency, specifically, to the chief administrator of the MVC (Motor Vehicle Commission), to fashion a proper remedy with the assistance of the Attorney General."[27]

The New Jersey case illustrates the major defect in requiring full comprehension. Most importantly, when a court rules in a way that undermines the statute—especially undermining a principle from the base of the statutory scheme—the neatly constructed statutory house-of-cards cannot stand. What happened in New Jersey contradicts proper statutory interpretation; the court completed their analysis backwards. It started with a pro-due-process policy objective, found some dicta to support its cause, and falteringly distinguished the base policy of the statutory scheme in order to achieve the court's policy objective. Instead, a court should look at the statute in its context and *then* dig for legislative intent and policy—to do otherwise is outside the purview of the court.[28] If the court had properly acknowledged the statute's context, it would have discovered the legislature previously selected the policy at the foundation of the DUI implied consent framework: protecting human life over the ancillary due process rights of intoxicated suspects. Informing suspects of the consequences of refusal was intended to encourage compliance, not

25. *Id.* at 432–33 (*citing* State v. Widmaier, 724 A.2d 241, 253 (N.J. 1999)).

26. *Id.* at 435.

27. *Id.* at 424.

28. *See, e.g.*, PGE v. Bureau of Labor and Industries, 859 P.2d 1143 (Or. 1993); State v. Gaines, 206 P.3d 1042 (Or. 2009).

act as a courteous warning. Even though the New Jersey court acknowledges the advisement language was meant to encourage compliance, it twists the meaning into a pseudo due process right.

Another ugly consequence of the New Jersey court's approach is the difficulty inherent in getting intoxicated people to fully comprehend the advisement. The court acknowledges the diversity of languages, including sign language, but makes no suggestions and takes no responsibility to fix the problem—a keen sign of legislating from the bench. Some due process advocates have argued that, with smart phone technology, it would be easy for law enforcement to type in the rights and consequences language and have the internet do the translation. In theory, this idea is appealing. However, as the New Jersey court found, the budgeting, logistics (can one get internet access in an onion field?), and administration of such an overhaul would be too difficult for many law enforcement agencies. Using technology this way could be a "best practice" but it should not be required. In *Cabanilla*, the Oregon Supreme Court nailed the issue on the head while respecting its jurisdictional limits, unlike the New Jersey Court:

> We recognize that, in this digital age, it may be a simple matter for police departments to have computers programmed with prerecorded translations of the implied consent advice in almost any language police officers might encounter in a given jurisdiction. However, this case is about what the statutes require, *and not what this court thinks is advisable or convenient for police departments to do*.[29]

Other states should take heed of New Jersey's tale.

The states in the middle notch of the continuum hold that law enforcement must make reasonable accommodation to communicate the advisement. The policy behind this approach allows lawmakers to save face; they avoid having to say that suspects do not have to comprehend the advisement because the implied consent laws are implied. Instead, lawmakers get to say, "Well, we tried to do our best. What set of constituents could ask for more?"

The overall policy behind this enforcement approach is two-fold. In Wisconsin, for example, the purpose of implied consent law is to (1) combat drunk driving by facilitating the gathering of evidence

29. State v. Cabanilla, 273 P.3d 125, 133 n.12 (Or. 2012) (emphasis added).

against drunk drivers *and* (2) to advise the accused about the nature of the driver's implied consent.[30] The Wisconsin policy produces an interesting, if not muddy, balance. A law enforcement officer must make reasonable efforts to convey the implied consent warning to a non-English speaking person.[31] But even in Wisconsin, where *Miranda* warnings are required in the language of the defendant, implied consent warnings do not necessarily have to be in the language of the defendant: "there are significant distinctions that dictate that an accused driver need not comprehend the implied consent warnings for the warnings to have been *reasonably conveyed*."[32] The distinction between "convey" and "comprehend" is minimal, but here the tie goes to the general purpose of the DUI statutory scheme—to combat loss of life on the highway.

An alternative middle-of-the-road approach policy lowers the burden on law enforcement from the high burden of the states requiring full comprehension. These states hold that, as long as an officer did not mislead the defendant when trying to communicate the rights and consequences, the advisement is sufficient. For example, in Texas:

> A person asked to submit a specimen must be given certain admonishments. If a person's consent to a breath test is induced by an officer's misstatement of the consequences flowing from a refusal to take the test, the consent is not voluntary and the test result is inadmissible in evidence.[33]

While the middle of the road approach might appeal to lawmakers as equitable-sounding, in practice the result of the compromise is uncertain and unreliable. Iowa's history illustrates this problematic

30. State v. Garcia, 756 N.W.2d 216, 219–23 (Iowa 2008) (citing State v. Piddington, 623 N.W.2d 528 (Wis. 2001) ("[The implied consent law] requires the arresting officer under the circumstances facing him or her at the time of the arrest, to utilize those methods which are reasonable, and would reasonably convey the implied consent warnings.")).

31. *See* State v. Piddington, 623 N.W.2d 528 (Wis. 2001) (finding under Wisconsin law, a law enforcement officer who asks a person to submit to chemical testing must warn the person of the potential revocation consequences of refusing to submit to the test or of failing the test).

32. *Id.*

33. Franco v. State, 82 S.W.3d 425, 427 (Tex. Ct. App. 2002). *See also* Percy v. South Carolina Dept. of Highways & Pub. Transp., 434 S.E.2d 264, 265–66 (S.C. 1993) (recognizing that an Implied Consent advisory is sufficient if the defendant is "reasonably informed of his rights . . . and . . . is neither tricked nor misled into thinking he has no right to refuse the test.").

approach.

In 2008, the Iowa General Assembly adopted the epitome of middle approach, requiring "reasonable efforts" to "reasonably inform" defendant to have a "reasonable understanding."[34] This approach, adopted by a number of states, is arguably the most dangerous because it allows a court to engage in ad hoc balancing, as demonstrated in the Iowa Supreme Court case *Garcia*.[35]

In *Garcia*, an officer had informed the defendant of his *Miranda* warnings by showing the Spanish version of the warnings on a sheet but read the implied consent warnings to Garcia only in English.[36] Similar to Oregon's *Cabanilla*, Garcia understood some English but did not comprehend the warnings enough to make a reasoned and informed decision.[37] The court held that "under the circumstances facing her at the time of the arrest, [the officer] utilized reasonable methods to reasonably convey the implied consent warnings to Garcia."[38]

The court justifies the officer's behavior by piling equivocal, if not potentially ambiguous and confusing language, on other ambiguous and confusing language. This language includes words like "reasonable," "sufficient," etc."[39] This compilation of muddy standards offers no real standard for law enforcement to measure future actions. The case explains why such a "reasonableness" standard is so dangerous: courts must start to engage in legislative policy balancing, where the legislature has already decided on the policy—protection of human life on highways—and thus *implied* consent. *Garcia* defined "reasonable", and declared that it is an objective standard measured from the perspective of the law enforcement officer rather than the driver's subjective level of comprehension. However, this muddy standard, while seemingly objective, is fraught with questions. Must every police department use technology to translate the warnings? How long is too long of a delay to wait for a translator to come to the testing area—after all, the evidence is literally dissolving by the minute? When must the officer not even attempt to arrest an apparently intoxicated driver if the

34. IOWA CODE §321J.2 (2008); *Garcia*, 756 N.W.2d at 219–23 (Iowa 2008).

35. *Garcia*, 756 N.W.2d at 19–23.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

language is unknown to the arresting officer? Should the officer just let the clearly intoxicated driver go free on the roads? Officers in Iowa will no doubt encounter other dubious questions in their DUI arrests. Such a balancing of interests defies the meaning of implied consent: a policy choice made by the Iowa legislature many years before *Garcia*.

Lastly, the states on the final end of the continuum hold that, by the very nature of implied consent law, law enforcement must merely recite the advisement. Georgia, Minnesota, and Illinois, for example, require that an officer convey the rights and consequences to a defendant but explicitly state the defendant does not have to understand the rights and consequences.[40] In fact, in Kansas, a deaf mute defendant was convicted even though he could not understand or verbally communicate his consent to take the breath test.[41]

The underlying policy of these states is to aid the state in making its highways safe by lawfully requiring suspected persons to take the test. In the words of the Iowa Supreme Court the policy was "to reduce the holocaust on our highways, part of which is due to the driver who imbibes too freely of intoxicating liquor."[42] The Illinois Supreme Court "recognized that the implied-consent statute was enacted as a matter of public policy to make highways safer. Therefore, the remedial nature of the statute warranted liberal construction to accomplish its overall goal of safety."[43] Indeed, in

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40. *Garcia*, 756 N.W.2d at 219–23. *See also, e.g.*, Furcal-Peguero v. State, 566 S.E.2d 320, 324 (Ga. Ct. App. 2002); People v. Wegielnik, 605 N.E.2d 487, 489–90 (Ill. 1992); Yokoyama v. Comm'r of Pub. Safety, 356 N.W.2d 830, 831 (Minn. Ct. App. 1984); Martinez v. Peterson, 322 N.W.2d 386, 388 (Neb. 1982) (finding no requirement that the driver understand the consequences of refusal or be able to make a reasoned judgment in Nebraska implied consent law). The following states also generally support the No-Comprehension stance: Colorado, Delaware, Florida, Maine, Montana, and Nebraska. State v. Dubiel, 958 So. 2d 486, 488 (Fla. Dist. App. 2007); People v. Culp, 537 P.2d 746, 747 (Colo. 1975); DEL. CODE ANN. tit. 21, § 2742 (2012); State v. Brann, 736 A.2d 251, 255 (Me. 1999); Anderson v. State, 168 P.3d 1042, 1044 (Mont. 2007); State v. Green, 470 N.W.2d 736, 741 (Neb. 1991) (finding the defendant does not need to understand the warning, but the defendant must take the test); Jury v. State Dept. of Licensing, 60 P.3d 615, 617 (Wash. Ct. App. 2002) (holding that the driver's decision to take or refuse the breath test need not be knowingly and intelligently made, the warnings must only permit the opportunity for a knowing and intelligent decision).

41. State v. Bishop, 957 P.2d 369, 379 (Kan. 1998); KANS. STAT. ANN. §8-1001 (West 2012) ("It shall not be a defense that the person did not understand the written or oral notice required by this section.").

42. Severson v. Sueppel, 152 N.W.2d 281, 284 (Iowa 1967). This is how Iowa began their implied consent law. However, a 2008 case changed the policy. *See supra* note 18.

43. People v. Johnson, 758 N.E.2d 805, 810–11 (Ill. 2001). This has undergone some

Delaware, there is no advisement required at all; a police officer may take reasonable steps to conduct such chemical testing even without asking for the consent of the person and, thereby, invoke the implied consent law without barriers.[44]

Part of the policy recognizes the practical side of the problem: the suspects are intoxicated. As some of the examples above explain, even in the best of situations, an intoxicated native English speaker may struggle to fully comprehend an English advisement. However, the intoxicated person chose to be impaired when he consumed intoxicants before driving. The state has a very significant safety interest in protecting drivers and passengers on the roads from intoxicated drivers. Consequently, the state has a similarly significant interest in getting the clearest evidence to prove the violation. Furthermore, if the objective chemical test is difficult to obtain, law enforcement will be left to prove the case with subjective factors such as bloodshot eyes, unsteady walking, and odor of alcohol. A defendant could lose rights, or worse, be wrongfully accused if the evidence relies solely on subjective factors. For the protection of both the public and the defendant, clear and effective chemical tests are ideal. To be clear and effective, the chemical test must be done in a very timely fashion because the intoxicant will naturally dissipate in the person's system over time, erasing all the evidence. Indulging a defendant's pseudo due process right to comprehend the advisement pales in comparison to the aim of saving human lives through informed enforcement.

The policy behind the implied consent statutory scheme is best illustrated when a suspected drunk driver is unconscious or dead. The policy choice must be made: is the implied consent law really implied, or not? Because if it is not really implied, if comprehension is *required*, then law enforcement cannot get the evidence it needs to keep dangerous drivers off the road and to hold them accountable for the damage they cause. Some states have a statutory provision that is implicated when a person is unable to refuse consent all together, such as when they are unconscious or dead. These provisions state that the policy justifications behind the implied consent statute is outweighed by the importance of finite timing of testing in the case of

changes since 2001 but those changes are minor and not applicable to the warnings section cited here.

44. DEL. CODE ANN. tit. 21, § 2742 (West 2012).

unconscious or dead defendant.[45] This is an area where the No-Comprehension states' policy choice if *implied* consent makes the most sense. Thus, many states allow blood alcohol testing for unconscious persons.[46]

The states that do not require defendant's comprehension of the advisement give full weight to the stated legislative policy choice. For example, an Idaho case highlights the benefits of this approach. There, the court stated that "the purpose of a warning of license suspension following a refusal . . . is to overcome an unsanctioned refusal by threat instead of force. *It is not to reinstate a right to choice*, but rather to nonforcibly enforce the driver's previous implied consent."[47]

By nature of the implied consent law, all drivers legally consent to be chemically tested or suffer the consequences by choosing to drive on public roads. The use of state-funded roads is a privilege, not a right, and the laws regarding its use should consistently reflect this fact.

V. OREGON'S EXPERIENCE

The Oregon Supreme Court recently considered whether to remain in the third, no-comprehension-required side of the continuum or shift toward the middle or full comprehension requirement. In *Cabanilla*, the Oregon Supreme Court reaffirmed Oregon's position on the continuum. In an opinion written by former Chief Justice DeMuniz, the Court held that evidence of a DUI defendant's refusal to take a breath test is admissible against the defendant even if the state does not establish that the defendant understood the information

45. ALA. CODE § 32-5-192 (West 2012); ARIZ. REV. STAT. ANN. § 28-1321 (West 2012); Clark v. State, 764 S.W.2d 458, 460–61 (Ark. Ct, App. 1989); CAL. VEH. CODE § 23612 (West 2012); IND. CODE ANN. § 9-30-6-2 (West 2012); N.M. STAT. ANN. § 66-8-108 (West 2012); N.C. GEN. STAT. ANN. § 20-16.2 (West 2012); Wilhelmi v. Director of Dept. of Transp., 498 N.W.2d 150, 156 (N.D. 1993); OKLA. STAT. ANN. tit. 47, § 751 (West 2012); S.C. CODE ANN. § 56-5-2950 (West 2012).

46. ALA. CODE § 32-5-200(c) (West 2012); ARIZ. REV. STAT. ANN. § 28-1321 (West 2012); CAL VEH. CODE §23612, State v. DeWitt, 184 P.3d 215, 219 (Id. 2008); 625 ILL. COMP. STAT. 5/11-501.1 (2012); IND. CODE ANN. § 9-30-6-2 (West 2012); NEV. REV. STAT. ANN. § 484C.160(2) (West 2012); N.M. STAT. ANN. § 66-8-108 (West 2012); N.C. GEN. STAT. ANN. § 20-16.2(6)(B) (West 2012); OHIO REV. CODE ANN. § 4511.191(4) (West 2012); OKLA. STAT. ANN. tit. 47, § 751(D) (West 2012); S.C. CODE ANN. § 56-5-2950(A) (2012).

47. State v. DeWitt, 184 P.3d 215, 219 (Idaho 2008) (citing State v. Newton, 636 P.2d 393, 398 (Or. 1981), *overruled on other grounds by* State v. Spencer, 750 P.2d 147 (Or. 1988)) (emphasis added).

given about the rights and consequences of refusing to take the breath test.[48]

The Oregon DUI scheme, like all other states, is that of implied consent. Oregon, like most states, added a section requiring law enforcement officers to inform suspects of their rights and consequences. Oregon Revised Statute section 813.100 states in relevant part:

> (1) Any person who operates a motor vehicle upon premises open to the public or the highways of this state shall be deemed to have given consent, subject to the implied consent law, to a chemical test of the person's breath, or of the person's blood if the person is receiving medical care in a health care facility immediately after a motor vehicle accident, for the purpose of determining the alcoholic content of the person's blood if the person is arrested for driving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance. A test shall be administered upon the request of a police officer having reasonable grounds to believe the person arrested to have been driving while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance. *Before the test is administered the person requested to take the test shall be informed of consequences and rights as described under ORS 813.130.*
>
> (2) No chemical test of the person's breath or blood shall be given, under subsection (1) of this section, to a person under arrest for diving a motor vehicle while under the influence of intoxicants in violation of ORS 813.010 or of a municipal ordinance, if the person refuses the request of a police officer to submit to the chemical test after the person has been informed of the consequences and rights as described under ORS 813.130.[49]

Furthermore, the statute commands the Department of Transportation to prepare a form outlining a driver's rights and consequences for law enforcement to read to suspects.[50] Compared with other states' statutes, Oregon's is fairly simple. There is no

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48. State v. Cabanilla, 273 P.3d 125, 127 (Or. 2012).

49. OR. REV. STAT. § 813.100(1)–(2) (2011) (emphasis added). If a person refuses to take the test, the officer will suspend the defendant's driving license. OR. REV. STAT. § 813.100(3) (2011).

50. OR. REV. STAT. § 813.130(1)–(2) (2011).

reasonableness requirement, no paperwork to sign, and no need to find translators. This statute recognizes the benefits flowing from informed suspects while acknowledging the legal reality that suspects have already consented to the test. If the legislature had intended to reasonably accommodate, or to make a pseudo-due-process right in the law, it would have included these provisions in the statute.

Oregon law on DUI issues has evolved since the 1969 *Heer v. Department of Motor Vehicles* decision. In *Heer*, the Oregon Supreme Court held that the Implied Consent Law is constitutional, and complies with due process.[51] In 1980, the Court of Appeals held that failure to advise an arrestee of his *Miranda* rights before his submission to a breath test was not grounds for suppression of the results of the test.[52] In *Spencer*, the Court focused on the legislative history of DUI laws to make a valuable distinction:

> The basic concept embodied in the implied consent law is that one who drives a motor vehicle on the state's highways impliedly consents to a breath test. . . . Consent being implied by law, a driver may not legally refuse. A driver, however, can *physically* refuse to submit. . . . The history and development of the implied consent law . . . suggest[s] that the advice to be given an arrestee was intended to provide additional incentive, short of physical compulsion, to induce submission.[53]

The Oregon Supreme Court first addressed the communication of the advisement issue in 1969, in *Fogle*, taking a practical view of the nature of intoxication:

> While the statute recognizes that a person may refuse to submit to the test, the legislature could hardly have contemplated that it was necessary that there be a completely knowing and understanding submission. If this were the case, the only people who could be tested would be those who were not sufficiently intoxicated to interfere with their mental processes.[54]

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51. Heer v. Dep't of Motor Vehicles, 450 P.2d 533, 537 (Or. 1969).

52. State v. Medenbach, 616 P.2d 543, 545–46 (Or. Ct. App. 1980).

53. State v. Spencer 750 P.2d 147, 153 (Or. 1988) (emphasis added). *See also* State v. Weishar, 717 P.2d 231, 234–35 (Or. Ct. App. 1986) (citing Bush v. Bright, 71 Cal. Rptr. 123, 124–25 (Cal. Ct. App. 1968)).

54. State v. Fogle, 459 P.2d 873, 874 (Or. 1969).

Fourteen years later, the court continued to analyze nature of implied consent by examining the legislative history behind the 1983 amendments.[55] In *Weishar*, the officer read the advisement to the suspect, but because he had a hearing impairment the suspect did not understand the oral advisement. [56] The officer gave Weishar the written version, but he was too intoxicated to be able to read the advisement.[57] *Weishar* held that under the 1983 amendments, the officer must inform the arrestee of the advisement *before* asking the arrestee to take the test.[58] However, the court found that the legislature did not go so far as to require "voluntary and informed choice," or to require that defendant understand what he had been told.[59]

The 1991 *Nguyen* court determined that the advisement law "is intended to be coercive, not protective; the information about rights and consequences is intended to induce submission to the breath test."[60] In *Nguyen*, the court overturned the trial court's decision to suppress breath test evidence.[61] The officer read the advisement in English, but the defendant only spoke and understood Vietnamese.[62] Defendant argued, and the trial court agreed, that the word "inform" in the statute required that there be some possibility that defendant could understand the advisement.[63] The Court of Appeals disagreed, stating that "[a]lthough the statute requires that a person under arrest for driving under the influence of intoxicants be 'informed' of the consequences and rights described in [Oregon Revised Statutes section] 813.130, it does not require that the information be understood."[64]

The case that recently re-emphasized Oregon's position on the issue is *State v. Cabanilla*. The Oregon Court of Appeals affirmed without opinion the conviction of Cabanilla, a Spanish-speaking

55. State v. Weishar, 717 P.2d 231 (Or. Ct. App. 1986).

56. *Weishar*, 717 P.2d at 231.

57. *Id.*

58. *Id.* at 236 (emphasis added).

59. *Id.* at 236. In *Weishar*, the court upheld the decision of the majority in *State v. Newton*, 636 P.2d 393 (Or. 1981), rather than requiring the higher level of comprehension they mandated under *State v. Scharf*, 605 P.2d 690 (Or. 1980).

60. State v. Nguyen, 813 P.2d 569, 570 (Or. Ct. App. 1991).

61. *Id.* at 570–71.

62. *Id.* at 569–70.

63. *Id.* at 570.

64. *Id.*

defendant.[65] The *Cabanilla* court also addressed the issue of "Spanglish"—where the law enforcement officer spoke some broken Spanish and arrestee spoke some broken English—a kind of quasi-communication.

In June 2008, a Malheur County Sheriff's Deputy was dispatched to the scene of a crash.[66] The driver's seat was empty, but there was blood on the steering wheel and on Defendant Cabanilla's forehead.[67] Cabanilla smelled strongly of alcohol.[68] Deputy asked Cabanilla if he had been drinking any "cervezas."[69] Cabanilla said, "Si, two or three, dos, tres."[70] Deputy spoke mostly in English and used hand gestures to communicate with Cabanilla.[71] Deputy knew a few Spanish words, mostly those associated with conducting field sobriety tests.[72] Deputy's police report indicated that he believed there was a language barrier between himself and Cabanilla.[73] Deputy demonstrated several field sobriety tests, and Cabanilla understood enough to mimic the Deputy.[74] Cabanilla exhibited several indicators of intoxication.[75]

Following the field sobriety test, the Deputy arrested Cabanilla.[76] Cabanilla answered, in English, several questions from the standardized Oregon State Police alcohol interview report.[77] After completing the report, the Deputy read the implied consent form in English, and asked Cabanilla, in English, if he would take the breath test.[78] Cabanilla refused and was convicted of driving under the influence of intoxicants and refusing to take a breath test.[79]

On appeal, Cabanilla argued that the trial court committed prejudicial error by admitting Cabanilla's refusal to take the breath

65. State v. Cabanilla, 250 P.3d 38, 38 (Or. Ct. App. 2011).
66. Brief of Appellant at 4, State v. Cabanilla, 273 P.3d 125 (Or. 2012) (S059289).
67. *Id.* at 8.
68. *Id.* at 4–5.
69. *Id.* at 5.
70. *Id.*
71. *Id.*
72. Brief of Appellant at 5, State v. Cabanilla, 273 P.3d 125 (Or. 2012) (S059289).
73. *Id.*
74. *Id.* at 6.
75. *Id.* at 8.
76. *Id.*
77. *Id.* at 6.
78. Brief of Appellant at 7, State v. Cabanilla, 273 P.3d 125 (Or. 2012) (S059289).
79. *Id.*

test into evidence.[80] Cabanilla argued that the plain meaning of Oregon Revised Statute section 813.100 requires an officer to "inform" a person arrested for DUI of their rights and the consequences of refusal, which means the officer needs to provide sufficient opportunity for the arrested person to understand these rights and consequences.[81] When an officer knows some Spanish and the suspect knows some English, there is not a sufficient opportunity for the suspect to be informed.[82] Cabanilla asserted that because he was not informed, his refusal to take the test should have been excluded.[83] Defendant further argued that the court should overturn *State v. Nguyen*, where the court admitted breathalyzer evidence even though the defendant only spoke and understood Vietnamese,[84] under the premise that the *PGE-Gaines* statutory interpretation analysis would change the outcome of *Nguyen* today.[85]

In briefs, Oregon argued that the *PGE-Gaines* statutory interpretation reveals the advisement is a tool to facilitate the collection of evidence without resorting to physical force; the suspect's actual comprehension is not required.[86] To support this contention, the State cited the statute: "The department may establish *any form* [of the advisement] *it determines appropriate and convenient*."[87] The goal of the information is not to be understood, but to be appropriate and convenient for the speaker, i.e., law enforcement. "Implied consent statutes implement simple, workable procedures to generate evidence of impaired driving" and are not for the convenience of the arrestee.[88]

Furthermore, the state argued, when looking at the context of the

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80. *Id.* at 9, 21.

81. *Id.* at 3.

82. *Id.* at 3.

83. *Id.* at 3–4.

84. Brief of Appellant at 13, State v. Cabanilla, 273 P.3d 125 (Or. 2012) (S059289); State v. Nguyen, 813 P.2d 569 (Or. 1991).

85. Brief of Appellant, *supra* note 66, at 15 (citing PGE v. Bureau of Labor and Industries, 859 P.2d 1143, 1145–47 (Or. 1993) and State v. Gaines, 206 P.3d 1042, 1050–51 (Or. 2009)). These companion cases explain the Oregon Supreme Court's method of statutory interpretation, commonly referred to as "PGE-Gaines." First, the court must look at text and context. Next, if useful, the Court will look at legislative history. Finally, if the meaning statute is still unclear, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.

86. Brief of Respondent at 10, State v. Cabanilla, 273 P.3d 125 (Or. 2012).

87. *Id.* at 14 (citing OR. REV. STAT. ANN. § 813.130(1) (West 2011)) (emphasis in original).

88. *Id.* at 1.

statute, the "rights and consequences" requirement is one part of Oregon's *implied consent* law.[89] The umbrella of implied consent, then, casts a shadow onto the advisement: it is meant to be more of an enforcement tool than an imperative due process requirement. After all, "the very concept of implied consent . . . was intended to eliminate the right of choice and to recognize actual choice *only* in the sense of forbearance of physical resistance."[90] The advisement often produces strong evidentiary results since "evidence of a refusal . . . tend[s] to show that the driver believed he or she was under the influence of an intoxicant . . . ."[91] The Supreme Court adopted this idea in *Cabanilla*:

> As long as it is clear that the driver knew that he or she was being asked to take a breath test to measure his or her blood alcohol level – and there is no question that defendant understood that much here – it is reasonable to infer from the *fact* of the driver's refusal to take the test that the driver believed that he or she would fail it.[92]

In *Cabanilla*, as with other cases across the nation, the American Civil Liberties Union (ACLU) raised due process in an amicus brief.[93] The ACLU echoed the due process arguments rejected by the *Heer* Court in 1969, when it found the implied consent statutory scheme constitutional in Oregon.[94]

Like the New Jersey Court, the ACLU focused on the language and ignored the context of the statute. It argued that the word "inform," in light of due process and equal protection, requires an officer to provide suspects a meaningful opportunity to understand the advisement.[95] The ACLU then extended their argument, insisting that

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89. *Id.* at 11 (emphasis added); OR. REV. STAT. ANN. § 813.100 (West 2011).

90. Brief of Respondent, *supra* note 86, at 17 (citing State v. Newton, 636 P.2d 393 (Or. 1981)).

91. *Id.* at 2.

92. State v. Cabanilla, 273 P.3d 125, 131 (Or. 2012) (quoting State v. Fish, 893 P.2d 1023, 1028 (Or. 1995)) ("Thus, the fact that a person refused or failed to perform . . . tests inferentially may communicate the person's belief – that the person refused or failed to perform the tests because he or she believed that the performance of the tests would be as incriminating.")).

93. Brief for the ACLU Foundation of Oregon, Inc. as Amicus Curiae Supporting Appellants, *State v. Cabanilla*, 273 P.3d 125 (Or. 2012).

94. State v. Fogle, 459 P.2d 873, 874 (Or. 1969).

95. Brief for the ACLU, *supra* note 80, at 2.

a "meaningful opportunity to understand" requires that the advisement be read to a person in a language he in-fact understands.[96] The ACLU also noted that Ohio, Washington, and New Jersey require a person to have a meaningful opportunity for comprehension.[97] Some state statutes using "advise" have held that a defendant need not understand the warning,[98] although "advise" conveys a stronger implication of comprehension than Oregon's "inform." Either way, the language needs to be read in the context of the entire DUI statutory scheme. Like the New Jersey Court, the ACLU did what *Gaines* prohibits: a court may not choose a policy side and then interpret a statute. A court must look to a statute's text, context, and legislative history, in that order. The *PGE-Gaines* analysis preserves exclusive legislative dominion over policy choices and democratic separation of powers demands that policy choices remain in the legislature's domain.

The Court did recognize the dissonance of the word "inform" and the reality of the statute. The Court conceded that the ordinary definition of "inform" is to impart information in a way that can be understood.[99] That concession notwithstanding, the Court still held "a failure to 'inform' a driver in that sense does not result in the exclusion of evidence of his refusal to take the breath test."[100] While the defendant is not informed, the Court acknowledged, the evidentiary rule trumped any other contentions.

The ACLU analogized *Cabanilla* to *State v. Ruiz*, where the Oregon Supreme Court required arrestees to actually understand their *Miranda* rights.[101] However, the admission of the refusal evidence does not violate defendant's Article I, section 20 rights because implied consent laws do not involve a privilege or immunity (contrary

96. *Id.* at 2–3.

97. *Id.* at 6 (citing State v. Whitman Cnty. Dist. Court, 714 P.2d 1183, 1185 (Wash. Ct. App. 1986); Couch v. Rice, 261 N.E.2d 187, 188–89 (Ohio Ct. App. 1970); State v. Marquez, 998 A.2d 421, 434 (N.J. 2010)).

98. "Any person who is required to submit to a chemical blood, breath, or urine test or tests pursuant to this section shall be advised that refusal to submit to such test or tests is a separate crime for which the person may be charged." NEB. REV. STAT. § 60–6,197 (5) (2012). "The only understanding required by the licensee is that he has been asked to take a test. It is not a defense that he does not understand the consequences of a refusal or is not able to make a reasoned judgment as to what course of action to take." State v. Green, 470 N.W.2d 736, 741 (Neb. 1991).

99. State v. Cabanilla, 273 P.3d 125, 131 (Or. 2012).

100. *Id.*

101. Brief for the ACLU, *supra* note 93, at 9–10.

to *Miranda* warnings).[102] There is no privilege or immunity in DUI laws because the driver has already consented to this particular test. Unlike arrests where *Miranda* must be used the suspect is not going to be detained because he refused to take the test. In fact, when a person is arrested for a suspected DUI violation, the person is required to understand their *Miranda* warnings. The Court did not address the ACLU's due process argument, as the constitutional arguments were not preserved in the courts below.[103]

The *Cabanilla* court upheld one of the basic notions found in the nearly 30-year old case of *Spencer*:

> When a driver is asked to take a breath test, his or her only decision is whether to physically refuse . . . However, because the driver has only the physical ability, but not the legal right, to refuse, the legal validity of the driver's refusal does not depend on whether his or her decision to physically refuse is fully informed or voluntary.[104]

The Supreme Court was careful to point out that if there is no *attempt* to inform an arrestee of the rights and consequences of refusal, the evidence of refusal may be suppressed.[105]

A careful analysis of the due process claims and the constitutional claims lobbying for suspect comprehension reveals that, especially in Oregon, no comprehension of the advisement is required. Requiring comprehension would undermine the foundational policy decision of implied consent laws. The *Cabanilla* Court recognized this policy objective: "[T]he overarching purpose of the rights and consequences requirement is to coerce a driver's submission to take the tests; it is not to inform the driver of the specifics of the law."[106]

VI. CONCLUSION

As the population shifts from one dominant language to many,

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102. Brief of Respondent, *supra* note 86, at 4 (citing OR. CONST. art. I, §20).

103. *Cabanilla*, 273 P.3d at 130 n. 10.

104. *Id.* at 131–32.

105. *Id.* at 134 (distinguishing State v. Trenary, 850 P.2d 356 (Or. 1993)).

106. *Id.* at 131. Here, the Court relies on *Spencer*: "The history and development of the implied consent law . . . suggest that the advice to be given an arrestee was intended to provide an additional incentive, short of physical compulsion, to induce submission." State v. Spencer, 750 P.2d 147, 153–54 (Or. 1988).

law enforcement should be careful to respect due process rights. Indeed, law enforcement should be encouraged to go above the minimum. The middle of the road states, requiring reasonable accommodation, do have a solid argument that if the true purpose of the advisement is to induce compliance, then making reasonable efforts for comprehension will *aid* law enforcement, not deter its mission. If law enforcement has a way to enable the suspect to comprehend the advisement, it should be encouraged (but not required) to do so. However, legislatures across all 50 states made the policy decision to not require informed consent many years ago when adopting an implied consent statutory scheme. Oregon, and all states, should keep implied consent laws *implied*.

Currently, there are three main approaches of DUI advisements among the states. Each approach has interacted with the reality of the DUI arrests in the states. Case law shows that when theory meets reality, the third, no-comprehension approach is the only logical choice.