HIEMSTRA*

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* refus(u)2(209 Tmes)5Sie8.5d.cmict tow[(nn3h)1.5(mpm.002 Tc-.g2645 c.9(e)-1.4

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

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.*

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]

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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*.

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

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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.*

approach.

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*.

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:

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]

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

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

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.*

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

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]

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]

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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.