NO ENTIENDO: STATE V. MARQUEZ, LANGUAGE BARRIERS, AND DRUNK DRIVING

Student Note

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INTRODUCTION

In *State v. Marquez*, the New Jersey Supreme Court had to decide the question of what police officers must do when trying to communicate with a drunk driving suspect who does not speak English or any other common language.[1] Although suspected drunk drivers are obliged by law to submit to a breath test,[2] police officers cannot issue a citation for refusal unless they "inform" the suspect of the associated penalties.[3] Thus, when suspects do not speak English, police officers are faced with a difficult problem: what does it mean to "inform" the suspect?

[1] State v. Marquez, 998 A.2d 421 (N.J. 2010).

[2] This is not to say that police officers can force a suspect to submit to the test.

[3] N.J. STAT. ANN. § 39:4-50.4a (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12); N.J. STAT. ANN. § 39:4-50.2(e) (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12).

State v. Marquez dealt primarily with this problem. In 2009, the New Jersey Appellate Division issued an opinion on the case, and a year later the New Jersey Supreme Court reversed.[4] Based on a reading of the various cases, statutes, and articles relevant to this subject, I conclude below that the New Jersey Supreme Court correctly held that a driver is not sufficiently "informed" unless he subjectively understands the warning that police officers administer to him. It is my contention that this is the only construction of the word that achieves the policy goals of implied consent statutes.

This case note is divided into five parts. Part I is a summarization and comparison of the two courts' holdings. Part II examines how other states deal with this issue. Part III explains why the Supreme Court's holding in *Marquez* properly incentivizes drunk drivers to submit to breath tests and identifies practical concerns that remain. Part IV offers recommendations to other states. Part V concludes briefly.

I. THE TWO *MARQUEZ* OPINIONS

A. FACTUAL BACKGROUND AND PROCEDURAL HISTORY:

Late in the evening on September 20, 2007, German Marquez was involved in a car accident with one other vehicle.[5] Marquez's Toyota had apparently rear-ended the other car.[6] Officer Shane Lugo of the Plainfield Police Department responded to the scene.[7] Officer Lugo first asked Marquez for his credentials in English, but when it became clear that Marquez did not understand, Lugo repeated the request in

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[4] *Compare* State v. Marquez, 974 A.2d 1092 (N.J. Super. Ct. App. Div. 2009) (holding that "inform" requires only that the officer speak to the suspect in English), *with Marquez*, 998 A.2d 421 (holding that "inform" means that the suspect must be able to understand the information that the officer is trying to convey).

[5] *Marquez*, 998 A.2d at 424.

[6] *Marquez*, 974 A.2d at 1093. It seems that the Supreme Court was unwilling to draw this inference. Instead, it merely stated, "[t]he damaged front end of his car was touching the other car's bumper." *Marquez*, 998 A.2d at 424.

[7] *Marquez*, 998 A.2d at 424.

Spanish.[8] Defendant then produced his license, registration, and insurance card.[9] Officer Lugo noticed that Marquez was slurring his breath and smelled of alcohol. He asked Marquez to exit his vehicle and walk to the curb.[10] Marquez braced himself as he exited the car and leaned against a tree.[11] While not bracing himself, Marquez swayed back and forth.[12] Officer Lugo asked Marquez in English to perform field sobriety tests.[13] Although he appeared to listen, Marquez did not understand what Officer Lugo was saying.[14] Believing that Marquez was intoxicated, Officer Lugo placed him under arrest.[15]

Officer Lugo transported Marquez to the police station, where Officer Anthony Berlinski, a certified Alcotest operator, observed Marquez for twenty minutes.[16] The officers then brought Marquez into a room where they could administer the breathalyzer test using an Alcotest machine.[17] Officer Lugo read to Marquez a standard statement entitled "Division of Motor

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Marquez*, 974 A.2d at 1094.

[12] *Marquez*, 998 A.2d at 424.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* Alcotest is a machine that measures blood-alcohol content. State v. Chun, 943 A.2d 114, 128 (N.J. 2008). Operators must wait twenty minutes before administering the test, making sure that the suspect does not ingest any more alcohol, regurgitate, swallow anything, or chew gum or tobacco. *Id.* at 129. If the suspect does any of those things, the operator must start the twenty-minute period over again. *Id.* Alcotest uses both infrared technology and electric chemical oxidation to provide two separate measures of breath alcohol concentration. *Id.* at 128. The two readings are then printed out from the machine. *Id.*

[17] *Marquez*, 998 A.2d at 424.

Vehicles Standard Statement for Operators of a Motor Vehicle – N.J.S.A. 39:4-50.2(e)."[18] The text of that statement is as follows:

> 1. You have been arrested for operating a motor vehicle while under the influence of intoxicating liquor or drugs or with a blood alcohol concentration of 0.10%[19] or more.
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> 2. You are required by law to submit to the taking of samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood.
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> 3. A record of the taking of the samples, including the date, time, and results, will be made. Upon your request, a copy of that record will be made available to you.
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> 4. Any warnings previously given to you concerning your right to remain silent and your right to consult with an attorney do not apply to the taking of breath samples and do not give you the right to refuse to give, or to delay giving, samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood. You have no legal right to have an attorney, physician, or anyone else present, for the purpose of taking the breath samples.
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> 5. After you have provided samples of your breath for chemical testing, you have the right to have a person or physician of your own selection, and at your own expense, take independent samples and conduct independent chemical tests of your breath, urine, or blood.

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[18] *Id.* A sample of the page that police officers read from can be found online at http://www.state.nj.us/lps/dcj/agguide/dmvref2.pdf.

[19] Strangely, even though in 2003 the legal limit for blood alcohol content was reduced to .08%, this change is not reflected in the standard statement. N.J. STAT.ANN. § 39:4-50(a) (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12); *Marquez*, 998 A.2d at 424 n.1.

6. If you refuse to provide samples of your breath you will be issued a separate summons for this refusal.

7. Any response that is ambiguous or conditional, in any respect, to your giving consent to the taking of breath samples will be treated as a refusal to submit to breath testing.

8. According to N.J.S.A. 39:4-50.4a, if a court of law finds you guilty of refusing to submit to chemical tests of your breath, then your license to operate a motor vehicle will be revoked by the court for a period of no less than six months and no more than 20 years. The Court will also fine you a sum of no less than $250 and no more than $1,000 for your refusal conviction.

9. Any license suspension or revocation for a refusal conviction will be independent of any license suspension or revocation imposed for any related offense.

10. If you are convicted of refusing to submit to chemical tests of your breath, you will be referred by the Court to an Intoxicated Driver Resource Center and you will be required to satisfy the requirements of that center in the same manner as if you had been convicted of a violation of N.J.S.A. 39:4-50, or you will be subject to penalties for your failure to do so.

11. I repeat, you are required by law to submit to the taking of samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood. Now, will you submit the samples of your breath?[20]

[20] *Marquez*, 998 A.2d at 424-25.

Upon hearing this, Marquez shook his head and pointed to his eye.[21] Because Officer Lugo felt that the response was ambiguous, he read an additional statement to Marquez:[22]

> I have previously informed you that the warnings given to you concerning your right to remain silent and your right to consult with an attorney do not apply to the taking of breath samples and do not give you a right to refuse to give, or to delay giving, samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood. Your prior response, or lack of response, is unacceptable. If you do not unconditionally agree to provide breath samples now, then you will be issued a separate summons charging you with refusing to submit to the taking of samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood.
>
> Once again, I ask you, will you submit to giving samples of your breath?[23]

Marquez replied, "No entiendo," which is Spanish for "I don't understand."[24] Officer Berlinski was only trained to read the statement in English.[25] The officers repeatedly gestured to Marquez to demonstrate how to give a breath sample, but he did not attempt to use the Alcotest machine.[26] The officers then

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[21] *Id.* at 425.

[22] *Id.*

[23] *Id.* at 425-26. Once again, this text can be found online at http://www.state.nj.us/lps/dcj/agguide/dmvref2.pdf.

[24] *Marquez*, 998 A.2d at 426.

[25] State v. Marquez, 974 A.2d 1092 (N.J. Super. Ct. App. Div. 2009).

[26] *Marquez*, 998 A.2d at 426.

issued summonses for driving while intoxicated,[27] refusing to submit to a breath test,[28] and careless driving.[29]

At trial in the Plainfield Municipal Court it was uncontroverted that Marquez does not speak English.[30] He said he had taken his driver's license exam in Spanish.[31] He also said that on the night of the incident, he was dizzy because he had taken Percocet tablets to treat pain associated with an eye injury.[32] He claimed that he had not been drinking any alcohol that night.[33] The municipal court found him guilty of all three charges.[34]

Marquez unsuccessfully challenged his convictions in the Superior Court.[35] That court held that police are not obligated, either under statute or principles of due process, to translate the standard statement into Spanish.[36] Marquez then appealed to the Appellate Division, solely on the issue of whether he could be convicted for refusing to submit to a breathalyzer test when the standard statement was read to him in a language that he did not understand.[37]

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[27] N.J. STAT. ANN. § 39:4-50 (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12).

[28] N.J. STAT. ANN. § 39:4-50.4a (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12).

[29] N.J. STAT. ANN. § 39:4-97 (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12); *Marquez*, 998 A.2d at 426.

[30] *Marquez*, 998 A.2d at 426.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*; State v. Marquez, 974 A.2d 1092, 1096 (N.J. Super. Ct. App. Div. 2009).

[36] *Marquez*, 974 A.2d at 1099-1100.

[37] *Marquez*, 998 A.2d at 427.

B. THE APPELLATE DIVISION'S OPINION:

The Appellate Division upheld Marquez's refusal conviction.[38] Speaking to the issue of whether police are required to read the standard statement in a language that the defendant understands, the Appellate Division first looked to the precedent established by *State v. Nunez*.[39] In *Nunez*, the Law Division framed the issue as a question of statutory construction, not constitutional rights.[40] The court there observed that under N.J.S.A. 39:4-50.2, all drivers give their implied consent to submit to a breathalyzer test when they drive on state highways.[41] It thus concluded that the implied consent cannot be vitiated by a defendant's inability to understand a police officer's attempts to inform him of his rights.[42]

The Appellate Division then examined and discounted the argument that Marquez's due process right was violated because he did not understand the statement that Officer Berlinski read to him.[43] For guidance, the court looked to a prior case, *Rivera v. Board of Review*,[44] where the New Jersey Supreme Court held that due process is given where "notice and an opportunity for hearing appropriate to the nature of the case" are provided to the defendant.[45] The Appellate Division in *Marquez* reasoned

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[38] *Marquez*, 974 A.2d at 1093.

[39] 351 A.2d 813 (N.J. Super. Ct. Law Div. 1976). *See Marquez*, 974 A.2d at 1098-99.

[40] *State v. Nunez*, 351 A.2d at 816. *Nunez* dealt with a related issue of whether the term "inform" in N.J.S.A. 39:4-50.2(d) requires police officers to use a language that the defendant understands *after* he has submitted to a breathalyzer test. Although *Marquez* deals with informing the defendant of his rights and obligations *before* he submits to a breathalyzer test (the term "inform" appearing again in N.J.S.A. 30:4-50.2(e)), *Nunez* is nonetheless appropriately analogous.

[41] *Id.* at 817.

[42] *Id.*

[43] *Marquez*, 974 A.2d at 1098-1100.

[44] 606 A.2d 1087 (N.J. 1992).

[45] *Rivera*, 606 A.2d at 1089-90 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).

that by giving his implied consent to submit to a breathalyzer test, Marquez "knew, or should have known, that he could not decline to blow air into the breath testing device without exposing himself to licensure sanctions."[46] The court found that implied consent, "buttressed by the fact that the New Jersey motor vehicle license testing process includes specific coverage of our drunk driving laws, including the refusal statute,"[47] provided sufficient notice, and was thus consistent with due process.[48]

The court then provided a sample of the Motor Vehicle Commission's driver's manual, which is available in Spanish.[49] In relevant part, the manual states:

> New Jersey has an implied consent law. This means that motorists on New Jersey roadways have agreed, simply by using New Jersey roadways, to submit to a breath test given by law enforcement or hospital staff following an arrest for a drinking and driving offense. Motorists who refuse to take a breath test will be detained and brought to a hospital, where hospital staff may draw blood.
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> Motorists who refuse to take a breath test in New Jersey are subject to an MVC insurance surcharge of $1,000 per year for three years.[50]

The court said that the availability of the driver's manual in Spanish "mitigate[s] the contention that [Marquez] was not alerted to the refusal law because of his asserted language barrier."[51]

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[46] *Marquez*, 974 A.2d at 1100.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] Available at http://www.state.nj.us/mvc/pdf/Licenses/Driver%20Manual/Chapter_7.pdf.

[51] *Marquez*, 974 A.2d at 1100.

Finally, the court discussed the policy reasons for not requiring translation of the standard statement. It opined that it would be a "considerable administrative burden" on the Motor Vehicle Commission if it were obligated to translate the standard statement into a language or dialect that the person understands.[52] This, coupled with the "scientifically time-sensitive nature of blood and breath evidence" would make it impracticable to have to wait for a translation to be completed in each case.[53]

C. THE SUPREME COURT'S OPINION:

Reversing the Appellate Division, the New Jersey Supreme Court held that to properly "inform" a person of the penalties for refusing to submit to a breathalyzer test, police must use a language that the person understands.[54]

The Supreme Court began its discussion with a summary of the evolution of the "statutory scheme at the heart of this case."[55] The Court stated that the Legislature's purpose in regulating drunk driving has been "'to curb the senseless havoc and destruction caused by intoxicated drivers.'"[56] Drunk driving was first criminalized in 1921, and the legal limit of a driver's blood-alcohol level has gradually been reduced from .15% in 1951 to .08% today.[57] For a time, suspected drunk drivers could refuse to submit to a blood-alcohol test with impunity, making it difficult for police officers to enforce the drunk driving laws.[58]

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[52] *Id.*

[53] *Id.* at 1101.

[54] State v. Marquez, 998 A.2d 421, 434 (N.J. 2010).

[55] *Id.* at 428.

[56] *Id.* (quoting State v. Tischio, 527 A.2d 388, 392 (N.J. 1987)).

[57] *Id.*; N.J. STAT. ANN. § 39:4-50 (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12). After drunk driving was criminalized, the legal limit of a driver's blood-alcohol level was set to .15% in 1999, lowered to .10% in 1977, and again to .08% in 2003. *Marquez*, 998 A.2d at 428 n.1.

[58] *Marquez*, 998 A.2d at 428; State v. Wright, 527 A.2d 379, 385 (N.J. 1987) ("Without a breathalyzer test, police were denied a method of reliably distinguishing those motorists who were drunk from motorists who displayed symptoms of drunkeness [sic] that were actually attributable to other causes.").

Thus, in 1966 the Legislature passed an implied-consent law[59] and imposed a penalty on drivers who refused to submit to a blood-alcohol test.[60] Although officers were not initially obliged to inform drivers of the penalty for refusing to submit to a blood-alcohol test,[61] the Legislature made it a requirement in 1977.[62]

Paradoxically, the statutory scheme enacted in 1966 provided drivers with a disincentive to submit to a blood-alcohol test.[63] The penalty for refusal was a six-month license revocation, which was "so much shorter than any penalty imposed for drunk driving except for a first 'impaired' offense."[64] More than 25% of people arrested for drunk driving refused to allow themselves to be tested.[65] Therefore, in 1977, the Legislature made the penalty for refusal a ninety-day license suspension for a first offense and a one-year suspension for a second offense.[66] The Legislature also added the requirement that police officers "inform the person arrested of the consequences of refusal."[67]

After this account of the legislative history, the Court then turned its attention to the refusal statute.[68] The Court noted

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[59] *Marquez*, 998 A.2d at 428; N.J. STAT. ANN. § 39:4-50.2 (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12).

[60] *Marquez*, 998 A.2d at 428. The statute was originally N.J.S.A. 39:4-50.4, but it was eventually replaced by N.J.S.A. 39:4-50.4a.

[61] *Id.*

[62] *Id.*

[63] *Id.* at 428-29.

[64] *Id.* (citation omitted). "A second offender, for example, faced either a two or ten year revocation, depending on his record[,] if charged with driving while under the influence. Yet by refusing the test, he deprived the state of objective evidence of intoxication and risked only a six-month suspension." *Id*. at 429 (internal citations and quotations omitted).

[65] *Id*. at 428.

[66] *Id*. at 429. The penalty was later increased to a six-month suspension for a first offense and a two-year suspension for subsequent offenses. *Id.*

[67] *Marquez*, 998 A.2d at 429 (citations omitted).

[68] *Id*.

that discerning the legislature's intent "is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language."[69] The Court quoted the refusal statute and the statutory requirement that police officers "inform" arrested persons of the penalties for refusing to submit to a blood-alcohol test.[70] As quoted by the Court, the refusal statute reads,

> (a) ... the municipal court shall revoke the right to operate a motor vehicle of any operator who, after being arrested for a violation of R.S.39:4-50 or section 1 of P.L.1992, c. 189 (C.39:4-50.14), shall refuse to submit to a test provided for in section 2 of P.L.1966, c. 142 (C.39:4-50.2) when requested to do so, for not less than seven months or more than one year unless the refusal was in connection with a second offense under this section, in which case the revocation period shall be for two years or unless the refusal was in connection with a third or subsequent offense under this section in which case the revocation shall be for ten years....
>
> *The municipal court shall determine* by a preponderance of the evidence whether the arresting officer had probable cause to believe that the person had been driving or was in actual physical control of a motor vehicle on the public highways or quasi-public areas of this State while the person was under the influence of intoxicating liquor or a narcotic, hallucinogenic, or habit-producing drug or marijuana; whether the person was placed under arrest, if appropriate, and *whether he refused to submit to the test upon request of the officer*; and if these elements of the

[69] *Id.* (quoting DiProspero v. Penn, 874 A.2d 1039, 1048 (N.J. 2005)).

[70] *Id.* at 430 (quoting N.J. STAT. ANN. § 39:4-50.2 (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12) and N.J. STAT. ANN. § 39:4-50.4a (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12)).

> violation are not established, no conviction shall issue.[71]

The Court determined that to sustain a conviction for refusal, a police officer must have asked the driver to submit to a breath test, and that the implied consent statute provides how officers must make that request.[72] That is, the Court noted, "to be convicted for refusal, judges must find that the driver 'refused to submit to the test *upon request of the officer*'" after the officer has informed "the person arrested of the consequences of refusing to submit to such test[.]"[73] Based on this construction, the Court concluded that the refusal statute and the implied consent statute "rely on each other substantively" and "must therefore be read together" when interpreting how police officers must ask persons to submit to a breath test.[74]

The Court also noted that it had previously held that "anything substantially short of an unconditional, unequivocal assent to an officer's request that the arrested motorist take the breathalyzer test constitutes a refusal to do so."[75] However, the Court recognized that even that strict standard does not answer whether a police officer's reading of the standard statement is an element for conviction of the refusal statute.[76]

The Court observed that it had previously held that police officers "must provide defendants the standardized statement of the consequences for the failure to submit to a breathalyzer test."[77] Furthermore, the Attorney General's written guidelines for the prosecution of refusal violations include language indicating that police must read the standard statement to

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[71] *Id.* at 430-31 (emphasis in Court opinion); N.J. STAT. ANN. § 39:4-50.4a (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12).

[72] *Marquez*, 998 A.2d at 430-31.

[73] *Id.* at 431 (citation omitted).

[74] *Id.*

[75] *Id.* at 433 (quoting State v. Widmaier, 724 A.2d 241, 252 (N.J. 1999)).

[76] *Id.*

[77] *Id.* (quoting State v. Cummings, 875 A.2d 906, 913 (N.J. 2005)).

sustain a conviction.[78] Based on this precedent and the "plain language of the statutes," the court concluded that the refusal convictions require proof that a police officer requested the [driver] to submit to a chemical breath test.[79]

The Court then turned to the substantive focus of this case note – the statutory construction of the term "inform."[80] Citing Webster's Dictionary, the Court observed that "to inform" means "'to communicate knowledge to' and 'make acquainted,'" and that the term "implies the imparting of knowledge, especially of facts or events necessary to the understanding of a pertinent matter."[81] Moreover, the Court noted that the Legislature's adoption in 1977 of the recommendations made by the Motor Vehicle Study Commission evidences a desire "to

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[78] *Marquez*, 998 A.2d at 433. The guidelines read, in part, that the fourth element of the offense is that "the person refused to submit to chemical breath testing, after the law enforcement official read the Standard New Jersey Motor Vehicle Commission . . . Statement for that offense to that person." OFFICE OF THE ATT'Y GEN., ATTORNEY GENERAL GUIDELINE: PROSECUTION OF DWI & REFUSAL VIOLATIONS 4-5 (Jan. 24, 2005), *available at* http://www.state.nj.us/oag/dcj/agguide/d-10jd-dwi-2005.pdf. It seems, however, that the existence of this element is not as uncontroversial as the majority would have us believe, as evidenced by Justice LaVecchia's firm assertion that the interrelation between the refusal statute and implied consent law does not "mean . . . that the requirements imposed by the implied consent law must be imported and incorporated as an element of the refusal statute that the prosecutor must prove . . . in order to sustain a refusal conviction." *Marquez*, 998 A.2d at 442 (LaVecchia, J., dissenting). Nevertheless, Justice LaVecchia readily agreed in her opinion that "the refusal statute requires officers to request motor vehicle operators to submit to a breath test; [and] the implied consent statute tells officers how to make that request." *Id.* (LaVecchia, J., dissenting) (quoting *Marquez* 998 A.2d at 430). I admit that I do not quite understand the basis of Justice LaVecchia's position. She says that the implied consent statute tells officers how to make a request that drivers submit to the test, but that the police officer does not have to read a standard statement to sustain a conviction; this nuanced distinction seems explicitly contradicted by the language of the implied consent law: "[a] standard statement, prepared by the chief administrator, shall be read by the police officer." N.J. STAT. ANN. § 39:4-50.2(e) (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12).

[79] *Marquez*, 998 A.2d at 433-34.

[80] *Id.* at 434.

[81] *Id.* (quoting Webster's Third New International Dictionary 1160 (3d ed. 1993)).

offset potential, harsher consequences by conveying knowledge of them to drivers at the scene."[82] In sum:

> [M]otorists must be reminded that a breath test is mandatory, and 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 understand is inconsistent with that end.[83]

II. COMPARISON WITH OTHER STATES' APPROACHES[84]

Implied consent laws are rather varied from state to state in terms of text and construction.

Hawaii's implied consent law contains a section on refusal that is substantially similar to New Jersey's. The general portion of Hawaii's implied consent law reads, in relevant part:

> (a) Any person who operates a vehicle upon a public way, street, road, or highway or on or in the waters of the State shall be deemed to have given consent, subject to this part, to a test or tests approved by the director of health of the person's breath, blood, or urine for the purpose of determining alcohol concentration or drug content of the person's breath, blood, or urine, as applicable.
>
> (b) The test or tests shall be administered at the request of a law enforcement officer having probable cause to believe the person operating a

[82] *Id.* at 435.

[83] *Id.*

[84] This section does not aim to examine the laws of all fifty States. Rather, this section will summarize the typical approaches employed in some States, and these summaries are designed to provide sufficient background for the substantive discussion that will follow in the next portion of this Note.

> vehicle upon a public way, street, road, or highway or on or in the waters of the State is under the influence of an intoxicant or is under the age of twenty-one and has consumed a measurable amount of alcohol, only after:
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> (1) A lawful arrest; and
>
> (2) The person has been *informed* by a law enforcement officer that the person may refuse to submit to testing under this chapter.[85]

Although the statute reads, "the person may refuse to submit to testing," there are penalties associated with refusal.[86] Moreover, Hawaii's implied consent law contains a provision similar to New Jersey's with regard to how police should handle an apparent refusal to submit to a blood-alcohol test:

> If a person under arrest refuses to submit to a breath, blood, or urine test, none shall be given, except as provided in section 291E-21. Upon the law enforcement officer's determination that the person under arrest has refused to submit to a breath, blood, or urine test, if applicable, then *a law enforcement officer shall*:
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> (1) Inform the person under arrest of the sanctions under section 291E-41 or 291E-65; and
>
> (2) Ask the person if the person still refuses to submit to a breath, blood, or urine test, thereby subjecting the person to the procedures and sanctions under part III or section 291E-65, as applicable;
>
> provided that if the law enforcement officer fails to comply with paragraphs (1) and (2), the person

[85] HAW. REV. STAT. § 291E-11 (LEXIS through 2012 Regular Session, Acts 1-28) (emphasis added).

[86] HAW. REV. STAT. § 291E-41(d) (LEXIS through 2012 Regular Session, Acts 1-28).

> shall not be subject to the refusal sanctions under part III or section 291E-65.[87]

The language of Hawaii's statutes thus explicitly states that the sort of procedural error in *Marquez*[88] that precluded conviction of refusal would likewise preclude conviction in Hawaii. The Hawaii Supreme Court recognized this in *State v. Wilson*.[89] The requirement that police inform a suspect of the consequences of refusal is designed to allow that person to "knowingly and intelligently consent to or refuse a chemical alcohol test."[90] Based on the requirement that a suspect be able to knowingly and intelligently consent, it seems natural that the Hawaii Supreme Court would agree with New Jersey's in concluding that a police officer must inform a person of the consequences of refusal in a language that the person understands.

Not all states give the word "inform" the same construction. Pennsylvania's implied consent law states, "[i]t shall be the duty of the police officer to inform the person that [] the person's operating privilege will be suspended upon refusal to submit to chemical testing[.]"[91] A defendant in Pennsylvania can avoid being penalized for refusal if, after being warned by a police officer, his refusal was nonetheless not knowing and conscious.[92] However, "most [Pennsylvania] cases hold that a failure to understand English provides no foundation for an

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[87] HAW. REV. STAT. § 291E-15 (LEXIS through 2012 Regular Session, Acts 1-28) (emphasis added).

[88] Namely, failing to *inform* the suspect of the consequences of refusal.

[89] 987 P.2d 268 (Haw. 1999). Hawaii recently amended its implied consent laws, and the version discussed in *Wilson* is not current. *See* HAW. REV. STAT. § 286-255 (LEXIS current with amendments through Act 235 of the 2011 Regular Session). However, the version discussed in *Wilson* did contain language similar to the current version, and likewise required that police inform a suspect of the consequences of refusal. *Wilson*, 987 P.2d at 272.

[90] *Wilson*, 987 P.2d at 272.

[91] 75 PA. CONS. STAT. ANN. § 1547(b)(2) (Lexis through 2012 Regular Session Act 40, exacted 5-8-2012).

[92] Martinovic v. Commw. Dept. of Transp., 881 A.2d 30, 34 (Pa. Commw. Ct. 2005).

argument that a licensee was unable to make a knowing and conscious refusal."[93] Police officers are required to "apprise" drivers of the consequences of a refusal to take a breath test, but the law in Pennsylvania is not construed to require police officers to make certain that the driver understands his right to refuse a breathalyzer test.[94] Police officers likewise do not have the duty to seek the aid of "an interpreter to make sure a motorist understands implied consent warnings."[95] The reasoning is largely policy-based:

> [W]hen motorists are limited by their understanding of the English language, thereby allegedly preventing them from "knowingly" refusing the test, we still hold that those motorists "knowingly" refused the test absent some other verifiable impediment... Otherwise, anyone who speaks little to no English can automatically claim that he or she did not understand the [implied consent] warnings and avoid the consequences of refusing a chemical test, just as anyone who is drunk could automatically claim that he or she was too drunk to understand the [implied consent] warnings and avoid the consequences of refusing a chemical test.[96]

Oregon has also dealt with the meaning of the word "inform." In a short opinion, the Court of Appeals of Oregon held, "[a]n officer is not required to determine how fully the arrested person is able to understand" an implied consent warning, and so there is no requirement for an officer to use a language that the driver understands.[97] Interestingly, in that opinion the court reversed a lower court's holding that

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[93] *Id.* at 35.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 36. This passage is also used by Justice LaVecchia in her dissenting opinion in *Marquez*. *Marquez*, 998 A.2d. at 445 (LaVecchia, J., dissenting).

[97] State v. Nguyen, 813 P.2d 569, 571 (Or. Ct. App. 1991).

resembled the New Jersey Supreme Court's holding in *Marquez* in some respects:

> [A]ny commonsensical interpretation of the word 'inform' would mean at least, at a minimum, that he personally have some understanding of the language that he was being spoken to or being allowed to read. One cannot be informed when one has an inability to understand. . . . [I]t doesn't necessarily mean that the person did understand, but there at least had to be some possibility of understanding, which it is clear to me that there was not.[98]

The Court of Appeals of Oregon believed that Oregon's implied consent statute was "intended to be coercive, not protective; the information about rights and consequences is intended to induce submission to the breath test."[99]

Wisconsin uses a "reasonableness" test in determining whether a police officer sufficiently "informed" a suspect.[100] This test "is based upon the objective conduct of [the] officer, rather than upon the comprehension of the accused driver."[101] This test also does not require police officers to always obtain an interpreter when there is a language barrier,[102] because it may be possible to reasonably convey the necessary information to the suspect without an interpreter and because the time it would take to obtain an interpreter may give the suspect's blood-alcohol level enough time to fall below the legal limit.[103] There are some instances, however, where the language barrier would be so robust that an interpreter would be necessary, and so

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[98] *Id.* at 570 (quoting the trial court without citation).

[99] *Id.*

[100] State v. Piddington, 623 N.W.2d 528, 539 (Wis. 2001).

[101] *Id.*

[102] In *Piddington*, the defendant was deaf. *See id.*, *generally*. The issue was whether an interpreter should have been used when the police officer was trying to inform the defendant of the consequences for refusal. *Id.*

[103] *See id.* at 542.

police officers would not be able to reasonably convey the implied consent warnings to the suspect in the absence of an interpreter.[104]

Similarly, Justice LaVecchia wrote a dissenting opinion in *Marquez* proposing that police be required to make objectively reasonable efforts to inform the driver of the consequences of refusal.[105] Justice LaVecchia and the Justices who joined her opinion felt that the majority went "too far" in saying that a police officer must use a language that the driver understands.[106] While recognizing the benefits of translations for use in giving implied consent warnings, the dissenting Justices believed that imposing translations as a requirement was unwarranted by the text of the implied consent law.[107]

Iowa's approach also closely mirrors Wisconsin's. The Iowa Supreme Court has held that "consent to testing must be voluntary, i.e., freely made, uncoerced, reasoned, and informed."[108] The Iowa implied consent statute requires that the driver "be advised" of the consequences of his refusal.[109] The Iowa Supreme Court found that the intent of this language is

> to provide a person who has been asked to submit to chemical testing "a basis for evaluation and decision-making in regard to either submitting or not submitting to the test. This involves a weighing of the consequences if the test is refused against the consequences if the test reflects a controlled

[104] State v. Begicevic, 678 N.W.2d 293, 301 (Wis. Ct. App. 2004).

[105] State v. Marquez, 998 A.2d 421, 444 (N.J. 2010) (LaVecchia, J., dissenting).

[106] *Id.* at 445 (LaVecchia, J., dissenting).

[107] *Id.* (LaVecchia, J., dissenting).

[108] State v. Garcia, 756 N.W. 2d 216, 220 (Iowa 2008).

[109] IOWA CODE ANN. § 321J.8 (LEXIS through 2-12-2012).

> substance, drug, or alcohol concentration in excess of the 'legal' limit.[110]

The Iowa Supreme Court accordingly has adopted the same rule as Wisconsin, requiring police officers to do what is reasonable under the circumstances.[111]

Some states require only that a suspect understand that he has been asked to submit to a breath test, making it irrelevant whether the suspect understands the consequences of refusal. For example, in Nebraska the rule is as follows:

> To constitute a refusal to submit to a chemical test required under the implied consent statute, the only understanding required by the licensee is an understanding that he has been asked to take a test. *There is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasonable judgment as to what course of action to take.*[112]

Ohio's implied consent law similarly provides:

> A law enforcement officer who makes a request pursuant to this division that a person submit to a chemical test or tests *is not required to advise the person of the consequences* of submitting to, or refusing to submit to, the test or tests and is not required to give the person the form described in division (B) of section 4511.192 of the Revised Code, but the officer shall advise the person at the time of the arrest that if the person refuses to take a chemical test the officer may employ whatever reasonable means are necessary to ensure that the

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[110] *Garcia*, 756 N.W.2d at 221. The Iowa Supreme Court dramatically refers to drunk driving as a partial cause of the "holocaust" taking place on its highways. *Id.*

[111] *Id.* at 222.

[112] Martinez v. Peterson, 333 N.W.2d 386, 388 (Neb. 1982) (emphasis added).

> person submits to a chemical test of the person's whole blood or blood serum or plasma.[113]

In Ohio, drivers who do not speak English well enough to understand a police officer's request to submit to a blood-alcohol test are "estopped, in a proceeding under [Ohio Rev. Code Ann. §] 4511.191, to assert insufficient language skill to comprehend the request ... when received in the statutory manner and form."[114]

In Alaska, conviction for refusal requires proof that the defendant understood the purpose of the breath test, and that he was legally required to take the test.[115] Conviction for refusal does not require that the defendant understood the specific consequences of refusal.[116] "[T]he defendant's guilt hinges on the defendant's awareness that the breath test was intended to produce material evidence of the defendant's driving offense and that the defendant was legally required to take the test."[117] The Alaska courts interpret the defendant's knowledge of the purpose of the test and the legal obligation to take it as being the *mens rea* elements of refusal, while actually refusing the test is the *actus reus*.[118] Thus, the implication is that a person accused of refusal in Alaska would have to have somehow been informed in his own language (or sufficiently informed otherwise, but how that would be accomplished is likely a fact-specific issue that would vary from case to case) that he was obliged to take the test, but not that he would face certain consequences for refusal.[119]

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[113] OHIO REV. CODE ANN. § 4511.191(5)(a) (LEXIS through 1-23-2012) (emphasis added). When compared to the New Jersey implied consent law, Ohio's statute seems rather draconian.

[114] State v. Hurbean, 261 N.E.2d 290, 298 (Ohio Ct. App. 1970).

[115] Yang v. State, 107 P.3d 302, 312 (Alaska Ct. App. 2005).

[116] *Id.*

[117] *Id.* at 311 (internal quotations omitted).

[118] *Id.* at 310-11.

[119] The court in *Yang* never reaches this issue, and much of its analysis is somewhat confused and at times hard to fully understand. *See generally Yang*,

Illinois, instead of requiring police to "inform", requires police to "warn":

> A person requested to submit to a test as provided above *shall be warned* by the law enforcement officer requesting the test that a refusal to submit to the test will result in the statutory summary suspension of such person's privilege to operate a motor vehicle, as provided in Section 6-208.1 of this Code...The person *shall also be warned* by the law enforcement officer that if the person submits to the test or tests provided in paragraph (a) of this Section and the alcohol concentration in such person's blood or breath is 0.08 or greater... a statutory summary suspension of such person's privilege to operate a motor vehicle, as provided in Sections 6-208.1 and 11-501.1 of this Code...will be imposed.[120]

Although one might be inclined to say that "warn" and "inform" imply the same sort of subjective understanding on the part of the recipient, the Illinois Supreme Court has held that "[t]he statute does not require that a motorist understand the consequences of refusing to take a blood-alcohol test before the State may summarily suspend his or her driver's license for failure to take the test."[121] The Illinois Supreme Court justified its holding by emphasizing that the purpose of the implied consent laws is not to "advise drivers as to whether they should take a blood-alcohol test," but rather is "to make the highways safer."[122] Moreover, the Court observed that the delay associated with obtaining an interpreter or a translation would

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107 P.3d 302. The assertions I make in the sentence pointing to this footnote are inferences based on the language in that case.

[120] 625 ILL. COMP. STAT. ANN. 5/11-501.1 (LEXIS through 3-30-2012) (emphasis added). Note the use of the passive voice, over which the New Jersey Supreme Court in *Marquez* had a brief debate. *Compare* State v. Marquez, 998 A.2d 421, 431 n.4 (N.J. 2010), *with Marquez*, 998 A.2d. at 444-45 (LaVecchia, J., dissenting).

[121] People v. Wegielnik, 605 N.E.2d 487, 489-90 (Ill. 1992).

[122] *Id.* at 490.

undermine the purposes of the implied consent statute, and noted that the "vast majority" of people in Illinois speak English.[123] The Illinois Supreme Court later expounded on its interpretation of the word "warn," noting "that warnings required by the implied-consent statute are not meant to enable an 'informed choice.'"[124] The implied consent warnings in Illinois are designed to "benefit the State, not the motorists."[125]

The Georgia implied consent statute requires that a driver be "advised" of his rights under the implied consent law:[126]

> At the time a chemical test or tests are requested, the arresting officer shall select and read to the person the appropriate implied consent notice from the following:
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> (1) Implied consent notice for suspects under age 21:
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> ...
>
> (2) Implied consent notice for suspects age 21 or over:
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> ...
>
> (3) Implied consent notice for commercial motor vehicle driver suspects:
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> ...
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> If any such notice is used by a law enforcement officer to *advise* a person of his or her rights regarding the administration of chemical testing,

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[123] *Id.*

[124] People v. Johnson, 758 N.E.2d 805, 811 (Ill. 2001).

[125] *Id.* As noted above, in New Jersey the implied consent warnings became mandatory when the Legislature made more stringent penalties for refusal violations. *Marquez*, 998 A.2d at 428. The implication from this is that the warnings were meant to benefit (at least in part) the driver.

[126] Furcal-Peguero v. State, 566 S.E.2d 320, 324 (Ga. Ct. App. 2002).

> *such person shall be deemed to have been properly advised of his or her rights* under this Code section and under Code Section 40-6-392 and the results of any chemical test, or the refusal to submit to a test, shall be admitted into evidence against such person. Such notice shall be read in its entirety but need not be read exactly so long as the substance of the notice remains unchanged.[127]

The courts in Georgia interpret this text to mean only that drivers have the right to have the warning read to them.[128] There is no requirement in Georgia that the driver understand the implied consent notice.[129] Thus, a non-English-speaker in Georgia has no right to be advised in his own language, but police would nonetheless be obliged to read the warning even if they knew that the driver would have no way of understanding any of it.[130]

In *Rodriguez v. State*,[131] the Georgia Supreme Court also examined the act of informing non-English-speakers of the consequences of refusal as an equal protection issue. Ga. Code Ann. § 24-9-103 requires arresting police officers to "provide a qualified interpreter to any hearing impaired person whenever the hearing impaired person is taken into custody for allegedly violating any criminal law or ordinance of the state or any political subdivision thereof."[132] This applies to instances where the implied consent statute requires a police officer to convey the statutory warning to a driver suspected of drunk driving.[133] In *Rodriguez*, the defendant claimed, in part, that the lack of such a requirement when asking non-English-speakers to

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[127] GA. CODE ANN., § 40-5-67.1(b) (The State of GA through 1-20-2012) (emphasis added).

[128] *Furcal-Peguero*, 566 S.E.2d at 324 n.7.

[129] *Id.* at 325.

[130] *See id.*

[131] 565 S.E.2d 458 (Ga. 2002).

[132] GA. CODE ANN., § 24-9-103 (The State of GA through 1-20-2012).

[133] *Rodriguez*, 565 S.E.2d at 460.

submit to a breath test was a violation of his Equal Protection Rights.[134] The court observed that the "Georgia and U.S. Constitutions require government to treat similarly situated individuals in a similar manner," and so to prove this part of his Equal Protection claim, the defendant had to prove that he was similarly situated to hearing-impaired persons.[135]

The court did not believe that the defendant in *Rodriguez* was similarly situated to hearing impaired persons.[136] The important distinction between hearing impaired persons and non-English-speakers, the court held, is that "hearing impaired persons physically cannot learn to understand an implied consent warning read to them in English, whereas non-English-speaking persons such as [defendant] have no hearing disability and have the potential to understand such a warning."[137] Thus, this part of the defendant's Equal Protection claim was unsuccessful.[138]

The defendant in *Rodriguez* also made an Equal Protection challenge on the basis that non-English-speakers were being denied the same protections that English speakers had.[139] The court found this unavailing because the implied consent statute in Georgia does not require the officer to use English – it just does not require the officer to necessarily use a language the driver understands.[140] Thus, the court opined, no distinctions between English and non-English speakers had been drawn by the implied consent statute.[141] Absent some explicit classification in the statute, the defendant had to prove that there was some sort of discriminatory purpose, but because the

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[134] *Id.*

[135] *Id.* (quoting Old S. Duck Tours v. Mayor of Savannah, 535 S.E.2d 751 (Ga. 2000)).

[136] *Id.*

[137] *Id.*

[138] *Rodriguez*, 565 S.E.2d at 460.

[139] *Id.*

[140] *Id.* at 461.

[141] *Id.*

defendant failed to show a discriminatory purpose in the implied consent statute, his claim was unsuccessful.[142]

The Minnesota courts have loosely indicated that implied consent warnings are at least similar to *Miranda* warnings with regards to whether a defendant must understand the warning.[143] However, that connection is not so strong that the standard required in *Miranda* warnings is the same as that in implied consent warnings.[144] The courts in Minnesota do not require the presence of an interpreter, but they nonetheless recognize the value in having one when possible.[145] Ultimately, the rule in Minnesota is similar to the rules discussed above from Nebraska, Ohio, and Alaska:

> [T]he only understanding required by the licensee is an understanding that he has been asked to take a test. There is no defense to refusal that he does not understand the consequences of refusal or is not able to make a reasonable judgment as to what course of action to take.[146]

III: WHY *MARQUEZ* "GOT IT RIGHT" AND WHY OTHER PROBLEMS REMAIN

A. MARQUEZ

In her dissenting opinion in *Marquez*, Justice LaVecchia wrote that the majority's holding rendered the implied consent laws "entirely meaningless."[147] The objection she seems to be

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[142] *Id.*

[143] *See* Yokoyama v. Comm'r of Pub. Safety, 356 N.W. 2d 830, 831 (Minn. Ct. App. 1984) (citing a *Miranda* case involving a language barrier for guidance on how an implied consent case should be decided).

[144] *See id.*

[145] *Id.*

[146] *Id.* (quoting *Martinez*, 322 N.W.2d at 388).

[147] State v. Marquez, 998 A.2d 421, 439 (N.J. 2010) (LaVecchia, J., dissenting).

raising is that if drivers have already given their implied consent, then why does the majority give certain drivers a way to abrogate that consent with impunity?[148] That is, why can non-English-speakers avoid the penalties of refusal solely because they do not understand a warning that they have presumably already taken into consideration?

One might argue that this is a matter of "fairness" – that it is unfair to punish people for refusing the test when they do not understand the consequences of refusal. In this regard, *Lambert v. California* is tantalizingly relevant.[149] In that case, a woman had earlier been convicted of a felony, and was residing in Los Angeles.[150] At that time, Los Angeles had a law requiring convicted felons living in the city for more than five days to register with the City.[151] Because she had been living in Los Angeles for seven years, she was charged and convicted in state court for failing to register, despite her lack of knowledge of the registration law.[152] The United States Supreme Court overturned her conviction under the registration law, holding that it was a violation of her due process rights to apply the law against her where she had no actual knowledge of her duty to register, and where there was no probability of her having such knowledge.[153] The Court emphasized that "[n]otice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act," and the principle of notice "is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case."[154]

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[148] In making this interpretation of Justice LaVecchia's statement, I do not intend to create a "straw man" argument, despite my ultimate objection to her complaint.

[149] 355 U.S. 225 (1957).

[150] *Id.* at 226.

[151] *Id.*

[152] *Id.* at 226-27.

[153] *Id.* at 229-30.

[154] *Id.* at 228.

The similarity between refusal violations and the *Lambert* case is clear: in both instances, a law was being used to punish a person who had no actual knowledge of his obligations under that law. However, the *Lambert* case does not, and should not, inform courts as to how they should handle implied consent laws and refusal violations. *Lambert* dealt solely with "conduct that is wholly passive," and did not speak of "the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed."[155] While in implied consent cases the driver's act of driving a motor vehicle is considered the cause for his reason to know that he is subject to tests for blood-alcohol content,[156] in *Lambert* the felon's presence in Los Angeles alone was the basis of the defendant's violation.[157] Moreover, the Los Angeles law at issue in *Lambert* was markedly different from other registration laws, giving the defendant even less reason to know of her obligations under it.[158] All fifty states have implied consent laws,[159] and so the ubiquity of the obligation under those laws distinguishes them from the law at issue in *Lambert*. Finally, *Lambert* was a criminal case, whereas refusal violations in New Jersey are punished without criminal sanctions.[160] Thus, the relevance of *Lambert* to implied consent cases is dubious at best.

I believe the real answer to Justice LaVecchia's problem, dictionary definitions of the word "inform" aside,[161] lies in

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[155] *Lambert*, 355 U.S. at 228.

[156] *See, e.g.*, N.J. STAT. ANN. § 39:4-50.2 (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12).

[157] *Lambert*, 355 U.S. at 229.

[158] *Id.*

[159] Robert Voas et al., Implied Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes, 40 J. SAFETY RES. 77, 81 (2009), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2760408.

[160] N.J. STAT. ANN. § 39:4-50.4a (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12) (providing that all penalties for refusals shall be fines and suspension of licenses, without criminal sanctions).

[161] As mentioned, the majority in *Marquez* used Webster's Dictionary in supporting its construction of the law. State v. Marquez, 998 A.2d 421, 434 (N.J. 2010).

policy. The purpose of New Jersey's implied consent law and refusal law is to help police officers acquire evidence for convictions of Driving Under the Influence (DUI) offenses; before those laws were enacted, enforcement of drunk driving laws was being undermined by a high rate of refusals.[162] In short, the point of these laws is to coerce (if that is an appropriate term) drivers to submit to a breath test. However, if a driver does not subjectively know that he will be punished for refusing to submit to a breath test, then he likely would believe that he could avoid punishment altogether by refusing. Accordingly, without a subjective understanding of the implied consent warnings, drivers do not have sufficient knowledge to be incentivized to submit to a test, and the policy goals of the implied consent and refusal laws would be vitiated altogether. Indeed, this is precisely why the Supreme Court's holding in *Marquez* was the "correct" one.

This conclusion causes one to question, with regards to policy, the wisdom of a rule that does not include a driver's subjective knowledge of the content of an implied consent warning as an element of the refusal violation. Even more so, one is inclined to question the reasoning of the courts that have used motivating drivers to submit to breath tests as a justification for *not* requiring a subjective knowledge element for refusal violations.[163] Those courts require police officers to read or provide the statement to drivers, but have no requirement that the driver understand the statement or be

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[162] *Id*. at 428.

[163] For example, see People v. Wegielnik, 605 N.E.2d 487, 490 (Ill. 1992).

> The implied-consent statute serves the legislative purpose of promoting highway safety by assisting in the determination of whether drivers suspected of intoxication are in fact under the influence of alcohol . . . . The threat of summary suspension for refusing to take a blood-alcohol test motivates drivers to take the test, thereby allowing the State to obtain objective evidence of intoxication . . . . For this reason, it is in the State's best interest for law enforcement officials to fully explain the consequences of refusal.

Id. (citations omitted). As discussed above, in *Wegielnik* the court concluded that subjective knowledge of the consequences of refusal is not a requirement for conviction of a refusal violation. *Id.* at 491.

given any means of understanding the statement.[164] With such rules in place, it would seem sufficient for police officers to read a coded statement that is entirely unintelligible without a key of some sort. Police would have to take the time to provide the statement, but would not have to offer the driver any assistance in decoding it – and the consequences of ignoring the warning contained in the coded statement would be the driver's problem to deal with. Obviously this *reductio* is entirely absurd, but when a driver speaks only Urdu or Mandarin, an implied consent warning read only in English may as well be coded.

B. REMAINING PROBLEMS:

As a counterbalance of sorts, practical considerations are also important because they demonstrate the sheer difficulty in effecting the mandate of *Marquez*. It would be nearly impossible for police to be prepared to communicate the implied consent warnings in every language. According to the United States Census, over twenty-four million people in the United States speak English less than "very well."[165] The languages spoken in the United States are varied and in some cases obscure.[166] The chances of police having to provide a translation for a particular and obscure language are very slim, but in the aggregate the chances of having to provide a translation for some obscure language are not insignificant.[167] Putting the onus

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[164] *Id.*; Yokoyama v. Comm'r of Pub. Safety, 356 N.W. 2d 830, 831 (Minn. Ct. App. 1984); State v. Hurbean, 261 N.E.2d 290, 298 (Ohio Ct. App. 1970).

[165] *Detailed Languages Spoken At Home and Ability to Speak English for the Population 5 Years and Older by States: 2006-2008*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/socdemo/language/index.html (follow link marked "Detailed Tables") (last visited May. 18, 2012).

[166] *Id.* For example, languages such as Spanish and Chinese are among the most commonly used among people who do not speak English "very well," but there are many others, such as Telugu, Ilocano, Yupik, or even Chibchan (spoken by only 24 people, according to the data). *Id.*

[167] According to the New Jersey Supreme Court, in New Jersey cases where an interpreter is necessary, the chances of requiring an interpreter for a language that is "of a select, relatively small group of languages" is 90%. *Marquez*, 998 A.2d at 436 n.10. Thus, if the use of foreign languages in court events is any indicator for the use of language in traffic stops (perhaps a large

on police officers to ensure that every single driver understands what is said to him is perhaps overly burdensome. In fact, if a driver asks a question about the warning and an officer has nothing but a pre-written translation available to him, it would be entirely impossible for an officer to convey the meaning of the warning without a translator, which may be unavailable.

Moreover, there is the added complication of figuring out what language the driver speaks and thus which prepared translation to provide. When a driver speaks a language that is so rare or so unlike other languages with which officers are more familiar, it is unclear how officers would ascertain which translation of the implied consent warning to use. Asking questions such as "What language do you speak?" would be ineffective for obvious reasons. It may be beneficial for police to have a brief sentence in each language asking the driver if he understands that language, but given the number of languages in existence, even this may be overly time consuming.[168]

Additionally, a subjective understanding requirement may give particularly bold drivers an incentive to prevent police from reading an implied consent warning by feigning a lack of understanding of English. If police officers are unable to determine what language a driver speaks as a result of the driver's false pretense, they may never get around to reading the implied consent warnings. However, this problem might ultimately not be an issue at all, because only the most informed drivers would know New Jersey law well enough to pretend not to speak English, and those drivers would very likely already be sufficiently informed of the consequences of refusal. Perhaps the real problem in these scenarios would not be convicting the driver of a refusal violation, but rather, having to deal with the hassle of communicating with a person who does not appear to speak any language that the police officers can identify.

Some might argue that a subjective understanding requirement would allow certain non-English-speakers to avoid punishment, and so there should be no subjective understanding requirement at all. I believe this would allow for

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assumption, but not unreasonably so, I believe), then roughly 10% of all non-English-speakers would require a translation of the implied consent warning into a language that is not frequently used.

[168] U.S. CENSUS BUREAU, *supra* note 165.

the punishment of drivers who had not been drinking at all, and who have "refused" the test solely because they did not understand that there were punitive consequences associated with refusal. This casts the proverbial net far too wide and would tend to remove perfectly harmless drivers from the roads.

To summarize, although *Marquez* does an excellent job incentivizing drivers to submit to breath tests, it is by no means a "perfect" answer to the problem.

C. RELATED PROBLEMS:

Another issue that is closely related to the policy goals of implied consent laws is the matter of how refusal violations are penalized. New Jersey penalizes refusals with license suspensions and fines, with the duration of the suspension and fine amounts increasing with each subsequent refusal violation.[169] Persons convicted of driving while intoxicated also face license suspension and fines, but are subject to incarceration as well.[170] Penalties for driving while intoxicated increase with each subsequent conviction.[171] This is the same approach taken by a number of states.

Not all states penalize refusals with purely administrative sanctions. [172] For example, in Virginia the first refusal violation is a civil offense, but subsequent violations are criminal offenses.[173] Virginia is one of eight states that penalize refusals with criminal sanctions.[174] In addition, Virginia provides an enhanced penalty when the driver has been convicted for a refusal violation within ten years after being convicted of driving while intoxicated or other limited offenses.[175] The enhanced

[169] N.J. STAT. ANN. § 39:4-50.4a (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12).

[170] N.J. STAT. ANN. § 39:4-50 (West, Westlaw through P.L. 2012 Chapter 11, approved 5-10-12).

[171] *Id.*

[172] Voas et al., *supra* note 159 (follow hyperlink "Table 3").

[173] V.A. CODE ANN. § 18.2-268.3(D) (LEXIS through 12-13-11).

[174] Voas et al., *supra* note 159.

[175] V.A. CODE ANN. § 18.2-268.3(D) (LEXIS through 12-13-11).

penalty can include jail terms of six or twelve months, depending on how many times the driver has been convicted of driving while intoxicated or other related offenses.[176]

The chief point here, briefly put, is that states with higher penalties for drunk driving than for refusal incentivize drivers to always refuse. Thus the holding in *Marquez* that drivers must be subjectively made aware of the penalties of refusal is not independently sufficient to encourage drivers to submit to a breath test. In fact, in some instances it may even lead to some drivers actually refusing a breath test.

There are also other reasons why knowledgeable drivers refuse to submit to breath tests. A 1995 study examined the statistical data on breath test refusals in Minnesota.[177] At the time of the study, the refusal rate in Minnesota was slightly less than 25%.[178] Of the 15,145 first offenders who submitted to a breath test, 75% were convicted of a drunk driving offense, 20% were convicted of some other charge, and 5% were not convicted of any offense.[179] However, of the 2,401 drivers who refused to submit to a breath test (who made up 14% of all first offenders), 58% were convicted of a drunk driving offense, 31% were convicted of some other offense, and 11% were not convicted of any offense.[180] There was a similar pattern for repeat offenders: of the 9,242 who submitted to the test, 87% were convicted of drunk driving, 4% were convicted of some other offense, and 9% were not convicted of any offense; of the 4,782 who refused the test, 76% were convicted for drunk driving, 7% were convicted for a different offense, and 13% were not convicted for any

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[176] *Id.*

[177] H.L. Ross et al., *Causes and Consequences of Implied Consent Test Refusal*, 11 ALCOHOL, DRUGS, & DRIVING 57 (1995). Although the study's data and analysis was limited to Minnesota, the results are nonetheless helpful because Minnesota's evolving implied consent laws allowed for an analysis of "two different legal contexts, one where the penalty was administrative only and one where it was both administrative and also criminal for many repeat offenders," and because Minnesota's driving statistics "are among the best available." *Id.* at 58.

[178] *Id.*

[179] *Id.* at 59.

[180] *Id.* at 59-60.

offense.[181] The result is clear: for one reason or another, drivers who refused to submit to a breath test had a higher probability of avoiding a conviction for drunk driving. According to the study, one cause is that "[w]ithout [a breath test], the first offender is likely to get an offer to plead to careless driving."[182]

Drivers' reasons for refusing in the first place were varied.[183] The study provides a number of illustrative and sometimes entertaining quotations as to why specific drivers refused.[184] The first category were the drivers who were "confused or incompetent," who, either because they were inebriated or because the contents of the warning were too complex for the average listener, were unable to comprehend the mandatory nature of the test and the consequences of refusal.[185] According to one attorney quoted in the study, "[t]hese are involuntary refusals, not deliberate ones."[186] Moreover, some of the drivers in this category are said to have refused as a result of police conduct.[187] The following passage explains this phenomenon:

> The attitude of some officers seems to foster refusal. Officers receive no training on how to obtain cooperation on the part of a DUI suspect. . . . . Officer attitude and demeanor affects the refusal rate. If the suspects perceive the officer as being fair – telling the suspect what is going on and letting the violator set the tone – they are more likely to cooperate.[188]

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[181] *Id.* at 60.

[182] *Id.*

[183] Ross et al., *supra* note 177, at 61.

[184] *Id.* at 61-62. For example, one refuser explained, "I would have taken the test if the first cop had asked me. The second was an asshole!" *Id.* at 61.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.* at 62.

The second category of drivers who refused were those who made a rational choice to refuse.[189] The study indicated that most lawyers believe that refusal is more beneficial to the defense than taking the breath test, and this perception "seems to produce refusals in many cases."[190] As indicated by the statistics cited above, there is a lower incidence of conviction for drunk driving when drivers refuse to submit to a breath test.[191] It is, therefore, a rational choice for drivers to refuse.

The third category of those who refused were the ones who did so because of "deliberate and non-rational negativism and hostility characteristic of anti-social personalities."[192] I will not discuss this category because there is little than can be done to change the personalities of drivers in an effort to decrease refusal rates.

The study's ultimate conclusion was that the causes of breath test refusal are "confusion and incompetence of the impaired driver, apparently rational calculation of the costs and benefits of refusal, and general or situational hostility of the suspect."[193] Therefore, if we assume that the 1995 study provides an effective analogical basis for use in other states, we must address these causes in determining how implied consent laws should be applied.

V. RECOMMENDATIONS

There is a "marginally significant" link between refusal rates and alcohol-related crash rates.[194] Thus, one way states can reduce instances of alcohol-related crashes is by enacting policies that encourage drivers to submit to breath tests. To this end, and to most effectively carry out the goal of obtaining evidence of drunk driving from breathalyzer tests in New Jersey and other states, I have a few recommendations.

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[189] Ross et al., *supra* note 177, at 62.

[190] *Id.*

[191] Ross et al., *supra* note 177, at 59-60.

[192] *Id.* at 62.

[193] *Id.* at 57.

[194] Voas et al., *supra* note 159, at 79.

First, states should include, as an element of a refusal charge, that the driver subjectively understood the implied consent warnings. As discussed, this best ensures that drivers are sufficiently informed, and they are accordingly more likely to submit to a breath test.

However, as a result of the practical considerations discussed above, I think a viable (but inferior) alternative to this rule is to have a rule requiring police to make reasonable attempts to inform the driver of the consequences of refusal.[195] This approach would balance the goals of increasing the incentive to submit to a test, and preventing drivers from feigning the use of a foreign language that police cannot identify for the sake of providing the correct implied consent warning. In the vast majority of cases there would be no practical difference, because reading or providing a translated statement would both inform the driver and constitute a reasonable attempt at informing the driver. In a small minority of cases, however, requiring only reasonable attempts would ensure both that drivers do not pretend to not speak English so as to delay the provision of *any* implied consent warning, and that drivers cannot escape responsibility under the implied consent laws solely because they did not understand a warning that they are presumed to already have taken into consideration. If a state's goal when enacting its implied consent and refusal laws was to ensure that drivers submit to breath tests, the state does not further its policy goals if it does not try to ensure that drivers understand the consequences of refusal.

Second, the penalties for refusal need to be comparable to the penalties for drunk driving. When a driver is faced with a choice of guaranteeing a DUI conviction by providing a breath sample, and guaranteeing a refusal violation in the hopes of avoiding a DUI conviction, the rational driver will always choose the lesser penalty. Thus, states like New Jersey actually give drivers an incentive not to submit to a breath test. This may explain why some drunk driving attorneys allegedly recommend

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[195] For example, Iowa and Wisconsin, respectively: State v. Garcia, 756 N.W. 2d 216, 221-22 (Iowa 2008); State v. Piddington, 623 N.W.2d 528, 539 (Wis. 2001). Moreover, this was the approach suggested by Justice LaVecchia in her dissent in *Marquez*, as noted above. State v. Marquez, 998 A.2d 421, 444-45 (N.J. 2010) (LaVecchia, J., dissenting).

to their clients that they refuse to submit to breath tests.[196] It seems the best way to eliminate this problem is to increase the penalty for refusal to match the penalty for driving while intoxicated. An appropriate scheme would be one where if a driver were convicted of refusal, but not of driving while intoxicated, the penalty would be as though the driver had been convicted of driving while intoxicated. However, if the driver were convicted of both, there would be some sort of enhanced penalty, perhaps by way of an increased fine or a longer license suspension. With this in place, drivers would never benefit from refusing to submit to a blood test. Hopefully, this would lead to a decrease in refusals.

Criminalizing refusal violations "has not been investigated thoroughly."[197] The consequences of making the penalties for refusal identical to the penalties for driving while intoxicated may, therefore, have little impact on refusal rates. Nevertheless, a study has shown that when Minnesota criminalized refusal, there was a 5% net increase in convictions and punishment for driving while intoxicated and refusals.[198] Although the conviction rates for driving while intoxicated went down, the conviction rates for refusal more than offset that decrease, which ultimately led to the net increase.[199]

Third, it may be helpful for states to require blood tests for drivers who refuse to submit to breath tests. The primary purpose of requiring blood tests when drivers refuse breath tests would be to encourage drivers to submit to the breath test. Arizona, California, and other jurisdictions have enacted statutes requiring blood tests for drivers who refuse to submit to breath tests, and those jurisdictions have achieved a low rate of refusal.[200]

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[196] Voas et al., *supra* note 159, at 79.

[197] *Id.* at 82.

[198] *Id.*

[199] *Id.*

[200] *Id.*

For example, a case study was done in Scottsdale, Arizona, on the administration of blood tests and refusal rates.[201] The procedure for police officers in Scottsdale is to read the implied consent warning to the driver and request that the driver submit to a blood test.[202] The officers also ask the driver if he understands what has just been read, "because this has been an issue in the past," and initial each paragraph as it is completed.[203] If the driver understands and consents, he is transported to a hospital for the blood test.[204] If the driver does not consent, a warrant for a blood test is sought.[205] "Reportedly, this system has worked well."[206] The National Highway Traffic Safety Administration (NHTSA) has also termed this method (generally, not just in the context of Scottsdale) a promising program.[207]

A final and minor recommendation that I have is for states to take measures to prevent officers from provoking refusals through their own actions. I accept that police officers are not a typically belligerent group, but based on the 1995 study cited above, there is at least some indication that police officers themselves cause some drivers to refuse to submit to a test.[208] It may be helpful to simply inform police of this in training, and that may lead to a decline in such refusals. However, I am not inclined to offer much more as a possible solution, because if a police officer is less than polite to a suspected drunk driver, I

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[201] Ralph K. Jones et al., *Problems and Solutions in DWI Enforcement Systems*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. 39-45, http://www.nhtsa.gov/people/injury/enforce/EnforceDWI/pdf/3casestudies.pdf (last visited May 18, 2012).

[202] *Id.* at 40.

[203] *Id.*

[204] *Id.*

[205] *Id.* at 41.

[206] *Id.*

[207] Jones et al., *supra* note 201.

[208] Ross et al., *supra* note 177, at 62.

would tend to believe that it is the driver's own behavior that led to the police officer's demeanor.[209]

VI: CONCLUSION

Between the Appellate Division's and the Supreme Court's respective opinions in *State v. Marquez*, the Supreme Court's opinion properly enables drivers to be incentivized to submit to a breath test because subjective knowledge of the consequences of refusal is a necessary requirement for making a reasoned judgment of whether or not to submit. States that do not require that a driver subjectively understand the implied consent warning hinder their chances of obtaining DUI convictions, and potentially run the risk of punishing even sober drivers who are unfortunate enough to be unable to effectively communicate with arresting officers. Thus, other states should follow New Jersey's example to better ensure that their drunk driving laws will be as effective as possible.

Finally, by increasing the penalty of refusal and by requiring blood tests when a breath test is refused, states can expect to see a decline in refusal rates. Informed drivers who are aware that the penalty for refusal will be less than the penalty for a drunk driving conviction will tend to refuse to submit to a breath test because they know that they will be more likely to avoid a harsher penalty by doing so. This incentive is removed if the penalty for refusal is at least as much as a penalty for a DUI conviction. Moreover, the requirement of blood tests in the event of refusal to submit to a breath test has been shown to be an effective deterrent for refusals.

SPECIAL ACKNOWLEDGMENT

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[209] Admittedly, this is pure conjecture, but I find the intuitive reasoning appealing. I assume that many readers have had enough encounters with the inebriated to know how frustrating the experience can be.

Simon was a co-author of that article, and his willingness to help a young law student was much appreciated.