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PALMER, J., dissenting. The majority concludes that Detective Michael Morgan of the Newington police department did not violate the rights of the defendant, Christopher Jenkins, under article first, § 7, of the Connecticut constitution when Morgan conducted a consent search of the defendant's vehicle following his lawful stop of the defendant for a traffic violation in Newington at approximately 11:30 p.m. on May 7, 2004. I disagree with the majority's conclusion because I believe that, under the state constitution, Morgan was required to inform the defendant that he had no obligation to consent to the search of his vehicle and that he was free to leave, once he received the traffic ticket, if he chose to withhold consent to search.[1] I reach this conclusion for two interrelated reasons. First, such an advisement is necessary to ensure that a waiver of the constitutionally protected right to refuse consent to a vehicle search following a routine traffic stop has been given freely and intelligently. Second, without that advisement, there exists too great of a risk that the person being detained in connection with the traffic stop, who may not leave the scene until permitted to do so by the police, will feel constrained to agree to the search due to the element of compulsion inherent in the nature of an encounter with the police. The need for such an advisement is all the greater when, as in the present case, the police lack even a reasonable and articulable suspicion that the detained vehicle contains contraband. Because Morgan failed to advise the defendant, I would conclude that the search violated the defendant's rights under article first, § 7. Accordingly, I respectfully dissent.[2]

The undisputed facts and procedural history relevant to this issue are set forth in the majority opinion and require no repetition. I turn, therefore, to the legal principles that guide my analysis. "It is well established that federal constitutional and statutory law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights. . . . Furthermore, although we often rely on the United States Supreme Court's interpretation of the amendments to the constitution of the United States to delineate the boundaries of the protections provided by the constitution of Connecticut, we have also recognized that, in some instances, our state constitution provides protections beyond those provided by the federal constitution, as that document has been interpreted by the United States Supreme Court. . . . Indeed, this court has determined that, in certain respects, article first, § 7, of the state constitution affords greater protection than the fourth amendment to the United States constitution. E.g., *State* v. *Miller*, 227 Conn. 363, 377, 630 A.2d

1315 (1993) (article first, § 7, requires police to obtain warrant to search impounded automobile); *State* v. *Geisler*, 222 Conn. 672, 691–92, 610 A.2d 1225 (1992) (emergency exception to warrant requirement is narrower under article first, § 7, than under federal constitution); *State* v. *Marsala*, 216 Conn. 150, 171, 579 A.2d 58 (1990) (good faith exception to warrant requirement does not exist under article first, § 7, of state constitution); *State* v. *Dukes*, 209 Conn. 98, 120–21, 547 A.2d 10 (1988) (search incident to arrest exception to warrant requirement is narrower under article first, § 7, than under federal constitution). In determining the scope of the rights secured by our state constitution, the following tools of analysis should be considered to the extent applicable: (1) the [text of the constitutional provision] . . . (2) holdings and dicta of this court . . . (3) federal precedent . . . (4) sister state decisions . . . (5) the [history of the constitutional provision] . . . including the historical constitutional setting and the debates of the framers . . . and (6) economic/sociological considerations."[3] (Citation omitted; internal quotation marks omitted.) *State* v. *Davis*, 283 Conn. 280, 305–306, 929 A.2d 278 (2007).

I agree with the majority that neither the text nor the constitutional history of article first, § 7, of the Connecticut constitution supports the defendant's claim that the state constitution affords greater protection than the federal constitution with respect to a request for consent to search a vehicle made by a police officer in connection with a routine traffic stop. I disagree, however, with the majority's analysis of the remaining *Geisler* factors,[4] which, in my view, leads to the conclusion that, under the state constitution, a consent search of such a vehicle is invalid unless the detained motorist is informed of his or her right to withhold consent to such a search.

I

FEDERAL PRECEDENT

As the majority observes, in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973), the United States Supreme Court rejected the very same claim under the fourth amendment to the federal constitution that the defendant in the present case raises under the state constitution. Specifically, the court in *Schneckloth* concluded that "the question [of] whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances. While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent." Id., 227. For the reasons that follow, I am unpersuaded by the court's analysis in *Schneckloth*, at least in the context of a request for consent during a routine traf-

fic stop.[5]

In *Schneckloth*, the court commenced its analysis by observing that "[t]he most extensive judicial exposition of the meaning of 'voluntariness' has been developed in those cases in which the [c]ourt has had to determine the 'voluntariness' of a defendant's confession for purposes of the [f]ourteenth [a]mendment." Id., 223. A review of these cases, the court explained, reveals "no talismanic definition of 'voluntariness,' mechanically applicable to the host of situations [in which] the question has arisen. . . . It cannot be taken literally to mean a 'knowing' choice." (Citation omitted.) Id., 224. "Rather, 'voluntariness' has reflected an accommodation of the complex of values implicated in police questioning of a suspect. At one end of the spectrum is the acknowledged need for police questioning as a tool for the effective enforcement of criminal laws. . . . At the other end of the spectrum is the set of values reflecting society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness, and that the possibility of unfair and even brutal police tactics poses a real and serious threat to civilized notions of justice." (Citations omitted.) Id., 224–25. The court further explained that, in light of these competing concerns, it traditionally has framed the test for voluntariness as whether "the confession [is] the product of an essentially free and unconstrained choice by its maker . . . ." Id., 225. In making this determination, the court made clear that the totality of the circumstances must be considered, and, although the accused's awareness of his constitutional rights is one of several factors relevant to that determination, it is not a dispositive factor. Id., 226–27.

The court in *Schneckloth* reasoned that a similar analysis should apply to the determination of whether a suspect voluntarily has given consent to search. "As with police questioning, two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion." Id., 227. In reaching this conclusion, the court observed that, in cases in which the police may "have some evidence of illicit activity, but lack probable cause to arrest or search," consent searches serve a vital purpose because they "may be the only means of obtaining important and reliable evidence." Id. These searches, the court stated, may "[provide] some assurance that [third parties], wholly innocent of the crime, [will] not [be] mistakenly brought to trial." Id., 228.

The court then stated that requiring the state to prove "affirmatively . . . that the subject of the search knew that he had a right to refuse consent would, in practice, create serious doubt [about] whether consent searches could continue to be conducted." Id., 229. In support

of this assertion, the court explained: "There might be rare cases [in which] it could be proved from the record that a person in fact affirmatively knew of his right to refuse . . . . But more commonly where there was no evidence of any coercion, explicit or implicit, the prosecution would nevertheless be unable to demonstrate that the subject of the search in fact had known of his right to refuse consent." Id., 229–30. "The very object of the inquiry—the nature of a person's subjective understanding—underlines the difficulty of the prosecution's burden under [a] rule [that would require proof of such knowledge]. Any defendant who [is] the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew [that] he could refuse to consent. And the near impossibility of meeting this prosecutorial burden suggests why [the] [c]ourt has never accepted any such litmus-paper test of voluntariness." Id., 230.

The court in *Schneckloth* acknowledged that the police officer seeking consent to search the vehicle in that case simply could have informed the subject of the traffic stop that he had the right to withhold such consent. The court, however, rejected that approach, reasoning as follows: "One alternative that would go far toward proving that the subject of a search did know [that] he had a right to refuse consent would be to advise him of that right before eliciting his consent. . . . [I]t would be thoroughly impractical [however] to impose on the normal consent search the detailed requirements of an effective warning. Consent searches are part of the standard investigatory techniques of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning. The police may seek to investigate further suspicious circumstances or to follow up leads developed in questioning persons at the scene of a crime. These situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights. . . . And, while surely a closer question, these situations are still immeasurably far removed from 'custodial interrogation' where, in *Miranda* v. *Arizona*, [384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)], we found that the [c]onstitution required certain now familiar warnings as a prerequisite to police interrogation." (Citation omitted.) *Schneckloth* v. *Bustamonte*, supra, 412 U.S. 231–32.

The court in *Schneckloth* also rejected the respondent's contention that, because " 'consent' is a waiver of a person's rights under the [f]ourth and [f]ourteenth [a]mendments," to establish waiver, the state must be required to "demonstrate 'an intentional relinquishment

or abandonment of a known right or privilege.' " Id., 235. In so concluding, the court observed that a knowing and intelligent waiver is not required whenever a subject declines to invoke a constitutional protection; instead, waiver analysis applies only to those rights needed to protect the fairness of a trial or trial-type proceeding. Id., 237–38. By way of example, the court observed that, in *Miranda*, it had "found that *custodial* interrogation by the police was inherently coercive, and consequently held that detailed warnings were required to protect the privilege against compulsory self-incrimination. The [c]ourt [in *Miranda*] made it clear that the basis for [its] decision was the need to protect the fairness of the trial itself:

" 'That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court. . . . Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." ' [*Miranda* v. *Arizona*, supra, 384 U.S. 466]." (Emphasis in original.) *Schneckloth* v. *Bustamonte*, supra, 412 U.S. 240.

The court continued: "[T]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the [f]ourth [a]mendment." Id., 241. Thus, the court concluded that there was no reason to extend the requirement of a knowing and intelligent waiver to consent searches. See id. The fourth amendment, the court explained, was not designed to protect the accuracy of the truth determining process at trial; instead, it protects an individual's privacy against arbitrary intrusion by the police. Id., 242. In support of this assertion, the court relied on its prior determination that "there is no likelihood of unreliability or coercion present in a search-and-seizure case . . . ." (Citation omitted; internal quotation marks omitted.) Id. Consequently, the court maintained, "it cannot be said [that] every reasonable presumption ought to be indulged against voluntary relinquishment. . . . [I]t is no part of the policy underlying the [f]ourth and [f]ourteenth [a]mendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals. . . . Rather, the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may [e]nsure that a wholly innocent person is not wrongly charged with a [crime]." (Citation omitted; internal quotation marks omitted.) Id., 243.

The court further explained that "it would be next

to impossible to apply to a consent search the standard of 'an intentional relinquishment or abandonment of a known right or privilege.' " Id. According to the court, in determining whether one knowingly and voluntarily has waived a right, a trial judge in "the structured atmosphere of a courtroom" must conduct an examination into whether there is an intelligent and competent waiver by the accused. Id., 243–44. This detailed examination would be unrealistic in the "informal, unstructured context of a consent search . . . . And if, for this reason a diluted form of 'waiver' were found [to be] acceptable, that would itself be ample recognition of the fact that there is no universal standard that must be applied in every situation [in which] a person forgoes a constitutional right." Id., 245.

Finally, the court explained that *Miranda* does not compel a knowledge requirement in the context of a consent search. Id., 246. The court asserted that, unlike the inherent coerciveness of custodial interrogation that requires safeguards to ensure voluntariness, consent searches "normally occur on a person's own familiar territory . . . [and thus] the specter of incommunicado police interrogation in some remote station house is simply inapposite. There is no reason to believe . . . that the response to a policeman's question is presumptively coerced; and there is, therefore, no reason to reject the traditional test for determining the voluntariness of a person's response. *Miranda*, of course, did not reach investigative questioning of a person not in custody, which is most directly analogous to the situation of a consent search, and it assuredly did not indicate that such questioning ought to be deemed inherently coercive." Id., 247. The court thus concluded that a consent search following a routine traffic stop may pass muster under the fourth amendment even though the police have not informed the subject of the stop that he or she may decline to give consent to the search. See id., 248–49.

In separate opinions, Justices William O. Douglas, William J. Brennan, Jr., and Thurgood Marshall dissented from the opinion of the majority in *Schneckloth*. Justice Douglas concluded that a suspect should be informed of his right to withhold consent because, " '[u]nder many circumstances a reasonable person might read an officer's "[m]ay I" as the courteous expression of a demand backed by force of law.' " Id., 275–76 (Douglas, J., dissenting). In the same vein, Justice Brennan stated that "[t]he [c]ourt holds . . . that an individual can effectively waive this right even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of his privacy would be constitutionally prohibited. It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence." Id., 277 (Brennan, J., dissenting).

Justice Marshall's dissent has been celebrated by commentators and scholars. See, e.g., A. Loewy, "Knowing 'Consent' Means 'Knowing Consent': The Underappreciated Wisdom of Justice Marshall's *Schneckloth* v. *Bustamonte* Dissent," 79 Miss. L.J. 97, 104–108 (2009). Justice Marshall begins his dissent with the observation that, "[s]everal years ago, [Justice Potter Stewart, the author of the majority opinion in *Schneckloth*] reminded us that '[t]he [c]onstitution guarantees . . . a society of free choice. Such a society presupposes the capacity of its members to choose.' *Ginsburg* v. *New York*, 390 U.S. 629, 649 [88 S. Ct. 1274, 20 L. Ed. 2d 195] (1968) ([Stewart, J.] concurring in result). I would have thought that the capacity to choose necessarily depends [on] knowledge that there is a choice to be made. But . . . the [majority in *Schneckloth*] reaches the curious result that one can choose to relinquish a constitutional right—the right to be free [from] unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request to search." *Schneckloth* v. *Bustamonte*, supra, 412 U.S. 277 (Marshall, J., dissenting). In Justice Marshall's view, because the United States Supreme Court always had "scrutinized with great care claims that a person has forgone the opportunity to assert constitutional rights," there is no reason why that analysis should not apply with equal force to the issue of "whether a simple statement of assent to search, without more, should be sufficient to permit the police to search and thus act as a relinquishment of [that person's] constitutional right to exclude the police." Id., 278 (Marshall, J., dissenting).

After concluding that cases involving coerced confessions are inapposite in the context of a consent search,[6] Justice Marshall rejected the assertion of the majority in *Schneckloth* that consent " 'cannot be taken literally to mean a "knowing" choice.' " Id., 284 (Marshall, J., dissenting). Indeed, Justice Marshall explained that he had "difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all." Id. Furthermore, "[i]f consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police. . . . I can think of no other situation in which we would say that a person agreed to some course of action if he convinced us that he did not know that there was some other course he might have pursued. I would therefore hold, at a minimum, that the prosecution may not rely on a purported consent to search if the subject of the search did not know that he could refuse to give consent. . . . Where the police claim authority to search yet in fact lack such authority, the subject does not know that he may permissibly refuse them entry, and it is this lack of knowledge that invalidates the consent."[7] (Citations omitted.)

Id., 284–85 (Marshall, J., dissenting).

Justice Marshall also rejected the majority's assertion that, "if an officer paused to inform the subject of his rights, the informality of the exchange would be destroyed. I doubt that a simple statement by an officer of an individual's right to refuse consent would do much to alter the informality of the exchange, except to alert the subject to a fact that he surely is entitled to know. It is not without significance that for many years the agents of the Federal Bureau of Investigation have routinely informed subjects of their right to refuse consent, when they request consent to search. . . . The reported cases in which the police have informed subjects of their right to refuse consent show, also, that the information can be given without disrupting the casual flow of events. . . . What evidence there is, then, rather strongly suggests that nothing disastrous would happen if the police, before requesting consent, informed the subject that he ha[s] a right to refuse consent and that his refusal would be respected." (Citations omitted.) Id., 287–88 (Marshall, J., dissenting).

Justice Marshall concluded "that when the [majority in *Schneckloth*] speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights. . . .

"I find nothing in the [majority] opinion [in *Schneckloth*] to dispel my belief that . . . '[u]nder many circumstances a reasonable person might read an officer's "[m]ay I" as the courteous expression of a demand backed by force of law.' . . . Most cases, in my view . . . [reflect that] consent ordinarily is given as acquiescence in an implicit claim of authority to search. Permitting searches in such circumstances, without any assurance at all that the subject of the search knew that, by his consent, he was relinquishing his constitutional rights, is something that I cannot believe is sanctioned by the [c]onstitution." (Citations omitted.) Id., 288–89 (Marshall, J., dissenting).

The United States Supreme Court reaffirmed its holding in *Schneckloth* in *Ohio* v. *Robinette*, 519 U.S. 33, 39–40, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996). In *Robinette*, the state of Ohio appealed from the judgment of the Supreme Court of Ohio, which had adopted the following rule under the United States and Ohio constitutions: " '[C]itizens stopped for traffic offenses [must] be clearly informed by the detaining officer when they are free to go after a valid detention, before an officer attempts to engage in a consensual interrogation. Any attempt at consensual interrogation must be preceded by the phrase "[a]t this time you legally are free to go" or by words of similar import.' " Id., 36. The United States Supreme Court rejected the rule announced by

the Supreme Court of Ohio as a matter of federal constitutional law.[8] Remarking that "the touchstone of the [f]ourth [a]mendment is reasonableness . . . [which is] measured in objective terms by examining the totality of the circumstances"; (citation omitted; internal quotation marks omitted) id., 39; the court observed that it "consistently [has] eschewed bright-line rules . . . ." Id. Indeed, relying on the conclusion of the court in *Schneckloth* that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning"; (internal quotation marks omitted) id., quoting *Schneckloth* v. *Bustamonte*, supra, 412 U.S. 231; the court concluded that it similarly would "be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary."[9] *Ohio* v. *Robinette*, supra, 39–40.

Before addressing the merits of the court's reasoning in *Schneckloth*, it bears emphasis that, in considering the value of applicable federal precedent in the context of a *Geisler* analysis, it is necessary to consider that precedent's persuasive value. See *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 230–31, 957 A.2d 407 (2008) ("[we examine federal] precedent for guidance and analogy [in construing our own constitution but only] when [those] authorities are logically persuasive and well-reasoned" [internal quotation marks omitted]); cf. *State* v. *Brunetti*, 276 Conn. 40, 115, 883 A.2d 1167 (2005) (*Palmer*, *J.*, dissenting) ("a judicial opinion must be judged not on the number of votes that it has garnered but on its reasoning"), superseded by *State* v. *Brunetti*, 279 Conn. 39, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). Thus, when this court undertakes an independent analysis of the meaning of article first, § 7, of the state constitution, it may reject as lacking in persuasive force, for state constitutional purposes, precedent of the United States Supreme Court construing the analogous provisions of the fourth amendment to the federal constitution. Indeed, not infrequently, this court, in interpreting article first, § 7, has rejected the reasoning and holding of a majority opinion of the United States Supreme Court and, instead, expressly or implicitly adopted the reasoning employed by one or more dissenting justices of that court. See, e.g., *State* v. *Miller*, supra, 227 Conn. 377 (declining to adopt rule in *Chambers* v. *Maroney*, 399 U.S. 42, 51–52, 90 S. Ct. 1975, 26 L. Ed. 2d 419 [1970], as matter of state constitutional law, and holding, in accordance with rationale of concurrence and dissent of Justice John M. Harlan in *Chambers*, that warrantless search of automobile impounded by police that is not performed for inventory purposes is violation of article first, § 7); *State* v. *Oquendo*, 223 Conn. 635, 649–52, 613 A.2d 1300 (1992) (declining to adopt restrictive definition of seizure adopted in *California* v. *Hodari D.*, 499 U.S. 621, 626,

111 S. Ct. 1547, 113 L. Ed. 2d 690 [1991], for purposes of article first, §§ 7 and 9, relying in part on reasoning of dissent of Justice Stevens in *Hodari D.*); *State* v. *Geisler*, supra, 222 Conn. 682–83, 687–90 (declining to follow *New York* v. *Harris*, 495 U.S. 14, 18, 21, 110 S. Ct. 1640, 109 L. Ed. 2d 13 [1990], for purposes of state constitution and holding, in accordance with reasoning of dissent of Justice Marshall in *Harris*, that, under article first, § 7, evidence derived from arrest of suspect following unlawful warrantless entry into home must be suppressed, despite probable cause for arrest, unless taint of illegal entry is attenuated by passage of time or intervening circumstances); *State* v. *Marsala*, supra, 216 Conn. 168–71 (rejecting "good faith" exception to exclusionary rule adopted in *United States* v. *Leon*, 468 U.S. 897, 913, 104 S. Ct. 3405, 82 L. Ed. 2d 677 [1984], for purposes of article first, § 7, relying in part on reasoning of dissent of Justice Brennan in *Leon*); *State* v. *Stoddard*, 206 Conn. 157, 166–67, 169, 537 A.2d 446 (1988) (rejecting holding of *Moran* v. *Burbine*, 475 U.S. 412, 422, 106 S. Ct. 1135, 89 L. Ed. 2d 410 [1986], and concluding, in accordance with reasoning of dissent of Justice Stevens in *Moran*, that due process clause of article first, § 8, of state constitution requires police promptly to inform suspect of his attorney's attempt to provide legal assistance during interrogation). In the foregoing cases, as in other cases, we have rejected United States Supreme Court precedent in interpreting our state constitution because, as this court previously has observed, "decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law." (Internal quotation marks omitted.) *State* v. *Marsala*, supra, 216 Conn. 160, quoting *Horton* v. *Meskill*, 172 Conn. 615, 642, 376 A.2d 359 (1977). For the reasons that follow, *Schneckloth* also is such a case.

The analysis employed by the court in *Schneckloth* has been widely criticized by legal scholars. See, e.g., *United States* v. *Gagnon*, 230 F. Sup. 2d 260, 269 n.8 (N.D.N.Y. 2002) ("[t]he judicially created framework of the consent doctrine has been severely criticized, with no small measure of merit, as ignoring the practical realities of encounters between police and citizens"), rev'd on other grounds, 373 F.3d 230 (2d Cir. 2004); *Brown* v. *State*, 182 P.3d 624, 632 (Alaska App. 2008) (noting that "legal commentators have been widely critical of the United States Supreme Court's consent-search jurisprudence"); 4 W. LaFave, Search and Seizure (4th Ed. 2004) § 8.2 (i), p. 111 ("Perhaps the most telling criticism of . . . *Schneckloth* . . . is that the [c]ourt misapprehended the potential for psychological coercion in the context of consent searches. . . . [T]here is much to be said for the conclusion that . . . [the]

right to withhold consent [should be communicated to a suspect]." [Internal quotation marks omitted.]); R. Simmons, "Not 'Voluntary' but Still Reasonable: A New Paradigm for Understanding the Consent Search Doctrine," 80 Ind. L.J. 773, 775 (2005) ("[i]t is no exaggeration to say that the nearly unanimous condemnation of the [c]ourt's rulings on consensual searches is creating a problem of legitimacy [that] threatens to undermine the integrity of judicial review of police behavior"); R. Ward, "Consensual Searches, The Fairytale That Became a Nightmare: *Fargo* Lessons Concerning Police Initiated Encounters," 15 Touro L. Rev. 451, 457 (1999) ("many of the suppositions underlying [*Schneckloth*] are false"); A. Barrio, note, "Rethinking *Schneckloth v. Bustamonte*: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent," 1997 U. Ill. L. Rev. 215, 218 ("*Schneckloth* misapprehended the potential for psychological coercion in the context of consent searches"). This criticism is based on certain flaws in several of the assumptions that underlie the reasoning of the majority opinion in *Schneckloth*.

First, *Schneckloth* has been criticized for overlooking the coercive effect that an officer's request for consent is likely to have on a motorist who has been detained in connection with a traffic stop. As one commentator has stated, "[w]hat is remarkable . . . is the ever-widening gap between [f]ourth [a]mendment consent jurisprudence, on the one hand, and scientific findings about the psychology of compliance and consent on the other. Ever since the [c]ourt first applied the 'totality of the circumstances' standard to consent search issues in *Schneckloth* . . . in 1973, it has held in case after case, with only a few exceptions, that a reasonable person in the situation in question either would feel free to terminate the encounter with [the] police, or would feel free to refuse the police request to search. By contrast, empirical studies over the last several decades on the social psychology of compliance, conformity, social influence, and politeness have all converged on a single conclusion: the extent to which people feel free to refuse to comply is extremely limited under situationally induced pressures." J. Nadler, "No Need to Shout: Bus Sweeps and the Psychology of Coercion," 2002 Sup. Ct. Rev. 153, 155. It therefore has been argued that the United States Supreme Court should incorporate the "empirical findings on compliance and social influence into . . . consent [search] jurisprudence . . . to dispel the 'air of unreality' that characterizes current doctrine." Id., 156–57; see also W. LaFave, "The 'Routine Traffic Stop' From Start to Finish: Too Much 'Routine,' Not Enough Fourth Amendment," 102 Mich. L. Rev. 1843, 1902 (2004) ("[i]t is . . . nonsensical for courts to continue their embrace of the . . . position that a reasonable motorist, having been seized, would conclude he was free to leave [even though not told so] in

the face of ongoing police interrogation"); T. Maclin, "The Good and Bad News About Consent Searches in the Supreme Court," 39 McGeorge L. Rev. 27, 28 (2008) ("everyone . . . knows . . . [that] a police 'request' to search a bag or automobile is understood by most persons as a 'command' "); M. Strauss, "Reconstructing Consent," 92 J. Crim. L. & Criminology 211, 219 n.29 (2001) ("Except [when] consent is required in a person's home, it is often sought in areas unfamiliar and intimidating. How many of us feel like we are on 'familiar territory' when pulled over to the side of the road by a police car or two?"); M. Strauss, supra, 235 (*Schneckloth* "ignor[es] the most significant factor of all: the inevitability that individuals will feel coerced simply by virtue of dealing with an authority figure like the police"); R. Weaver, "The Myth of 'Consent'," 39 Tex. Tech L. Rev. 1195, 1199 (2007) ("The *Schneckloth* decision is . . . troubling because it ignores the realities of police-citizen encounters and the inherent pressures on individuals to comply with police requests. . . . [W]hen a police officer requests permission to search, the police officer inevitably retains a distinct psychological advantage over the suspect."); A. Barrio, supra, 1997 U. Ill. L. Rev. 233 ("[t]he most baffling aspect of the [United States] Supreme Court's conception of voluntary consent is that it virtually ignores the well-documented observation that most people mechanically obey legitimate authority"); cf. G. Dery, " 'When Will This Traffic Stop End?': The United States Supreme Court's Dodge of Every Detained Motorist's Central Concern—*Ohio* v. *Robinette*," 25 Fla. St. U. L. Rev. 519, 559–60 (1998) (observing that United States Supreme Court's statements regarding relative positions of power between police officer and citizen are simply incorrect in context of routine traffic stop).

Indeed, drawing on relevant empirical studies, several commentators have concluded that the dissenting justices in *Schneckloth* were correct in that individuals tend to see an officer's request for consent as a demand. See M. Strauss, supra, 92 J. Crim. L. & Criminology 236–42. For example, it seems evident, on the basis of empirical research regarding obedience to authority and uniform, that individuals "attribute legitimacy to the police officer's uniform [and] that they obey police authority reflexively." A. Barrio, supra, 1997 U. Ill. L. Rev. 243; see also J. Burkoff, "Search Me?," 39 Tex. Tech L. Rev. 1109, 1138 (2007) ("most people do not expect that they have the right not to accede a police officer's request that a search be authorized" [internal quotation marks omitted]). Consequently, "the weight of scientific authority suggests that a suspect's ignorance of fundamental [f]ourth [a]mendment rights must be viewed as a state of mind that renders a suspect's consent involuntary." A. Barrio, supra, 247; see also id., 240 ("[the] obedience theory casts serious doubt on the continued vitality of what *Schneckloth* characterized as

Miranda's central holding: that custody is a necessary prerequisite for a finding of psychological coercion"). Thus, "[t]o curb the coercive power of police authority, the police officer should be required to advise the suspect of his right to withhold consent prior to requesting his permission to search. Such a warning would combat the obedience phenomenon by assuring the suspect both that he is under no obligation to give consent and that the investigating officer is 'prepared to recognize his privilege.' " Id., 247; see also 4 W. LaFave, Search and Seizure (4th Ed. 2004) § 8.2 (i), pp. 111–12 (expressing support for such approach).

The factual scenario in the present case provides a good example of why the court in *Schneckloth* was wrong in concluding that a motorist stopped for a traffic violation is not likely to feel compelled to agree to a police officer's request for permission to search his or her vehicle. According to the court in *Schneckloth*, there is no reason to believe that the subject of such a stop will view the encounter as coercive because the search "occur[s] on [the driver's] own familiar territory [where] the specter of incommunicado police interrogation in some remote station house is . . . inapposite." *Schneckloth* v. *Bustamonte*, supra, 412 U.S. 247. Of course, there can be no doubt that police interrogation of a person held incommunicado and far from home gives rise to a legitimate concern about the voluntariness of any statement obtained as a result of such interrogation, and so, too, is the voluntariness of the defendant's consent to search open to serious doubt. The defendant, an African-American from out of state and traveling alone, was stopped by Detective Morgan shortly before midnight and pulled over in a dark area of the Berlin Turnpike. Morgan operated an unmarked car but was dressed in full police uniform and possessed a firearm, a utility belt with handcuffs, pepper spray and a flashlight, all in plain view. While preparing the traffic citation in his cruiser, Morgan called for a backup police officer because, unbeknownst to the defendant, Morgan intended to request that the defendant consent to a search of his vehicle. That backup officer, Sergeant Derrick Sutton, who also was in full police uniform, arrived before Morgan had returned to the defendant's vehicle. At that point, ten to fifteen minutes had passed since the defendant had been stopped. Morgan then approached the defendant and told him to exit his car. Morgan explained the citation to the defendant but did not give it to him at that time. Rather, Morgan asked the defendant whether he had anything illegal on his person, and, when the defendant said that he did not, Morgan patted him down. Morgan then asked the defendant if he had anything illegal in the vehicle, and the defendant responded that all he had in the car was some beer on the floor in front of the passenger seat. When the defendant told Morgan that he could "go ahead and check," Morgan conducted a search of the

defendant's vehicle.

It is fanciful to think that the circumstances that led to the search of the defendant's vehicle did not give rise to a substantial element of compulsion. The defendant, an African-American who does not reside in this state, was pulled over in a dark area of the highway, late at night, by an armed police officer, and detained there, in his car, for up to fifteen minutes, at which point a second armed police officer arrived at the scene in a separate cruiser. Morgan then directed the defendant to exit his vehicle, questioned him about contraband on his person, conducted a patdown search, and asked him whether he had any contraband in the vehicle. It is difficult to see how anyone held under such circumstances would not feel vulnerable as a result of the encounter with the police, and there is little doubt that, in light of that vulnerability, the average person in that situation also would feel the need to accommodate, if not placate, the police officers involved in the encounter.

A second criticism of *Schneckloth*, which also is based on empirical evidence, concerns the assertion that a knowledge requirement could jeopardize the continued viability of consent searches. In fact, studies suggest just the opposite, that is, that it appears that persons subjected to traffic stops give consent to vehicle searches at the same rate regardless of whether they are aware that such consent may be withheld. See, e.g., I. Lichtenberg, "*Miranda* in Ohio: The Effects of *Robinette* on the 'Voluntary' Waiver of Fourth Amendment Rights," 44 How. L.J. 349, 370, 373 (2001) (study demonstrated that between approximately 75 and 95 percent of motorists agree to police search of vehicle and that rates were very similar regardless of whether motorists were apprised of their right to refuse such consent, and, consequently, assertion of court in *Schneckloth* that such advisement would jeopardize continued viability of consent searches was "[c]learly . . . unfounded"); M. Phillips, Note, "Effective Warnings Before Consent Searches: Practical, Necessary, and Desirable," 45 Am. Crim. L. Rev. 1185, 1201 (2008) (citing study demonstrating that approximately 88 percent of motorists agree to consent search after being advised verbally and in writing of right to refuse consent). These findings should not be surprising in light of the fact that approximately 84 percent of suspects who have been advised of their rights in accordance with *Miranda* nevertheless waive their right to remain silent and comply with a request by the police for a statement. See S. Chanenson, "Get the Facts, Jack! Empirical Research and the Changing Constitutional Landscape of Consent Searches," 71 Tenn. L. Rev. 399, 442 (2004).

Although this data indicating that the provision of warnings has little effect on the rate at which consent

is granted may suggest that such warnings are ineffective, it fairly may be argued that warnings nevertheless serve a salutary purpose insofar as they are likely to reduce the compulsion that people feel on the basis of "an inaccurate belief that the police have the legal right to compel them to [agree to the requested] search." R. Simmons, supra, 80 Ind. L.J. 819. To be sure, motorists undoubtedly have a multitude of reasons for granting consent to search, not all of which are the product of the inherently coercive nature of the police stop and following encounter; see *People* v. *James*, 19 Cal. 3d 99, 114, 561 P.2d 1135, 137 Cal. Rptr. 447 (1977) ("[T]here may be a number of 'rational reasons' for a suspect to consent to a search even though he knows the premises contain evidence that can be used against him: for example, he may wish to appear cooperative in order to throw the police off the scent or at least to lull them into conducting a superficial search; he may believe the evidence is of such a nature or in such a location that it is likely to be overlooked; he may be persuaded that if the evidence is nevertheless discovered he will be successful in explaining its presence or denying any knowledge of it; he may intend to lay the groundwork for ingratiating himself with the prosecuting authorities or the courts; or he may simply be convinced that the game is up and further dissembling is futile."); and, consequently, warnings may have an impact on what may be considered negative forms of compulsion, such as acquiescence to a show of authority. See R. Simmons, supra, 820; see also R. Ward, supra, 15 Touro L. Rev. 477 ("[t]he combined forces of obedience to authority, the power of the uniform and lower expectations of privacy make it imperative that citizens be told from the outset that they do have a choice"). Indeed, the importance of *Miranda* warnings is widely accepted even though the large majority of suspects who are advised of their rights under *Miranda* nevertheless give a statement to the police.

There also seems to be little or no basis for the assertions of the court in *Schneckloth* that it would be unreasonable to burden the state with having to prove that a motorist who gives consent to search during the course of a routine traffic stop was aware of his or her right to refuse consent; *Schneckloth* v. *Bustamonte*, supra, 412 U.S. 229–30; and that requiring the police to advise motorists of their right to withhold consent to search would adversely affect the informality of the encounter, thereby impairing the ability of the police to use the consent search as a standard investigatory technique. See id., 231–32. With respect to the court's first assertion, I see no reason why the state could not meet its burden of proving knowledge simply by demonstrating that the officer at the scene had advised the motorist of the right to withhold consent and that he or she was free to leave upon choosing that option. Indeed, in the ordinary case, the state's burden would

be readily satisfied by testimony from the police officer that the subject of the stop was so advised. The court's second assertion, namely, that it would be "thoroughly impractical" to require the police to give such an advisement; id., 231; also is dubious. The advisement would take but a few seconds and easily could be given at the same time that the officer seeks the motorist's consent to search. See, e.g., M. Phillips, supra, 45 Am. Crim. L. Rev. 1185–86 (observing that high courts of several states have required police to provide warnings before seeking consent to search and asserting that "[a] review of the experience[s] of these states indicates that a warning requirement is practical"); E. Smary, note, "The Doctrine of Waiver and Consent Searches," 49 Notre Dame L. Rev. 891, 903 (1974) (criticizing as "straw-man logic" court's assertion in *Schneckloth* that it would be thoroughly impractical for police officer to engage in detailed examination needed to ensure valid waiver); cf. J. Adams, "Search and Seizure as Seen By Supreme Court Justices: Are They Serious or Is This Just Judicial Humor?," 12 St. Louis U. Pub. L. Rev. 413, 446–47 (1993) (criticizing court's consideration in *Schneckloth* of practical considerations of police in assessing whether advisement of right to withhold consent should be required).

Finally, the court in *Schneckloth* has been criticized for essentially ignoring the issue of how a consent to search fairly may be deemed to be truly voluntary when the person giving consent does not know that he or she has an absolute right, protected by the constitution, to refuse to do so. Thus, as one commentator has stated, "[a]ny competent person can give up rights at the request of the government. But it is hard to comprehend a theory of individual rights that permits that decision to be made by someone unaware that he is relinquishing a fundamental civil liberty." M. Cloud, "Ignorance and Democracy," 39 Tex. Tech L. Rev. 1143, 1169 (2007).

In sum, because the reasons underlying the court's holding in *Schneckloth* ultimately are not persuasive, the holding of the court is itself not persuasive.[10] Indeed, the dissenting opinions in *Schneckloth* are significantly more convincing than the opinion of the majority in *Schneckloth*. This court therefore is not bound to adopt the holding of the majority opinion in *Schneckloth* for purposes of the state constitution.

II

HOLDINGS AND DICTA OF THIS COURT

As I discussed in part I of this opinion, this court has interpreted article first, § 7, of the Connecticut constitution as providing protections beyond those guaranteed under the fourth amendment to the federal constitution in a variety of different contexts. In no case, however, has this court or the Appellate Court previously had occasion to consider the scope of article first, § 7, in

the context of consent searches generally or, more specifically, in the context of a consent search of a vehicle following a routine traffic stop. Accordingly, Connecticut precedent is neutral on the issue of whether the state constitution provides the same or greater protection than the federal constitution with respect to searches of the kind conducted in the present case.

III

SISTER STATE DECISIONS

A significant majority of the states that have considered the issue apply the *Schneckloth* totality of the circumstances test in assessing whether consent was voluntary for purposes of their state constitutions, and do not require an express advisement of the right to withhold consent. E.g., *Henry* v. *State*, 621 P.2d 1, 4 and n.9 (Alaska 1980); *State* v. *Knaubert*, 27 Ariz. App. 53, 56–57, 550 P.3d 1095 (1976), overruled on other grounds by *State* v. *Grilz*, 136 Ariz. 450, 666 P.2d 1059 (1983); *People* v. *Hayhurst*, 194 Colo. 292, 295–96, 571 P.2d 721 (1977); *State* v. *Thompson*, 284 Kan. 763, 779–81, 166 P.3d 1015 (2007); *Scott* v. *State*, 366 Md. 121, 145, 782 A.2d 862 (2001), cert. denied, 535 U.S. 940, 122 S. Ct. 1324, 152 L. Ed. 2d 231 (2002); *Reese* v. *State*, 95 Nev. 419, 421, 596 P.2d 212 (1979); *State* v. *Osborne*, 119 N.H. 427, 433, 402 A.2d 493 (1979); *State* v. *Robinette*, 80 Ohio St. 3d 234, 245, 685 N.E.2d 762 (1997); *State* v. *Flores*, 280 Or. 273, 279–82, 570 P.2d 965 (1977); *Commonwealth* v. *Cleckley*, 558 Pa. 517, 527, 738 A.2d 427 (1999); *State* v. *Cox*, 171 S.W.3d 174, 181–84 (Tenn. 2005); *State* v. *Contrel*, 886 P.2d 107, 111–12 (Utah App. 1994), cert. denied, 899 P.2d 1231 (Utah 1995); *State* v. *Zaccaro*, 154 Vt. 83, 88–91, 574 A.2d 1256 (1990); *State* v. *McCrorey*, 70 Wash. App. 103, 110–11, 851 P.2d 1234, review denied, 122 Wash. 2d 1013 (1993); *State* v. *Rodgers*, 119 Wis. 2d 102, 114–15, 349 N.W.2d 453 (1984). For many of the reasons set forth in part I of this opinion, however, I believe that the cases that have rejected *Schneckloth* are better reasoned and, therefore, more persuasive with respect to the determination of whether consent voluntarily was granted in the inherently coercive context of a routine traffic stop.

For example, in *State* v. *Johnson*, 68 N.J. 349, 353–54, 346 A.2d 66 (1975), the New Jersey Supreme Court rejected *Schneckloth* in construing the New Jersey constitution[11] and imposed a knowledge requirement for consent searches.[12] The court in *Johnson* observed that "[m]any persons, perhaps most, would view the request of a police officer to make a search as having the force of law. Unless it is shown by the [s]tate that the person involved knew that he had the right to refuse to accede to such a request, his assenting to the search is not meaningful. One cannot be held to have waived a right if he was unaware of its existence." Id., 354. The court therefore concluded that when "the [s]tate seeks to justify a search on the basis of consent it has the burden

of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent." Id., 353–54. Although the court declined to impose a strict warning requirement in noncustodial settings, under the New Jersey constitution, the state must demonstrate that the defendant knew that he or she had the right to refuse to give consent.[13] Id.

Justice Morris Pashman dissented. Although he agreed with the majority in rejecting *Schneckloth* for purposes of the New Jersey constitution, he concluded that the standard that the majority adopted fell "short of what [was] necessary to protect the privacy rights of the consenting individual." Id., 359 (Pashman, J., dissenting). Recognizing that a person confronted with a request by the police for consent to search is likely to feel an element of compulsion due to the nature of the encounter, Justice Pashman concluded that the state should be obligated to establish that that person was aware of his right to withhold consent and that the police would respect his decision to withhold consent if he chose to do so. Id., 366 (Pashman, J., dissenting). Justice Pashman explained: "I find it inconceivable and incomprehensible to suppose that an individual can be said to have relinquished privileges as fundamental as those embodied in our constitutional guarantees against unreasonable searches and seizures unless it clearly and unmistakably appears that the subject of the search knew that he did not have to submit to the official request. *Schneckloth* . . . cannot withstand close scrutiny when it treats that knowledge as merely one factor to be considered in determining the validity of a consent search." Id., 367–68 (Pashman, J., dissenting).

Similarly, in *Penick* v. *State*, 440 So. 2d 547, 551 (Miss. 1983), the Mississippi Supreme Court concluded, contrary to the holding of *Schneckloth*, that a knowing waiver is necessary before consent may be deemed valid under the Mississippi constitution. Subsequently, the Mississippi Supreme Court clarified that the state is not required to prove that the defendant had knowledge of his or her right to refuse consent; instead, the defendant must show "impaired consent or some diminished capacity." (Internal quotation marks omitted.) *Graves* v. *State*, 708 So. 2d 858, 863 (Miss. 1997). Thus, "[i]f the defendant claims that his waiver was not knowledgeable, the burden is on him to raise the issue of lack of knowledgeable waiver. Knowledgeable waiver is defined as consent [when] the defendant knows that he or she has a right to refuse, being cognizant of his or her rights in the premises." Id., 864. Although this standard is not crystal clear, most courts have interpreted it as requiring a knowledgeable waiver for all consent searches. See, e.g., *Commonwealth* v. *Cleckley*, supra, 558 Pa. 526.

In a context analogous to the temporary detention of the subject of a routine traffic stop, that is, a consensual

investigative encounter,[14] the Hawaii Supreme Court has concluded that, under the Hawaii constitution, an investigating officer must inform the subject of a suspicionless encounter of his or her right to terminate the encounter.[15] See *State* v. *Kearns*, 75 Haw. 558, 570–72, 867 P.2d 903 (1994). In particular, the court concluded that "an investigative encounter can . . . be deemed 'consensual' [only] if (1) prior to the start of questioning, the person encountered was informed that he or she had the right to decline to participate in the encounter and could leave at any time, and (2) the person thereafter voluntarily participated in the encounter."[16] Id., 571.

In reaching its conclusion, the court observed that "[i]t is appropriate to require police officers who wish to question individuals without even a reasonable suspicion of criminal activity to ensure that the individuals are aware of their rights, because 'no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights.' *Escobedo* v. *Illinois*, 378 U.S. 478, 490 [84 S. Ct. 1758, 12 L. Ed. 2d 977] (1964) . . . . Moreover, 'if the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.' Id." *State* v. *Kearns*, supra, 75 Haw. 571. Indeed, in a subsequent case, *State* v. *Trainor*, 83 Haw. 250, 925 P.2d 818 (1996), the Hawaii Supreme Court explained that, "[i]n the context of walk and talk investigations[17] . . . [c]onsent . . . can hardly be viewed as either voluntary or intelligent if it is obtained through such material nondisclosures as an officer's failure to advise the consenting individual . . . that the individual is free to go at any time." (Internal quotation marks omitted.) Id., 260.

Moreover, at least two state courts expressly have declined to apply *Schneckloth* in the context of a "knock and talk" search, which has been described as a "fashionable . . . alternative to obtaining a search warrant when police officers do not have sufficient probable cause to obtain a search warrant. What generally occurs is that several law enforcement officers accost a home dweller on the doorstep of his or her home and request consent to search that home. If an oral consent is given, the search proceeds. What is found by police officers may then form the basis for probable cause to obtain a search warrant and result in the subsequent seizure of contraband." (Internal quotation marks omitted.) *State* v. *Brown*, 356 Ark. 460, 466, 156 S.W.3d 722 (2004). Thus, in *State* v. *Ferrier*, 136 Wash. 2d 103, 115, 118–19, 960 P.2d 927 (1998), and *State* v. *Brown*, supra, 472–74, the Supreme Court of Washington and the Supreme Court of Arkansas, respectively, held that the use of the "knock and talk" investigative technique is unconstitutional when the police fail to inform the subject of his or her right to refuse consent.

In *Ferrier*, the Supreme Court of Washington concluded that, under article I, § 7, of the Washington constitution,[18] as a prerequisite for a valid knock and talk search, the resident must be "advised, prior to giving her consent to the search of her home, that she could refuse to consent." *State* v. *Ferrier*, supra, 136 Wash. 2d 115. The court observed: "[A]ny knock and talk is inherently coercive to some degree. . . . [T]he great majority of home dwellers confronted by police officers on their doorstep or in their home would not question the absence of a search warrant because they either (1) would not know that a warrant is required; (2) would feel inhibited from requesting its production, even if they knew of the warrant requirement; or (3) would simply be too stunned by the circumstances to make a reasoned decision about whether or not to consent to a warrantless search." Id. To mitigate the coercive effects of the knock and talk, the court concluded that "officers who conduct the procedure [must] warn home dwellers of their right to refuse consent to a warrantless search. This would provide greater protection for privacy rights that are protected by the state constitution and would also accord with the state's [f]ourth [a]mendment burden of demonstrating, by clear and convincing evidence, that consent to a search was voluntarily given." Id., 116. The court further observed that "the only sure way to give [the right to refuse consent] substance is to require a warning of its existence. If we were to reach any other conclusion, we would not be satisfied that a home dweller who consents to a warrantless search possessed the knowledge necessary to make an informed decision. That being the case, the [s]tate would be unable to meet its burden of proving that a knowing and voluntary waiver occurred." Id., 116–17; see *State* v. *Brown*, supra, 356 Ark. 470–72 (adopting *Ferrier*, among other cases, for purposes of article two, § 15,[19] of Arkansas constitution);[20] see also *State* v. *Brown*, supra, 466 ("[i]t is the intimidation effect of multiple police officers appearing on a home dweller's doorstep, sometimes in uniform and armed, and requesting consent to search without advising the home dweller of his or her right to refuse consent that presents the constitutional problem").

Although it is axiomatic that the "physical entry of the home is the chief evil against which the wording of the [f]ourth [a]mendment is directed"; *United States* v. *United States District Court*, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972); the analysis of the coercive effect of the knock and talk investigative procedure involved in the foregoing cases also is applicable to a request by the police for consent to search following a routine traffic stop because of the inherently coercive nature of the latter type of encounter. Indeed, the Wyoming Supreme Court has observed that the atmosphere surrounding a traffic stop is more coercive than that attendant to the knock and talk encounter,

stating that "the standards [that have been] . . . applied in [cases involving] premises searches—where the individual is on his or her own premises and likely feels freer to turn law enforcement away—[are] even more applicable in the context of roadside vehicle searches—where the traveler has been stopped for a traffic offense and is not free to leave." *O'Boyle* v. *State*, 117 P.3d 401, 412 (Wyo. 2005).

As in *O'Boyle*, several courts have taken notice of the coercion inherent in the routine traffic stop in crafting rules applicable to that factual scenario. For example, in *State* v. *Carty*, 170 N.J. 632, 790 A.2d 903, modified, 174 N.J. 351, 806 A.2d 798 (2002), the court observed that, "[i]n the context of motor vehicle stops, [in which] the individual is at the side of the road and confronted by a uniformed officer seeking to search his or her vehicle, it is not a stretch of the imagination to assume that the individual feels compelled to consent." Id., 644. Indeed, after analyzing scholarly articles and empirical data, the court observed that (1) detained motorists give consent approximately 95 percent of the time it is sought even though, in New Jersey, following the decision of the New Jersey Supreme Court in *State* v. *Johnson*, supra, 68 N.J. 349, police in New Jersey are required to inform motorists of their right to withhold consent, and (2) the vast majority of motorists subjected to consent searches following routine traffic stops are not charged with any wrongdoing. *State* v. *Carty*, supra, 645. As a result, the court in *Carty* concluded that, despite its holding in *Johnson*, "consent searches following valid motor vehicle stops are either not voluntary because people feel compelled to consent for various reasons, or are not reasonable because of the detention associated with obtaining and executing the consent search."[21] Id., 646.

Although other courts have not expressly adopted the rule articulated in *Carty*, they nevertheless have identified the coercive effects of a request for consent to search following a routine traffic stop. For example, in *Brown* v. *State*, supra, 182 P.3d 624, the Alaska Court of Appeals observed that "motorists who have been stopped for traffic infractions do not act from a position of psychological independence when they decide how to respond to a police officer's request for a search. Because of the psychological pressures inherent in the stop, and often because of the motorist's ignorance of [his or her] rights, large numbers of motorists—guilty and innocent alike—accede to these requests." Id., 626. The court in *Brown* further observed that, "[i]n all but exceptional cases . . . consent searches [following routine traffic stops] are held to be valid under the [f]ourth [a]mendment. The federal law in this area is premised on the assumption that, all things being equal, a motorist who does not wish to be subjected to a search will refuse consent when the officer seeks permission to conduct a search. But experience has shown that this

assumption is wrong." Id., 630. The court concluded: "Motorists are giving consent in such large numbers that it is no longer reasonable to believe that they are making the kind of independent decision that lawyers and judges typically have in mind when they use the phrase 'consent search'." Id., 631; see also *Commonwealth* v. *Strickler*, 563 Pa. 47, 73, 757 A.2d 884 (2000) ("[the] element of coercion [inherent in all interactions between a uniformed police officer and a citizen] is obviously enhanced when police actually detain a citizen, albeit lawfully, for some period of time, by means of a traffic or similar stop"); *Commonwealth* v. *Strickler*, supra, 74 (in determining whether encounter following conclusion of routine traffic stop is consensual, courts cannot "discount the fact that there remains at work some pertinent psychological dynamic based [on] the relative positions of authority as between the officer and a citizen-subject, and an immediately-preceding exercise of the officer's authority").

Finally, although many state courts have adopted the *Schneckloth* standard under their respective state constitutions, I am more persuaded by the thoughtful dissenting opinions that have been issued in many of those cases. For example, in *Commonwealth* v. *Cleckley*, supra, 558 Pa. 517, the Supreme Court of Pennsylvania concluded that article I, § 8, of the Pennsylvania constitution does not require the subject of a consent search to be informed of his or her right to refuse to consent. See id., 527. The court, relying on (1) the fact that most states apply *Schneckloth* for purposes of their own constitutions, and (2) the lack of local policy issues indicating that a departure from the federal standard is needed; id., 526–27; concluded that "the federal voluntariness standard as enunciated in *Schneckloth* adequately protects the privacy rights obtained under [a]rticle I, [§] 8 of [the Pennsylvania] constitution." Id., 527.

In his dissent, Justice Russell M. Nigro concluded "that when police seek consent to perform an otherwise unconstitutional search, they should be required under . . . the Pennsylvania constitution to expressly advise the subject of the search that he or she has the right to refuse to give consent and that any refusal will be respected." Id., 528 (Nigro, J., dissenting). In reaching this conclusion, Justice Nigro stated that "the majority . . . ignore[d] the practical impact that a police officer's request for consent to search has on the average citizen." Id., 530 (Nigro, J., dissenting). Relying on both *State* v. *Johnson*, supra, 68 N.J. 349, and Justice Marshall's dissent in *Schneckloth*, Justice Nigro concluded that, "[i]f a person believes [that] he has no choice but to consent upon an officer's request, then that person's consent cannot be said to have been given voluntarily, much less knowingly and intelligently. The safeguard advocated by [the] [a]ppellant—a simple statement by the police that the subject of the search has the lawful

right to withhold consent to search—would serve to protect not only those who are unaware of their rights, but also those who, although perhaps aware of their rights, become too intimidated to refuse what can readily be perceived as an official demand." *Commonwealth* v. *Cleckley*, supra, 558 Pa. 530–31 (Nigro, J., dissenting). Lastly, Justice Nigro rejected the majority's assertion that the commonwealth of Pennsylvania would be prejudiced if it was required to inform suspects of their rights before seeking consent to search: "There is . . . little reason to believe, as the *Schneckloth* [c]ourt apparently did, that the requirement of informed consent would reduce the number of consent searches obtained by the police. It has not occurred with the [f]ifth [a]mendment waiver even in the wake of *Miranda*, and there is no reason to expect [that] it will occur in the face of the requirement to inform of the right to refuse a consent to search. Many cases hinge on confessions, despite the *Miranda* warning requirement. Although somewhat different considerations are often present in a confession situation, such as the prior arrest of the defendant, and thus more than mere suspicion exists at that point, there is little cause to believe that warnings of the right to refuse to consent to search will, in any great degree, cause a vast reduction in the number of consent searches." (Internal quotation marks omitted.) Id., 531 (Nigro, J., dissenting).

Likewise, in *State* v. *Flores*, supra, 280 Or. 273, the Supreme Court of Oregon concluded that the Oregon constitution provides no greater protection than the federal constitution for purposes of consent searches.[22] See id., 282. That case, in which the court implicitly overruled a prior Oregon Supreme Court decision that predated *Schneckloth* and required the police to inform the subject of the encounter of his or her right to withhold consent; see id., 276–77, 281; was predicated on (1) the reasoning of *United States* v. *Watson*, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976);[23] see *State* v. *Flores*, supra, 281; (2) the absence "of any unique local conditions, such as widespread police misconduct infringing suspects' rights against unreasonable searches and seizures, that would require a different rule under the state constitution"; id.; and (3) the perceived need for a "uniform" standard, "particularly when state and law enforcement agencies collaborate . . . ."[24] Id.

In his dissent, Justice Hans A. Linde noted the then existing criticism of *Schneckloth* and explained that the reasoning of *Schneckloth* was "rejected . . . by the experts who prepared the [M]odel Code of Pre-Arraignment Procedure for the American Law Institute, and by the [American Law Institute] in approving that code. The [American Law] [I]nstitute adopted the position that before undertaking a search on the basis of consent, an officer must inform the individual whose consent is sought that he need not consent and that

anything found may be used as evidence . . . . [I]n short, the [American Law] [I]nstitute would treat [the] waiver of the protection of a search warrant the same as [the] waiver of the right to remain silent."[25] Id., 285–86 (Linde, J., dissenting). Justice Linde also observed that, as the drafters of the Model Code of Pre-Arraignment Procedure explained in its accompanying commentary, there is a greater need for warnings in the context of a consent search than in the context of a custodial interrogation because, "by the consent search the officer is seeking to short-circuit another means available to him—the use of a warrant—to obtain evidence. No such alternative exists with respect to information sought by interrogation. It seems far less justifiable to omit the protection of the warning when, by the very act of seeking consent, the officer is depriving the person from whom it is sought of the protective screening of judicial involvement in the issuance of the warrant." (Internal quotation marks omitted.) Id., 286 (Linde, J., dissenting). Declining to adopt fully the American Law Institute's position, Justice Linde was persuaded by the approach that the New Jersey Supreme Court had taken in *Johnson* and concluded that warnings are not constitutionally required as long as the state could show that consent was given with the knowledge that it could be withheld. Id., 287–88 (Linde, J., dissenting). Dissenting justices of other state courts also have recognized the inherently coercive nature of the encounter between a police officer and motorist subject to a traffic stop. See, e.g., *Salmeron* v. *State*, 280 Ga. 735, 739, 632 S.E.2d 645 (2006) (Sears, C. J., dissenting) (disagreeing with decision of majority not to impose reasonable suspicion requirement for consent searches and noting that "[t]raffic stops are inherently time-consuming and coercive events providing ample opportunity for interrogations" and that "[m]ost citizens naturally feel compelled to submit to any request from a police officer who has already seized them for some other legal violation"); *State* v. *Akuba*, 686 N.W.2d 406, 426 (S.D. 2004) (Sabers, J., dissenting) ("An honest appraisal of the typical traffic stop must [lead] to the conclusion that it is an inherently coercive situation in which very few citizens understand their constitutional protections. . . . A citizen pulled over to the side of the road and brought to a trooper's car would not feel free to terminate the encounter and carry on with their business. . . . Therefore, the encounter is inherently coercive and an officer should be required to meet a threshold evidentiary standard before requesting such consent." [Citations omitted; internal quotation marks omitted.]).

Ultimately, I am not convinced by the reasoning of those courts that have adopted *Schneckloth* as the governing standard for purposes of their state constitutions. Indeed, those courts generally have not engaged in any substantive analysis of the rationale underlying the court's holding in *Schneckloth*. Moreover, they sim-

ply do not address the pervasive criticism that has been directed at *Schneckloth*.[26] As Justice Linde observed in his dissenting opinion in *Flores*, the extent of the protections of our constitution "is not answered by the [decision] in *Schneckloth* . . . . It cannot be answered by the Supreme Court of the United States but only by [the Supreme Court of Oregon]. Obviously, if [this] case had arisen before *Schneckloth* . . . this court would have had to form its own judgment. It does not escape that responsibility after *Schneckloth*." (Citations omitted.) *State* v. *Flores*, supra, 280 Ore. 285 (Linde, J., dissenting). For this reason, I am persuaded by the dissenting opinions in those cases because I believe that they properly account for the coercion inherent in routine traffic stops that was overlooked by the majority in *Schneckloth*.

IV

ECONOMIC AND SOCIOLOGICAL CONSIDERATIONS

In my view, these considerations support the conclusion that the police should be required to advise a motorist that he or she has a right to withhold consent to search following a routine traffic stop. Public trust in the police is likely to be enhanced if they are required to provide motorists with such an advisement, and the empirical evidence indicates that the vast majority of motorists who are warned of their right to withhold consent will continue to grant consent despite the warning. Indeed, it is especially important that a motorist be advised of his or her right to refuse consent when, as in the present case, the police officer lacks even a reasonable and articulable suspicion that the vehicle contains contraband; in such circumstances, a request for consent is no more than a fishing expedition pursuant to which the police are able to take advantage of the coercive nature of the encounter and, in many cases, the subject's lack of knowledge that he or she has the legal right to withhold consent without any resultant adverse consequences.

V

CONCLUSION

Upon review of the *Geisler* factors, I conclude that article first, § 7, of the Connecticut constitution provides greater protection than the federal constitution with respect to consent searches undertaken in connection with routine traffic stops. For the foregoing reasons, I am not persuaded by the analysis of *Schneckloth* and its progeny; the view that the police must inform motorists of their right to withhold consent, although the minority position, is considerably more persuasive. Indeed, by and large, those courts that have adopted the standard articulated in *Schneckloth* have failed to engage in any real analysis of the rationale underlying the court's holding in that case. Cf. *State* v. *Thompson*, supra, 284 Kan. 779–80 (observing that scholarly criti-

cism of *Schneckloth* "is valid in many respects" and that, if the court were free to adopt different rule, it "would consider a different paradigm," but also noting that it was not free to depart from *Schneckloth* in light of prior Kansas decisions concluding that Kansas constitution's analogue to fourth amendment was coextensive with federal constitution). I therefore am convinced that, for purposes of article first, § 7, of the state constitution, a motorist's consent to search following a routine traffic stop should not be deemed voluntary unless the motorist has been informed of his or her right to withhold consent.[27] In essence, I see no reason for this court to abandon its prior precedent concerning the standard for an effective waiver of a constitutional right. "[W]e have adopted the definition of a valid waiver of a constitutional right as the intentional relinquishment or abandonment of a known right." (Internal quotation marks omitted.) *State* v. *Gore*, 288 Conn. 770, 776, 955 A.2d 1 (2008); accord *State* v. *Ouellette*, 271 Conn. 740, 752, 859 A.2d 907 (2004). Having repeatedly characterized this standard as a "strict" one; *State* v. *Gore*, supra, 776; accord *State* v. *Ouellette*, supra, 752; we also have explained that "[a]n effective waiver presupposes full knowledge of the right or privilege allegedly waived and some act done designedly or knowingly to relinquish it. . . . Moreover, the waiver must be accomplished with sufficient awareness of the relevant circumstances and likely consequences." (Citations omitted; internal quotation marks omitted.) *State* v. *Ramos*, 201 Conn. 598, 603, 519 A.2d 9 (1986); cf. *State* v. *Madera*, 210 Conn. 22, 48, 554 A.2d 263 (1989) ("[c]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights . . . [and] do not presume acquiescence in the loss of fundamental rights" [internal quotation marks omitted]).

Applying these principles to the present case, I conclude that the defendant was not properly informed of his right to withhold consent. Although the state asserts that the defendant volunteered permission to search before consent was sought, and, consequently, there was no need for Morgan to inform the defendant of his right to withhold consent, I agree with the defendant that he reasonably construed Morgan's inquiry about whether the vehicle contained anything illegal as demonstrating Morgan's interest in searching the vehicle. Indeed, prior to asking the defendant about the contents of his vehicle, Morgan asked him whether he had anything illegal on his person; when the defendant responded in the negative, Morgan patted him down. In such circumstances, the defendant reasonably would have believed that Morgan intended to search the vehicle—an intent that Morgan readily and candidly acknowledged.[28] Thus, because the defendant was not informed of his right to refuse to consent to a search of his vehicle, I respectfully dissent.

[1] I disagree with Justice Katz that the defendant inadequately briefed his claim that Morgan's search of his vehicle violated his rights under the state

constitution on the ground that Morgan had failed to advise the defendant that he had a right not to consent to the search of his vehicle.

[2] I agree with the majority that the record is inadequate for review of the defendant's claim that Morgan's patdown search of the defendant was unlawful and, further, that Morgan's conduct in obtaining the defendant's consent to search did not violate the fourth amendment to the United States constitution. Finally, I also agree with the majority that, in contrast to the view expressed by Justice Katz in her dissenting opinion, it was not improper under the state constitution for Morgan to seek the defendant's consent to search despite his lack of reasonable and articulable suspicion to do so, at least in the absence of evidence indicating an abuse of the use of consent searches following routine traffic stops by the police. Thus, in my view, the search violated article first, § 7, of the state constitution not because Morgan sought the defendant's consent to search his vehicle but, rather, because Morgan had failed to advise the defendant that he had the right to refuse to consent to such a search.

[3] This court first articulated the importance of considering these factors for purposes of state constitutional analysis in *State* v. *Geisler*, supra, 222 Conn. 684–85, and, consequently, they often are referred to as the *Geisler* factors.

[4] See footnote 3 of this opinion.

[5] Because *Schneckloth* is the seminal case concerning consent searches following routine traffic stops, it is necessary to discuss the case in some detail.

[6] In reaching this conclusion, Justice Marshall explained that "the phrase 'voluntary consent' seems redundant in a way that the phrase 'voluntary confession' does not." *Schneckloth* v. *Bustamonte*, supra, 412 U.S. 280 n.6 (Marshall, J., dissenting). Relying on *Miranda*, Justice Marshall asserted that, "[b]ecause of the nature of the right to be free of compulsion, it would be pointless to ask whether a defendant knew of it before he made a statement; no sane person would knowingly relinquish a right to be free of compulsion. Thus, the questions of compulsion and of violation of the right itself are inextricably intertwined. The cases involving coerced confessions, therefore, pass over the question of knowledge of that right as irrelevant, and turn directly to the question of compulsion." Id., 281 (Marshall, J., dissenting). Justice Marshall further asserted that, although "we would not ordinarily think that a suspect could waive his right to be free of coercion, for example, we do permit suspects to waive the rights they are informed of by police warnings, on the belief that such information in itself sufficiently decreases the chance that a statement would be elicited by compulsion. . . . Thus, nothing the defendant did in [any case] involving coerced confessions was taken to operate as a relinquishment of his rights; certainly the fact that the defendant made a statement was never taken to be a relinquishment of the right to be free of coercion." (Citation omitted.) Id., 281–82 (Marshall, J., dissenting).

By contrast, Justice Marshall explained, the *Schneckloth* case did not involve the right to be free from police misconduct of the kind implicated by a coerced confession but, rather, the issue of consent. Id., 282 (Marshall, J., dissenting). Justice Marshall further observed that the two concepts are different because freedom from coercion is a substantive, constitutional right, whereas consent "is a mechanism by which substantive requirements, otherwise applicable, are avoided." Id. Thus, the substantive requirement of the fourth amendment is that searches may be conducted only on the basis of a properly issued warrant supported by probable cause. See id. Justice Marshall further asserted that, although there are exceptions to this requirement, they are justified by the overriding needs of law enforcement, which are applicable when consent is the sole justification for a search. Id., 282–83 (Marshall, J., dissenting). Indeed, Justice Marshall explained that "the needs of law enforcement are significantly more attenuated, for probable cause to search may be lacking but a search permitted if the subject's consent has been obtained. Thus, consent searches are permitted, not because such an exception to the requirements of probable cause and warrant is essential to proper law enforcement, but because we permit our citizens to choose whether . . . they wish to exercise their constitutional rights." Id., 283 (Marshall, J., dissenting).

[7] "When a prosecutor seeks to rely [on] consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance [on] a warrant cannot later be justified on the basis of consent

if it turns out that the warrant was invalid. The result can be no different when it turns out that the [s]tate does not even attempt to rely [on] the validity of the warrant, or fails to show that there was, in fact, any warrant at all." *Bumper* v. *North Carolina*, 391 U.S. 543, 548–50, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968).

[8] Although the Ohio Supreme Court had decided the case on the basis of both the federal and Ohio constitutions, the United States Supreme Court concluded that it was appropriate to consider the federal constitutional issue because the Ohio Supreme Court had relied almost entirely on fourth amendment jurisprudence in reaching its decision. *Ohio* v. *Robinette*, supra, 519 U.S. 36–37.

[9] Justice John Paul Stevens dissented, concluding that, on the basis of the facts presented, the Supreme Court of Ohio "correctly held that [the] consent [of the defendant, Robert Robinette] to the search of his vehicle was the product of an unlawful detention." *Ohio* v. *Robinette*, supra, 519 U.S. 45 (Stevens, J., dissenting). In reaching this conclusion, Justice Stevens explained that "[t]he [Supreme Court of Ohio] was surely correct in stating: 'Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.' " Id., 47 (Stevens, J., dissenting).

[10] I note that commentators also have criticized the court's reliance in *Schneckloth* on coerced confession cases because the court never explained why those cases are relevant in the fourth amendment context; e.g., D. Smith, comment, "*Ohio* v. *Robinette*: Per Se Unreasonable," 29 McGeorge L. Rev. 897, 928 (1998); whereas other commentators have characterized "the [c]ourt's distinction between 'trial rights' and [f]ourth [a]mendment rights [as] *questionable* . . . ." (Emphasis added.) D. Kaplan & L. Dixon, "Coerced Waiver and Coerced Consent," 74 Denv. U. L. Rev. 941, 951 (1997).

[11] The court in *Johnson* reached this conclusion even though article I, paragraph seven, of the New Jersey constitution is virtually identical to the fourth amendment and previously had not been interpreted to provide greater protections than the fourth amendment. *State* v. *Johnson*, supra, 68 N.J. 353 n.2.

[12] *Johnson* involved the consent search of a residence, but its holding applies to consent searches of vehicles following a routine traffic stop, as well. See, e.g., *State* v. *Carty*, 170 N.J. 632, 639, 790 A.2d 903, modified on other grounds, 174 N.J. 351, 806 A.2d 798 (2002).

[13] A 1999 consent decree required the provision of warnings in New Jersey in all cases involving requests for consent to search following a routine traffic stop. Consent Decree in *United States* v. *New Jersey*, Civil No. 99-5970 (MLC) (D.N.J. December 30, 1999), available at http://www.state.nj.us/oag/jointapp.htm (last visited August 26, 2010).

[14] "The Supreme Court has said [that] there are three types of police-citizen encounters:

"(1) consensual encounters [that] do not implicate the [f]ourth [a]mendment; (2) investigative detentions [that] are [f]ourth [a]mendment seizures of limited scope and duration and must be supported by a reasonable suspicion of criminal activity; and (3) arrests, the most intrusive of [f]ourth [a]mendment seizures and reasonable only if supported by probable cause." (Internal quotation marks omitted.) *United States* v. *Brown*, 496 F.3d 1070, 1074 (10th Cir. 2007).

[15] The Hawaii Supreme Court characterized this police practice as a "walk and talk" investigation. (Internal quotation marks omitted.) *State* v. *Kearns*, 75 Haw. 558, 564, 867 P.2d 903 (1994). The court explained the practice as follows: "[T]he Honolulu [p]olice [department] . . . utilizes a walk and talk drug interdiction program in order to arrest drug smugglers and to seize any narcotics [that] they might be carrying on their persons or in their luggage. This walk and talk program does not employ any type of drug courier profile or require the officers to have a reasonable suspicion that a person may be in possession of illegal drugs . . . or . . . engaged in criminal activity. Instead, [officers] are trained to engage in consensual encounters whereby airline passengers are approached and in a conversational manner, [are] requested to consent to a search of their luggage or person." (Internal quotation marks omitted.) Id.

[16] It must be noted that, in *Kearns*, the court stated that, for purposes of a consent search, the police are *not* required to inform the person whose consent to search is sought that he or she has the right to refuse consent.

State v. *Kearns*, supra, 75 Haw. 570. The court explained that, "[a]lthough this rule is appropriate in the context of searches [when] the scope of the search is generally well-defined and limited to a particular item or area at the time consent is given, it is not equally applicable to seizures"; id.; including the "walk and talk" encounter. The court, however, failed to offer any meaningful explanation as to why it is constitutionally necessary for the police to advise the subject of a "walk and talk" encounter of his or her right to refuse to speak to the police, on the one hand, and why it is not constitutionally necessary for the police to advise a person of his or her right to withhold consent to a search, on the other. Indeed, it is particularly difficult to ascertain the reason for any such distinction when, as in the present case, the police do not even have reasonable suspicion that the person from whom consent to search is sought is in possession of contraband. Thus, I disagree with the court in *Kearns* that its rationale for requiring the police to advise the subject of a "walk and talk" encounter is not equally applicable to a case involving a consent to search. Cf. *State* v. *Robinette*, supra, 80 Ohio St. 3d 244 ("The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow." [Internal quotation marks omitted.]).

[17] See footnote 15 of this opinion.

[18] Article I, § 7, of the Washington constitution, Washington's analogue to the fourth amendment, provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." As the court in *Ferrier* observed, "[t]his provision differs from the [f]ourth [a]mendment in that [u]nlike the [f]ourth [a]mendment, [the Washington constitution] clearly recognizes an individual's right to privacy with no express limitations." (Internal quotation marks omitted.) *State* v. *Ferrier*, supra, 136 Wash. 2d 110.

[19] Article two, § 15, of the Arkansas constitution provides: "The right of the people of this State to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." As the court in *Brown* observed, this provision is almost identical to the fourth amendment to the United States constitution. *State* v. *Brown*, supra, 356 Ark. 467.

[20] In reaching its conclusion, however, the court in *Brown* distinguished its automobile search jurisprudence. See *State* v. *Brown*, supra, 356 Ark. 468. Specifically, the Arkansas Supreme Court previously had determined that, with respect to automobile searches, the protections of the Arkansas constitution are coterminous with those of the fourth amendment to the United States constitution. Id. With respect to the search of a home, however, the Arkansas Supreme Court previously had determined that the Arkansas constitution provides greater protection than the federal constitution. See id., 468–70.

[21] Accordingly, the New Jersey Supreme Court engrafted onto *Johnson* an additional requirement, namely, "that consent searches following a lawful stop of a motor vehicle should not be deemed valid under *Johnson* unless there is reasonable and articulable suspicion to believe that an errant motorist or passenger has engaged in, or is about to engage in, criminal activity." *State* v. *Carty*, supra, 170 N.J. 647. The court reasoned that this requirement "serves to validate the continued detention associated with the search. It also serves the prophylactic purpose of preventing the police from turning a routine traffic stop into a fishing expedition for criminal activity unrelated to the stop." Id.; see also *State* v. *Fort*, 660 N.W.2d 415, 418–19 (Minn. 2003) (as matter of state constitutional law, police may not question subject of routine traffic stop regarding matters unrelated to that stop without reasonable and articulable suspicion).

[22] Specifically, the defendant, Armando Zamora Flores, contended that his consent to search two lockers at a bus station was invalid because the police had failed to inform him of his right to refuse to consent to the search. *State* v. *Flores*, supra, 280 Or. 275–76. Flores was in custody when he gave consent to search. See id., 275. Although the court in *Schneckloth* did not address whether its rationale extended to cases in which a suspect is in custody, in *United States* v. *Watson*, 423 U.S. 411, 424–25, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976), the United States Supreme Court concluded that it did under the circumstances of that case.

[23] See footnote 22 of this dissenting opinion.

[24] The Supreme Court of Oregon addressed the merits of the state constitutional claim of the defendant, Armando Zamora Flores, only briefly, concluding that "requiring proof that a criminal suspect was aware of his right to refuse consent would be tantamount to requiring a police warning similar to the *Miranda* warning. . . .

"The application of [*Miranda*] to searches and seizures can . . . be justified [only] on the basis that there is the same necessity for prophylaxis because of similar abuses by the police in obtaining consents to searches and seizures." (Internal quotation marks omitted.) *State* v. *Flores*, supra, 280 Or. 281–82. The court, however, did not analyze the reasoning of either *Schneckloth* or *Watson*.

[25] "[T]he reporter for the search and seizure sections of the Model Code of Pre-Arraignment Procedure . . . commented [further] on *Schneckloth* as follows: 'It seems unlikely that there is any greater knowledge of one's right to refuse a search than the right to silence.' He goes on to explain that a choice based on a wholly erroneous factual belief may not be the result of a will that has been overborne, but neither is it an understanding choice.

" 'In consent searches, the police have full knowledge that the person from whom they are seeking consent is under no obligation to give it. The right to refuse is a fact crucially pertinent to an understanding consent and, if there is the slightest doubt that the person in question is not aware of his right, and no such information is given [to] him, the police are eliciting consent on the basis of withheld information. It is hard to describe such conduct as other than deceptive, or the [c]ourt's decision [in *Schneckloth*] as other than retrograde.' " *State* v. *Rodgers*, supra, 119 Wis. 2d 119–20 n.3 (Abrahamson, J., dissenting).

[26] For example, in *State* v. *Cox*, supra, 171 S.W.3d 174, the court adopted *Schneckloth* as the governing test under the Tennessee constitution, predicated on the following analysis: "In the case of consent searches . . . the totality of the circumstances test adequately balances the government's interest in pursuing criminal investigations against the citizen's right to be free from unreasonable searches and seizures. The very nature of a consent search differs from the other exceptions to the warrant requirement; a subject approached regarding a consent search is presumed free to decline the request. . . .

"*Schneckloth* remains the majority rule despite the occasional efforts to scuttle it. Accordingly, [the court] decline[s] to impose a requirement that the subject be informed of the right to refuse consent." Id., 183–84; see also *Henry* v. *State*, supra, 621 P.2d 4 n.9 (adopting *Schneckloth* because "the formal waiver requirements appropriate in a trial setting or during custodial interrogation would unjustifiably hamper proper police investigation").

[27] It may be argued, as some courts have concluded, that the state should not be required to establish that the police advised the subject of the consent search of his or her right to refuse consent, as long as the state can prove that the subject actually knew that consent could be withheld. I do not agree with this approach because it is important that the subject be made aware that the police are prepared to honor the subject's decision to refuse consent and that no adverse consequences will befall the subject upon such a refusal. Unless the police warn the subject of his or her right to refuse consent, there remains the risk that the subject will feel compelled to agree to the search out of concern for how the police will react to a decision to withhold consent.

[28] As I previously indicated, I agree with the majority's conclusion that the record is inadequate to review the defendant's separate claim that the patdown search was illegal. The fact that Morgan conducted a patdown search of the defendant, however, is relevant to the issue of whether the defendant reasonably would have considered Morgan's subsequent inquiry regarding the presence of contraband in the vehicle as indicative of Morgan's intent to search the vehicle.