

## RIGHT-TO-REFUSE WARNINGS: A MINORITY'S CRUSADE FOR JUSTICE

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### I. INTRODUCTION

SINCE 1991, when an appellate court first used the phrase “knock and talk,” both citizens and courts have questioned the constitutionality of this procedure.<sup>1</sup> Although courts settled the constitutionality issue, questions remain as to the fairness of the technique. Many police departments utilize the “knock and talk” to its fullest potential because it is a simple way to bypass the warrant requirement of the Fourth Amendment and comparable state amendments.<sup>2</sup> Police use the “knock and talk” when they do not have enough information to receive a search warrant, but they are suspicious of an individual and want to be proactive. Therefore, they will approach a person’s house, knock on the door, explain why they are there, and ask for consent to search the house. More often than not, the homeowner will consent to the search.<sup>3</sup>

Critics of the “knock and talk” argue it is unfair because people do not know their rights during this procedure.<sup>4</sup> As a result, homeowners’ consent to the search is usually against their best interests. Any contraband or other evidence obtained during the search can, and often does, lead to serious consequences for the homeowner. Some state courts have tried to make the “knock and talk” less intrusive and fairer for the homeowner. One way is to require the police officer, before asking for consent, to inform the homeowner that he has the right to refuse consent.<sup>5</sup> The “right-to-refuse warning” is currently required only by a minority of states. However, this simple warning would have dramatic effects if adopted everywhere. For example, it would drastically serve to combat the inherent coerciveness of this procedure as well as help preserve mutual respect between the police and the homeowner.

This comment examines the Arkansas Supreme Court’s decision in *Carson v. State of Arkansas*,<sup>6</sup> which reinforced its ruling in *State v. Brown*.<sup>7</sup> Where the

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1. H. Morley Swingle & Kevin M. Zoellner, “Knock and Talk” Consent Searches: If Called by a Panther, Don’t Anther, 55 J. MO. B. 25, 25 (Jan./Feb. 1999). The case that first used the phrase “knock and talk” was *State v. Land*, 806 P.2d 1156, 1157 (Or. Ct. App. 1991).

2. See Swingle & Zoellner, *supra* note 1, at 25.

3. *Id.* (quoting *State v. Smith*, 488 S.E.2d 210, 212 (N.C. 1997)).

4. See *id.* at 26.

5. See, e.g., *State v. Ferrier*, 960 P.2d 927, 933 (Wash. 1998); *State v. Graves*, 708 So. 2d 858, 863 (Miss. 1997).

6. No. CR04-863, 2005 Ark. LEXIS 455 (Ark. July 1, 2005).

7. 156 S.W.3d 722 (Ark. 2004).

court held that requiring state police officers to provide a right-to-refuse warning before any search of the home, even with consent, can be considered valid. First, this comment explains a “knock and talk” procedure and how it fits in the larger context of searches and seizures. Second, it briefly summarizes the U.S. Supreme Court’s decisions on such procedures and how that Court has ruled on the issue of requiring police officers to give the subject of the search a warning of the right to refuse consent. Third, this comment discusses the facts and reasoning behind the decision in *Carson*. Fourth, this comment analyzes various other states’ approaches to right-to-refuse warnings and focuses on the “knock and talk” procedure. In addition, this comment explores why a small minority of states adopted the approach of Arkansas and afforded more protection for citizens under their own constitutions, even those with almost identical wording to the U.S. Constitution. It also explores why many more states have adopted the U.S. Supreme Court’s reasoning and have not required right-to-refuse warnings. Finally, this comment discusses the notion of whether “voluntary” consent is ever truly voluntary. This comment argues that the Arkansas approach requiring right-to-refuse warnings is the approach all states should adopt when police officers conduct a “knock and talk.”

## II. BACKGROUND

Typically, the legal system requires a police officer to have a warrant before entering a private home. This requirement is set forth by the Fourth Amendment in the U.S. Constitution, and is replicated in state constitutions.<sup>8</sup> However, there is a simple way to circumvent the warrant requirement—the police officer can obtain the homeowner’s voluntary consent to search.<sup>9</sup> To determine whether the consent is voluntary, the U.S. Supreme Court, along with many state courts,<sup>10</sup> employs a totality of the circumstances test.<sup>11</sup> Using the totality of the circumstances test, courts determine if consent was voluntary by considering factors such as, “the number of officers present, the age, maturity, intelligence, and experience of the consenting party, the officers’ conduct . . . and the duration, location, and time of the encounter.”<sup>12</sup> In addition, some courts also consider whether the person had knowledge of the right to refuse consent. States have

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8. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

9. *Schneekloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

10. *See, e.g., Scott v. State*, 782 A.2d 862, 875 (Md. 2001).

11. *Schneekloth*, 412 U.S. at 225-26.

12. *Scott*, 782 A.2d at 875-77 (applying these factors and, although acknowledging the Washington and New Jersey Supreme Court’s opinion to the contrary, refusing to weigh any factor more heavily than any other).

differing views regarding how much weight to place on that factor. Some states, such as Arkansas, have deemed knowledge of the right to refuse consent the determinative factor, while others afford it equal weight with the other factors.<sup>13</sup>

A. *Definition of a “Knock and Talk”*

What exactly is a “knock and talk” procedure? While many courts provide a definition,<sup>14</sup> the Indiana Court of Appeals provides one of the most comprehensive:

A knock and talk investigation “involves officers knocking on the door of a house, identifying themselves as officers, asking to talk to the occupant about a criminal complaint, and eventually requesting permission to search the house. If successful, it allows police officers who lack probable cause to gain access to a house and conduct a search.”<sup>15</sup>

Once the officers get permission to search the house, they are allowed to use any contraband they find as the basis for probable cause.<sup>16</sup> The officers can then obtain a search warrant and seize the contraband.<sup>17</sup> However, the officer will not always need to obtain a search warrant due to the plain view doctrine. The well-established plain view doctrine states “police may seize evidence in plain view without a warrant.”<sup>18</sup> This rule applies as long as the “initial intrusion that brings the police within plain view is supported ... by one of the recognized exceptions to the warrant requirement.”<sup>19</sup> Police use one of the recognized exceptions—voluntary consent—in the “knock and talk” procedure. Thus, as long as the homeowner voluntarily allows the police officer inside the home, the officer can legally seize any contraband within his plain view. Furthermore, not only can the officer seize the contraband, but the officer can also arrest the homeowner for possession of the contraband. Therefore, consenting to a “knock and talk” could have serious consequences for the homeowner. Despite the potentially severe consequences, the U.S. Supreme Court has never heard a case directly involving the constitutionality of this simple method for police officers to bypass the search warrant requirement.<sup>20</sup>

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13. See, e.g., *Hayes v. State*, 794 N.E.2d 492, 496-97 (Ind. Ct. App. 2003).

14. See, e.g., *State v. Smith*, 488 S.E.2d 210, 212 (N.C. 1997); *Iowa v. Reinier*, 628 N.W.2d 460, 466 (Iowa 2001).

15. *Hayes*, 794 N.E.2d at 496 (citations omitted) (quoting *State v. Reinier*, 628 N.W.2d 460, 466 (Iowa 2001)).

16. *State v. Brown*, 156 S.W.3d 722, 726 (Ark. 2004).

17. *Id.*

18. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (plurality opinion) (stating that the plain view doctrine is not violative of any privacy rights because it only occurs after a valid search has already begun).

19. *Horton v. California*, 496 U.S. 128, 135 (1990) (holding that any “plain view” evidence seized via a search pursuant to a search warrant is legal).

20. See *Hayes*, 794 N.E.2d at 496 (noting that the only cases to address this issue are federal and state appellate courts).

Even though the Supreme Court has never heard a “knock and talk” case, “[b]oth federal and state appellate courts which have considered the question . . . have concluded that the ‘knock and talk’ procedure does not *per se* violate the Fourth Amendment.”<sup>21</sup> Consequently, if police arrest a homeowner as a result of a “knock and talk” search, the homeowner cannot argue that the procedure was unconstitutional. Instead, most homeowners will claim their consent was not voluntary.<sup>22</sup> A court will then look at the totality of the circumstances test outlined in *Schneekloth v. Bustamonte*<sup>23</sup> to determine voluntariness.

Although many are critical of the “knock and talk” procedure, others defend it as a valid and necessary police practice for several reasons. First, a “knock and talk” is not a guise under which police officers can do whatever they want. The procedure must be used solely to gain consent to a search. “[M]erely characterizing a law enforcement maneuver as a ‘knock and talk’ does not warrant judicial bypass of constitutional safeguards against unreasonable searches and seizures.”<sup>24</sup> Second, proponents of the procedure argue that requiring more than a “knock and talk” could unfairly benefit a guilty homeowner. If the homeowner refuses to give consent, the police’s “knock and talk” attempt “would not only alert the suspect that he is being watched but would quite likely leave the police empty handed.”<sup>25</sup> Third, the judicial system has examined the “knock and talk” and has determined it to be a valid practice. As long as the procedure is constitutional, there is no reason for police to stop using these tactics. Most importantly, supporters of the “knock and talk” search note that the tactic is frequently successful.<sup>26</sup>

Whether police use the “knock and talk” to get drugs off the street or keep child pornography out of the market, police have successfully employed this technique to achieve such results.<sup>27</sup> The problem with the “knock and talk” lies not within the procedure itself, but within the circumstances surrounding the search.<sup>28</sup> However, these circumstances could be mitigated with one simple sentence: “You have the right to refuse to consent to our search.” The question

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21. *Id.*

22. Rick Rousos & Jenna Deopere, “Knock and Talk” Search Comes Under Fire, LEDGER, Jan. 27, 1999, at A1.

23. *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (setting forth many factors to take into consideration, including: age of the accused, lack of education or low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, and the repeated and prolonged nature of the questioning).

24. *People v. Galloway*, 675 N.W.2d 883, 888 (Mich. Ct. App. 2003) (recognizing that there could be times when, even though the procedure is constitutional, the “knock and talk” procedure will be considered unreasonable).

25. Swingle & Zoellner, *supra* note 1, at 26.

26. *Id.* at 25.

27. *See, e.g., United States v. Spence*, 397 F.3d 1280 (10th Cir. 2005).

28. *See* Adrian J. Barrio, Note, *Rethinking Schneekloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court’s Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 222 (citing Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPL. SOC. PSYCHOL. 47 (1974) (studies suggest that a police officer’s mere request to search compromises a suspect’s decision-making ability)).

remains, why do so many states refuse to mandate something so simple, yet so important?

*B. United States Supreme Court Decisions*

To better understand where a “knock and talk” procedure stands, this comment examines the landmark U.S. Supreme Court cases in which the Court has refused to require that police tell people of their rights during a consensual encounter. Because most state courts consider a “knock and talk” a consensual encounter, they follow the U.S. Supreme Court precedent and do not require police to give right-to-refuse warnings. However, a few state courts have resisted this approach and require this warning under their own constitutions.

The U.S. Supreme Court has never reviewed the constitutionality of the “knock and talk” procedure, but has, in other contexts, discussed whether it was necessary for police officers to provide the subject of the search with a right-to-refuse warning during consensual encounters.<sup>29</sup> One of the principal cases that addressed the right-to-refuse warning was *Schneckloth v. Bustamonte*.<sup>30</sup> A police officer stopped a car because it had an improperly working headlight and license plate light.<sup>31</sup> During the stop, the officer asked to search the car.<sup>32</sup> A passenger, the owner’s brother, consented to the search, which produced three stolen checks.<sup>33</sup> The passenger was eventually convicted for possessing checks with the intent to defraud.<sup>34</sup> The Ninth Circuit vacated the federal district court’s denial of a writ of habeas corpus and remanded the case; it held that because the police officer did not inform him of his right to refuse consent, the consent was involuntary.<sup>35</sup> The U.S. Supreme Court reversed the Ninth Circuit and held that knowledge of the right to refuse consent is only one of many factors to consider in the totality of the circumstances to determine the voluntariness of consent.<sup>36</sup>

In *Schneckloth*, the U.S. Supreme Court did not provide many reasons for their refusal to “Mirandize” the Fourth Amendment. However, it did note that “it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning.”<sup>37</sup> Justice Marshall’s dissent was skeptical of this argument.<sup>38</sup> Marshall stated that he had “difficulty in comprehending how a decision made without knowledge of available alternatives can be treated as a choice at all.”<sup>39</sup> His strong dissent demonstrates the divisiveness of this topic with each side equally passionate about its position.

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29. See, e.g., *Schneckloth*, 412 U.S. at 218.

30. *Id.*

31. *Id.* at 220.

32. *Id.*

33. *Schneckloth v. Bustamonte*, 412 U.S. 218, 220 (1973).

34. *Id.* at 219-20.

35. *Id.* at 221-22.

36. *Id.* at 232-33.

37. *Id.* at 231.

38. *Id.* at 287 (Marshall, J., dissenting).

39. *Id.* at 284 (Marshall, J., dissenting).

Furthermore, Marshall's dissent was so well reasoned that some state courts incorporated his arguments into their majority opinions when implementing right-to-refuse warnings.<sup>40</sup>

The U.S. Supreme Court reinforced the *Schneckloth* holding in 1996 through its opinion in *Ohio v. Robinette*.<sup>41</sup> In *Robinette*, a police officer pulled the defendant over for speeding and performed a routine traffic stop.<sup>42</sup> After the officer completed the stop, he asked if he could search the car.<sup>43</sup> Robinette consented.<sup>44</sup> Upon searching the car, the officer found marijuana and a methamphetamine pill.<sup>45</sup> Robinette was eventually charged with the "knowing possession of a controlled substance."<sup>46</sup> The Ohio Supreme Court created a bright-line rule that officers must tell the individuals that they are "free to go" before a consent search can be considered voluntary.<sup>47</sup> However, the U.S. Supreme Court reversed.<sup>48</sup> Using the *Schneckloth* reasoning, the Court reiterated that there should not be a bright-line rule regarding the validity of a consent search.<sup>49</sup>

Neither *Schneckloth* nor *Robinette* dealt specifically with consent in the "knock and talk" context, but the U.S. Supreme Court illustrated its disapproval of bright-line warning requirements in a non-custodial setting. In both cases, the Supreme Court strongly endorsed a case-by-case totality of the circumstances analysis to determine voluntariness.<sup>50</sup> When examining the totality of the circumstances, the Court determined that knowledge of a right to refuse could be one of the factors used, but it should not be the only factor. Furthermore, courts should not afford such knowledge more weight than any other factor in the analysis.<sup>51</sup>

In addition to the U.S. Supreme Court's consideration of right-to-refuse warnings during consent searches, some state courts have also considered the issue under their own constitutions. Even though state courts must provide as much protection as required by the Fourth Amendment, state courts can interpret their own constitutional search and seizure provisions to confer greater protection for their own citizens.<sup>52</sup> However, even with this ability, many state courts do not deviate from the Supreme Court's interpretation on many issues. State courts are aware of the delicate balance of which Justice Souter spoke when he said, "If we place too much reliance on federal precedent we will render the State rules a

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40. *State v. Ferrier*, 960 P.2d 927, 933-34 (Wash. 1998).

41. 519 U.S. 33, 39-40 (1996).

42. *Id.* at 35-36.

43. *Id.* at 36.

44. *Id.*

45. *Id.*

46. *Id.*

47. *State v. Robinette*, 653 N.E.2d 695, 696 (Ohio 1995).

48. *Ohio v. Robinette*, 519 U.S. 33, 36 (1996).

49. *Id.* at 39-40.

50. *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973); *Robinette*, 519 U.S. at 40.

51. *Schneckloth*, 412 U.S. at 232-33; *Robinette*, 519 U.S. at 39-40.

52. *California v. Greenwood*, 486 U.S. 35, 38-39 (1988) (rejecting the respondent's argument that the Fourth Amendment alone can set the standards for police conduct).

mere row of shadows; if we place too little, we will render State practice incoherent.”<sup>53</sup> Nevertheless, some state courts choose to confer more protection than the Supreme Court’s minimal safeguards for consent searches. Arkansas is one such state as evidenced in the decision *Carson v. State*.<sup>54</sup>

### III. STATEMENT OF THE CASE

It was eleven o’clock in the morning when Dawson, a non-uniformed officer, traveled alone to David Carson’s house.<sup>55</sup> Earlier, Officer Dawson received a phone call with information that Carson was manufacturing drugs out of a home lab.<sup>56</sup> Doubtful that the phone call was sufficient probable cause to be granted a search warrant, he decided to employ the “knock and talk” procedure.<sup>57</sup> The officer arrived at Carson’s house, knocked on the door, and Carson opened the door.<sup>58</sup> When Officer Dawson showed Carson his badge and asked to step inside, Carson refused.<sup>59</sup> At first, Carson told him he was busy; then he stepped outside to speak with the officer.<sup>60</sup> Officer Dawson later testified that Carson was acting suspicious because he was “sweating, had trouble making eye contact, and was shaking.”<sup>61</sup> The officer began to talk about the strong chemical odor emanating from the house, Carson’s stained hands, and “everything [he] could see that [he] thought would relate to the manufacturing of methamphetamine.”<sup>62</sup> At that point, Carson began to cry, confessed to Officer Dawson that he did in fact have a methamphetamine lab, and took him inside to show him everything.<sup>63</sup> Officer Dawson saw the items in plain view and “placed Carson into custody.”<sup>64</sup>

At trial, the judge denied Carson’s motion to suppress the evidence found in his home.<sup>65</sup> Carson entered a conditional plea of guilty, and the trial court sentenced him to four years in prison.<sup>66</sup> Carson appealed, arguing the “knock and talk” was illegal because Officer Dawson never advised him of his right to refuse consent; therefore, the methamphetamines seized by the officer should not have been put into evidence.<sup>67</sup> The Arkansas Supreme Court agreed with Carson and

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53. *State v. Bradberry*, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring specially) (noting the important role of judges in state constitutional law cases, Justice Souter suggested that when there are heightened requirements under the state law, judges should require counsel to develop fully all aspects of their arguments).

54. *Carson v. State*, No. CR04-863, 2005 Ark. LEXIS 455, at \*4-5 (Ark. July 1, 2005).

55. *Id.* at \*5-6.

56. *Id.* at \*5.

57. *Id.* at \*6-7.

58. *Id.* at \*6.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Carson v. State*, No. CR04-863, 2005 Ark. LEXIS 455, at \*7 (Ark. July 1, 2005).

65. *Id.* at \*1.

66. *Id.*

67. *Id.* at \*1-2.

concluded Officer Dawson's search was invalid, and therefore, the admission of evidence was improper.<sup>68</sup> The Arkansas Supreme Court used *Carson* to strengthen its 2004 decision in *State v. Brown*<sup>69</sup> where it held that under article 2, section 15 of the Arkansas Constitution, officers who utilize the "knock and talk" technique are required to inform the home dweller that he or she has the right to refuse to consent to the search.<sup>70</sup> *Brown* overruled decades of adherence to a bright-line rule refusing to require a right-to-refuse warning.<sup>71</sup> In *Carson*, the Arkansas Supreme Court seized its opportunity to reinforce its commitment to the rule set forth in *Brown*. With this holding, Arkansas solidified its position as part of the small minority of states that have upheld a bright-line rule requiring a police officer to give a person the right-to-refuse warning in order to consider any ensuing search valid.<sup>72</sup>

#### IV. ANALYSIS OF THE CURRENT STATUS OF RIGHT-TO-REFUSE WARNINGS

In *Carson*, the Arkansas Supreme Court enforced a right-to-refuse warning, a position supported by only three other states. Washington,<sup>73</sup> Mississippi,<sup>74</sup> and New Jersey<sup>75</sup> also require an officer to provide a warning prior to a consent search before the courts will consider the search valid. Although states can legally provide greater protection under their own constitutions than provided under the U.S. Constitution, in this context, it is rare. This comment discusses cases from states on both sides of the issue to provide a context of the current positions and reasoning regarding right-to-refuse warnings during "knock and talk" procedures.

##### A. States That Require a Right-to-Refuse Warning

Washington is one of the few states that require a right-to-refuse warning.<sup>76</sup> The Washington Supreme Court announced this rule in 1998 with its decision in *State v. Ferrier*.<sup>77</sup> In this case, two officers received a tip from the homeowner's son that she was growing marijuana in her home.<sup>78</sup> The officers conducted a "knock and talk" because they did not have sufficient information to support

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68. *Id.* at \*11.

69. *Id.* at \*10-11 (noting its earlier holding in *State v. Brown*, 156 S.W.3d 722 (Ark. 2004)).

70. *Brown*, 156 S.W.3d at 732 (holding that because the defendant was not advised of her right to refuse consent to the search, the search was in violation of Arkansas Constitution art. II, sec. 15, and therefore, all evidence seized from the search must be suppressed).

71. *See King v. State*, 557 S.W.2d 386, 389 (Ark. 1977) (adopting the *Schneckloth* standard as the proper way to determine, under the Arkansas Constitution, what is voluntary consent).

72. *Carson*, No. CR04-863, 2005 Ark. LEXIS 455, at \*11.

73. *State v. Ferrier*, 960 P.2d 927, 934 (Wash. 1998).

74. *Graves v. State*, 708 So. 2d 858, 864 (Miss. 1997).

75. *State v. Johnson*, 346 A.2d 66, 68 (N.J. 1975).

76. *Ferrier*, 960 P.2d at 934.

77. *Id.*

78. *Id.* at 928.



probable cause to obtain a warrant.<sup>79</sup> When the officers arrived and identified themselves, the defendant opened the door and let them inside.<sup>80</sup> The officers had a consent-to-search form, which they explained to the homeowner prior to her consent. However, the form did not indicate, nor did the officers tell her, that she had a right to refuse consent.<sup>81</sup> As a result of the consent search, the officers found marijuana.<sup>82</sup>

The trial court convicted the homeowner of manufacturing a controlled substance.<sup>83</sup> She appealed that conviction, claiming that she did not voluntarily consent to the search; thus, the police had violated her state constitutional right to privacy.<sup>84</sup> The Washington Supreme Court based its decision on the right to privacy afforded by article I, section 7 of Washington's Constitution.<sup>85</sup> It held that the homeowner needed to be informed of her right to refuse consent to the search.<sup>86</sup> Because the homeowner was not apprised of this right, the search was unconstitutional.<sup>87</sup> Although the court's reasoning was scarce, the main impetus for the majority's decision was the belief that "any 'knock and talk' is inherently coercive to some degree."<sup>88</sup> Sharply departing from the U.S. Supreme Court's reasoning on the same subject, the Washington Supreme Court felt that there was inherent coerciveness, which it could mitigate by requiring officers to inform people of their right to refuse consent during a "knock and talk" procedure.<sup>89</sup>

The dissent felt that the majority completely disregarded precedent in creating the mandatory right-to-refuse warning.<sup>90</sup> Furthermore, the dissent felt that the defendant should have inferred that she had a right to refuse consent because the officers asked multiple times for her permission.<sup>91</sup> In considering the totality of the circumstances, the dissent looked at the defendant's education and the fact that the police asked for, rather than asserting, a right to search her property. According to the dissent, common sense would dictate that a need to ask for permission would mean not only that they needed permission in order to act, but also that the homeowner could withhold permission.<sup>92</sup> These factors, along with the police telling her that anything they found in the search would be used against her, caused the dissent to believe the search was voluntary, regardless of the absence of a right-to-refuse warning. This argument did not prevail, however,

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79. *Id.*

80. *Id.* at 929.

81. *Id.*

82. *Id.*

83. *State v. Ferrier*, 960 P.2d 927, 929 (Wash. 1998).

84. *Id.* at 930.

85. Article I reads, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7.

86. *Ferrier*, 960 P.2d at 934.

87. *Id.*

88. *Id.* at 933.

89. *Id.*

90. *Id.* at 935 (Durham, C.J., dissenting).

91. *Id.* at 935-36 (Durham, C.J., dissenting).

92. *Id.*

and *State v. Ferrier* remains a good example of the reasoning provided by those few states that require warnings before “knock and talks.”

The courts of Mississippi and New Jersey also provided minimal reasoning in their respective decisions in *Graves v. State*<sup>93</sup> and *State v. Johnson*.<sup>94</sup> With these decisions, both state supreme courts created a bright-line rule requiring a right-to-refuse warning. In *Graves*, the Mississippi Supreme Court based its decision on the wording of the Mississippi Constitution, holding that in a “knock and talk” situation, consent is valid “where the defendant knows that he or she has a right to refuse, being cognizant of his or her rights in the premises.”<sup>95</sup> Likewise, the New Jersey Supreme Court’s decision in *State v. Johnson* held that it was necessary for a person in his or her home to have knowledge of the right to refuse consent in order to voluntarily consent to a search.<sup>96</sup>

Arkansas, Washington, Mississippi, and New Jersey strongly endorse their minority positions, citing fairness and privacy rights as key considerations in requiring the right-to-refuse warning during a “knock and talk” procedure.<sup>97</sup> Most people would agree that fairness and privacy are both worthy goals, and if right-to-refuse warnings would enhance both of these ideals, they would heartily support them. Therefore, it is surprising that so few courts require these warnings.

#### B. States That Do Not Require a Right-to-Refuse Warning

The majority of states follows the U.S. Supreme Court’s reasoning set forth in *Schneckloth* and *Robinette* and do not require officers to provide a warning during a consensual encounter.<sup>98</sup> For example, in *State v. Johnston*,<sup>99</sup> the New Hampshire Supreme Court ruled that police officers do not have to advise a homeowner of his right to refuse consent prior to any consensual search.<sup>100</sup> In *Johnson*, the defendant appealed the lower court’s decision convicting him on five counts of child pornography. His main argument was that he did not voluntarily consent to the search, and therefore, the evidence obtained should not have been admitted.<sup>101</sup> Although it acknowledged the Washington Supreme Court’s warning requirement, the New Hampshire Supreme Court decided that such a warning was unnecessary. The court relied heavily on the specific facts of the case and held that the state proved by a preponderance of evidence that the defendant “freely, knowingly, and voluntarily consented” to the search of his

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93. 708 So. 2d 858, 864 (Miss. 1997).

94. 346 A.2d 66 (N.J. 1975).

95. *Graves*, 708 So. 2d at 863 (holding that the Mississippi Constitution requires that in order to waive one’s rights, “it must clearly appear that she voluntarily permitted, or expressly ... agreed to the search, being cognizant of her rights in the premises”).

96. 346 A.2d 66, 67-68 (N.J. 1975).

97. *Carson v. State*, No. CR04-863, 2005 Ark. LEXIS 455, at \*7 (Ark. July 1, 2005); *State v. Ferrier*, 960 P.2d 927, 934 (Wash. 1998); *Graves*, 708 So. 2d at 863; *Johnson*, 346 A.2d at 66-68.

98. *E.g.*, *Hayes v. State*, 794 N.E.2d 492, 498 (Ind. Ct. App. 2003).

99. *State v. Johnston*, 839 A.2d 830, 836 (N.H. 2004).

100. *Id.*

101. *Id.* at 835.

house.<sup>102</sup> This is a surprising result because the defendant's testimony that he only consented because they were police officers and "[he] thought [he] had to"<sup>103</sup> called into question the inherent coerciveness of this procedure. The court ultimately rejected the proposition that the procedure was inherently coercive, reasoning that because the officers were not in uniform, they arrived at the defendant's in the afternoon, and they did not threaten him, there was no coerciveness.<sup>104</sup>

Indiana also refused to require a right-to-refuse warning in the "knock and talk" context. In *Hayes v. State*,<sup>105</sup> the police conducted a "knock and talk" at a motel, which has been held as the equivalent of a home.<sup>106</sup> After Hayes opened the door, the officers asked him if they could come in to talk to him about recent complaints of drug activity, but they did not inform him he had the right to refuse to let them enter.<sup>107</sup> Hayes allowed them in and told them to "look around."<sup>108</sup> The police found a crack pipe and cocaine.<sup>109</sup> They subsequently arrested Hayes, and the judge admitted the drugs into evidence at trial.<sup>110</sup> Appealing his conviction, Hayes argued he did not voluntarily consent since he was not given a right-to-refuse warning. Therefore, he argued that the police seized the drugs illegally, and the trial court erred in admitting the evidence. The Indiana Court of Appeals held that, although it thought it was wise to require a right-to-refuse warning, the reasoning by the overwhelming majority of states persuaded it that the proper approach was to examine the totality of the circumstances when determining the voluntariness of the consent.<sup>111</sup> After examining the totality of the circumstances, the court held that consent was voluntary, and the seizure was legal.<sup>112</sup> The court stressed that the "constitutional question is not whether the consent was an intelligent one, only whether it was voluntary."<sup>113</sup>

In addition, Ohio courts also hold that a right-to-refuse warning is not necessary in order to create a valid voluntary consent.<sup>114</sup> In one case, *State v. Morris*, a court of appeals held that "a suspect may give a valid consent to search even if the suspect is not informed that he or she has the right to refuse consent."<sup>115</sup> This case was not decided in the context of a "knock and talk"

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102. *Id.*

103. *Id.* at 832.

104. *Id.* at 834-35.

105. 794 N.E.2d 492 (Ind. Ct. App. 2003).

106. *Ceroni v. State*, 559 N.E.2d 372, 373 (Ind. Ct. App. 1990) (stating that a motel room is considered a home, even when the defendant did not rent the hotel room himself, because in a hotel one still has a legitimate expectation of privacy).

107. *Hayes*, 794 N.E.2d at 493.

108. *Hayes v. State*, 794 N.E.2d 492, 494 (Ind. Ct. App. 2003).

109. *Id.*

110. *Id.* at 495.

111. *Id.* at 498-500.

112. *Id.*

113. *Id.* (quoting *Scott v. State*, 782 A.2d 862, 875 (Md. 2001)).

114. *See, e.g., State v. Morris*, 548 N.E.2d 969, 971 (Ohio Ct. App. 1988); *State v. Robinette*, 685 N.E.2d 762, 771 (Ohio 1997).

115. *Morris*, 548 N.E.2d at 971.

procedure, but nevertheless, it shows the court's disfavor of mandating a right-to-refuse warning. Later, in *State v. Robinette* on remand, the Ohio Supreme Court reiterated its support of the U.S. Supreme Court's stance on voluntary consent searches.<sup>116</sup> In that case, the Ohio Supreme Court based its decision on section 14, article I of the Ohio Constitution, and used the totality of the circumstances test espoused in *Schneckloth* to determine that Robinette did not voluntarily consent to the search of his vehicle.<sup>117</sup> Although neither of these cases concern a "knock and talk," they highlight the Ohio Supreme Court's support of the U.S. Supreme Court's position of using the totality of the circumstances test during consensual encounters.

### C. *Reasons for the Minority Approach*

Many other courts have used reasoning similar to that of Maryland, Indiana, and Ohio courts to reject any mandatory warning prior to voluntary consent in order to make such consent valid.<sup>118</sup> Although it is common for courts in different jurisdictions to disagree, it is interesting when a court disregards an overwhelming majority to create a minority rule. Why did Arkansas and the few other states resist both the U.S. Supreme Court's reasoning and the majority of state courts' reasoning to provide more protection for its own citizens? Various reasons for the minority rule could exist, including: (1) an important difference in the wording of state constitutions; (2) a difference in the content of state constitutions; or (3) a concern for an increasingly strong and manipulative state police force.

#### 1. *Wording of Individual State Constitutions*

One potential reason for the surprising outcome in minority states could be due to the wording of each individual state's constitution. It is plausible to think that if each state had different search and seizure provisions, and each state court based each decision on their individual constitution, the outcomes would be different. Using this reasoning, the constitutions that had a search and seizure provision resembling the Fourth Amendment would follow the U.S. Supreme Court's approach. Likewise, those that had textually different provisions would presumably turn out differently. However, this is not the case. Most state constitutions have wordings in their search and seizure provisions very similar to that of the Fourth Amendment, and many have similar wordings to each other; yet, state courts have interpreted them differently.

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116. *Robinette*, 685 N.E.2d at 771.

117. *Id.* at 771-72.

118. *See, e.g.*, *State v. Forrester*, 541 S.E.2d 837, 841 (S.C. 2001) (rejecting a mandatory right-to-refuse rule in favor of both federal and state precedent supporting the totality of the circumstances test); *State v. Rardin*, 392 So. 2d 350, 351 (Fla. Dist. Ct. App. 1981) (holding it was not dispositive that the police officer did not advise the defendant of his right to refuse consent, because that factor is only one of many when the court considers voluntariness); *Levi v. State*, 147 S.W.3d 541, 545 (Tex. App. 2004) (holding that a police officer's failure to provide a right-to-refuse warning does not automatically make the defendant's consent involuntary).

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For example, take the search and seizure provisions of the Arkansas and Ohio state constitutions. 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.<sup>119</sup>

The Ohio Constitution similarly states:

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.<sup>120</sup>

Both states' constitutions echo the language of the Fourth Amendment of the U.S. Constitution, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>121</sup>

Yet Ohio subscribes to the U.S. Supreme Court's interpretation and Arkansas does not. Therefore, there must be another explanation for the different approaches taken by the states.

The State of Maryland is another interesting example. The Maryland Supreme Court, basing its reasoning on the Maryland Declaration of Rights, held that police do not need to tell an individual that he has a right to refuse consent.<sup>122</sup> Surprisingly, the language of the Maryland Declaration of Rights is vastly different from the Fourth Amendment of the U.S. Constitution.<sup>123</sup> Despite this, the court stated that "notwithstanding its lack of textual consistency with the Fourth Amendment, we have consistently construed Article 26 [of the Maryland Constitution] as being *in pari materia* with the Federal provision and have

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119. ARK. CONST. art. II, § 15.

120. OHIO CONST. art. I, § 14.

121. U.S. CONST. amend IV.

122. *Scott v. State*, 782 A.2d 862, 874-75 (Md. 2001).

123. The Maryland Declaration of Rights, article 26 reads: "all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places, or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted." MD. CONST. art. XXVI.

accepted as persuasive the Supreme Court's construction of the Fourth Amendment."<sup>124</sup>

## 2. *Content of Individual State Constitutions*

The text of the state constitutions does not explain the differences from state to state, so perhaps the content of the state constitutions explains the different interpretations. However, on closer examination this argument also is not convincing. The state constitutions of South Carolina, Hawaii, Illinois, Louisiana, Washington, and Arizona all contain an express right to privacy in their search and seizure provisions.<sup>125</sup> This express right to privacy would seemingly create a higher expectation of privacy for the individual; consequently, this provision should encourage state courts to provide heightened protection for the subject of a "knock and talk" under their constitutions. While this is a logical argument, the express right to privacy does not appear to be an influential factor when determining if police officers must provide a right-to-refuse warning.

Of the aforementioned states, only Washington interprets its constitutional search and seizure provision to require police officers to give a right-to-refuse warning.<sup>126</sup> To complicate matters, Arkansas does not have an express right to privacy, yet it requires the right-to-refuse warning. At best, the express right to privacy provision has a minimal impact on the constitutional interpretation methods of state judges. Perhaps the answer to the question of why Arkansas, Washington, Mississippi, and New Jersey are the only states to require a right-to-refuse warning lies not within the instruments needing interpretation, but in the people interpreting the instruments.

## 3. *An Attempt by Judges to Provide a Greater Parity in Search and Seizure Law*

When judges hear a case, they are supposed to ignore their biases and interpret the law. However, in practice this simply cannot happen. Judges have had a lifetime to develop their opinions, and it would be idealistic to suggest that once they are behind the bench they can disregard past experiences. Judges undoubtedly hear the stories of police brutality and questionable police tactics. Exacerbating the problem of too much police freedom are procedures such as the "knock and talk." Some argue that in states where no warning is necessary, the entire procedure is "ripe for unethical conduct by police."<sup>127</sup> Many people feel these procedures provide police officers with too much power and argue that if a group is given too much power, they will abuse their power.<sup>128</sup> Perhaps some of the judges in Arkansas, Washington, Mississippi, and New Jersey have seen this

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124. *Scott*, 782 A.2d at 873.

125. *Forrester*, 541 S.E.2d at 841.

126. *State v. Ferrier*, 960 P.2d 927, 934 (Wash. 1998).

127. Rousos & Deopere, *supra* note 22, at A1.

128. See Herbert Gaylord, *What Good is the Fourth Amendment? "Knock and Talk" and People v. Frohrip*, 19 T.M. COOLEY L. REV. 229, 242 (2002).

phenomenon. Consequently, those courts may have tried to rein in some of that power and give it back to the homeowners, where presumably, the framers of the state constitutions wanted the power.

One of the best ways for judges to transfer some power back to the people is to require that the police educate each person as to his or her rights. The right-to-refuse-warning is one potential solution. The police officers would still be permitted to utilize the “knock and talk” technique, which is typically fruitful in gathering information. However, individuals would now be empowered by the right-to-refuse warning and could send the police officer away to get enough information to constitute probable cause and obtain a proper search warrant.

There is no single reason that explains why Arkansas, Washington, New Jersey, and Mississippi ignored the overwhelming majority and imposed mandatory right-to-refuse warnings. These courts had their own motivation in requiring the warning, but rarely explained their motivating factor. Whatever the reason, these state courts have bravely carved out a welcomed requirement for the largely unregulated “knock and talk” technique. Unfortunately, it might be difficult for other courts to adopt this position because their rationales are scarce. Nevertheless, these courts may serve as an impetus for change in other state courts when confronted with a “knock and talk” case.

#### D. *Effect of Right-to-Refuse Warnings*

Since Arkansas now requires a right-to-refuse warning, the next logical question is what will be the effect of that warning? The warnings will probably result in one of two different scenarios. The first possibility is that the right-to-refuse warnings will have little effect, and officers will continue to receive a large number of consents. The second possibility is that giving the warning will result in fewer consents, requiring the officers to gather enough evidence to constitute probable cause and return with a search warrant. Neither result would be detrimental to police efforts, as both ways would still allow a search to take place as long as there is probable cause.

Although one cannot accurately predict the result, the former possibility seems most probable for multiple reasons. First, similar warnings given by the FBI have not considerably deterred the amount of consents they have received.<sup>129</sup> Second, the warnings are permitted to be quick and vague so that some people may still not fully understand their rights. Third, the *Miranda* warning given prior to being taken into custody has had little effect on voluntary confessions.<sup>130</sup> However, with a warning system in place, at least the façade of a fair and balanced search and seizure procedure would be preserved. This brings more credibility to the police officers conducting the search, and makes citizens feel comfortable and secure in their homes. Therefore, since these warnings will likely have little effect on the “knock and talk” procedure, the benefits of requiring the warnings outweigh any downfalls of such a requirement.

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129. *Schneckloth v. Bustamonte*, 412 U.S. 218, 287 (1973).

130. *See, e.g.*, Alexander Nguyen, *The Assault on Miranda*, AM. PROSPECT ONLINE, Mar. 27, 2000, <http://www.prospect.org/web/page.wv?section=root&name=ViewPrint&articleId=4282>.

In similar situations requiring police to give the subjects of their search a warning, there has been little effect on the number of voluntary consents given. This is the first reason a right-to-refuse consent warning will likely have little effect on the number of voluntary consent searches during a “knock and talk.” For example, in his dissent in *Schneckloth v. Bustamonte*, Justice Marshall emphasized 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.”<sup>131</sup> Justice Marshall declared that this warning had not detrimentally affected the FBI’s ability to conduct consent searches.<sup>132</sup> In many cases where FBI agents told the subject that he had the right to refuse consent because they had no warrant, the defendant submitted to the search anyway.<sup>133</sup> It is unlikely that a subject of an Arkansas police officer’s search would respond differently than a subject of an FBI search.

The effect of a right-to-refuse warning would also be negligible because the Arkansas Supreme Court does not require that the warning have any specific structure.<sup>134</sup> The officer’s warning does not need to be strict, formal, or forcefully given. Rather, it could be as casual as, “‘Now, you know you don’t have to let us in,’ [the officer will tell the subject of the search,] ‘but we REALLY need to talk to [a person in the house].’”<sup>135</sup> Such a warning would be easy to give and would not impede the encounter. Presumably, any warning that is this casual and conversational will have a negligible effect.

Another indication these warnings will have minimal effect is that they are similar to the mandatory Miranda warnings. Many scholars and police officers agree that these warnings have little influence on the number of confessions given. In *Miranda v. Arizona*,<sup>136</sup> the U.S. Supreme Court held that prior to a custodial interrogation, officers, in order to protect against self-incrimination, must inform the suspect of various rights, including the right to remain silent.<sup>137</sup> Although there were negative responses to the decision when it first was issued, today the Miranda warnings have become accepted police practice. This acceptance into police culture is due in part to their ineffectiveness. According to Lieutenant James Blanchette of the Hartford, Connecticut Police Department, “[o]ne of the reasons police and prosecutors have learned to live with Miranda is that the rules have not radically changed law enforcement. The majority of suspects waive their rights.”<sup>138</sup> His statements are supported by a study conducted by one of the leading opponents of the Miranda warnings, Professor

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131. *Schneckloth*, 412 U.S. at 287.

132. *Id.*

133. See *United States v. Miller*, 395 F.2d 116, 117 (7th Cir. 1968) (showing that when FBI officers informed a defendant that he did not need to make a statement and that he had the right to talk to an attorney, the defendant still showed the officers incriminating evidence).

134. The decisions were silent about the necessary content of the warning.

135. Stanley Adelman, *Towards an Independent State Constitutional Jurisprudence II—Arkansas Supreme Court Rules State Constitution Requires Warning Prior to “Knock and Talk” Searches*, 2004 ARK. L. NOTES 3, 8.

136. 384 U.S. 436 (1966).

137. *Id.* at 467-68.

138. Nguyen, *supra* note 130.



Paul Cassell. Cassell found that suspects waive their rights eighty to ninety percent of the time.<sup>139</sup> Although Cassell argues these warnings have “seriously harmed society by hampering the ability of the police to solve serious crimes,”<sup>140</sup> his own study regarding the waiver rates casts doubt on his conclusion. Regardless of the effect on police practices, the majority of suspects voluntarily waive their rights after the police officer recites the Miranda warning. In light of the Miranda results, it is reasonable to believe homeowners will also waive their rights after a similar warning given during a “knock and talk” procedure.

The right-to-refuse warnings required by a minority of states are very similar to the Miranda warnings. Police give both warnings to educate the suspect. They are designed to protect people from coercive police tactics and any self-incrimination resulting from such tactics. If the Miranda warnings are frequently waived, there is no reason to suspect that warnings given in the “knock and talk” context would not be waived. Even if the suspect does assert his or her rights by refusing to give information to an officer during a “knock and talk,” this still will not “seriously harm society” as Cassell accuses the Miranda warnings of doing. The police officer will simply have to gather enough information to support a finding of probable cause to return to the house with the search warrant. Even so, with or without these warnings, many people will still consent to the police officer when asked to search their homes. Therefore, the warnings will have no large, devastating impact on the success rate of “knock and talks.” However, the warning does preserve justice for the few homeowners who, enlightened by the warning, will force the police officers to take the less coercive route to searching by getting a search warrant.

The preservation of justice, privacy, and human dignity is at the heart of both the Fourth Amendment and the United States of America.<sup>141</sup> The American Constitution explicitly protects those who need protecting—including those who are in their homes when police knock at their doors.<sup>142</sup> In order to harness this mutual respect and human dignity, it is imperative that police treat everyone, even suspects of crimes, with the respect that America promises.<sup>143</sup> Treating someone with respect could be as simple as providing the right-to-refuse warning. The simple act of informing the homeowner that she does not need to consent to any search or answer any questions would serve two purposes. First, it would show that the officers have respect for homeowners and have no desire to take advantage of their ignorance of the law. Second, it would enlighten

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139. *Id.*

140. Paul Cassell, *Handcuffing the Cops: Miranda's Harmful Effects on Law Enforcement*, NCPA POLICY REP. NO. 218, at 18 (1998), <http://www.ncpa.org/~ncpa/studies/st218.pdf>.

141. See Christopher Paul Fischer, Comment, *Criminal Law—Evidence “I Hear You Knocking, But You Can’t Come In”*: The North Dakota Supreme Court Again Declines to Decide Whether the State Constitution Precludes a Good Faith Exception to the Exclusionary Rule in *State v. Herrick*, 1999 N.D. 1, 588 N.W.2d 846, 76 N.D. L. REV. 123, 156 (2000) (noting that North Dakota Supreme Court Justice Maring cited *State v. Phelps*, which held that the guiding principle of the Fourth Amendment was to protect personal privacy and dignity against unreasonable searches and seizures).

142. See U.S. CONST. amend IV.

143. See Linda Ross Meyer, *Unruly Rights*, 22 CARDOZO L. REV. 1, 12 (2000).

homeowners and notify them that they in fact do have the option of telling the officer to leave. Either of these results would help to further the goals of the Fourth Amendment or its equivalent in state constitutions. Therefore, although this warning would only take a few seconds, its benefits to society would have a lasting impact.

E. *“Knock and Talks” Are Inherently Coercive Because Consent Is Never Truly Voluntary*

When the Arkansas Supreme Court decided *Brown* and *Carson*, an underlying theme was the inherent coerciveness of the “knock and talk” procedure. This theme was especially prevalent in the *Brown* decision, which cited the Washington Supreme Court as part of a basis for its holding. The Washington Supreme Court previously held that a “‘knock and talk’ is inherently coercive to some degree,” but that these coercive effects can “be mitigated by requiring officers who conduct the procedure to warn home dwellers of their right to refuse consent to a warrantless search.”<sup>144</sup> If this is correct, then the inherent coercion will essentially force people to consent against their own best interests. This self-incrimination is precisely what the Miranda warnings were designed to prevent in the custodial interrogation setting. However, as long as the majority of courts believe that “knock and talks” are non-coercive, consensual encounters, and therefore, with a minimal chance of self-incrimination, they will refuse to require right-to-refuse warnings prior to a “knock and talk.” However, this is simply not the case; “knock and talks” are inherently coercive.

Consenting against one’s own interests in order to submit to authority, in addition to the self-incrimination aspect, shows the inherent coerciveness of this procedure. During “knock and talks,” homeowners often give consent because they feel as though they have no other option. Consequently, their consent often leads to their arrest. At hearings on motions to suppress, homeowners frequently testify that they consented because they thought they had to consent or they did not know they had another option.<sup>145</sup> This explains why the “knock and talk” is so successful in getting homeowners to consent.<sup>146</sup> One Fifth Circuit judge recognized the high rate at which people consent to searches and suggested that the “knock and talk” be renamed the “knock, enter, maybe talk, and search.”<sup>147</sup>

Police officers naturally intimidate most people, and as such, most people try to accommodate their requests. Scholars agree that many people automatically

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144. *Id.*

145. *See, e.g., State v. Johnston*, 839 A.2d 830, 832 (N.H. 2004) (finding the defendant only consented because “[he] thought [he] had to”); *State v. Brown*, 156 S.W.3d 722, 725 (Ark. 2004) (finding the defendant signed a consent to search form because “she thought she had no choice but to sign it,” and that she did not know she could say “no”).

146. *See, e.g., State v. Ferrier*, 960 P.2d 927, 928 (Wash. 1998). During his testimony, one police officer stated, “[v]irtually everybody allows you in.... I would say about half of them [“knock and talks”] were successful in terms of the fact that we found evidence of a crime.” *Id.*

147. Fred A. Simpson, *Police “Knock and Talk” Tactics Hit Home*, 42 HOUS. LAW. 55, 55 (July/Aug. 2004).

comply with requests from police officers.<sup>148</sup> Indiana Court of Appeals Judge Robb agrees with this hypothesis stating, “I do not think that any reasonable person, when approached by a police officer and questioned about his activities, would honestly feel free to refuse to answer or to leave.”<sup>149</sup> Even a U.S. Supreme Court Justice in *Robinette* acknowledged this trend of self-incrimination during consensual encounters. Justice Stevens felt as though these people must be consenting against their best interest because they felt as though they had a legal duty to allow the officer to search.<sup>150</sup> Some argue that the U.S. Supreme Court was incorrect in its reasoning in *Schneckloth* and that because “consent searches contain inherently compelling pressures ... the Fourth Amendment requires the police to give a suspect prophylactic warnings prior to requesting his permission to search. These warnings must ... communicate to the suspect that he may withhold consent.”<sup>151</sup>

One court took the notion of inherent coerciveness to the extreme. Recently, a court of appeals in Florida held that the coerciveness of the procedure in one particular instance caused an entire “knock and talk” encounter to be unlawful even though a right-to-refuse warning was not required.<sup>152</sup> After looking at the totality of the circumstances, Judge Vincent Torpy concluded that having three uniformed sheriffs arrive at one’s house declaring that they “need” to talk to the defendant was so coercive as to render the entire search illegal.<sup>153</sup> Judge Torpy wrote, “[t]his considerable show of authority was sufficient to create the perception that a major criminal investigation was underway.”<sup>154</sup> The defendant’s attorney stated that “[t]he court is telling judges in [thirteen] counties that here we have a process and this ‘knock and talk’ is inherently coercive.”<sup>155</sup> He continued, “I think this opinion is sending a message that ‘knock and talk’ is constitutionally suspect.”<sup>156</sup>

In response to this decision, the Orange County Sheriff’s Office has revised its “knock and talk” procedure.<sup>157</sup> With the new policy, “deputies ... are encouraged

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148. See, e.g., Daniel J. Steinbock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity, and Incivility of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507, 532-35 (2001).

149. *Overstreet v. State*, 724 N.E.2d 661, 665 (Ind. Ct. App. 2000) (Robb, J., dissenting) (refusing to hold that when a police officer approaches a man in a gas station and questions him that constitutes as a seizure, and because the defendant should have felt free to leave, all evidence seized was legal).

150. *Ohio v. Robinette*, 519 U.S. 33, 48 (1996) (Stevens, J., dissenting).

151. Adrian J. Barrio, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court’s Conception of Voluntary Consent*, 1997 U. ILL. L. REV. 215, 218.

152. *Miller v. State*, 865 So. 2d 584, 585 (Fla. Dist. Ct. App. 2004) (holding that a police officer telling the defendant “that [she] needed to let him in or they’d get a search warrant” is one factor that made the search too coercive to be considered a valid search).

153. *Id.* at 588.

154. *Id.*

155. Newsbrief: *Florida Appeals Court Nixes “Knock and Talk” Arrest*, DRUG WAR CHRON., Jan. 16, 2004, available at <http://stopthedrugwar.org/chronicle/320/knock.shtml>.

156. *Id.*

157. Anthony Colarossi, *Orange Fine-Tunes Home-Entry Policy*, ORLANDO SENTINEL, Mar. 24, 2004, at B1.

to let residents know they can refuse to answer questions and don't have to allow officers to enter the home."<sup>158</sup> A legal bulletin circulated by the sheriff's office states, "this simple statement may be enough to ensure that a consensual encounter stays a consensual encounter and any evidence collected by the officer as a result is admissible in trial."<sup>159</sup>

Although the bulletin may be correct, the officer would still have the burden of proving the consent was voluntary.<sup>160</sup> A discretionary warning does little to help the officer overcome that burden. However, a mandatory warning requirement would be much stronger proof that the police gave the warning and that the resulting consent was voluntary.<sup>161</sup> Given this reluctance of police departments to require mandatory warnings, it becomes even more imperative for courts to step in and defend the rights of homeowners.

The preceding examples show that consent in the "knock and talk" context is not truly voluntary due to its inherently coercive nature. Due to this coerciveness, judges should consider the "knock and talk" procedure to be more like the custodial interrogation of *Miranda*<sup>162</sup> and less like the consensual encounter of *Robinette*.<sup>163</sup> Therefore, even though no warnings are needed for consensual encounters, if all courts considered the "knock and talk" procedure as outside the realm of the consensual encounter, then they could justify the use of right-to-refuse warnings. It is because "knock and talks" are inherently coercive that courts must mandate that police give a right-to-refuse warning—people need some protection from unsavory police tactics. In addition, coercion violates the tenets of the Fourth and Fourteenth Amendments.<sup>164</sup> Although in a "knock and talk" context the court is examining state constitutions, the same principle should hold true that "a consent [can]not be coerced, by explicit or implicit means."<sup>165</sup>

## V. CONCLUSION

The Arkansas Supreme Court has made a sound policy decision by requiring police officers to provide homeowners a notice of their right to refuse consent. In *Carson*, the court preserved the police officers' abilities to perform "knock and talk" procedures. At the same time, however, the court empowered the subjects of these searches with the knowledge necessary to make an informed decision to consent. The decision probably will not have a dramatic result on the number of voluntary consents given to officers during this procedure.

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158. *Id.*

159. *Id.*

160. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

161. *Rousos & Deopere*, *supra* note 22, at A1 (explaining that in "knock and talk" cases, the decisions "often come down to a question of credibility between the police and a defendant," and a mandatory warning requirement would make that question much more likely to come down in favor of the police officer).

162. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

163. *Ohio v. Robinette*, 519 U.S. 33, 41 (1996).

164. *Schneckloth*, 412 U.S. at 228.

165. *Id.*

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Nevertheless, the simple act of providing a warning helps curb undesirable, coercive police tactics. In addition, it would help preserve both mutual respect between police and the homeowners and human dignity. Although this decision only affects officers within the State of Arkansas, perhaps it will spur other state courts to re-examine the requirements for a lawful “knock and talk” procedure under their own constitutions, so that they too can reap the benefits of a simple warning.