

## KNOCK, KNOCK. WHO'S THERE?: UNDERCOVER OFFICERS, POLICE INFORMANTS, AND THE “CONSENT ONCE REMOVED” DOCTRINE

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### I. INTRODUCTION

The right of a person to be free from unreasonable government intrusion into his home has long been recognized throughout this nation's history.<sup>1</sup> Indeed, the ancient adage that a man's home is his castle<sup>2</sup> finds support in the Constitution because “the chief evil against which the wording of the Fourth Amendment is directed” is the “physical entry of the home.”<sup>3</sup> To protect this interest, the Fourth Amendment requires that agents of the government seek a warrant prior to entering a home.<sup>4</sup> But this requirement is not absolute. Generally, government agents may enter a house without a warrant in two situations: (1) judicially created warrant exceptions and (2) law enforcement activity found to be reasonable and thus outside the bounds of the Fourth Amendment's purview.<sup>5</sup> Within the latter category falls the Consent Once Removed Doctrine (CORD), which allows an undercover officer, or sometimes an informant, who has gained consensual entry into a dwelling, to call for backup officers to enter in order to effectuate a valid arrest.<sup>6</sup>

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<sup>1</sup> *Silverman v. United States*, 365 U.S. 505, 511–12 (1961); *see also Boyd v. United States*, 116 U.S. 616, 630 (1886) (recognizing “the sanctity of a man's home and the privacies of life”).

<sup>2</sup> *Miller v. United States*, 357 U.S. 301, 307 (1958).

<sup>3</sup> *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972).

<sup>4</sup> U.S. CONST. amend. IV; *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984).

<sup>5</sup> *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (“The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures.”).

<sup>6</sup> *Callahan v. Millard Cnty.*, 494 F.3d 891, 901 (10th Cir. 2007) (Kelly, J., dissenting) (discussing how the consensual entry in a CORD situation alleviates the warrant requirement), *rev'd on different grounds sub nom. Pearson v. Callahan*, 555 U.S. 223 (2009).

The CORD has developed primarily to enable law enforcement to use undercover police officers to gain entry into a home and make arrests upon discovering illegal activity or contraband.<sup>7</sup> The underlying rationale is to allow an undercover officer, who has observed illegal activity, to summon aid in effectuating an arrest. The doctrine is considered essential for ensuring officer safety and preventing the destruction or loss of evidence that may result from not arresting the suspect and seizing the contraband immediately.<sup>8</sup>

Every court that has considered the issue has validated the CORD as an extension of recognized judicial doctrines allowing warrantless entry by law enforcement. Disagreement has occurred, however, as to whom the doctrine may be applied. Specifically, courts are divided as to whether the doctrine should extend beyond undercover police to lay informants working with police. The concern is that applying the doctrine to lay police informants will violate the restrictions and protections of the Fourth Amendment,<sup>9</sup> and essentially, render them “a nullity.”<sup>10</sup> These fears are based largely on two risks: (1) that informants will not adhere to the legal mandates of the Fourth Amendment, as police generally do, which restrict the scope of searches in a CORD context<sup>11</sup> and (2) the increased privacy intrusion attendant to allowing, in most instances, criminals to serve a law enforcement function.<sup>12</sup>

This Comment argues that the CORD is a valid extension of recognized judicial doctrines when applied to undercover police officers, but should be invalid when applied to police informants. Part II of this Comment will discuss the development of the CORD, which resulted from the application of judicial doctrines that allow for the warrantless entry of additional officers into a home in the event that an undercover officer has gained consensual entry, has probable cause to believe a crime has occurred, and then requests aid in effectuating an arrest, as well as the various analytical approaches taken by

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<sup>7</sup> See, e.g., *Callahan*, 555 U.S. at 228 (describing use of CORD to gain entry through undercover officers, who then saw illegal activity and called other officers to effect an arrest); *United States v. Romero*, 452 F.3d 610, 619 (6th Cir. 2006) (same); *United States v. Yoon*, 398 F.3d 802, 806 (6th Cir. 2005) (same).

<sup>8</sup> See, e.g., Tim Sobczak, Note, *The Consent-Once-Removed Doctrine: The Constitutionality of Passing Consent from an Informant to Law Enforcement*, 62 FLA. L. REV. 493, 507 (2010).

<sup>9</sup> See, e.g., *United States v. Jachimko*, 905 F. Supp. 540, 546–47 (N.D. Ill. 1995).

<sup>10</sup> See, e.g., *id.* at 546 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

<sup>11</sup> See, e.g., *id.* at 547.

<sup>12</sup> *United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995).

a number of appellate courts. Part III looks to the various approaches that courts have used to analyze the CORD based on privacy interests, consent, and the power of citizens' arrest in various states. Lastly, Part IV argues that the CORD should not extend to undercover police informants and should apply only to police officers because of the Supreme Court's required balancing of interests when analyzing Fourth Amendment issues.

## II. DEVELOPMENT OF THE CORD

### A. *The Fourth Amendment: Balancing Reasonableness*

The Fourth Amendment provides the essential right of one to be free from unreasonable searches or seizures by law enforcement.<sup>13</sup> It does so in two separate clauses: one protects the basic right to be free from unreasonable searches and seizures, and the other requires that a warrant be particular in scope and supported by probable cause for any such unreasonable searches to be valid.<sup>14</sup> Furthermore, the Supreme Court has found the home to be subject to specific protection as "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."<sup>15</sup> Because of this concern, warrantless searches are generally considered unreasonable *per se*.<sup>16</sup> Although some exceptions to this rule exist, they are "jealously and carefully drawn."<sup>17</sup> Where a search is reasonable, though, it need not fit into any exception because it does not implicate the Fourth Amendment at all.<sup>18</sup>

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<sup>13</sup> 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.

<sup>14</sup> *Payton v. New York*, 445 U.S. 573, 584 (1980).

<sup>15</sup> *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972).

<sup>16</sup> *See, e.g., Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>17</sup> *Jones v. United States*, 357 U.S. 493, 499 (1958); *see also Kylo v. United States*, 533 U.S. 27, 31 (2001) ("With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." (citing *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *Payton*, 445 U.S. at 586)).

<sup>18</sup> *Kylo*, 533 U.S. at 31 ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from *unreasonable* governmental intrusion.'" (emphasis added) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))).

As a preliminary matter, it is important to note the balancing of interests that the Supreme Court has acknowledged must occur whenever a warrantless search is at issue. Generally, the test of any government intrusion on privacy is one of reasonableness<sup>19</sup> comprising two prongs: a subjective expectation of privacy and an objective analysis as to whether society is prepared to accept such an expectation.<sup>20</sup> The subjective expectation requires an individual to actually believe that he has a right to privacy; the objective prong requires the Court to determine if such an expectation is reasonable and one which society is prepared to recognize.<sup>21</sup> Only when these two prongs are met may government action be so intrusive as to be deemed unreasonable, and thus violative of the Fourth Amendment. But once a privacy right is established, the Supreme Court requires that the government interests involved in the intrusion be weighed against the privacy interests upon which the government intruded to determine whether the government's actions are reasonable under the Fourth Amendment.<sup>22</sup> Additionally, wherever consent is given, a court is not

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<sup>19</sup> *United States v. Knights*, 534 U.S. 112, 118 (2001) (“The touchstone of the Fourth Amendment is reasonableness . . . .”)

<sup>20</sup> This test was first announced in Justice Harlan's concurring opinion in *Katz v. United States*:

My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have [sic] exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as “reasonable.” Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the “plain view” of outsiders are not “protected” because no intention to keep them to himself has been exhibited.

389 U.S. at 361 (Harlan, J., concurring).

<sup>21</sup> The Supreme Court's holding in *O'Connor v. Ortega* defines how reasonableness may be determined:

We have no talisman that determines in all cases those privacy expectations that society is prepared to accept as reasonable. Instead, “the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion.”

480 U.S. 709, 715 (1987) (quoting *Oliver v. United States*, 466 U.S. 170, 178 (1984)); see also *Oliver*, 466 U.S. at 187 (“The liberty shielded by the Fourth Amendment, as we have often acknowledged, is freedom ‘from unreasonable government intrusions into . . . legitimate expectations of privacy.’” (quoting *United States v. Chadwick*, 433 U.S. 1, 7 (1977))).

<sup>22</sup> See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (“[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.”) .

required to analyze reasonableness because Fourth Amendment protections are deemed to have been waived.<sup>23</sup>

*B. Elements of the CORD*

Although most courts analyze the CORD as having three elements,<sup>24</sup> the doctrine is essentially composed of four different legal principles: (1) officers may gain entry into a home through ruse or deception; (2) following entry, officers may make warrantless arrests for any crimes which they have probable cause to believe are occurring; (3) to promote officer safety, additional officers may enter without a warrant to help effectuate an arrest; and (4) following arrest, the officers inside a home may conduct limited searches incident to arrest, seize items in plain view, and conduct protective sweeps, all without rendering the entry, arrest, or searches unreasonable.<sup>25</sup> The Supreme Court of the United States has already decided the constitutionality of all the elements that make up the CORD except the third—the entry of additional officers. This Part will therefore briefly address the already settled principles before turning to the validity of the entry of additional officers.

1. Using Deception to Gain Consent to Enter a Dwelling

The Supreme Court recognized in *Lewis v. United States* that government agents have the ability to use stratagem or deception to filter out criminal activity and that undercover police activity is a necessary tactic of law enforcement.<sup>26</sup> Accordingly, the Court refused to hold that the government agent's use of deception to gain consent to enter a dwelling was a violation of the Fourth Amendment.<sup>27</sup> Instead, the Court specifically noted that the use of undercover agents is a

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<sup>23</sup> See, e.g., *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 242–43 (1973)).

<sup>24</sup> See, e.g., *United States v. Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996) (citing *United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995)); *United States v. Jachimko*, 19 F.3d 296, 298–99 (7th Cir. 1994).

<sup>25</sup> *United States v. Yoon*, 398 F.3d 802, 806 n.1 (6th Cir. 2005); *Bramble*, 103 F.3d at 1478.

<sup>26</sup> 385 U.S. 206, 208–09 (1966) (citing *Grimm v. United States*, 156 U.S. 604, 610 (1895); see also *Andrews v. United States*, 162 U.S. 420, 423 (1896)). While *Lewis* is the seminal case regarding the use of undercover officers, the Court has reaffirmed its holding over the years. See, e.g., *United States v. Jimenez Recio*, 537 U.S. 270 (2003); *Maryland v. Macon*, 472 U.S. 463, 470 (1985); *United States v. Russell*, 411 U.S. 423, 445 (1973).

<sup>27</sup> *Lewis*, 385 U.S. at 208.

“practical necessity,”<sup>28</sup> and that disallowing the use of deception would “come near to a rule that the use of undercover agents in any manner is virtually unconstitutional *per se*.”<sup>29</sup>

Moreover, while the Court recognized that the home has been accorded the full range of Fourth Amendment protections,<sup>30</sup> the Court also noted that when “the home is converted into a commercial center . . . for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street.”<sup>31</sup> The Court also observed that undercover agents should not be prevented from doing what an ordinary citizen may do merely because of their law-enforcement function—“[a] government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant.”<sup>32</sup>

In addition, because a contrary holding would have severely hampered police efforts to ferret out criminal activity, the Court ruled that where consent to enter is given, the fact that the government agent is operating under a ruse or deception does not vitiate this consent so long as the agent acts within the scope of authority given.<sup>33</sup> The Court was careful, however, to limit the scope of what such agents may do upon entry in order to ensure that such an exception to the Fourth Amendment be drawn narrowly.<sup>34</sup> So long as law enforcement agents act within the bounds of consent given, their entry without a warrant will not be deemed violative of the Fourth Amendment, even if obtained under false pretenses.<sup>35</sup>

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<sup>28</sup> *Id.* at 210 n.6.

<sup>29</sup> *Id.* at 210.

<sup>30</sup> *Id.* at 211.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Lewis*, 385 U.S. at 210–11.

<sup>34</sup> *Id.* at 211; *id.* at 212–13 (Brennan, J., concurring) (stating that one who allows an undercover agent to enter his home may not complain that his privacy has been invaded so long as the agent acts within the scope contemplated as the reason for the initial entry).

<sup>35</sup> Some commentators have argued that the initial grant of consent to an informant or officer inherently limits his ability to grant further consent to backup officers. *See, e.g., Sobczak, supra* note 8, at 502. While this limit may have relevance in an ordinary search, once an officer establishes probable cause to arrest and initiates an arrest, he may then carry out additional searches, *see* discussion *infra* Part II.B.3, notwithstanding the limits on the original consent given. This is part of the “more” Judge Kelly noted as an additional basis for the CORD in *Callahan* when noting that the doctrine is based on “more than consent alone.” *Callahan v. Millard Cnty.*, 494

## 2. Warrantless Arrests Based on Probable Cause

Police have long possessed the authority to arrest someone who they have probable cause to believe has committed a crime in their presence.<sup>36</sup> In relation to the CORD, though, the Fourth Amendment analysis is complicated by the fact that the arrest normally takes place in the arrestee's own home. This complication arises because the Supreme Court specifically held in *Payton v. New York* that warrantless entries into a home to effect an arrest, even for a felony, are unconstitutional.<sup>37</sup> But because the CORD is premised on entry gained with consent, *Payton* is inapplicable.<sup>38</sup> Thus, in the typical CORD case, where an officer gains consent to enter a dwelling and subsequent events give rise to probable cause that the occupant is engaging in a felony, the officer may arrest the occupant without a warrant while avoiding any violation of the Fourth Amendment.

## 3. Searches Incident to Arrest

Although the CORD primarily focuses on the entry of additional officers, noting the scope of searches that may be conducted without a warrant following an arrest is instructive.<sup>39</sup> Specifically, police and

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F.3d 891, 901 (10th Cir. 2007) (Kelly, J., dissenting), *rev'd on different grounds sub nom.* *Pearson v. Callahan*, 555 U.S. 223 (2009).

<sup>36</sup> *See, e.g.*, *United States v. Watson*, 423 U.S. 411, 417 (1976) (holding that officers may arrest those who they have probable cause to believe have committed a felony); *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (finding that an officer may arrest someone for even a minor criminal offense without violating the Fourth Amendment, so long as they have probable cause to believe the person violated the law).

<sup>37</sup> *Watson*, 423 U.S. at 417.

<sup>38</sup> *Id.* at 583.

<sup>39</sup> No warrant is required when a search is reasonable, and therefore, one ordinarily is not needed in a situation which falls under the CORD. *See supra* note 5 and accompanying text. But, it is also important to recognize that the mere fact that a warrant could be obtained does not invalidate an otherwise lawful search or arrest. *Vale v. Louisiana*, 399 U.S. 30, 40 (1970) (Black, J., dissenting). In *United States v. Rabinowitz*, the Court explained that the failure to obtain a warrant does not automatically invalidate a search.

A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant. Whether there was time may well be dependent upon considerations other than the ticking off of minutes or hours. The judgment of the officers as to when to close the trap on a criminal committing a crime in their presence or who they have reasonable cause to believe is

law enforcement agents have a number of recognized exceptions to the warrant requirement that would allow them to conduct minimal searches following arrest: the plain view doctrine, searches incident to arrest, and protective sweeps. Each is briefly analyzed below.

a. Plain-View Doctrine

The Supreme Court has held on numerous occasions that police may seize evidence in plain view without a warrant.<sup>40</sup> Moreover, this allowance is not limited to situations when the police are executing a warrant; it applies to any situation when the police are lawfully located and have lawful access to the item seized.<sup>41</sup> Finally, the officers' discovery of illegal items need not be inadvertent—because the officers have already intruded upon privacy interests, the discovery of items in plain view does not further impinge upon an individual's privacy and thus inadvertence is not required.<sup>42</sup>

Accordingly, in a CORD context, the initial officer, and any officers who enter a home as backup, may lawfully seize any illegal contraband that they discover so long as its criminal nature is immediately apparent.<sup>43</sup> In addition, any officers carrying out either a search incident to arrest or a protective sweep may also seize evidence that happens to be in plain view.<sup>44</sup> This obviously affords great flexibility to any law enforcement agent involved because in most CORD cases

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committing a felony is not determined solely upon whether there was time to procure a search warrant. Some flexibility will be accorded law officers engaged in daily battle with criminals for whose restraint criminal laws are essential.

339 U.S. 56, 65 (1950); *see also* *Arizona v. Hicks*, 480 U.S. 321, 333 (1987) (Powell, J., dissenting) (noting that to require police to always obtain a warrant whenever possible, even if not necessary, “may handicap law enforcement without enhancing privacy interests”).

<sup>40</sup> The Court defined the Plain View Doctrine in *Coolidge v. New Hampshire*.

The [plain view] doctrine serves to supplement the prior justification—whether it be a warrant for another object, hot pursuit, search incident to lawful arrest, or some other legitimate reason for being present unconnected with a search directed against the accused—and permits the warrantless seizure. Of course, the extension of the original justification is legitimate only where it is immediately apparent to the police that they have evidence before them; the “plain view” doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.

403 U.S. 443, 466 (1971).

<sup>41</sup> *Horton v. California*, 496 U.S. 128, 137 (1990).

<sup>42</sup> *Id.* at 141–42.

<sup>43</sup> *Id.* at 136.

<sup>44</sup> *Id.* at 137.

the evidence required to convict the defendant is in plain view. But because of the limited scope of the doctrine, no Fourth Amendment rights are implicated, and a lawful CORD entry remains constitutional despite any seizure of items in plain view.

b. Searches Incident to Arrest

The Supreme Court's holding in *Chimel v. California* provides the requisite legal justification for officers to search an arrestee and to seize any illegal contraband on his person or within his immediate control.<sup>45</sup> Such a search, termed a search incident to arrest, is justified under privacy analysis because it prevents an arrestee from possibly gaining a weapon to resist arrest and from destroying any evidence that may be in his immediate area.<sup>46</sup> The Supreme Court, though, has narrowly construed such searches. Past decisions make clear that the *Chimel* doctrine disallows the general rummaging through drawers and dressers or searches through rooms other than the room in which the arrest occurs in order to prevent an overbroad intrusion upon the arrestee's privacy, for which a warrant is required.<sup>47</sup> Because CORD cases predominantly involve drugs, however, such a search incident to arrest generally provides the requisite evidence necessary to prosecute and convict the arrestee and thus generally alleviates the officers' need to obtain a warrant.<sup>48</sup>

c. Protective Sweeps

The seminal case on protective sweeps, *Maryland v. Buie*, provides that the Fourth Amendment permits a protective sweep when an "officer possess[es] a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or oth-

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<sup>45</sup> 395 U.S. 752, 762–63 (1969).

<sup>46</sup> *Id.* at 763.

<sup>47</sup> *Id.* ("There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs . . . . Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.")

<sup>48</sup> See, e.g., *Callahan v. Millard Cnty.*, 494 F.3d 891, 893–94 (10th Cir. 2007) (noting that upon a search of the arrestee, "the officers found evidence of a drug sale and possession"), *rev'd on different grounds sub nom.* *Pearson v. Callahan*, 555 U.S. 223 (2009).

ers.”<sup>49</sup> In light of this danger, the Court ruled that the intrusion on a person’s privacy, while not being de minimis, was outweighed by the government interest in protecting officers in an unfamiliar environment.<sup>50</sup> But the Court specifically limited such searches to “extend only to a cursory inspection of those spaces where a person may be found.”<sup>51</sup> Moreover, the search may not last any longer than is necessary “to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.”<sup>52</sup>

Thus, while officers without a warrant are bound by the consent given when entering a dwelling based on the CORD, those bounds may be stretched somewhat in that the officers may conduct searches incident to arrest under *Chimel*, perform protective sweeps of areas that may reasonably be believed to be harboring an attacker under *Buie*, and seize illegal items in plain view pursuant to *Coolidge*. Although such searches are obviously limited in scope, law enforcement officers acting within the CORD are usually able to obtain sufficient evidence to prosecute a crime<sup>53</sup> simply by the application of these three holdings.

#### 4. Entry of Additional Officers to Effectuate an Arrest

The heart of the CORD is the entry of additional officers into a dwelling to assist in an arrest, and the effect that this entry has on the reasonableness of the intrusion for Fourth Amendment purposes. Further complicating the issue is the difference, if any, that arises when the person observing illegal activity is not a police officer but a police informant. This element of the doctrine has engendered a split among the various Courts of Appeals that have addressed this issue, and the Supreme Court has not yet offered any specific guidance.

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<sup>49</sup> 494 U.S. 325, 327 (1990) (citing *Michigan v. Long*, 463 U.S. 1032, 1049–50 (1983)) (internal citations and quotations omitted).

<sup>50</sup> *Id.* at 333–34.

<sup>51</sup> *Id.* at 335.

<sup>52</sup> *Id.* at 335–36.

<sup>53</sup> Indeed, most CORD cases involve drugs, which the defendant in any given case normally displays to the undercover officer or informant. *See, e.g.*, *United States v. Yoon*, 398 F.3d 802, 803 (6th Cir. 2005) (showing marijuana to an informant); *United States v. Pollard*, 215 F.3d 643, 649 (6th Cir. 2000) (displaying drugs to police officers); *United States v. Akinsanya*, 53 F.3d 852, 855 (7th Cir. 1995) (showing drugs to an informant); *United States v. Diaz*, 814 F.2d 454, 456 (7th Cir. 1987) (allowing undercover law enforcement agent to view, and chemically test, cocaine); *New Jersey v. Henry*, 627 A.2d 125, 127 (N.J. 1993) (selling crack cocaine to undercover detective).

In what appears to be the earliest case addressing the entry of additional officers to enter a residence to aid in an arrest, the U.S. Court of Appeals for the Seventh Circuit held in *United States v. White* that the entry of various officers following consensual entry of an undercover agent did not implicate the warrant requirement of the Fourth Amendment.<sup>54</sup> The court based its decision on the fact that White, the defendant, had consented to the entry of one undercover agent and that, had the other undercover officer sought entry later, White would have admitted him back into the room.<sup>55</sup> Therefore, the court held that, regardless of a magistrate's neutral evaluation and issuance of a warrant, the same privacy intrusion would have resulted.<sup>56</sup>

Five years later, in *United States v. Paul*, the Seventh Circuit was again called upon to determine whether the entry of police officers to effectuate an arrest was in violation of the Fourth Amendment.<sup>57</sup> This case differed from *White* in that instead of the initial entry being made by an undercover police officer, the police used an informant equipped with an electronic signaling device.<sup>58</sup> The informant was instructed to signal police when he saw marijuana in plain view; once he did, the officers knocked on the door and, receiving no answer, entered and proceeded to the basement where they arrested the defendant.<sup>59</sup> Writing for the court, Judge Posner noted that had the undercover informant been an officer, he would have been justified in arresting Paul upon seeing the drugs in plain view.<sup>60</sup> Also, the court noted that the undercover informant could have made a citizen's arrest had he so chosen.<sup>61</sup> Thus, because the interests protected by *Payton* had been "fatally compromised when the owner admits a confidential informant and proudly displays contraband to him," the entry of other officers to assist in an arrest did not violate the Fourth Amendment.<sup>62</sup>

The following year, the Seventh Circuit again found that the entry of police officers to assist in an arrest was valid under the Fourth Amendment even when the initial officer who gained consent had

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<sup>54</sup> 660 F.2d 1178, 1183 (7th Cir. 1981).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 808 F.2d 645, 646 (7th Cir. 1986).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 646–47.

<sup>60</sup> *Id.* at 648.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

left the room and then sought to re-enter.<sup>63</sup> The main justification for the warrantless entry, though, was that the insistence of imposing a neutral magistrate and the warrant process would be an unnecessary and cumbersome safeguard because, by his initial consent, the defendant showed his willingness to allow the undercover officer into his motel room.<sup>64</sup> Thus, the court reasoned that “it serves no purpose to require an arrest warrant where the same intrusion would occur whether or not the magistrate issued the warrant.”<sup>65</sup> The court was careful to note, however, that the doctrine does not allow law enforcement agents to enter and exit a home at will—they may only do so to obtain help when making an arrest.<sup>66</sup>

The Seventh Circuit again upheld the CORD where an informant, rather than an undercover officer, provided the signal for arrest in *United States v. Akinsanya*.<sup>67</sup> The court held that although the defendant consented only to the entry of the undercover informant, by doing so “he effectively gave consent to the agents with whom [the informant] was working.”<sup>68</sup> Furthermore, the court rested its decision on the fact that consent is a valid substitute for a warrant and specifically stated that exigent circumstances<sup>69</sup> were not implicated merely because an undercover informant was in the presence of dangerous criminals.<sup>70</sup>

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<sup>63</sup> *United States v. Diaz*, 814 F.2d 454, 459 (7th Cir. 1987).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 459 n.4 (citing *United States v. White*, 660 F.2d 1178, 1183 (7th Cir. 1981)).

<sup>66</sup> *Id.* at 459.

<sup>67</sup> 53 F.3d 852, 856 (7th Cir. 1995).

<sup>68</sup> *Id.*

<sup>69</sup> For a discussion of the “exigent circumstances” doctrine see, for example, *Chapman v. United States*, 365 U.S. 610, 615 (1961), *Johnson v. United States*, 333 U.S. 10, 15 (1948), *McDonald v. United States*, 335 U.S. 451, 455 (1948). Although the justifications for exceptions to the warrant requirement in exigent circumstances also justify the easing of the warrant requirement in situations involving the CORD, the doctrine is not based upon such notions but instead is a compilation of doctrines which bring the circumstances outside the warrant requirement altogether. For example, the Supreme Court has noted that situations that make time of the essence sometimes mandate that strict adherence to the warrant requirement be eased. See, e.g., *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (building on fire); *United States v. Santana*, 427 U.S. 38, 42–43 (1976) (pursuit of a fleeing felon); *Schmerber v. California*, 384 U.S. 757, 770–71 (1966) (destruction of evidence). The easing of the warrant requirement in situations in which officers must enter to help subdue or arrest an individual is supported by the same reasoning.

<sup>70</sup> *Akinsanya*, 53 F.3d at 856 n.1.

Although the CORD originated in the Seventh Circuit, other circuits have since adopted it. One year after *Akinsanya*, the U.S. Court of Appeals for the Ninth Circuit applied the CORD to a case involving the illegal sale of bird parts.<sup>71</sup> Although the court explicitly adopted the rule from the Seventh Circuit, it also noted that it based its holding on a prior decision finding that once an individual gives consent to law enforcement to enter his premises, any expectation of privacy is diminished.<sup>72</sup> In addition, the court determined that “any remaining expectation of privacy was outweighed by the legitimate concern for the safety of [the officers inside].”<sup>73</sup>

The U.S. Court of Appeals for the Sixth Circuit also recently adopted the CORD in *United States v. Pollard*.<sup>74</sup> Like the Ninth Circuit, the majority in *Pollard* found that “the back-up officers were acting within constitutional limits when they entered to assist [the undercover officer] since no further invasion of privacy was involved once the undercover officer made the initial entry.”<sup>75</sup> Judge Jones, however, dissented, opining that the CORD did not meet the requirements needed under the Sixth Circuit’s precedent to recognize a new exigency to waive the warrant requirement.<sup>76</sup>

Despite Judge Jones’ dissent, the Sixth Circuit subsequently expanded the CORD and applied it to a case involving an undercover police informant in *United States v. Yoon*.<sup>77</sup> The court specifically noted that where an undercover informant, as opposed to a police officer, requests assistance, the analysis does not change; that is, the entry of the additional backup officers does not constitute an increased intrusion of an individual’s privacy interests.<sup>78</sup> Most notable, though, is the concurring opinion of Judge Kennedy. Explaining why the CORD should apply to both undercover police officers and informants, Judge Kennedy noted that the CORD does not rely on either consent or exigent circumstances.<sup>79</sup> Instead, the concurrence noted that by allowing an informant or undercover officer into his

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<sup>71</sup> *United States v. Bramble*, 103 F.3d 1475, 1477 (9th Cir. 1996).

<sup>72</sup> *Id.* (citing *United States v. Rubio*, 727 F.2d 786, 797 (9th Cir. 1983)).

<sup>73</sup> *Id.* (quoting *Rubio*, 727 F.2d at 797) (alterations in original).

<sup>74</sup> 215 F.3d 643, 649 (6th Cir. 2000).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (Jones, J., dissenting).

<sup>77</sup> 398 F.3d 802, 808 (6th Cir. 2005).

<sup>78</sup> *Id.*; see also *id.* at 811 (Kennedy, J., concurring) (“[T]here is no justifiable distinction between the undercover officer’s and an informant’s ability to call upon the police to aid in the arrest.”).

<sup>79</sup> *Id.* at 808–09.

house, a defendant compromises his privacy interests to such a degree so as to prevent him from claiming that the entry of further officers violates this privacy interest.<sup>80</sup>

*Yoon* also triggered a dissent which expressed “grave concern . . . because the extension of the doctrine to lay informants . . . entrusts to ordinary civilians law-enforcement powers previously given only to the police.”<sup>81</sup> Despite the dissenting opinions in both *Pollard* and *Yoon*, the Sixth Circuit continues to apply the CORD irrespective of whether the agent requesting assistance is an undercover police officer or police informant.<sup>82</sup>

In addition to the three federal courts of appeals, two state supreme courts have also adopted the CORD.<sup>83</sup> The Supreme Court of New Jersey found that when officers gain consensual entry, have probable cause that a crime has occurred or is occurring, and then request backup to make an arrest, the entry of the additional officers is reasonable and therefore violates neither the federal nor New Jersey Constitution.<sup>84</sup> Likewise, the Supreme Court of Wisconsin deemed that where police officers enter following a pre-arranged signal indicating that the undercover agents inside have probable cause to arrest, no violation of the Fourth Amendment occurs.<sup>85</sup>

Overall, based on a review of the jurisdictions that have addressed the issue, it seems that there is a trend towards recognition of the CORD as a valid expansion of police powers. Moreover, once the additional officers enter the dwelling there are a number of doctrines already recognized by the Supreme Court that allow several searches to occur as incidental to any arrest without impinging on the values and rights protected by the Fourth Amendment.

### III. TYPES OF ANALYSIS UNDERTAKEN BY COURTS WHEN ANALYZING THE CORD

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<sup>80</sup> *Id.* at 809 (citing *United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986); *United States v. Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996); *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983)).

<sup>81</sup> *Id.* at 813 (Gilman, J., dissenting).

<sup>82</sup> *United States v. Romero*, 452 F.3d 610, 619 (6th Cir. 2006).

<sup>83</sup> *Pearson v. Callahan*, 555 U.S. 223, 244 (2009).

<sup>84</sup> *New Jersey v. Henry*, 627 A.2d 125, 131–32 (N.J. 1993).

<sup>85</sup> *Wisconsin v. Johnston*, 518 N.W.2d 759, 762–63 (Wis. 1994). Note, though, that the Wisconsin Supreme Court did not technically adopt the CORD as the court worried that the application of the term itself would be “confusing and unnecessary.” *Id.* at 765 n.6. The legal reasoning of the decision, though, is directly parallel to that of the CORD, which the court explicitly acknowledged. *Id.*

The majority of courts to address the CORD have found it constitutional under the Fourth Amendment<sup>86</sup> despite criticism that it is an undue expansion of law enforcement powers.<sup>87</sup> Based on the holdings of three federal courts of appeals and two state supreme courts, the entry of additional officers to help undercover officers already inside a dwelling apparently amounts to a reasonable police action and thus does not implicate Fourth Amendment concerns. This of course assumes that the conduct and actions of the officers remains within the scope of consent given;<sup>88</sup> otherwise, an initially constitutional search may be rendered unlawful.<sup>89</sup> The basis of these holdings is that once a person has allowed an officer into his house, he has destroyed any subjective privacy interest which may have existed.<sup>90</sup> In addition, the safety of officers outweighs any remaining privacy interest that could possibly be argued to still exist.<sup>91</sup> Thus, courts have judged the entry of additional officers to be a reasonable

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<sup>86</sup> Some commentators conflate the CORD with other doctrines, namely the doctrine of third party consent, which is not implicated in most CORD cases. See Ben Sobczak, Note, *The Sixth Circuit's Doctrine of Consent Once Removed: Contraband, Informants and Fourth Amendment Reasonableness*, 54 WAYNE L. REV. 889, 902–03 (2008). Thus, the addition of extraneous elements alters any review of the CORD, as opposed to a review based on the components as listed *supra* Part II. Moreover, commentators applying the Supreme Court's holding of *Georgia v. Randolph*, 547 U.S. 103 (2006), to a CORD analysis have further complicated the issue as *Randolph* involved the issue of consent to enter given by a cotenant and the refusal of consent from a present homeowner. Sobczak, *supra* at 911. See also *Callahan v. Millard Cnty.*, 494 F.3d 891, 902 n.3 (10th Cir. 2007) (Kelly, J., dissenting) (stating that *Randolph* has no effect on application of the CORD), *rev'd on different grounds sub nom. Pearson v. Callahan*, 555 U.S. 223 (2009). In contrast, the CORD specifically contemplates consent by one with clear authority to give it, generally the defendant himself. Compare *Randolph*, 547 U.S. at 113 (analyzing “the reasonableness of police entry in reliance on consent by one occupant subject to immediate challenge by another [occupant]”), with *United States v. Pollard*, 215 F.3d 643, 646 (6th Cir. 2000) (noting that defendant readily admitted informant and undercover officer when they knocked on his door), and *United States v. Bramble*, 103 F.3d 1475, 1477 (9th Cir. 1996) (noting that defendant told undercover agents to come to his home, and upon their arrival invited them inside), and *United States v. Diaz*, 814 F.2d 454, 456 (7th Cir. 1987) (recognizing that defendant admitted undercover agent into his hotel room). Thus, the Supreme Court's recent holding in *Randolph* would have little, if any, implications for the CORD.

<sup>87</sup> See, e.g., Sobczak, *supra* note 86, at 903.

<sup>88</sup> *Lewis v. United States*, 385 U.S. 206, 211 (1966).

<sup>89</sup> See, e.g., *Terry v. Ohio*, 392 U.S. 1, 18–19 (1968).

<sup>90</sup> See, e.g., *Diaz*, 808 F.2d at 648.

<sup>91</sup> Transcript of Oral Argument at 30, *Pearson v. Callahan*, 555 U.S. 223 (2009) (No. 07-751). Justice Alito specifically noted that rejecting the CORD “is going to get police officers killed” if an officer tries to effectuate an arrest and is unable to request assistance from other officers outside a dwelling. *Id.*

intrusion under the Fourth Amendment and therefore not subject to the warrant requirement under various approaches of analysis.

Although each court that has addressed the issue has found that the CORD is a valid extension of constitutional precedent, disagreement has arisen as to whether the doctrine applies solely when an undercover police officer initiates the arrest or whether the CORD may also be applicable to undercover police informants. Using different reasoning and analysis, some courts have determined that the CORD should apply regardless of whether an informant or police officer requests backup either because the defendant's privacy interests have been compromised irrespective of the law enforcement agent involved,<sup>92</sup> because the consent given to the informant gave him authority to invite other law enforcement agents in,<sup>93</sup> or because of the statutory power of citizens (and thus informants) to make arrests.<sup>94</sup>

#### A. *Privacy Analysis*

The Fourth Amendment is primarily concerned with the reasonableness of government intrusions and privacy interests,<sup>95</sup> and thus, any doctrine that affects substantive Fourth Amendment rights must be analyzed with these principles in mind. To pass constitutional muster, the additional entry of officers pursuant to the CORD must not unreasonably intrude on the privacy interests of the defendant.

One of the earliest cases to apply the CORD, *United States v. Paul*, involved an undercover informant working with police in a sting operation to arrest a seller of marijuana.<sup>96</sup> Although the court noted that consent and the ability of the informant to make a citizen's arrest would have supported the additional entry of police officers,<sup>97</sup> it expressly extended the CORD to apply to informants because the primary interest protected by the Fourth Amendment "is the interest in the privacy of the home, and [it] has been fatally compromised when the owner admits a confidential informant and proudly displays contraband to him."<sup>98</sup> Moreover, the court noted that, in relation to an analysis of the reasonableness of the government intrusion, "[i]t

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<sup>92</sup> See, e.g., *State v. Bramble*, 103 F.3d 1475, 1477 (9th Cir. 1996) (quoting *United States v. Rubio*, 727 F.2d 786, 797 (9th Cir. 1983)).

<sup>93</sup> *United States v. Yoon*, 398 F.3d 802, 807 (6th Cir. 2005).

<sup>94</sup> *Id.* at 807 n.2.

<sup>95</sup> See *supra* Part II.A.

<sup>96</sup> 808 F.2d 645, 646 (7th Cir. 1986).

<sup>97</sup> *Id.* at 647-48.

<sup>98</sup> *Id.* at 648.

makes no difference that the owner does not know he is dealing with an informant.”<sup>99</sup>

Judge Kennedy, concurring with the Sixth Circuit’s decision in *Yoon*, followed the reasoning of *Paul* and stated that “the back-up officers entry into the suspect’s home does not offend the Constitution because the suspect’s expectation of privacy has been previously compromised.”<sup>100</sup> Most notably, Judge Kennedy reasoned that the doctrine is based not on the exigent circumstances or consent exceptions to the warrant requirement but on a diminishment of the suspect’s Fourth Amendment rights which resulted from allowing law enforcement officers to view his illegal activities.<sup>101</sup> Judge Kennedy specifically reasoned that the defendant admitted the informant into his home and then showed the informant marijuana,<sup>102</sup> “fatally compromis[ing]” his privacy interests.<sup>103</sup> Consequently, the additional entry of officers was found not to be an unreasonable intrusion because of the defendant’s already diminished expectation of privacy.<sup>104</sup>

The U.S. Court of Appeals for the Tenth Circuit, however, found the distinction between police officers and informants to be of material importance when applying the CORD.<sup>105</sup> In *Callahan v. Millard County*, the court held that application of the CORD was improper when an informant, rather than a police officer, summoned the entry of additional officers.<sup>106</sup> The court specifically declined to extend the consent given to an informant to additional police officers who sought to enter to effectuate an arrest.<sup>107</sup> The *Callahan* court looked to whether the statutory power to arrest made a difference in analyzing the powers of a police officer and an informant and specifically acknowledged the fact that police are given much more responsibility and authority than are ordinary citizens even when looking narrowly at the power to arrest.<sup>108</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *United States v. Yoon*, 398 F.3d 802, 810 (6th Cir. 2005) (Kennedy, J., concurring).

<sup>101</sup> *Id.* at 809–10.

<sup>102</sup> *Id.* at 803 (majority opinion).

<sup>103</sup> *Id.* at 809–10 (Kennedy, J., concurring) (quoting *United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986)).

<sup>104</sup> *Id.* at 810.

<sup>105</sup> 494 F.3d 891, 896 (10th Cir. 2007), *rev’d on different grounds sub nom.* *Pearson v. Callahan*, 555 U.S. 223 (2009).

<sup>106</sup> *Id.* at 896–97.

<sup>107</sup> *Id.* at 899.

<sup>108</sup> *Id.* at 897.

Judge Kelly dissented from the majority opinion in *Callahan*. In applying an analysis focused on privacy and reasonableness, the dissent noted that the “protection of the privacy of the individual . . . is forfeited when a homeowner freely allows government agents inside.”<sup>109</sup> Judge Kelly also opined that the question to be decided “was whether Mr. Callahan’s consent to the confidential informant coupled with the subsequent drug transaction so eroded his legitimate expectation of privacy that officers could enter his residence without a warrant in order to effectuate his arrest.”<sup>110</sup> Moreover, the dissenting judge, Judge Kelly, noted that the CORD is somewhat of a misnomer as “the doctrine depends on more than consent alone.”<sup>111</sup> Instead, “the doctrine requires both a valid consensual entry—which alleviates the warrant requirement—and a concomitant destruction of the homeowner’s legitimate expectation of privacy—which allows officers to enter.”<sup>112</sup>

Based on privacy analysis, various courts have grappled with the balance that should be struck under the Fourth Amendment to determine what is reasonable. While no clear answer is provided as to whether a manifest difference exists in privacy expectations between allowing an undercover officer or a police informant to summon the aid of additional officers, these courts have followed recognized Supreme Court precedent in framing the question as one of seeking balance between privacy rights and government interests. Because the Supreme Court has never couched its review of Fourth Amendment violations in analysis of consent or statutory powers to arrest, an analysis based on privacy interests appears to be the most proper approach.

*B. Power to Arrest Analysis*

Even though police informants are just regular citizens, they are normally imbued with state power by the very fact that they are working closely with government actors.<sup>113</sup> This fact, as well as the liability that the state may face for any actions of a police informant, has been important to some courts in deciding whether the CORD should ap-

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<sup>109</sup> *Id.* at 900 (Kelly, J., dissenting) (internal quotations omitted) (citing *Davis v. United States*, 328 U.S. 582, 587 (1946)).

<sup>110</sup> *Callahan*, 494 F.3d at 901.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *See id.* at 902 (majority opinion).

ply only to officers, or whether a situation involving an informant calling for backup would also be within the purview of the CORD.<sup>114</sup>

In *United States v. Yoon*, the Sixth Circuit analogized a CORD situation involving an informant to that involving a police officer.<sup>115</sup> Specifically noting that the state where the events took place authorized citizens' arrests, the court ruled that because the informant could have made the arrest himself it made no difference that instead he opted to request police assistance.<sup>116</sup> The ability of either an informant or a police officer to have carried out the arrest compelled the court to extend the application of the CORD to both.

The *Yoon* court also relied on the Seventh Circuit's holding in *United States v. Paul*, which found that because the informant could have arrested the defendant, the distinction between an officer and an informant should not alter the analysis as to whether the CORD should be applied in a given situation.<sup>117</sup> Specifically, the court stated that the defendant had taken the risk of allowing an individual into his home and that the distinction between whether that individual was working with law enforcement or was actually a law enforcement officer was too slight to alter the reasoning under general Fourth Amendment balancing.<sup>118</sup>

The Tenth Circuit in *Callahan v. Millard County* recently considered whether the statutory power to arrest granted to citizens in most states supported expansion of the CORD to include informants as well because informants could make arrests as any ordinary citizen could under the law.<sup>119</sup> The court, however, found such logic "unconvincing."<sup>120</sup> Summarily dismissing this line of reasoning, the court stated "[t]hat a citizen has the power to arrest does not grant the citizen all of the powers and obligations of the police as agents of the state."<sup>121</sup> Because of these distinct obligations and powers, the court refused to find that officers and informants should be treated similarly when analyzing the proper application of the CORD even though a constitutional distinction was never found to exist between an entry

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<sup>114</sup> *See id.*

<sup>115</sup> 398 F.3d 802, 807–08 (6th Cir. 2005).

<sup>116</sup> *Id.* at 807 n.2.

<sup>117</sup> 808 F.2d 645, 648 (7th Cir. 1986).

<sup>118</sup> *Id.*

<sup>119</sup> *Callahan*, 494 F.3d at 897.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

or search by an individual police officer and an entry or search by several police officers.<sup>122</sup>

The courts have basically sought an analogy between a law enforcement officer and an ordinary citizen given the statutory power to arrest. This approach, however, is incorrect because it fails to take into account the training, experience, and authority that a law enforcement officer possesses, which an ordinary informant lacks. Moreover, an analogy between a law enforcement officer and an ordinary citizen or informant takes little or no cognizance of the most important aspect in analyzing Fourth Amendment violations—the privacy rights of individuals.<sup>123</sup>

### C. Consent Analysis

Where an individual consents to a search, the warrant requirement is obviated and a Fourth Amendment challenge cannot be raised.<sup>124</sup> Some courts have used this reasoning as a foundation for the expansion of the CORD by extrapolating the consent given to an undercover officer or informant to apply to additional officers.<sup>125</sup>

In *United States v. Akinsanya*, the Seventh Circuit held that “[w]hen [the defendant] Akinsanya gave his consent to [the undercover informant] Gilani to enter his apartment, he effectively gave consent to the agents with whom Gilani was working.”<sup>126</sup> Thus, the court based its holding that the entry was not a violation of the Fourth Amendment on the fact that the consent given to the undercover informant could be extended to the officers with whom he was working, which would validate their entry.<sup>127</sup> The court in *United States v. Yoon* similarly found that the CORD was based on consent and that, once consent is given, officers are entitled to enter and

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<sup>122</sup> *Id.* at 897–98.

<sup>123</sup> *Wyoming v. Houghton*, 526 U.S. 295, 311 n.2 (1999) (Stevens, J., dissenting) (“Expectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims.” (quoting *United States v. Padilla*, 508 U.S. 77, 82 (1993))).

<sup>124</sup> *United States v. Ringold*, 335 F.3d 1168, 1174 (10th Cir. 2003) (“It has long been established that an officer may conduct a warrantless search consistent with the Fourth Amendment if the challenging party has previously given his or her voluntary consent to that search.”).

<sup>125</sup> *See, e.g., Callahan*, 494 F.3d at 897.

<sup>126</sup> *United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995).

<sup>127</sup> *Id.*

conduct limited searches of the area pursuant to the consent given to an undercover officer or informant.<sup>128</sup>

In contrast, though, the Tenth Circuit in *Callahan* rejected consent as an appropriate ground on which to base the CORD.<sup>129</sup> The majority refused to allow an informant invited inside a house to then turn around and invite police officers into the house because it was unwilling to expand the consent exception to such lengths.<sup>130</sup> Similarly, Judge Kennedy concurred in *United States v. Yoon* but explicitly based his reasoning on privacy analysis.<sup>131</sup> He found that “[n]either the exigent circumstances nor the traditional consent exception to the warrant requirement supports the application of the ‘consent once removed’ doctrine.”<sup>132</sup> Moreover, Judge Kennedy noted that “[a]lthough it is certainly true that an undercover agent or a government informant receives consent when he is invited into a suspect’s home, it is a fiction to claim that the subsequent officers who enter the suspect’s home also receive the suspect’s consent to enter.”<sup>133</sup> Instead, Judge Kennedy found the expectation of privacy to be the deciding factor, and because the defendant had destroyed his expectation of privacy by showing his criminal activity to an outside party, no Fourth Amendment violation occurred by the entrance of police officers.<sup>134</sup>

Thus, although disagreement exists among the circuits, some support can be found for the argument that the CORD is based on consent given to officers that is then “once removed” to the backup officers entering to help arrest an individual. Such reasoning allows courts to expand the scope of the original consent given when determining whether or not a search is reasonable or outside the purview of the warrant requirement. It is not, however, an appropriate basis for the foundation of the CORD because to rest on consent alone would be to expand the doctrine past its logical point.<sup>135</sup>

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<sup>128</sup> *United States v. Yoon*, 398 F.3d 802, 806 n.1 (6th Cir. 2005).

<sup>129</sup> *Callahan*, 494 F.3d at 897.

<sup>130</sup> *Id.* (“[T]he invitation of an informant into a house who then in turn invites the police . . . would require an expansion of the consent exception. In this context, the person with authority to consent never consented to the entry of police into the house.”).

<sup>131</sup> *Yoon*, 398 F.3d at 808 (Kennedy, J., concurring).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 809.

<sup>134</sup> *Id.* at 809–10.

<sup>135</sup> Specifically, as the court noted in *Callahan*, “a mere transient guest, without a ‘substantial interest in or common authority over the property,’ cannot consent to

D. *Using Privacy Analysis and Balancing to Determine the Proper Scope of the CORD*

Balancing privacy rights and government intrusion is the most proper method to analyze the CORD. Because the Supreme Court has always analyzed reasonableness and privacy, and not the scope of consent or the power to arrest, in determining whether police conduct comports with the requirements of the Fourth Amendment, discerning whether the application of the CORD accords with what is considered reasonable is the most logical and legally sound analytical approach.

Analysis of the CORD in relation to privacy and reasonableness balancing is the proper course to follow as opposed to reviewing the doctrine in a consent or statutory-power-to-arrest context. In *Randolph*, the Supreme Court specifically held that police may not search a residence if the owner or resident objects even if a cotenant has consented.<sup>136</sup> The Supreme Court's holding in *Randolph* cuts against any argument that consent given from an owner to an undercover informant then allows the informant to consent to the entry of police because cotenants have even greater rights than transient informants and even cotenants may not consent to such an entry under the holding of *Randolph*. Thus, following the reasoning of *Randolph*, police would be unable to enter a house based on an informant's consent because the homeowner will be present and would almost assuredly object.<sup>137</sup> If such objections raise a Fourth Amendment bar as to cotenants, the dichotomy between homeowner and informant necessarily indicates that the officers may not enter merely because the informant consents. The reasoning behind Judge Kelly's approach in *Callahan*, in addition to the obstacle presented by the Supreme Court's holding in *Randolph*, likewise counters the argument that "[t]he consent-once-removed doctrine allows one individual to receive consent from the homeowner and then pass that consent to another individual, who can then legally enter the home to assist the first individual."<sup>138</sup> As Judge Kelly noted, dissenting in *Callahan*, it is more than mere consent that serves as a basis for the CORD, but also

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the entry of others." *Callahan v. Millard Cnty.*, 494 F.3d 891, 899 (10th Cir. 2007) (citing *United States v. Falcon*, 766 F.2d 1469, 1474 (10th Cir. 1985)), *rev'd on different grounds sub nom.* *Pearson v. Callahan*, 555 U.S. 223 (2009).

<sup>136</sup> *Georgia v. Randolph*, 547 U.S. 103, 120 (2006).

<sup>137</sup> See Sobczak, *supra* note 86, at 908–10 (rejecting the CORD based on third-party consent principles).

<sup>138</sup> Sobczak, *supra* note 8, at 494.

a diminished, but not destroyed, subjective privacy interest.<sup>139</sup> Courts should not be misled by the name of the doctrine, and should not restrict their analysis merely because the word “consent” is used.

In addition to the existence of more than consent as a basis for the doctrine, a number of courts have noted differences between a police officer and an informant working for the state, which should be considered in deciding the appropriate scope of the CORD. As the Tenth Circuit noted in *Callahan*, these distinctions should be analyzed in determining the reasonableness of a Fourth Amendment search.<sup>140</sup> For example, courts have noted that the obligations police officers have but private citizens lack, such as the duty to execute warrants, raise an important issue in determining Federal Tort Claims Act liability when applied to a police officer as opposed to a private citizen making a citizen’s arrest.<sup>141</sup> Similarly, the citizen’s arrest power is considered not to include certain privileges and duties inherent in the position of other law enforcement offices.<sup>142</sup>

Accordingly, because the Supreme Court generally reviews Fourth Amendment violations in terms of privacy, this interest must frame the analysis of any entry by police officers instead of one based on consent or a statutory power to arrest.<sup>143</sup>

#### IV. THE CORD SHOULD NOT BE EXTENDED TO POLICE INFORMANTS

As a practical matter, disregarding the difference between informants and police officers raises a number of risks, including the overextension of a doctrine that, if abused, could allow police officers to subvert the protections of the Fourth Amendment. Using the Supreme Court’s evaluative framework centered on privacy and reasonableness, rather than an analysis based on consent or statutory powers to arrest, provides courts with the adequate tools to examine and decide issues involving the Fourth Amendment, such as the CORD. In addition to differences in statutory powers, the distinction between informants and officers raises important issues regarding the reason-

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<sup>139</sup> See *supra* Part III.A.

<sup>140</sup> *Callahan*, 494 F.3d at 897.

<sup>141</sup> *Arnsberg v. United States*, 757 F.2d 971, 979 (9th Cir. 1985).

<sup>142</sup> *Caban v. United States*, 728 F.2d 68, 73–74 (2d Cir. 1984); see also *United States v. Hillsman*, 522 F.2d 454, 461 (7th Cir. 1975) (discussing the difference of powers between police officers making an arrest and an individual private party making a citizen’s arrest).

<sup>143</sup> See, e.g., *Washington v. Chrisman*, 455 U.S. 1, 8 (1982); *Katz v. United States*, 389 U.S. 347, 357 (1967).

ableness of a search and various privacy concerns.<sup>144</sup> Specifically, commentators have argued that informants should not be granted the same powers as police because informants are less trustworthy sources of information.<sup>145</sup>

For instance, in an amicus brief to the Supreme Court in *Callahan*,<sup>146</sup> the American Civil Liberties Union (ACLU) argued that the CORD should not extend to informants because they are not as trustworthy as police officers.<sup>147</sup> This is important because a court must decide under the objective prong of the Fourth Amendment test whether society is ready to recognize that informants should be treated similarly to police officers when conducting searches and engaging in other law enforcement activities. Although the Court has noted that when an individual invites someone into his home, be it a police officer or police informant, he has broken the “seal of sanctity” and has waived his right to privacy in the premises,<sup>148</sup> the recognition has also long existed that the risk taken is that the confidant may report actions or statements to the police, but *not* that he may immediately summon police to effectuate an arrest.<sup>149</sup> This is an important distinction because the Court has previously limited the power of police to barge into a home without a warrant, which would be subverted by this notion of “breaking the seal.” If the Court had found such an expansion of police powers warranted, it could have simply allowed for police to enter the home immediately instead of creating the “unreliable ear” doctrine.<sup>150</sup>

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<sup>144</sup> *Callahan*, 494 F.3d at 896 (“We find the distinctions between an officer and an informant summoning additional officers to be significant.”).

<sup>145</sup> See *infra* note 148 and accompanying text.

<sup>146</sup> On appeal to the Supreme Court the case name changed to *Pearson v. Callahan*.

<sup>147</sup> Brief for the American Civil Liberties Union as Amicus Curiae Supporting Respondent at 15, *Pearson v. Callahan*, 555 U.S. 223 (Aug. 11, 2008) (No. 07-751) [hereinafter ACLU Brief].

<sup>148</sup> *Lewis v. United States*, 385 U.S. 206, 213 (1966).

<sup>149</sup> This principle is known as the “unreliable ear doctrine,” which allows police to wiretap an informant and record conversations with an individual without violating any Fourth Amendment privacy interests because the individual has taken the risk that the person may be reporting to police. See, e.g., *United States v. White*, 401 U.S. 745, 750 (1971); *Hoffa v. United States*, 385 U.S. 293, 303 (1966). In both cases, the Court never hinted that police may then barge into a home when they learned illegal activity was taking place inside a dwelling by listening to the wiretap, and such action would almost surely violate the Court’s arrest warrant requirement set forth in *Payton*.

<sup>150</sup> See *White*, 401 U.S. 745; *Hoffa*, 385 U.S. 293. If “breaking the seal” of the home eviscerated the privacy right of the homeowner, the unreliable ear doctrine would be

A recent case from the Tenth Circuit highlights the stark difference between police and informants and illustrates why the CORD should apply to the former but not the latter. Besides training, power, reliability, character, and the like, the conduct of informants calls into question whether they should be granted the trust and authority generally reserved only to police officers. In *Callahan v. Millard County*, officers learned of a planned methamphetamine sale from a confidential informant.<sup>151</sup> The informant, however, drank six-to-eight beers in the preceding three hours, and also had ingested some of the methamphetamine that was part of the proposed drug transaction.<sup>152</sup> While the police became aware of the informant's intoxicated state, they did not realize that he had also ingested illegal drugs.<sup>153</sup> Despite his condition, the officers planned to use the informant as part of a drug-bust, but they first made him drink coffee prior to the operation to help ensure his competency.<sup>154</sup>

Although the court made no findings as to whether the informant was still intoxicated while the operation occurred, the informant did not give the correct signal for officers to enter; instead, he gave a variation of the signal that the officers took as their cue to enter.<sup>155</sup> While this case presents an extreme example of the type of informants police may use, undercover informants are often themselves drug dealers or otherwise are, or have been, involved in some form of criminal conduct.<sup>156</sup>

These differences are important to note because allowing an officer into a home does not destroy one's privacy interest as some

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meaningless—police could simply rely on an informant's report and enter a home. Because, instead, the Court required a warrant based on such informant's reporting, the notion of "breaking the seal" and destroying all privacy rights must be rejected. See Initial Brief of Appellee-Respondent at 12, *Pearson v. Callahan*, 555 U.S. 223 (Aug. 11, 2008) (No. 07-751) ("This Court has held that an informant may reveal *information* to the police that was revealed to the informant inside a home, but the Court has never approved a warrantless home entry based simply on an informant's prior entry.").

<sup>151</sup> *Callahan v. Millard Cnty.*, No. 2:04-CV-00952, 2006 U.S. Dist. LEXIS 32665 at \*3 (D. Utah May 18, 2006), *aff'd in part, rev'd in part*, 494 F.3d 891 (10th Cir. 2007), *rev'd on different grounds sub nom.* *Pearson v. Callahan*, 555 U.S. 223 (2009).

<sup>152</sup> *Id.* at \*3–4.

<sup>153</sup> *Id.* at \*3.

<sup>154</sup> *Id.*

<sup>155</sup> *Callahan*, 494 F.3d at 893.

<sup>156</sup> See, e.g., *United States v. Akinsanya*, 53 F.3d 852, 857 (7th Cir. 1995) (noting that informant was an "experienced drug dealer"); see also *Callahan*, 2006 U.S. Dist. LEXIS 32665 at \*2–3 (acknowledging that the confidential informant only served as such after being arrested for drug possession).

courts have indicated;<sup>157</sup> doing so instead only diminishes it.<sup>158</sup> If the mere fact that an officer was present in one's home was sufficient to destroy one's privacy interest, no basis or need would exist for any of the search exceptions outlined above, such as the plain view doctrine, searches incident to arrest, or protective sweeps.<sup>159</sup> Indeed, if the presence of an officer in a home would destroy the privacy interests of the homeowner, the CORD would be a foregone conclusion and an individual would have no grounds to object. Thus, the difference between allowing an officer or an informant to signal others to enter is of vital importance because a homeowner still maintains some privacy interests despite allowing an agent of law enforcement into his home to view his illegal activities.

The ACLU, writing as amicus in *Callahan*, raised the most compelling argument as to why informants should be distinguished from police officers for CORD purposes. “[I]nformants undergo none of the training that law-enforcement officers receive and thus are typically unschooled in the law and law enforcement techniques.”<sup>160</sup> Moreover, “[p]olice officers receive extensive instruction and pass rigorous tests. They must complete field and classroom trainings, as well as satisfy background checks, prior to taking their oath of office.”<sup>161</sup> The fact that officers are entrusted with enormous power and discretion, and subject to extensive training<sup>162</sup> and examination, further separates them as a class from the ordinary informant who would be involved in a CORD case.<sup>163</sup>

The court in *United States v. Jachimko* also questioned whether informants should be granted the same powers as police officers. Specifically, the court asked whether an informant could be entrusted to act within the narrow limits that the Supreme Court established on investigative activity within a dwelling that occurs without a warrant, and how informants, generally of suspect character, can be trusted to be reliable in the execution of law enforcement operations.<sup>164</sup> Cur-

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<sup>157</sup> *United States v. Yoon*, 398 F.3d 802, 807–08 (6th Cir. 2005) (Kennedy, J., concurring).

<sup>158</sup> *United States v. Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996) (citing *United States v. Rubio*, 727 F.2d 786, 797 (9th Cir. 1983)).

<sup>159</sup> See *supra* Part B.2.

<sup>160</sup> ACLU Brief, *supra* note 147, at 17.

<sup>161</sup> *Id.* at 17–18.

<sup>162</sup> Initial Brief of Appellee-Respondent, *supra* note 150, at 31 (“Police are trained in conducting such arrests safely, while informants typically are not.”).

<sup>163</sup> ACLU Brief, *supra* note 147, at 18.

<sup>164</sup> *United States v. Jachimko*, 905 F. Supp. 540, 540 (N.D. Ill. 1995).

rent case law recognizes this difference by generally extending the CORD only to police officers, and not to undercover informers.<sup>165</sup>

All of these differences between police officers and informants lead to the conclusion that while it may be reasonable to trust the decision of an officer to summon additional backup upon viewing illegal activity and to begin the arrest process, it is unreasonable to extend such trust to informants who are generally untrained and of dubious character.<sup>166</sup> Indeed, informants do not even possess the full range of powers that police officers may exercise just because the police have employed them in the execution of a law enforcement operation, or because a statute has granted them the power to make arrests.<sup>167</sup> While the subjective privacy interest of a defendant is arguably weakened by the defendant's admission of a confidant who, unbeknownst to the defendant, is an informant, society is most likely not ready to recognize informants as being on par with law enforcement officers, and will mostly likely object to granting them similar power and authority. In sum, the privacy intrusion is increased when an undercover informant, as opposed to a police officer, is allowed to summon backup officers, and the reasonableness of such conduct is lessened. Because the difference between an undercover informant and an undercover officer is one of kind, rather than one of degree,

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<sup>165</sup> 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 6.1 (4th ed. 2009). Professor LaFave writes:

[I]t has frequently been held that no warrant is needed where the arrest is made within premises to which an undercover police officer gained admittance by indicating his interest in participating therein in criminal activity. That result is not surprising, as it squares with analogous Supreme Court and lower court decisions on the use of undercover agents. But the mere fact that a wired informant is inside the house, so that the police outside are able to hear the offense occurring (meaning the offense, albeit not committed in public, has occurred in the surveilling officer's presence) does not excuse the Payton warrant requirement.

*Id.* (internal citations omitted).

<sup>166</sup> The ACLU, writing as amicus in *Callahan*, raised a valid point:

Informants usually have criminal convictions or charges pending against them and for good reasons are not entrusted with the considerable authority granted to police officers. Informants, after all, find themselves in their position not because the government believes they can reliably enforce the law, but often for precisely the opposite reason: they have previously violated the law.

ACLU Brief, *supra* note 147, at 17.

<sup>167</sup> See, e.g., *Callahan v. Millard Cnty.*, 494 F.3d 891, 897 (10th Cir. 2007), *rev'd on different grounds sub nom.* *Pearson v. Callahan*, 555 U.S. 223 (2009).

courts should not extend the CORD to grant the same powers and authority to informants.

#### V. CONCLUSION

Every court to address the issue has found that the CORD is a valid extension of existing case law. Every component, except for the additional entry of officers, has already been decided and approved by the Supreme Court. The remaining element does not change the privacy analysis because the entry of backup officers constitutes a minimal additional intrusion on privacy. Moreover, whatever minor additional intrusion on privacy may result from the entry of additional officers is more than outweighed by the concern for the safety of the officers inside. The government-interest side of the balance therefore outweighs the personal interest in privacy.

The balance, however, changes when an undercover police informant, as opposed to an officer, gains entry and signals the arrest team. Because of the difference in training, authority, and experience, among other things, the intrusion resulting from the entry of police officers summoned by a fellow officer is of a different type than that of officers summoned by a police informant. The fact that a police informant, who usually has no training and is sometimes of questionable moral character, summons police to enter alters the Fourth Amendment balancing, and thus, the CORD should not apply when the police use an informant as an undercover operative. While some courts have based the expansion of the CORD to informants on a citizen's authority to affect an arrest or on some sort of transfer of consent from informant to the entering officers, the proper analysis must be one of privacy intrusions and reasonableness, as required by Supreme Court precedent.

Accordingly, courts should find the balance decidedly in favor of the personal and constitutional interests of the private homeowners. Allowing undercover informants to enter the home and initiate an arrest or to summon police officers is a situation wholly removed from one where all of the parties involved are trained law enforcement officers. The Fourth Amendment grants the greatest protection to the home, and exceptions to the warrant requirement are closely restrained. As such, courts should be wary of extending a doctrine, though valid when involving trusted law enforcement officers, to encompass anyone whom the police may use as undercover informants. Because of the distinctions in type and kind between lay in-

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formants and trained officers, courts should not expand the scope of the CORD to include informants.