A DISTINCTION WITHOUT A DIFFERENCE: HOW *CALLAHAN V. MILLARD COUNTY* DREW AN UNWARRANTED LINE IN THE SAND OF FOURTH AMENDMENT JURISPRUDENCE

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INTRODUCTION

Like other friendly neighborhood methamphetamine dealers, Bill and Doug run their respective businesses out of the privacy of their own homes. Because low-level drug dealing has not yet taken the evolutionary step into the realm of Internet commerce, each poison peddler is limited to face-to-face transactions and must invite potential customers into his residence-turned-marketplace. The vast majority of these unscrupulous patrons are run-of-the-mill meth addicts simply looking to satisfy their daily fixes. One day, however, each entrepreneur encounters a different sort of customer: Bill admits Buyer A into his home and presents his product; meanwhile, Doug allows Buyer B to enter his home and offers him a neatly packed cellophane bag full of methamphetamine. Unbeknownst to both Bill and Doug, each buyer wears a wire during the transaction, broadcasts the entire exchange to police officers waiting outside, and provides a pre-determined signal at the moment the dealer reveals his contraband. In each situation, the officers burst through the door within moments of receiving the signal and subsequently place the respective dealer under arrest. Although both Bill and Doug are arrested for their activities, only Bill is later convicted. Why? Buyer A was an undercover police officer, while Buyer B was merely a confidential informant acting as an agent of the government.

Bill and Doug were each caught in the middle of a "buy bust" operation, a common law enforcement technique in which undercover police officers or confidential informants pose as drug buyers to catch unsuspecting drug dealers red-handed.[1] Although reasonable minds may differ as to the effectiveness of the government's war on drugs, one thing is certain: the

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[1] Beth A. Freeborn, *Arrest Avoidance: Law Enforcement and the Price of Cocaine*, 52 J.L. & ECON. 19, 23-24 (2009); Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 616 (2000).

use of "buy bust" operations has become essential to law enforcement's ability to combat the country's drug problem.[2]

In *Callahan v. Millard County*,[3] the Tenth Circuit Court of Appeals held that police officers violated a suspect's Fourth Amendment rights when they entered his home based solely on a signal they had received from a wired confidential informant—not having a warrant, direct consent, or "exigent circumstances" to justify their entry.[4] In so doing, the Tenth Circuit rejected the Sixth and Seventh Circuits' extension of the "consent-once-removed" ("COR") doctrine to confidential informants.[5] The COR doctrine is an exception to the Fourth Amendment's warrant requirement, adopted by a number of state and federal courts,[6] that applies when an undercover government agent: (1) enters a suspect's home at the express invitation of an individual with authority to consent; (2) establishes probable cause that a crime has occurred; and (3) immediately summons waiting officers for assistance.[7] Prior to *Callahan*, no other circuit or state court had distinguished between the use of undercover police officers and confidential informants for the purpose of determining the COR doctrine's constitutionality. After granting certiorari to review this very issue, the United States Supreme Court declined to resolve this problem, instead reversing the Tenth Circuit's ruling on other grounds.[8]

This Note analyzes the Tenth Circuit's ruling in *Callahan* and argues that the Fourth Amendment does not require courts to distinguish between undercover police officers and confidential informants for the purposes of the COR doctrine. Part I discusses the development of the law with respect to the COR doctrine and the circuit split over its extension from undercover police officers to confidential informants. An examination of the COR doctrine's foundational principles follows in Section II.A. Section II.B analyzes the validity of the *Callahan* court's decision to draw a distinction between undercover police officers and confidential informants. Section II.C provides a discussion of the related, but inapplicable, doctrine of "Third Party Consent" ("TPC"). Finally, Section II.D examines the impact of the Supreme Court's decision not to resolve the current circuit split on the application of the COR doctrine. This Note concludes that the COR doctrine

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2 *See* Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 220-21 (1998).

3 494 F.3d 891 (10th Cir. 2007), *rev'd on other grounds sub nom.* Pearson v. Callahan, 129 S. Ct. 808 (2009).

4 *Id.* at 893, 899.

5 *Id.* at 896-98.

6 *See, e.g.*, United States v. Yoon, 398 F.3d 802, 806-08 (6th Cir. 2005); United States v. Bramble, 103 F.3d 1475, 1478-79 (9th Cir. 1996); United States v. Diaz, 814 F.2d 454, 459-60 (7th Cir. 1987); People v. Galdine, 571 N.E.2d 182, 190-91 (Ill. App. Ct. 1991); State v. Henry, 627 A.2d 125, 130-31 (N.J. 1993); Williams v. State, 937 S.W.2d 23, 26-27 (Tex. App. 1996).

7 *Callahan*, 494 F.3d at 896.

8 *See* Pearson v. Callahan, 129 S. Ct. 808, 823 (2009).

should apply to both undercover police officers and confidential informants and that any distinction between the two for the purpose of constitutional analysis under the Fourth Amendment is untenable.

I. BACKGROUND & DISCUSSION OF *CALLAHAN V. MILLARD COUNTY*

This Part discusses the evolution of the COR doctrine, its conceptual underpinnings, and the development of the circuit split over its extension from undercover police officers to confidential informants. Section I.A introduces the Fourth Amendment and the impact of an individual's reasonable expectation of privacy. Section I.B discusses the distinct voluntary consent exception to the Fourth Amendment's warrant requirement. Section I.C tracks the Seventh Circuit's creation of the COR doctrine and its expansion to confidential informants. Section I.D analyzes the Sixth Circuit's explicit adoption of the Seventh Circuit's COR jurisprudence. Section I.E examines the Tenth Circuit's departure from other circuits' application of the COR doctrine. Finally, Section I.F addresses the Supreme Court's decision not to resolve this circuit split during its appellate review of the Tenth Circuit's ruling.

A. *The Fourth Amendment and the Reasonable Expectation of Privacy Threshold*

The Fourth Amendment protects individual citizens from unreasonable searches and seizures by the government.[9] The central question in examining the constitutionality of a search or seizure is whether the government's actions were reasonable.[10] When government conduct does not qualify as a search or a seizure, however, the Fourth Amendment does not regulate the activity, and neither a warrant nor a showing of reasonableness is necessary.[11] In the landmark case of *Katz v. United States*,[12] the Supreme Court

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9 U.S. CONST. amend. IV ("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."). The Fourth Amendment, as well as the Bill of Rights in general, regulates *state actors*, so it does not protect against unreasonable searches or seizures by *private citizens*. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 77 (8th ed. 2007). The government, however, may not enlist private citizens to do what government officials otherwise cannot, so as to avoid the strictures of the Fourth Amendment. *Id.* The law of government agency is further discussed below. *See infra* Part II.B.1.

10 *Callahan*, 494 F.3d at 895; *see also* Illinois v. McArthur, 531 U.S. 326, 330 (2001); Texas v. Brown, 460 U.S. 730, 739 (1983).

11 SALTZBURG & CAPRA, *supra* note 9, at 36.

12 389 U.S. 347 (1967).

established a general test for determining whether government activity rises to the level of a search: the government conduct must offend the individual's subjective expectation of privacy, and that privacy interest must "be one that society is prepared to recognize as 'reasonable.'"[13]

Generally, individual citizens have a subjective expectation of privacy in their homes that easily satisfies the *Katz* test of objective legitimacy,[14] and government agents must obtain a warrant from a neutral and detached magistrate before they may enter a residence to perform a search or make an arrest.[15] In other words, warrantless searches inside the home are presumptively unreasonable for Fourth Amendment purposes.[16] This requirement is not absolute, however, as there are a limited number of well-delineated exceptions.[17] For example, a warrantless search of a home may be justified when "exigent circumstances" exist[18] or when the search is conducted pursuant to voluntarily given consent.[19]

B. *The Consent Exception to the Warrant Requirement*

When based upon voluntary consent, a search or seizure is reasonable even in the absence of a warrant or any articulable suspicion of criminal wrongdoing.[20] In *Schneckloth v. Bustamonte*,[21] the Court held that the proper analysis for determining consent is not whether a defendant knew that he had the right to refuse consent, but rather whether the defendant's consent to search was voluntary under the totality of the circumstances.[22] Due to the nature of Fourth Amendment protections and the "informal and unstructured conditions" in which consent requests ordinarily occur, the

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13 *Id.* at 361 (Harlan, J., concurring); SALTZBURG & CAPRA, *supra* note 9, at 41. For more information on the *Katz* test, see generally Peter Winn, Katz *and the Origins of the "Reasonable Expectation of Privacy" Test*, 40 MCGEORGE L. REV. 1 (2009) (detailing the background of the test set forth in *Katz*).

14 *See* Lewis v. United States, 385 U.S. 206, 211 (1966).

15 *See, e.g.*, Welsh v. Wisconsin, 466 U.S. 740, 748 (1984); Payton v. New York, 445 U.S. 573, 585-86 (1980); Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

16 *E.g.*, *Welsh*, 466 U.S. at 748-49; *Payton*, 445 U.S. at 586; *Coolidge*, 403 U.S. at 474-75; *Johnson*, 333 U.S. at 14 & n.4.

17 *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); *Coolidge*, 403 U.S. at 474-75; *Katz*, 389 U.S. at 357.

18 *See Payton*, 445 U.S. at 587-88; *Coolidge*, 403 U.S. at 474-75, 477-78. The exigency exception excuses police officers from obtaining a warrant in "fact-specific situations in which the state must show that immediate action was reasonably necessary to prevent flight, or to safeguard the police or public, or to protect against the loss of evidence." SALTZBURG & CAPRA, *supra* note 9, at 363.

19 *Schneckloth*, 412 U.S. at 219; *see* Davis v. United States, 328 U.S. 582, 593-94 (1946).

20 SALTZBURG & CAPRA, *supra* note 9, at 457.

21 412 U.S. 218 (1973).

22 *See id.* at 237-38; SALTZBURG & CAPRA, *supra* note 9, at 458.

Court concluded that officers need not inform suspects of their right to refuse consent, as such a requirement would effectively discourage suspects' cooperation with police.[23] Accordingly, a suspect's knowledge of his right to refuse consent is relevant to, but not dispositive of, a determination of voluntary consent.[24] In *Schneckloth*, the Court applied this totality of the circumstances test, finding that a suspect validly consented to a search when he expressed no reluctance to consent, was not under arrest when he granted consent, and was subjected to neither force nor threat of force.[25]

The Court later reaffirmed *Schneckloth*'s totality of the circumstances test in *United States v. Drayton*,[26] stating that "[i]n a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. . . . It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding."[27] In applying the *Schneckloth* test, the Fifth Circuit enunciated the following non-exclusive list of six primary factors to consider, none of which is dispositive:

> (1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.[28]

Although consent to enter a home must be voluntary and freely granted, an officer need not advertise his status as a government agent at the time of entry. Rather, a government agent may reasonably obtain consent by deception. In *Lewis v. United States*,[29] for example, a federal narcotics agent acquired an invitation into a suspect's home "by misrepresenting his identity and stating his willingness to purchase narcotics."[30] Once inside, the agent and the suspect consummated an unlawful narcotics transaction, and the government later introduced the narcotics evidence at the suspect's criminal trial over his objection.[31]

In holding that the search did not violate the Fourth Amendment, the *Lewis* Court reasoned that when an individual converts his home into a "commercial center" to which he invites outsiders for the purpose of trans-

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23 *See Schneckloth*, 412 U.S. at 231-32, 242-43; *see also* SALTZBURG & CAPRA, *supra* note 9, at 458.

24 SALTZBURG & CAPRA, *supra* note 9, at 458.

25 *Id.* at 458; *see Schneckloth*, 412 U.S. at 220, 247.

26 536 U.S. 194 (2002).

27 *Id.* at 207.

28 United States v. Gonzalez-Basulto, 898 F.2d 1011, 1012-13 (5th Cir. 1990) (quoting United States v. Galberth, 846 F.2d 983, 987 (5th Cir. 1988)) (internal quotation marks omitted).

29 385 U.S. 206 (1966).

30 *Id.* at 206-07.

31 *Id.* at 207.

acting unlawful business, that activity "is entitled to no greater sanctity than if it were carried on in a store, a garage, a car, or on the street."[32] In the same manner that a private citizen may accept this invitation, a government agent may agree to do business and enter upon the premises for precisely the reasons considered by the occupant.[33] Accordingly, this suggests that a suspect's dwelling, when converted into a "commercial center," does not receive the full range of Fourth Amendment protections that would normally attach to a home.

The *Lewis* Court further concluded that the agent's false pretense led to no breach of privacy because the suspect himself chose the venue in which the unlawful transaction took place[34] and the suspect's sole concern was whether the agent was willing to purchase the narcotics at the agreed upon price.[35] The occupant of a home "can break the seal of sanctity and waive his right to privacy in the premises,"[36] and therefore a government agent does not violate the Fourth Amendment so long as he does not exceed the scope of his invitation.[37] Consequently, when an individual assumes the risk that his associates will disclose his secret criminal activity, he maintains no reasonable expectation of privacy against undercover government activity.[38]

While *Lewis* expanded the consent doctrine to allow undercover agents to use deception to gain initial, consensual entry into the home of a drug dealer, this consent is not enough, by itself, to authorize the subsequent entry of additional agents during a "buy bust" operation. To take that next important step, something more is necessary.

C. *The Seventh Circuit's Creation of the COR Doctrine*

In *United States v. Janik*,[39] the Seventh Circuit first articulated the COR doctrine.[40] The defendant in *Janik*, who had recently purchased an

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32 *Id.* at 211.

33 *Id.*

34 *Id.* at 212.

35 *Lewis*, 385 U.S. at 210.

36 *Id.* at 213 (Brennan, J., concurring).

37 *See id.* at 211 (majority opinion); *see also* Gouled v. United States, 255 U.S. 298, 304-06 (1921) (invalidating a search where a government agent obtained entry into the defendant's office by claiming to pay a social visit, but exceeded the scope of consent by rummaging through papers in the office while the defendant was away).

38 SALTZBURG & CAPRA, *supra* note 9, at 486-87; *see also* Hoffa v. United States, 385 U.S. 293, 302 (1966) (concluding that the defendant relied not on the security of his hotel room, but rather on his belief that his associate would not reveal his statements).

39 723 F.2d 537 (7th Cir. 1983).

40 Ben Sobczak, Note, *The Sixth Circuit's Doctrine of Consent Once Removed: Contraband, Informants and Fourth Amendment Reasonableness*, 54 WAYNE L. REV. 889, 894 (2008). The COR concept actually originated in *United States v. White*, but was not fully articulated until *Janik*. *See*

illegal submachine gun, invited his friend, a Chicago policeman, to his apartment to inspect the weapon.[41] The policeman, however, coordinated with the Chicago police and the Federal Bureau of Alcohol, Tobacco and Firearms prior to the scheduled visit, and law enforcement officers hid outside the defendant's apartment building to await the arrival of the two men.[42] Once he entered the apartment, the policeman observed the weapon in plain view.[43] He then stepped out into the apartment's lobby to make radio contact with the team waiting outside of the building.[44] The backup officers subsequently entered the apartment building, arrested the defendant, and seized the illegal firearm.[45]

In later upholding the trial court's denial of the defendant's motion to suppress, the Seventh Circuit reasoned that the defendant's consent to the entry of his police officer friend, combined with the officer's authority to arrest the defendant himself upon viewing the gun,[46] entitled the officer to request help from other officers to effectuate the arrest and seizure.[47] Based on "the well settled principle that '[v]alid consent is of course a substitute for a warrant,'"[48] the court concluded that the entry of additional officers did not violate the Fourth Amendment.[49] Specifically, the court ruled that the assistance of additional officers was a "trivial" incremental invasion of the defendant's privacy, and because the officer was justified in seizing the illegal weapon in plain view, he was certainly "also privileged to have a police escort to prevent interference by [the defendant]."[50] The court's description of the additional officers' entry as a "trivial" incremental invasion

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United States v. White, 660 F.2d 1178, 1183 n.3 (7th Cir. 1981) ("We do not view this latter entry as being a separate intrusion in view of the fact that [an undercover agent] remained in the apartment at all times after his initial consensual entry.").

41 *Janik*, 723 F.2d at 541.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 According to the "plain view" doctrine, a police officer may seize an object he has discovered in plain view if: (1) he has lawfully arrived at the place from which he views the object; (2) the object's incriminating character is immediately apparent; and (3) he has lawful right of access to the object. Horton v. California, 496 U.S. 128, 136-37 (1990); *see also* Arizona v. Hicks, 480 U.S. 321, 326-27 (1987). In *Janik*, the officer's lawful presence in the position from which he viewed the illegal submachine gun not only permitted him to seize the contraband, but also allowed him to establish probable cause that a crime was occurring in his presence. *Janik*, 723 F.2d at 541, 547-49. Consequently, the officer could arrest the perpetrator of the crime without a warrant. *Id.* at 548-49; *see also* Virginia v. Moore, 553 U.S. 164, 178 (2008) ("When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.").

47 *Janik*, 723 F.2d at 547-48; Sobczak, *supra* note 40, at 894.

48 Sobczak, *supra* note 40, at 894 (alteration in original) (quoting *Janik*, 723 F.2d at 548).

49 *Janik*, 723 F.2d at 547-48.

50 *Id.* at 548.

of privacy is important because it implies reliance upon the notion that a suspect has a diminished expectation of privacy in an area that he has already voluntarily revealed to an undercover police officer.

The Seventh Circuit extended the COR doctrine from undercover police officers to confidential informants three years later in *United States v. Paul*.[51] In *Paul*, a confidential informant arranged to buy marijuana from the defendant and obtained voluntary consent to enter the defendant's home.[52] Once the undercover informant observed the contraband, he pressed a button on an electronic transmitting device, summoning backup officers who were waiting outside.[53] In finding that the COR principle applies to a situation in which a confidential informant makes the initial, consensual entry, the court stated that "the interest in the privacy of the home . . . has been *fatally compromised* when the owner admits a confidential informant and proudly displays contraband to him. It makes no difference that the owner does not know he is dealing with an informant."[54] The court reasoned that by inviting an individual into his home to make a drug transaction, the defendant assumed the risk that the individual could later testify as to what he saw, could have exercised his citizen's arrest power, could have grabbed some of the marijuana and run out to give it to the police, or could have been an undercover agent.[55] The court held that the incremental risk that the individual would be a *confidential informant* rather than a police officer was too slight to bring the warrant requirement into play.[56]

The Seventh Circuit continued to follow this approach in subsequent cases.[57] In *United States v. Diaz*,[58] for example, the court established a three-part test for when the COR doctrine applies—namely, when an undercover agent or government informant (1) "entered at the express invitation of someone with authority to consent," (2) "at that point established the existence of probable cause to effectuate an arrest or search," and (3) "immediately summoned help from other officers."[59] In *United States v. Bramble*,[60] the Ninth Circuit subsequently adopted the Seventh Circuit's formulation of the COR doctrine.[61] Although *Bramble* involved undercover police officers, the court made no distinction between undercover police officers

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51 808 F.2d 645 (7th Cir. 1986).

52 *Id.* at 646.

53 *Id.* at 646-47.

54 *Id.* at 648 (emphasis added).

55 *Id.*

56 *Id.*

57 *See* United States v. Akinsanya, 53 F.3d 852, 856 (7th Cir. 1995); United States v. Jachimko, 19 F.3d 296, 299 (7th Cir. 1994); United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987).

58 814 F.2d 454 (7th Cir. 1987).

59 *Id.* at 459.

60 103 F.3d 1475 (9th Cir. 1996).

61 *Id.* at 1478.

and confidential informants.[62] Likewise, the Eastern District of Virginia has adopted the *Diaz* framework for COR without distinguishing between undercover officers and informants.[63] A number of state courts have adopted the COR doctrine as well.[64]

D. *The Sixth Circuit's Adoption of the COR Doctrine*

In *United States v. Pollard*,[65] the Sixth Circuit formally adopted the COR doctrine.[66] In *Pollard*, both an undercover police officer and a confidential informant received initial consent to enter a suspect's home and did so concurrently.[67] Once the undercover officer established probable cause, the confidential informant provided the signal to backup officers waiting outside.[68] The court noted that probable cause did not exist prior to the display of contraband, so the police could not have obtained a warrant prior to the "buy bust" operation.[69] The court, however, adopted the COR doctrine and held that it was lawful to rely upon the backup officers to effectuate the arrest because the undercover officer, upon establishing probable cause, could have arrested the defendants himself and, therefore, the second entry involved no further invasion of privacy.[70] In adopting the COR doctrine, the court quoted the precise language used in *Diaz* and its progeny, which in-

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62 *See id.*

63 *See* United States v. Samet, 794 F. Supp. 178, 181 (E.D. Va. 1992) ("This doctrine of 'consent once removed' applies to cases in which 'the agent (or informant) entered at the express invitation of someone with authority to consent, at that point established the existence of probable cause to effectuate an arrest or search, and immediately summoned help from other officers.'" (quoting *Diaz*, 814 F.2d at 459)).

64 *See, e.g.*, People v. Finley, 687 N.E.2d 1154, 1160-61 (Ill. App. Ct. 1997) (applying the COR doctrine for the sake of the argument, but ultimately finding it inapplicable to the facts of the case); People v. Galdine, 571 N.E.2d 182, 190-91 (Ill. App. Ct. 1991) (adopting the COR doctrine); Baith v. State, 598 A.2d 762, 766-68 (Md. Ct. Spec. App. 1991) (upholding the constitutionality of a search based on consent given to an informant, but not explicitly discussing the COR doctrine); State v. Henry, 627 A.2d 125, 130-31 (N.J. 1993) (holding that an undercover officer's initial consensual entry validated a backup team's subsequent non-consensual entry to make arrests as a "component[] of a single, continuous, and integrated police action"); Williams v. State, 937 S.W.2d 23, 26-27 (Tex. Ct. App. 1996) (en banc) (finding the entry of a raid team lawful based on COR doctrine). *But see* State v. Johnston, 518 N.W.2d 759, 765 n.6 (Wis. 1994) (finding it "confusing and unnecessary" to adopt the COR doctrine).

65 215 F.3d 643 (6th Cir. 2000).

66 *Id.* at 648-49.

67 *Id.* at 646; *see also* United States v. Romero, 452 F.3d 610, 618-19 (6th Cir. 2006) (applying COR when undercover officer alone received initial consent).

68 *Pollard*, 215 F.3d at 649.

69 *See id.* at 648 n.4.

70 *Id.* at 648-49.

cluded the phrase, "[t]he undercover agent *or informant*."[71] In dissent, Judge Nathaniel Jones argued that the COR doctrine "represents an unjustified extension of [the] traditional exigent circumstances jurisprudence."[72]

In *United States v. Yoon*,[73] the Sixth Circuit held that the *Pollard* court's specific statement that the COR doctrine applies when an "officer *or informant*" enters at express invitation was dicta because in that case an informant entered at the same time as a police officer.[74] The court therefore viewed the application of COR to confidential informants as an issue not yet decided by the Sixth Circuit, but went on to formally extend the COR doctrine to apply to circumstances in which confidential informants are unaccompanied by undercover police officers.[75] The majority cited a Tennessee statute granting the arrest power to the state's citizens in support of its reasoning that the informant, upon establishing the necessary probable cause, "could have made the arrest himself had he chosen to do so. Instead, he called officers to assist him, a permissible choice."[76]

E. *The Tenth Circuit's Rejection of* Paul *and* Yoon *in* Callahan v. Millard County

In *Callahan v. Millard County*, the Tenth Circuit refused to adopt the Sixth and Seventh Circuits' extension of the COR doctrine to confidential informants.[77] In *Callahan*, a confidential informant with the Central Utah Narcotics Task Force met with Callahan and discussed a potential sale of methamphetamine that would occur at Callahan's home later that day.[78] The confidential informant immediately contacted a detective with the task force and informed him of the arrangement.[79] That evening, officers wired

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71 *See id.* (emphasis added) (quoting United States v. Akinsanya, 53 F.3d 852, 856 (7th Cir. 1995)) (internal quotation marks omitted).

72 *Id.* at 649 (Jones, J., dissenting). Although courts may recognize new exigencies when appropriate, Judge Jones stated that the present facts did not support the creation of a new exigency. *Id.* at 649-50. This argument, however, completely ignores the entirely separate consent exception to the warrant requirement, upon which the COR doctrine is initially based. This problem is discussed further below. *See infra* Part II.A.1.

73 398 F.3d 802 (6th Cir. 2005).

74 *Id.* at 806 (quoting *Pollard*, 215 F.3d at 648) (internal quotation marks omitted); *see also* Sobczak, *supra* note 40, at 896 n.36.

75 *Yoon*, 398 F.3d at 807-08; *see also* Sobczak, *supra* note 40, at 896.

76 *Yoon*, 398 F.3d at 807 & n.2. In her concurrence, Judge Kennedy sheds more light on the majority's decision. *See id.* at 808-11 (Kennedy, J., concurring); *see also* Sobczak, *supra* note 40, at 896-97. Judge Kennedy's concurring opinion is further discussed below. *See infra* Part II.A-B.

77 Callahan v. Millard Cnty., 494 F.3d 891, 896-98 (10th Cir. 2007), *rev'd on other grounds sub nom.* Pearson v. Callahan, 129 S. Ct. 808 (2009).

78 *Id.* at 893.

79 *Id.*

the confidential informant,[80] gave him a marked bill to use as payment, and arranged for him to give a signal once the transaction was completed.[81] After making a consensual entry into Callahan's home and consummating the deal, the confidential informant gave the signal.[82] The backup officers immediately entered Callahan's home and arrested him.[83] The search incident to Callahan's arrest[84] yielded evidence of drug paraphernalia and narcotics.[85]

Although the trial court admitted the evidence based on the exigency exception to the warrant requirement, the Utah Court of Appeals reversed this decision as well as Callahan's subsequent conviction.[86] During the appeal, the Utah Attorney General's Office conceded that no exigencies existed and did not argue for application of the COR doctrine.[87] Based on the Utah Court of Appeals' ruling, Callahan subsequently filed § 1983 civil rights claims[88] against members of the task force, alleging violations of his constitutional rights.[89] Although the district court examined the application of the COR doctrine in order to determine whether a constitutional violation had occurred, it found that the Supreme Court's recent decision in *Georgia v. Randolph*[90] enabled the court to assume that Callahan's rights were vio-

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80 Applying the *Katz* framework, the Supreme Court has found that the warrantless, surreptitious use of a radio transmitter by a government informer is constitutional, as the target of the recording has no reasonable expectation of privacy in his exchange with the informer. *See* United States v. White, 401 U.S. 745, 751-54 (1971) ("Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police."); *see also* Lopez v. United States, 373 U.S. 427, 439 (1963) ("[T]he risk that petitioner took in offering a bribe . . . fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.").

81 *Callahan*, 494 F.3d at 893.

82 *Id.*

83 *Id.* at 893-94.

84 It is a well-established exception to the warrant requirement that police may execute a warrantless search incident to an otherwise valid arrest, so long as the area and scope of the search is appropriately limited. *See, e.g.*, SALTZBURG & CAPRA, *supra* note 9, at 289-326.

85 *Callahan*, 494 F.3d at 893; Michael Edmund O'Neill, *(Un)reasonableness and the Roberts Court: The Fourth Amendment in Flux*, 2009 CATO SUP. CT. REV. 183, 196.

86 *Callahan*, 494 F.3d at 894.

87 *See id.*

88 *See* 42 U.S.C. § 1983 (2006). Congress enacted § 1983 in 1871 for the purpose of protecting "certain rights 'secured by the Constitution and laws' against infringement by the states." 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 1:1, at 1-3 (4th ed. 2008). When violations of these rights occur, § 1983 "creates an action for damages and injunctive relief for the benefit of 'citizens' and 'other persons' against those 'persons' responsible for the violations." *Id.* (footnotes omitted).

89 *See Callahan*, 494 F.3d at 894.

90 547 U.S. 103 (2006).

lated.[91] The district court, however, found that qualified immunity shielded the officers and subsequently dismissed Callahan's claims.[92]

On appeal, the Tenth Circuit considered the Sixth and Seventh Circuit's application of the COR doctrine.[93] Although the Tenth Circuit had not previously articulated a particular version of the COR doctrine, the court stated that "[h]ad the person inside [the suspect's] home been an undercover officer, no extension of our case law would be necessary."[94] The court explained that consent is a well-established method of conducting a reasonable warrantless search, that precedent allows the police to deceive in order to gain consent, and that an officer may carry out a warrantless arrest supported by probable cause once lawfully inside the home.[95] The court reasoned that it had "never drawn a constitutional distinction between an entry or search by an individual police officer and an entry or search by several police officers. Thus, the consent granted to the hypothetical undercover officer would have covered additional backup officers without any need for additional exceptions to the warrant requirement."[96]

In the Tenth Circuit's view, however, allowing police entry when consent to enter was granted to a confidential informant instead of an undercover officer *would* require an expansion of the consent exception.[97] The court reasoned that the suspect, by admitting the informant, never consented to the entry of the police.[98] The court noted that although a state may grant the arrest power to citizens, a citizen is not granted all of the powers and obligations of the police as agents of the state.[99] The court also rejected the officers' policy arguments regarding efficiency and officer safety on the grounds that the police may not manipulate or abuse the circumstances creating the exigency and that a generalized interest in expedient law enforcement alone cannot justify a warrantless search.[100] Consequently, the Tenth

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91 *Callahan*, 494 F.3d at 894. The Supreme Court's decision in *Randolph* deals with the related, but separate, "Third Party Consent" doctrine and is further discussed below. *See infra* Part II.C.

92 *Callahan*, 494 F.3d at 894. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson v. Callahan, 129 S. Ct. 808, 815 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

93 *Callahan*, 494 F.3d at 896.

94 *Id.*

95 *Id.* at 896-97.

96 *Id.* at 897.

97 *Id.* The majority specifically stated that "the invitation of an informant into a house *who then in turn invites the police*, which are the present facts, would require an expansion of the consent exception." *Id.* (emphasis added). This statement reveals an underlying assumption that the COR doctrine involves multiple consents to entry and is thus akin to the "Third Party Consent" doctrine. The COR doctrine, however, involves only a *single* consent to entry, which is theoretically extended to additional officers. This vital distinction is discussed extensively below. *See infra* Part II.C.

98 *Callahan*, 494 F.3d at 897.

99 *Id.*

100 *Id.* at 897-98.

Circuit held that the police violated Callahan's constitutional rights and went on to reverse the district court by denying the officers' qualified immunity defense.[101]

In dissent, Judge Paul Kelly, Jr. argued that the majority's holdings unnecessarily parted company with three other circuits and were contrary to longstanding Fourth Amendment principles.[102] Judge Kelly stated that the COR doctrine is "somewhat of a misnomer . . . because the doctrine depends on more than consent alone."[103] "Rather, 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 [additional] officers to enter."[104] Applying the assumption of risk argument from *United States v. Paul*, Judge Kelly framed the crucial issue as "whether a homeowner's legitimate expectation of privacy is any greater when he allows a confidential informant into his home rather than a full-fledged officer."[105] He countered the majority's argument that the suspect did not consent to the entry of police by explaining that "no one ever consents to the entry of police in these undercover situations," but rather they consent to the entry of an individual "who *might* be the police . . . or . . . who *might* be a government agent."[106] Judge Kelly further elaborated:

> [T]he pertinent issue is not the type of government agent allowed in, but the consequence of that invitation, combined with the subsequent sale of narcotics, on a resident's reasonable expectation of privacy. And the only principled resolution of that issue is to hold that, no matter what type of government agent is allowed in, any previously existent legitimate expectation of privacy is abandoned.[107]

Judge Kelly also rejected the majority's reliance upon the distinction between police powers shared by citizens and those powers possessed only by the police.[108] To Judge Kelly, application of the COR doctrine to confidential informants is "abundantly reasonable" because not only does a citizen possess the right to arrest, but when acting as a government agent during a "buy bust" operation, the private citizen can also potentially face civil liability for any unconstitutional actions he or the police commits.[109]

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101 *Id.* at 898-99.
102 *Id.* at 900 (Kelly, J., dissenting).
103 *Id.* at 901.
104 *Callahan*, 494 F.3d at 901 (Kelly, J., dissenting).
105 *Id.*
106 *Id.* at 902.
107 *Id.*
108 *Id.*
109 *Id.*

F. *The Supreme Court's Failure to Address the COR Issue in* Pearson v. Callahan

The constitutionality of the Sixth and Seventh Circuits' extension of the COR doctrine to confidential informants appeared to be the focal point of the case before the Supreme Court in *Pearson v. Callahan*.[110] Indeed, substantial portions of the parties' briefs and much of the oral argument focused on the issue.[111] During the Justices' exchanges with the attorneys at oral arguments, three different perspectives emerged.[112] Justices Ginsburg and Souter appeared to support Callahan's position by repeatedly expressing concerns over the importance of police officers obtaining warrants whenever possible.[113]

Justices Alito and Kennedy, by contrast, seemed concerned that a decision in Callahan's favor would endanger police officers and were therefore inclined to pronounce a constitutional rule authorizing the police to make warrantless entries and searches in such situations.[114] Justice Alito accused Callahan's counsel of "advocating a rule that is going to get police officers killed," explaining that such a rule would recognize the undercover agent's authority to personally place the suspects under arrest, but would forbid the agent from signaling backup officers to enter "and help him effect the arrest without anybody being killed."[115] Although on the surface the issue appeared to be whether the extension of COR to confidential informants was constitutional, Justice Alito's statement seemed to imply a concern that the Court could not overturn one extension of COR without overturning the doctrine as a whole. Nevertheless, Justice Kennedy explicitly stated that "[i]t seems to me that this is an area where the police do need guidance, and I need guidance,"[116] yet he found it "very difficult" to come to a conclusion in light of all the potential factual scenarios prospectively affected by such a rule.[117]

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110 129 S. Ct. 808 (2009).

111 *See* Brief for Petitioners at 20-41, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751); Reply Brief for Petitioners at 2-15, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751); Brief of Respondent at 15-36, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751); Transcript of Oral Argument at 10-16, Pearson v. Callahan, 129 S. Ct. 808 (2009) (No. 07-751).

112 Christopher E. Smith, Michael A. McCall & Madhavi M. McCall, *The Roberts Court and Criminal Justice at the Dawn of the 2008 Term*, 3 CHARLESTON L. REV. 265, 285 (2009).

113 *Id.*

114 *Id.*

115 *Id.* at 284 (quoting Transcript of Oral Argument, *supra* note 111, at 30) (internal quotation marks omitted).

116 *Id.* at 285 (quoting Transcript of Oral Argument, *supra* note 111, at 34) (internal quotation marks omitted).

117 *Id.* (quoting Transcript of Oral Argument, *supra* note 111, at 34) (internal quotation marks omitted).

A third perspective emerged during a line of questioning by Chief Justice Roberts and Justice Breyer, hinting that the Court might avoid altogether the "potentially difficult task of crafting a workable constitutional rule about [COR] for situations involving informants."[118] Under this approach, the Court would merely decide whether the officers had qualified immunity under the existing comprehension of the law at the time of the allegedly unconstitutional search.[119] As it turns out, the Court did just that by focusing exclusively on overturning the Court's prior ruling in *Saucier v. Katz*,[120] where it had enunciated a rigid procedure for analyzing qualified immunity claims.[121] Despite the Court's interest in the constitutional issue of COR, as well as its potential impact on the qualified immunity analysis, Justice Alito's unanimous opinion gave the COR issue short shrift and punted it down the road for another day.[122]

After ruling that courts need not determine whether a plaintiff has made out a violation of a constitutional right before analyzing a qualified immunity defense,[123] the Court concluded that the officers were "entitled to qualified immunity on the ground that it was not clearly established at the time of the search that their conduct was unconstitutional."[124] The Court reasoned that although the officers' own court of appeals had not yet ruled on COR entries when the entry at question occurred in 2002, two state supreme courts and three federal courts of appeals had accepted the COR doctrine, and none had issued a decision that would have squarely found the officers' behavior unconstitutional.[125]

II. ANALYSIS

The Sixth,[126] Seventh,[127] and arguably Ninth[128] Circuits have applied the COR doctrine to undercover confidential informants, while the Tenth

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118 Smith et al., *supra* note 112, at 285.

119 *Id.*

120 533 U.S. 194 (2001), *overruled by* Pearson v. Callahan, 129 S. Ct. 808 (2009).

121 *See id.* at 201-02.

122 O'Neill, *supra* note 85, at 196. The Supreme Court pointed only to the Tenth Circuit's holding, by a divided panel, that the petitioners' conduct violated the Fourth Amendment. Pearson v. Callahan, 129 S. Ct. 808, 814-15 (2009).

123 *See Pearson*, 129 S. Ct. at 818.

124 *Id.* at 813.

125 *Id.* at 822-23. The Court cited State v. Henry, 627 A.2d 125 (N.J. 1993), and State v. Johnston, 518 N.W.2d 759 (Wis. 1994), as the two state supreme courts that had accepted the COR doctrine. *Pearson*, 129 S. Ct. at 822-23. The Wisconsin Supreme Court in *Johnston*, however, explicitly refused to adopt the COR doctrine, referring to it as "confusing and unnecessary." *Johnston*, 518 N.W.2d at 765 n.6.

126 *See* United States v. Yoon, 398 F.3d 802, 806-08 (6th Cir. 2005).

127 *See* United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986).

128 *See* United States v. Bramble, 103 F.3d 1475, 1478-79 (9th Cir. 1996).

Circuit has refused to extend COR from undercover police officers to private citizens acting on behalf of the government.[129] Although the Tenth Circuit's ruling is based primarily on the scope of consent granted for the initial entry, as well as the array of powers held exclusively by police officers,[130] the remaining circuits that have dealt with the issue have found no constitutionally relevant distinction with respect to the formal employment status of the undercover agent.[131]

As the latter circuits have correctly concluded, the COR doctrine should apply to both undercover police officers and confidential informants. To understand the scope of the COR doctrine, it is necessary to understand the rationale behind it. First, when a police officer or informant obtains valid consent to enter a suspect's home, he may do so without having to comply with the usual warrant requirement.[132] Next, the suspect's intentional exposure of illicit activity to the officer or informant establishes probable cause as to the commission of a felony—thus authorizing the officer or informant to immediately arrest the suspect—and thereby destroys any legitimate expectation of privacy that the suspect has in his home.[133] Finally, now that the suspect no longer has a legitimate expectation of privacy in the immediate vicinity of the narcotics transaction, the officer or informant may call additional officers into that area to assist in the arrest without bringing Fourth Amendment protections into play.[134]

This Part analyzes the reasoning behind the COR doctrine and argues that the proper application of COR should not discriminate between undercover police officers and confidential informants. Section II.A examines the foundational principles of the COR doctrine and explains that COR conceptually relies on a reduced expectation of privacy. Section II.B explains why courts evaluating COR cases should not distinguish between undercover police officers and confidential informants. Section II.C analyzes the similar, but entirely separate, TPC doctrine and explains why its principles do not apply in the COR context. Finally, Section II.D addresses the Supreme Court's decision not to resolve the COR doctrine circuit split upon its granting of certiorari in *Callahan* and suggests potential consequences.

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129 *See* Callahan v. Millard Cnty., 494 F.3d 891, 898 (10th Cir. 2007), *rev'd on other grounds sub nom*. Pearson v. Callahan, 129 S. Ct. 808 (2009).

130 *See supra* Part I.E.

131 *See supra* Part I.C-D.

132 *See* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

133 *See* Lewis v. United States, 385 U.S. 206, 211 (1966); United States v. Yoon, 398 F.3d 802, 807 n.2 (6th Cir. 2005).

134 *See* United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986).

A. *Foundational Principles of the COR Doctrine*

This Section analyzes the foundational principles for the constitutionality of the COR doctrine. Subsection II.A.1 discusses the difficulty courts have had in clearly delineating a rationale for the COR doctrine, particularly with respect to the entirely separate exceptions to the warrant requirement of "exigent circumstances" and voluntary consent. Subsection II.A.2 explains the true conceptual underpinning of the COR doctrine: a severely diminished expectation of privacy.

1. Exigent Circumstances v. Consent

Exigent circumstances and consent are two distinct exceptions to the warrant requirement. Exigent circumstances allow the police to enter a home without a warrant when they have probable cause and particular circumstances reasonably justify their immediate action.[135] By contrast, when the police receive voluntary consent to enter a home, they may do so without a warrant or even any particularized suspicion of criminal wrongdoing.[136] Many courts, however, blur the line between the two exceptions.[137] For example, Judge Jones's dissent in *United States v. Pollard* suggests that COR was an unjustified extension of exigent circumstances.[138] Similarly, the Tenth Circuit *Callahan* majority, in declining to extend the COR doctrine to confidential informants, stated that to overcome the presumption of unconstitutionality of warrantless entries into the home, government actors must demonstrate that the search falls within the "carefully defined set of exceptions *based on the presence of* '*exigent circumstances*.'"[139] The majority framed its analysis as whether "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment"[140] and explained that the court must balance the "private interests and unique public safety con-

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135 *See supra* note 18 and accompanying text.

136 *See supra* Part I.B.

137 *See, e.g.*, Callahan v. Millard Cnty., 494 F.3d 891, 896 (10th Cir. 2007), *rev'd on other grounds sub nom.* Pearson v. Callahan, 129 S. Ct. 808 (2009).

138 *See* United States v. Pollard, 215 F.3d 643, 649-50 (6th Cir. 2000) (Jones, J., dissenting). Judge Jones stated that "[i]t is well settled that warrantless searches of a home are unreasonable unless supported by probable cause and exigent circumstances" and that "without any specific reason to believe that evidence would be destroyed or that officer safety was in danger, there is no justification for a warrantless intrusion into the sanctity of a private home." *Id.*

139 *Callahan*, 494 F.3d at 896 (emphasis added) (quoting United States v. Walker, 474 F.3d 1249, 1252 (10th Cir. 2007)) (internal quotation marks omitted).

140 *Id.* (quoting Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006)) (internal quotation marks omitted).

cerns" to find a new exigency exception.[141] Noting that the officers did not argue that an established exigency-based exception justified the warrantless entry, the majority went on to consider the application of the COR doctrine under this framework.[142] The majority's subsequent analysis of the COR doctrine appeared to reflect the underlying assumption that it must fall within the exigent circumstances exception, particularly in response to the officers' policy arguments that a contrary ruling would severely hamper law enforcement because the use of informants is essential and that a warrant requirement under these circumstances would cause delays and seriously jeopardize the informant's personal safety.[143] The court explicitly dismissed these concerns on the grounds that this argument "contradicts the nature of the exceptions based on exigent circumstances requiring that the police may not manipulate or abuse the circumstances creating the exigency."[144]

This analysis misses the point. Neither exigency nor traditional consent supports the application of COR.[145] The COR doctrine has arisen out of situations in which the police could not rely upon the exigency exception because the police are not allowed to create exigent circumstances to justify their entry into a suspect's home.[146] As no exigency would exist in a COR situation but for the undercover agent's initial consensual entry and subsequent narcotics transaction, exigency could only justify the entry of additional officers if the undercover agent finds himself in danger due to circumstances that he neither created nor could have readily averted.[147]

The courts applying the COR doctrine have recognized this shortcoming and have instead relied upon the exception of consent.[148] Nevertheless, the problem with traditional consent is that the suspect has only granted consent to enter his home to the individual whom he admitted into the home, and "it is a fiction to claim that the subsequent officers who enter the

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141 *Id.*

142 *Id.*

143 *See id.* at 897.

144 *Id.*

145 United States v. Yoon, 398 F.3d 802, 808-09 (6th Cir. 2005) (Kennedy, J., concurring).

146 *Id.* at 808-09, 809 n.3.

147 *See id.* at 809 n.3. "The Supreme Court has strictly circumscribed the exigent circumstances that validate a nonpublic warrantless arrest." Joann Grozuczak Goedert et al., *Warrantless Searches and Seizures*, 76 GEO. L.J. 561, 575 (1988). These "limited and carefully delineated" situations include emergency conditions such as the hot pursuit of a fleeing suspect, the imminent destruction of evidence, and immediate grave threats to the safety of law enforcement officers or the public. *Id.* at 575-76 (quoting Welsh v. Wisconsin, 466 U.S. 740, 749 (1984)) (internal quotation marks omitted). Even when faced with these sorts of conditions, the police may not invoke the exigency exception to justify a warrantless search or seizure within the home when police conduct creates the exigency. *Id.* at 576. "In addition, the government must demonstrate that the police could not reasonably have obtained an arrest warrant prior to a warrantless entry." *Id.*

148 *Yoon*, 398 F.3d at 809 (Kennedy, J., concurring).

suspect's home also receive the suspect's consent to enter.'"[149] Concluding that the COR doctrine is based on neither exigency nor traditional consent, one opinion suggested a possible conceptual foundation for the doctrine based upon a hybrid of the two doctrines: "a sort of 'quasi exigent circumstances and consent.'"[150] Under this rationale, a suspect has a diminished expectation of privacy once he invites an undercover agent into his home, and the legitimate concern for the safety of the undercover agent inside outweighs any remaining expectation of privacy.[151]

Although traditional consent alone is not enough to justify the application of the COR doctrine to the entry of additional officers, it does get the undercover agent's foot in the door, so to speak. The next step of the analysis deals with the change in circumstances—and applicability of the Fourth Amendment—once the suspect exposes his illicit activity to his undercover guest.

2. An Illegitimate Expectation of Privacy

The key to the COR doctrine is the suspect's lack of a reasonable expectation of privacy. Ordinarily, individuals have the utmost expectation of privacy in their homes, where the full range of Fourth Amendment protections applies.[152] A suspect, however, relinquishes his otherwise legitimate expectation of privacy in his home when he invites a government agent in for the purpose of conducting an illegal transaction.[153] Once the suspect has transformed his home into a "commercial center" to make illegal transactions, the area he has exposed to the undercover agent is "entitled to no greater sanctity than . . . a store, a garage, a car, or . . . the street."[154] Consequently, the Fourth Amendment no longer protects the particular portion of the individual's home in which the illegal transaction takes place.[155] So long as an officer or informant limits any search or seizure to the area the suspect has voluntarily exposed to him, the Fourth Amendment does not apply.[156]

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149 *Id.*; *see also Callahan*, 494 F.3d at 901 (Kelly, J., dissenting) ("The name 'consent once removed' is somewhat of a misnomer, however, because the doctrine depends on more than consent alone.").

150 *Yoon*, 398 F.3d at 809 n.2 (Kennedy, J., concurring).

151 *Id.*

152 Lewis v. United States, 385 U.S. 206, 211 (1966); *see supra* Part I.A.

153 *Lewis*, 385 U.S. at 211. "The Court has held on several occasions after *Katz* that there is no legitimate privacy interest in illegal activity." SALTZBURG & CAPRA, *supra* note 9, at 42 (citing United States v. Place, 462 U.S. 696 (1983) (finding no privacy interest in possession of contraband)).

154 *Lewis*, 385 U.S. at 211.

155 *See id.*

156 *See id.* There are certainly situations in which an individual may *inadvertently* display contraband or evidence of illegal activity to a guest. That person's reasonable expectation of privacy in his or her home would arguably remain intact, but such an analysis is beyond the scope of this Note. For the

In applying this framework in the "buy bust" context, the COR 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 [additional] officers to enter."[157] An individual "fatally compromise[s]" his expectation of privacy when he invites an undercover government agent into his home and intentionally displays illegal activity to him.[158] Once this happens, the undercover agent, having established probable cause to arrest and having the authority to in fact do so then and there, is entitled to call in backup officers to assist in the arrest.[159] In his dissenting opinion in *Callahan*, Judge Kelly explained that the relevant issue involved in COR cases is the consequence of the government agent's invitation into the home, combined with the subsequent sale of contraband, on a suspect's reasonable expectation of privacy.[160] "[N]o matter what type of government agent is allowed in, any previously existent legitimate expectation of privacy is abandoned."[161] Finally, the COR doctrine requires that the scope of the entry and subsequent search be limited by the scope of the original consent, so that only the area into which the government agent was initially admitted is subject to entry by additional officers.[162]

Thus, in the typical "buy bust" scenario, a suspect initially has a reasonable expectation of privacy in his home, and the Fourth Amendment governs police activity. The resident's voluntary consent to the entry of an undercover government agent allows the agent to enter the resident's home without a warrant, despite the fact that the suspect is unaware that he is admitting a state actor into his home.[163] Accordingly, the government agent needs no warrant to justify his physical presence within any areas of the home that the suspect voluntarily exposes to him during the course of their

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purposes of this discussion, the focus is on a suspect who *intentionally* reveals illegal activity to his undercover guest.

157 Callahan v. Millard Cnty., 494 F.3d 891, 901 (10th Cir. 2007) (Kelly, J., dissenting), *rev'd on other grounds sub nom.* Pearson v. Callahan, 129 S. Ct. 808 (2009).

158 United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986).

159 United States v. Yoon, 398 F.3d 802, 809-10 (6th Cir. 2005) (Kennedy, J., concurring). This arrest power is discussed further below. *See infra* Part II.B.

160 *Callahan*, 494 F.3d at 902 (Kelly, J., dissenting).

161 *Id.*

162 *See, e.g.*, United States v. Bramble, 103 F.3d 1475, 1478-79 (9th Cir. 1996). Thus, if a suspect admits the undercover agent into his living room, the only area subject to entry by additional officers is the living room. They may not perform a general search of the entire home or rummage through unexposed property based on the initial entry. *See* Gouled v. United States, 255 U.S. 298, 306 (1921) (invalidating a search where an undercover government agent exceeded the scope of consent by rummaging through papers in the defendant's office while the defendant was away). Further searches and/or seizures may be authorized, however, by searches incident to arrest or protective sweeps of the home. These doctrines are beyond the scope of this Note and are not discussed.

163 *See* Lewis v. United States, 385 U.S. 206, 211 (1966).

exchange.[164] Once the suspect displays contraband to the agent, he fatally compromises his expectation of privacy in the area he has exposed, as he has provided the agent with irrefutable probable cause that a crime is occurring in the agent's presence.[165] This eliminates the suspect's reasonable expectation of privacy in this particular area under the *Katz* rule.[166] Accordingly, the subsequent entry of the backup officers into this compromised area of the home involves no further invasion of privacy and consequently does not rise to the level of a search. Thus, the Fourth Amendment's warrant requirement no longer applies, and the entry of the additional officers does not require a warrant.

B. *Courts Should Not Distinguish Between Undercover Police Officers and Confidential Informants in Applying the COR Doctrine*

This Section explains why courts should not distinguish between undercover police officers and confidential informants when applying the COR doctrine. Subsection II.B.1 analyzes the law of government agency. Subsection II.B.2 discusses the nature of the citizen's arrest power and how it is the only law enforcement power arguably necessary to support the COR doctrine. Finally, Subsection II.B.3 explains how the employment status of the undercover agent has no impact upon the scope of consent granted by the suspect for the initial entry.

1. Government Agency

The Fourth Amendment does not apply to a search or seizure, even a patently unreasonable and arbitrary one, performed by a private citizen acting on his own initiative.[167] When a private citizen acts as an agent of the government, however, the Fourth Amendment regulates that private citizen exactly like a professional police officer, and his actions become "fully 'attributable to the Government.'"[168] As it is often difficult to determine when government agency has been established, this question inevitably turns on the degree of the government's involvement in the private citizen's conduct and can only be resolved "in light of all the circumstances."[169]

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164 *See id.*

165 *See* United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986).

166 *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

167 *E.g.*, Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 614 (1989); United States v. Jacobsen, 466 U.S. 109, 113 (1984); *see also* Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

168 Reply Brief for Petitioners, *supra* note 111, at 5 (quoting *Skinner*, 489 U.S. at 614).

169 *Skinner*, 489 U.S. at 614-15 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971)) (internal quotation marks omitted).

In making an agency determination, the citizen's employment status with the government is by no means dispositive.[170] Rather, courts focus on two important inquiries: (1) whether the private citizen subjectively believed at the time of the search or seizure that police or other government agents had explicitly or implicitly solicited his action; and (2) whether the government knew or had reason to know of and acquiesced in the citizen's intrusive conduct.[171] A private citizen's search or seizure will come within the purview of the Fourth Amendment where both questions are answered in the affirmative.[172] In nearly all cases involving undercover "buy bust" operations and confidential informants, the informants undoubtedly qualify as government agents: the government knows full well that an informant will enter a suspect's home during the operation, and an informant participates in the operation with the explicit purpose of assisting the police.[173]

Importantly, the consequences of government agency are not limited to the suppression of evidence stemming from an unconstitutional search or seizure. Once a private citizen becomes a government agent, he and the officers for whom he works assume the risk of civil liability for any of his actions later deemed unconstitutional.[174] The great obligation of police to respect citizens' constitutional rights carries over to the private citizen once he agrees to work alongside the government, and he can be held personally liable for any Fourth Amendment violations he commits.[175] This fact, when paired with the citizens' arrest power, demonstrates that the application of the COR doctrine to confidential informants is patently reasonable.[176]

2. The Citizen Arrest Power

The COR doctrine is *not* conceptually based on law enforcement powers such as "the ability to seize incriminating evidence in plain view or the theory of collective knowledge."[177] Rather, the entry of backup officers sat-

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170 Reply Brief for Petitioners, *supra* note 111, at 5.

171 Callahan v. Millard Cnty., 494 F.3d 891, 902 (10th Cir. 2007) (Kelly, J., dissenting), *rev'd on other grounds sub nom.* Pearson v. Callahan, 129 S. Ct. 808 (2009); SALTZBURG & CAPRA, *supra* note 9, at 77-78.

172 SALTZBURG & CAPRA, *supra* note 9, at 78.

173 *Callahan*, 494 F.3d at 902 (Kelly, J., dissenting).

174 *Id.*

175 *Id.*

176 *Id.*

177 United States v. Yoon, 398 F.3d 802, 810 (6th Cir. 2005) (Kennedy, J., concurring). This notion is contrary to the Tenth Circuit majority's opinion in *Callahan v. Millard County*, as well as Judge Ronald Lee Gilman's dissenting opinion in *United States v. Yoon*. *See Callahan*, 494 F.3d at 897; *Yoon*, 398 F.3d at 812 (Gilman, J., dissenting) (arguing that the COR doctrine is conceptually based on law enforcement powers that have never been granted to civilians, specifically those within the purview of the "plain view" and "collective knowledge" doctrines).

isfies the Fourth Amendment because the suspect has fatally compromised his expectation of privacy.[178] If any traditional police power is necessary to justify the COR doctrine, it is the arrest power because, according to Judge Kennedy's concurrence in *Yoon*, once the undercover agent establishes probable cause to arrest, he is authorized to request additional officers to help him safely effectuate that arrest under the COR doctrine.[179] If the arrest power belonged to police officers but not private citizens, courts would be in a better position to distinguish confidential informants from police officers when applying the COR doctrine. Because the arrest power "does not lie in the sole province of the police,"[180] however, this distinction is more tenuous.

Historically, professional police forces did not exist until the nineteenth century.[181] Prior to the creation of professional police forces, citizens frequently engaged in making arrests and conducting investigations.[182] At common law, a private citizen could make a warrantless arrest for a felony or breach of the peace committed in his presence.[183] This requirement was met if the citizen had reasonable grounds to believe that acts he has observed are in and of themselves "sufficiently indicative of a crime in the course of commission."[184]

Although the modern citizen does not possess all of the same powers and responsibilities as police officers,[185] most states have enacted statutes either codifying the existing common law citizen arrest power or modifying common law standards.[186] In those few states where no statutes exist on the

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178 *Yoon*, 398 F.3d at 810 (Kennedy, J., concurring).

179 *Id.* Recall that the COR doctrine requires that an undercover agent or government informant (1) enter at the express invitation of someone with authority to consent, (2) at that point establish the existence of probable cause to effectuate an arrest or search, and (3) immediately summon help from other officers. United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987).

180 *Yoon*, 398 F.3d at 810 (Kennedy, J., concurring).

181 Brief for Petitioners, *supra* note 111, at 36; *see also* Crawford v. Washington, 541 U.S. 36, 53 (2004); 1 JAMES F. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 194-200 (1883).

182 Brief for Petitioners, *supra* note 111, at 36-37 (citing M. CHERIF BASSIOUNI, CITIZEN'S ARREST: THE LAW OF ARREST, SEARCH, AND SEIZURE FOR PRIVATE CITIZENS AND PRIVATE POLICE 6-13 (1977)).

183 5 AM. JUR. 2D *Arrest* § 48 (2007); *see also* Alvin Stauber, *Citizen's Arrest: Rights and Responsibilities*, 18 MIDWEST L. REV. 31, 31 (2002).

184 5 AM. JUR. 2D, *supra* note 183.

185 Callahan v. Millard Cnty., 494 F.3d 891, 902 (10th Cir. 2007) (Kelly, J., dissenting), *rev'd on other grounds sub nom.* Pearson v. Callahan, 129 S. Ct. 808 (2009).

186 *See, e.g.*, ALA. CODE § 15-10-7 (LexisNexis 1995); ARIZ. REV. STAT. ANN. § 13-3884 (2010); 725 ILL. COMP. STAT. 5/107-3 (2006); TENN. CODE ANN. § 40-7-109 (2006); UTAH CODE ANN. § 77-7-3 (LexisNexis 2003); *see also* BASSIOUNI, *supra* note 182, at 14-22, 87-95; Stauber, *supra* note 183, at 31-33. "By 1976, thirty-one states had enacted legislation covering an arrest by a private person . . . . An analysis of the statutes and decisions of the fifty states reveals a substantial similarity in the privilege of citizen's arrest but it also discloses some divergence in its application." BASSIOUNI, *supra* note 182, at 14-15.

subject, the common law governs with respect to the private citizen's arrest powers.[187] Therefore, by creating an agency relationship with a confidential informant, the government entrusts no additional police powers to the individual citizen, and no "deputizing [of] the lawless" is necessary.[188]

Accordingly, a private citizen may obtain a suspect's consent to enter his home, determine that the suspect has committed a felony in his presence by displaying contraband, and subsequently arrest him.[189] As the private citizen has the same power to arrest in that situation as an undercover officer, it makes little sense to say that the suspect has a greater expectation of privacy when there is a private citizen in his home rather than a police officer. Hence, under the COR doctrine, the citizen, when acting as a government agent, should have the authority to summon assistance from police officers to effectuate the arrest because the suspect's expectation of privacy is no less compromised by inviting an informant into his home and exposing his illegal activity than by inviting an undercover police officer.[190] This suggests that—for the purpose of the COR doctrine—discriminating between police officers and confidential informants based on police powers is constitutionally improper.

3. The Scope of the Initial Consent Granted by a "Buy Bust" Suspect

The crux of the Tenth Circuit majority's reasoning in *Callahan v. Millard County* is that the invitation of a confidential informant into a home, as compared to that of an undercover police officer, "would require an expansion of the consent exception . . . [because] the person with authority to consent never consented to the entry of police into the house."[191] In *Florida v. Jimeno*,[192] however, the Supreme Court held that "[t]he standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of '*objective*' *reasonableness*—what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[193] Although this ruling occurred in the context of how pervasive a search a police officer could engage in based on a grant of general con-

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187 5 AM. JUR. 2D, *supra* note 183, § 47; Stauber, *supra* note 183, at 33. Although Louisiana is the only state in the union that does not adhere to the British common law tradition, it has enacted a citizen's arrest power statute. *See* LA. CODE CRIM. PROC. ANN. art. 214 (2003).

188 United States v. Yoon, 398 F.3d 802, 810 n.5 (6th Cir. 2005) (Kennedy, J., concurring) (internal quotation marks omitted).

189 *Id.* at 810.

190 *Id.*

191 Callahan v. Millard Cnty., 494 F.3d 891, 897 (10th Cir. 2007), *rev'd on other grounds sub nom.* Pearson v. Callahan, 129 S. Ct. 808 (2009).

192 500 U.S. 248 (1991).

193 *Id.* at 251 (emphasis added).

sent,[194] the conceptual underpinnings of *Jimeno* are perfectly applicable to the present situation.

While the *Callahan* majority is correct in that the suspect did not consent to the police entry, its logic is faulty because suspects *never* knowingly consent to the entry of police in the context of "buy bust" operations.[195] From an objective standpoint, the suspect's only concern is whether the person he admits is a willing purchaser who will pay the agreed price to complete the drug transaction.[196] By running such an operation, the suspect assumes a variety of risks about the potential customers he admits into his home: someone may later testify against him, may wear a wire, or may try to place him under arrest.[197] The suspect further assumes the risk that he is consenting to the entry of a person who might be a police officer or who might be a government agent.[198] It makes no difference to the scope of consent that the individual admitted later turns out to be a police officer or a confidential informant acting as a government agent. In each instance, the suspect grants consent with no knowledge as to the undercover status of his guest.[199] As Judge Kelly stated in dissent in *Callahan*: "So long as an invitation to enter is extended to a government agent (even unknowingly), the pertinent issue is not the type of government agent allowed in, but the consequence of that invitation, combined with the subsequent sale of narcotics, on a resident's reasonable expectation of privacy."[200] The only justified answer to this question is that, regardless of the employment status of the undercover agent, the suspect has abandoned any previously existing and objectively reasonable expectation of privacy.[201]

C. *The "Third Party Consent" Doctrine Is Irrelevant to COR Analysis*

In *Georgia v. Randolph*, the Supreme Court held that an officer's reliance upon the consent of one occupant of a home is unreasonable when her co-tenant is physically present and expressly refuses to permit the search.[202] The Court's decision involved a balancing of individual and government interests while relying on a notion of commonly accepted expectations of privacy.[203] Although the single occupant's consent would justify a warrantless search if her co-tenant were absent, "widely shared social expecta-

194 *See id.* at 249; SALTZBURG & CAPRA, *supra* note 9, at 478.
195 *Callahan*, 494 F.3d at 902 (Kelly, J., dissenting).
196 *See* Lewis v. United States, 385 U.S. 206, 210 (1966).
197 *See* United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986).
198 *See Callahan*, 494 F.3d at 902 (Kelly, J., dissenting).
199 United States v. Yoon, 398 F.3d 802, 811 (6th Cir. 2005) (Kennedy, J., concurring).
200 *Callahan*, 494 F.3d at 902 (Kelly, J., dissenting).
201 *Id.*
202 Georgia v. Randolph, 547 U.S. 103, 122-23 (2006).
203 Sobczak, *supra* note 40, at 899.

tions" make it unreasonable for police to enter a home when faced with a protesting occupant.[204] This case dealt with the similar, but separate, TPC doctrine, which allows police to obtain consent to search a suspect's property from someone who shares "common authority" over the property with the suspect.[205] The Court has explained that the authority justifying TPC rests upon the "mutual use of the property by persons generally having joint access or control for most purposes," which allows courts and police officers to reasonably recognize "that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."[206]

It has been argued that COR is an improper circumvention of the TPC doctrine's reasonableness limitation and is therefore unconstitutional.[207] While not going so far as to explicitly compare the two doctrines, the Tenth Circuit appeared to suggest that the COR doctrine, like TPC, is based on the existence of two separate consents: "one from the homeowner to the confidential informant and one from the confidential informant to the police."[208]

This analysis, however, fails for at least three reasons. First, when viewed as the Tenth Circuit majority suggests, the COR doctrine could not function with respect to either police officers or confidential informants—police officers have no more authority to subsequently grant consent to the entry of additional officers into a suspect's home than confidential informants do.[209] Second, undercover agents clearly lack common authority over the home of a "buy bust" target. They have, at best, no more than a temporary presence within the premises during the time it takes to purchase narcotics. This temporary presence cannot establish common authority "be-

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204 *See Randolph*, 547 U.S. at 111.

205 *See id.* at 110; United States v. Matlock, 415 U.S. 164, 171 (1974). The Supreme Court has also allowed for third-party consent searches in the absence of actual authority to consent under the doctrine of "apparent authority." *See* Illinois v. Rodriguez, 497 U.S. 177, 186-89 (1990). Where a third party grants consent to enter a home, but does not actually have common authority over the premises, the police entry is nevertheless valid if the officer had an objectively reasonable belief that the third party had authority to consent at the time of entry. *See id.* This iteration of the TPC doctrine is inapplicable to the COR context because the police are fully aware that their confidential informants do not exercise common authority over the premises at issue in these buy-bust scenarios and, consequently, cannot articulate an objectively reasonable belief to the contrary.

206 *Matlock*, 415 U.S. at 171 n.7.

207 *See* Sobczak, *supra* note 40, at 908-10.

208 Callahan v. Millard Cnty., 494 F.3d 891, 901 n.2 (10th Cir. 2007) (Kelly, J., dissenting), *rev'd on other grounds sub nom.* Pearson v. Callahan, 129 S. Ct. 808 (2009); *see also* United States v. Yoon, 398 F.3d 802, 809 (6th Cir. 2005) (Kennedy, J., concurring) ("Since the suspect controls who may enter his home absent a warrant or exigent circumstances, it cannot be claimed that a suspect, because he consented to the entry into his home by a government informant, also consents to the forced or surreptitious entry of the officers with whom the informant is working, since, in fact, no consent has been given to them.").

209 *Callahan*, 494 F.3d at 901 n.2 (Kelly, J., dissenting).

cause common authority necessarily requires a long-term relationship between the third party and the property."[210] In fact, an undercover agent lacks any Fourth Amendment rights whatsoever in a suspect's home, "much less common authority to consent to a government search of the home."[211]

Finally, the COR doctrine is conceptually premised on a single grant of consent, unlike TPC.[212] Under the proper rationale behind COR, the undercover agent obtains consent to enter, but he does not subsequently grant consent to the additional officers. Rather, once the undercover agent observes the narcotics, he establishes probable cause to arrest, which destroys the suspect's expectation of privacy in the particular area where he showed contraband to the agent. Now that no further privacy intrusion can occur in the area already exposed, the additional officers may enter without implicating the Fourth Amendment. Accordingly, the TPC doctrine is irrelevant to an analysis of the COR doctrine.

D. *The Supreme Court's Decision Not to Resolve the Circuit Split*

Considering the obvious uncertainty in the COR doctrine, why did the Supreme Court in *Pearson v. Callahan* fail to address the underlying Fourth Amendment issue?[213] The answer is unclear. The Court did not provide an explanation for its decision to leave the issue unresolved;[214] it simply pointed to the Tenth Circuit's ruling that the officers' conduct violated the Fourth Amendment.[215]

Previously, the Court in *Saucier* had enunciated a rigid, two-step sequence for analyzing qualified immunity claims—that is, a court must resolve (1) "whether the facts . . . alleged or shown [by the plaintiff] make out a violation of a constitutional right," and (2) if so, "whether the right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct."[216] Unless a government agent's conduct violated such a "clearly established" right, qualified immunity would apply, thus shielding the government official from liability for civil damages.[217] The Court in *Pearson*, however, held that this procedure, though often beneficial, should not remain an inflexible analytical tool in all cases.[218] In doing so, the Court did not address the COR issue.

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210 Brief for Petitioners, *supra* note 111, at 41 (citing *Matlock*, 415 U.S. at 171 n.7).

211 *Id.* (citing Minnesota v. Carter, 525 U.S. 83 (1998) (holding that an individual who enters a home as a guest to engage in narcotics dealing has no Fourth Amendment rights in the home)).

212 *See Callahan*, 494 F.3d at 901 n.2 (Kelly, J., dissenting).

213 *See* Pearson v. Callahan, 129 S. Ct. 808, 822-23 (2009).

214 O'Neill, *supra* note 85, at 196.

215 *See Pearson*, 129 S. Ct. at 814-15.

216 *Id.* at 815-16 (citations omitted) (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)).

217 *Id.* at 816.

218 *Id.* at 818.

One potential reason for the Court's decision to avoid the COR issue is that the Court had trouble forming a large enough voting coalition to establish a majority.[219] Another possibility is that the Court found it made more sense to avoid the constitutional question and preserve officer immunity precisely because the law is uncertain.[220] The effect of this approach is to allow the lower courts to further flesh out the issue and create a more pronounced consensus one way or the other. The problem, however, is that the application of this principle leaves the circuit split over the COR doctrine unsettled and postpones its resolution to a later date. This decision creates uncertainty and simply pushes the question of COR viability down the road indefinitely.[221]

One prospective consequence of the Court's decision to skirt the COR issue altogether is that it will only muddle the "clearly established" prong of qualified immunity claims in those jurisdictions that have yet to rule on the COR doctrine.[222] At this point, only the Tenth Circuit has stated that the application of COR to confidential informants is constitutionally impaired.[223] Because virtually every other jurisdiction has ruled the other way or has declined to address the issue, this amounts to the absence of a "clearly established" constitutional violation where a confidential informant signals for backup officers to enter in a "buy bust" operation in, for example, the Fifth Circuit. Consequently, the utilization of COR as extended to confidential informants in such a jurisdiction would remain viable, and qualified immunity would still be available, unless and until that jurisdiction rules otherwise. Thanks to the substantial circuit split on the matter, it will be very interesting to see how "clearly" the various jurisdictions perceive the doctrine to be "established." Time will tell whether police forces will take the chance of relying on confidential informants in "buy bust" operations when they are faced with potential liability under a § 1983 civil rights action.

On the other hand, the Court, while not explicitly adopting its reasoning, referred to the Tenth Circuit's finding that a constitutional violation had occurred in order to bypass the first prong of the *Saucier v. Katz* procedure.[224] This awkward utilization of the Tenth Circuit's determination has

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219 O'Neill, *supra* note 85, at 196.

220 David G. Savage, *Who's Policing the Fourth Amendment?: Two Cases Push the Unevenly Enforced Exclusionary Rule Closer to Repeal*, A.B.A. J., Apr. 2009, at 20. "[A]voidance of constitutional questions is not always undesirable[,] . . . [and] in some contexts the constitutional avoidance canon requires courts to resolve cases on other grounds where resolution of the constitutional question is not necessary." Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1555 (2009).

221 Savage, *supra* note 220, at 20.

222 Currently, the First, Second, Third, Fourth, Fifth, Eighth, Eleventh, and D.C. Circuits have yet to rule on the COR doctrine.

223 *See Pearson*, 129 S. Ct. at 823.

224 *See id.* at 814-15.

potentially created an opportunity for defense counsel to challenge the constitutionality of COR with respect to confidential informants. Criminal defense attorneys will likely argue that the Court assumed that a constitutional violation occurred by pointing to the Court's analysis of the facts exclusively under the second prong of the *Saucier* test.[225]

This unique circumstance could portend: (1) a future review of the COR doctrine by the Court in the context of a criminal case, where the Court cannot utilize the "qualified immunity shortcut" it took in *Pearson*; and (2) a ruling that the COR doctrine, as applied to both officers and unsworn confidential informants, meets constitutional muster. This potential scenario is critical to law enforcement efforts because a contrary ruling would have a devastating impact on the government's ability to utilize confidential informants in controlled buys in the future.

Practically speaking, even the Tenth Circuit has agreed with the notion that the COR doctrine, as applied to undercover *police officers*, was constitutional.[226] Thus, it seems intuitive that the Supreme Court, as currently configured, would not determine that such an application of the COR doctrine is constitutionally infirm. Based on the Tenth Circuit's ruling in *Callahan*, however, the Supreme Court *could* conceivably choose not to extend those circumstances to a "buy bust" operation involving a confidential informant who was not a sworn police officer. Such a result would be a major setback to law enforcement efforts due to the inherent nature of illegal drug transactions in which the use of undercover police officers is very complicated. For example, the people who sell narcotics are often very sophisticated in the drug trade and expect that potential buyers will use the contraband in their presence. While undercover police officers can certainly lie and deceive,[227] the use of narcotics is universally unacceptable for such undercover activity.[228] As a consequence, savvy dealers are not going to make transactions with strangers. It is most likely that the entire ruse and subterfuge, upon which the COR doctrine is based, will work much more efficiently if the target has a history with the person making the purchase. That is precisely the strength of using confidential informants: the targets of these "buy bust" operations are often personally familiar with them and thus considerably more likely to invite them into their homes in order to conduct illegal transactions.

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225 *See id.* at 822-23.

226 *See* Callahan v. Millard Cnty., 494 F.3d 891, 897 (10th Cir. 2007), *rev'd on other grounds sub nom.* Pearson v. Callahan, 129 S. Ct. 808 (2009).

227 *E.g.*, Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 778 (1997).

228 *See, e.g.*, Derrick Augustus Carter, *To Catch the Lion, Tether the Goat: Entrapment, Conspiracy, and Sentencing Manipulation*, 42 AKRON L. REV. 135, 181 (2009) (explaining that an English study reflected the community belief that police should not engage in criminal behavior in the name of the law).

CONCLUSION

Law enforcement agencies across the country utilize "buy bust" operations on a daily basis in waging the war on drugs. Courts have frequently justified the use of undercover government agents under these circumstances by way of the COR doctrine. The Tenth Circuit in *Callahan*, however, wrongly held that the COR doctrine applies only to undercover police officers and not to confidential informants. In doing so, the Tenth Circuit created a circuit split on the basis of an arbitrary distinction, as the nature of the government agency relationship, when paired with the citizens' arrest power and the indiscriminate nature of a suspect's scope of consent during initial consensual entry, renders the application of the COR doctrine to confidential informants patently reasonable. Unfortunately, when the Supreme Court decided *Callahan* on petition, it passed on a golden opportunity to resolve this circuit split and instead disposed of the case on other grounds. Nevertheless, the proper rule is clear: because the COR doctrine rests upon a hybrid rationale of consent and a diminished expectation of privacy, future courts should reject any distinction between undercover police officers and confidential informants when evaluating government action during "buy bust" operations.