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E.Z. v. Coler: Can the Constitution Protect Our Children?

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Notes and Comments

E.Z. v. Coler: Can the Constitution Protect Our Children?

I. Introduction

Although the United States Constitution does not expressly provide for a right of privacy,[1] the Supreme Court has recognized the existence of such a right in the penumbras of the first, fourth, ninth, and fourteenth amendments.[2] Society, on the other hand, has always assumed that individuals have a right to their privacy. Both the traditional sanctity attributed to the home by the courts and the right to familial privacy vest in the family a strong interest in the privacy of the home and the daily affairs taking place therein. To what extent, however, does the Constitution, according to judicial interpretation, protect this right to privacy?

In *E.Z. v. Coler*,[3] the District Court for the Northern District of Illinois upheld warrantless searches of suspected victims of child abuse and their homes. These searches were triggered by telephone calls made to a hotline operated by the Illinois Department of Children and Family Services[4] (hereinafter DCFS). The body searches[5] and home searches,[6] which took place with-

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1. *See generally* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

2. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 734-35 (2d ed. 1978) ("The oldest constitutional right to privacy is that protected by the Fourth Amendment's restriction on governmental searches and seizures.").

3. 603 F. Supp. 1546 (N.D. Ill. 1985).

4. DCFS is the state agency responsible for receiving and investigating cases of alleged child abuse and neglect. ILL. REV. STAT. ch. 23, para. 2057.3 (1980).

5. The term "body search" refers to:

> a situation where a DCFS investigative worker removes or rearranges clothing or causes same to be removed or rearranged from a child reported to be the subject of child abuse or neglect a portion of or all of the child's clothing so as to permit a visual inspection of the child's body.

Coler, 603 F. Supp. at 1548 n.2.

6. The term "home search" refers to "entering, examining, inspecting or viewing any

out warrants, were authorized by DCFS procedures. Acknowledging that the application of the fourth amendment was triggered by the searches in question, the court purported to engage in a balancing test of the interests involved. This balancing test, however, was virtually one-sided — the court chose to elevate the importance of the state's interest in protecting dependent children from harm at the hands of a parent or caretaker and then to summarily dismiss any analysis of the importance of the family's interest in the privacy of the home.

This purported balancing test led the court to conclude that the searches performed by the DCFS caseworkers did not violate the fourth amendment rights of the parents or the children. In light of fourth amendment jurisprudence, this case is significant in its analysis of the nature of the searches themselves and in its determination of the reasonableness of the searches.

Part II of this Note provides the framework of fourth amendment analysis regarding searches and the standards governing their reasonableness. Part III discusses the factual background of *E.Z. v. Coler* and sets forth an overview of the procedures followed by the DCFS caseworkers. Part IV analyzes the memorandum opinion of the district court with particular emphasis on the court's characterization of the searches in question and its reliance on *Wyman v. James*.[7] Part V of this Note concludes that while the state's interest in protecting the health and safety of dependent children is a significant one, the court's analysis of the particular type of search conducted served to obscure, rather than to clarify, fourth amendment analysis of searches of a noncriminal nature. In classifying the searches of the bodies of the suspected victims and their homes as "administrative,"[8] the court avoided imposing traditional fourth amendment standards of protection and thereby de-emphasized the significance of the intrusion on the families' rights to privacy in their homes and in their persons. The decision leaves open the question of what standards of protection, if any, exist for

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room or area in a person's dwelling other than the readily observable areas in the immediate vicinity of the place in which an interview of the occupants is being conducted." *Id.*

7. 400 U.S. 309 (1971). *See infra* text accompanying notes 62-69, 259-63.

8. *Coler*, 603 F. Supp. at 1555-56.

searches of a noncriminal and non-regulatory nature under the fourth amendment.

II. Background

A. *What is a Search?*

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.[9]

Clearly, the protections of this amendment are triggered when one or both events take place — either a search or a seizure. Despite the general agreement as to the fundamental purposes of the fourth amendment, problems arise in the application of its protections.[10] Application hinges upon a determination that a search or a seizure did take place in a particular situation;[11] however, a foolproof test for making such a determination does not yet exist.[12] Although the Supreme Court has not taken "a literal or mechanical approach to the question of what may constitute a search or seizure,"[13] over the years, the Court has been guided by various principles in its application of the fourth amendment. In *Silverman v. United States*,[14] the Court, focusing on location, determined that the fourth amendment is implicated when there has been a physical intrusion into a constitutionally protected area.[15] A few years later, in *Katz v. United*

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9. U.S. CONST. amend. IV.

10. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

11. For application of the fourth amendment to "searches" see *infra* text accompanying notes 15-20. For application of the fourth amendment to "seizures," see Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (A seizure, for purposes of the fourth amendment, occurs "when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.").

12. *Camara*, 387 U.S at 528.

13. Lanza v. New York, 370 U.S. 139, 142 (1962).

14. 365 U.S. 505 (1961).

15. The term "constitutionally protected areas" has included: persons (Schmerber v. California, 384 U.S. 757 (1966)); hotel rooms (Stoner v. California, 376 U.S. 483 (1964)); apartments (Clinton v. Virginia, 377 U.S. 158 (1964)); garages (Taylor v. United States,

States,[16] the Court shifted its focus of analysis by declaring that "the Fourth Amendment protects people, not places."[17] With this approach to the fourth amendment, the focus of inquiry became the person who was the subject of the search and whether this person had exhibited a legitimate expectation of privacy in the area searched.[18]

In order to invoke the protections of the fourth amendment, the expectation of privacy must be one which society would recognize as reasonable.[19] More recently, the Court reiterated the principle that a search within the meaning of the fourth amendment occurs when the government intrudes upon an individual's legitimate expectation of privacy.[20] Despite the Supreme Court's attempts at providing a definition of a search, ultimately, the factual circumstances of each case will determine whether the fourth amendment has been implicated.

A major aspect of fourth amendment jurisprudence is derived from the historical circumstances surrounding the origin of the amendment: Constitutional guarantees against unreasonable searches and seizures are generally construed liberally[21] in favor

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286 U.S. 1 (1932)); business offices (United States v. Lefkowitz, 285 U.S. 452 (1932)); stores (Amos v. United States, 255 U.S. 313 (1921)); and warehouses (See v. Seattle, 387 U.S. 541 (1967)).

16. 389 U.S. 347 (1967).

17. *Id.* at 351. *See also* Warden v. Hayden, 387 U.S. 294, 304 (1966) ("[T]he principal object of the Fourth Amendment is the protection of privacy rather than property. . . .").

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

19. *Id.*

20. Illinois v. Andreas, 463 U.S. 765, 771 (1983).

21. Grau v. United States, 287 U.S. 124, 128 (1932) (An affidavit setting forth facts tending to show that the dwelling described was used as a manufactory of intoxicating liquors but which states no facts from which a sale is necessarily inferred, is insufficient to support the issuance of a warrant.). *See also* Sgro v. United States, 287 U.S. 206, 210 (1932) (The Court advocated liberal construction of constitutional guarantees in a case involving a search warrant issued pursuant to the National Prohibition Act. The Act provided that the warrant to search for intoxicating liquors became void at the expiration of ten days from the date of its issuance. The Court held that after this period expired, the warrant could not be revived on the basis of the original affidavit merely by redating and reissuing it.); United States v. Lefkowitz, 285 U.S. 452 (1932) (Where, pursuant to a warrant, defendants were arrested in a designated room for conspiracy to sell, possess and transport intoxicating liquors, and the room was not alleged to have been a place of manufacture, sale or storage of liquor, a search of the room was unconstitutional.); Byars v. United States, 273 U.S. 28, 29 (1927) (In reversing a conviction for unlawful possession of counterfeit "strip" stamps, the court stated "[a] search prose-

of the individual to safeguard the right of privacy.[22] Such an approach in interpreting the fourth amendment serves to prevent impairment of the protection it extends.[23] A liberal construction is urged to "prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by the amendment, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous executive officers."[24] In *Boyd v. United States*,[25] the Supreme Court held that a statute requiring the production of a certain document in court for inspection by the government's attorney was unconstitutional.[26] The Court advocated liberal construction of the fourth amendment by declaring that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed."[27]

B. *Development of the Fourth Amendment in a Criminal Context*

The overriding function of the application of the fourth amendment is to protect personal privacy and dignity from un-

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cuted in violation of the Constitution is not made lawful by what it brings to light."); Gouled v. United States, 255 U.S. 298, 305 (1921) (The Court held that "the secret taking or abstraction, without force, by a representative of any branch or subdivision of the Government of the United States, of a paper writing of evidential value only belonging to one suspected of crime and from the house or office of such person . . . " violates the fourth amendment.); Boyd v. United States, 116 U.S. 616, 635 (1886) (The compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the fourth amendment.) ("A close and literal construction [of the amendments] deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.").

22. *See Lefkowitz*, 285 U.S. at 464; *Byars*, 273 U.S. at 29 (A state search warrant based on information alleging that affiant "had good reason to believe and did believe the defendant had in his possession intoxicating liquors and instruments and materials" used in the manufacture of such liquors, could not, under the fourth amendment, sustain a federal search of defendant's house.).

23. *Grau*, 287 U.S. at 128. *See supra* note 21.

24. *Gouled*, 255 U.S. at 304 (The fourth amendment was violated when a governmental official, aware that defendant was conspiring to defraud the government, made a "friendly" visit to defendant's home to seize his papers.).

25. 116 U.S. 616 (1886).

26. *Id.* at 634-35.

27. *Id.* at 635.

warranted intrusion by the state.[28] Traditionally, the most excessive kinds of intrusions occurred in searches of the person and the home.[29] Due to the substantial intrusiveness inherent in such searches, they must be authorized by a valid warrant[30] or judged according to a probable cause standard.[31] "The sanctity of privacy interests in the home requires no less than a judicial officer's determination of when such interests must yield to those of the government."[32]

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28. Schmerber v. California, 384 U.S. 757 (1966). While upholding the taking of a blood sample by a physician, at police direction, over the objection of the suspect, the Court acknowledged that the administration of the blood tests "plainly constitute[d] searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of [the Fourth] Amendment." *Id.* at 767. Therefore, despite the Court's holding that the fourth amendment was not violated:

> It bears repeating, however, that [the Court] reach[es] this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That [the Court] today hold[s] that the Constitution does not forbid the States [sic] minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Id. at 772.

29. Carroll v. United States, 267 U.S. 132, 140 (1925) "[T]he maxim that 'a man's home is his castle' does not include the full scope of the Fourth Amendment. It likewise protects the persons, and effects, wherever they may be, against unreasonable searches and seizures." *See also* Payton v. New York, 445 U.S. 573, 589 (1980) ("In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . ."); Boyd v. United States, 116 U.S. 616, 630 (1886) ("It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . ."); Illinois Migrant Council v. Pilliod, 531 F. Supp. 1011, 1021 (N.D. Ill. 1982) ("[P]rivacy interests protected by the fourth amendment are never stronger than when the search of a home is at issue.").

30. *See* Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior [judicial approval] are *per se* unreasonable under the Fourth Amendment. . . .") (emphasis in original). *See also* Steagald v. United States, 451 U.S. 204 (1981) (requiring a search warrant, absent exigent circumstances or consent, to search a third party's house for the subject of an arrest warrant); *Payton*, 445 U.S. 573 (prohibiting a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest); Camara v. Municipal Court, 387 U.S. 523, 531-32 (1967) (The fourth amendment bars prosecution of a person who has refused to permit a warrantless inspection of a personal residence; such an administrative inspection cannot be justified on the grounds that it makes minimal demands on occupants.).

31. Probable cause exists when "the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed." Stacey v. Emery, 97 U.S. 642, 645 (1878). *See also* Locke v. United States, 11 U.S. (7 Cranch) 339, 342 (1813).

32. Evans, *Constitutional Restraints on Residential Warrantless Arrest Entries: More Protection for Privacy Interests in the Home*, 10 AM. J. CRIM. L. 1, 25 (1982).

The impetus behind the formulation of the fourth amendment stemmed from the reaction against the "evils of the use of the general warrant in England and the writs of assistance in the Colonies. . . . [The fourth amendment] was intended to protect against invasions of 'the sanctity of a man's home and the privacies of life,' from searches under indiscriminate general authority."[33] Under a general warrant, "an officer or messenger may be commanded to search suspected places without evidence of a fact committed."[34]

Among the jurists who declared the invalidity of general warrants was Sir Matthew Hale.[35] Although the King and Parliament had disregarded Hale's views, the judiciary became the driving force behind the abolition of the general warrant.[36] The statutory authority to issue general warrants ceased with the end of the Printing Act in 1694; nevertheless, the secretaries of state continued to issue these warrants in cases dealing with seditious libel.[37] An early English case, *Wilkes v. Wood*,[38] involved the issuance of a general warrant for the arrest of John Wilkes and his accomplices, and for seizure of their papers. Wilkes had been publishing a pamphlet series, *North Briton*, which violently attacked the government. Denouncing the warrant, Chief Justice Pratt told the jury that "[t]o enter a man's house by virtue of a nameless warrant in order to procure evidence is worse than the Spanish inquisition, a law under which no Englishman would wish to live an hour . . . ."[39] On the question of general warrants, Pratt declared that "[i]f such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[40]

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33. Warden v. Hayden, 387 U.S 294, 301 (1967) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

34. Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978) (quoting H. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 104 (8th ed. 1968)).

35. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 27 (1966).

36. *Id.*

37. *Id.*

38. 19 Howell's State Trials 1153 (1763).

39. Wilkes v. Wood, 19 Howell's State Trials 1153, 1405 (1763).

40. *Id.* at 1167.

Another opponent of the writs of assistance and general warrants, James Otis, denounced these warrants in 1761 as "the worst instance of arbitrary power, the most destructive of English liberty, that ever was found in an English law book."[41] A landmark case in this area, *Entick v. Carrington*,[42] decided in 1765, determined that English law did not allow the officers of the Crown to break into a citizen's home with a general warrant to search for evidence of libel.[43]

Along with general warrants, the writs of assistance were recurring points of contention in the Colonies.[44] The practice of issuing writs of assistance to revenue officers, empowering them in their discretion to search suspected places for smuggled goods, was offensive to the colonists — particularly "the merchants and businessmen whose premises and products were inspected for compliance with the several parliamentary revenue measures."[45]

Ultimately, America's response to the practice of issuing general warrants was the fourth amendment.[46] The purpose of the amendment was to limit the arbitrary power of the government inherent in these warrants by protecting against unreasonable searches and seizures.[47]

"[D]uring the century following the adoption of the Federal Constitution and its first ten amendments only a few cases involving interpretation of the Fourth Amendment reached the Supreme Court."[48] However, as the jurisdiction of the United States broadened to include such criminal matters as the sale of narcotics and intoxicating liquors, the fourth amendment became one of the most prominent and litigated provisions of the Bill of Rights.[49]

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41. N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 59 (1937).

42. 19 Howell's State Trials 1029 (1763).

43. *Id.* at 1063-76.

44. Marshall v. Barlow's, Inc., 436 U.S. 307, 311 (1978).

45. *Id.*

46. United States v. Chadwick, 433 U.S. 1, 7-8 (1977).

47. *See generally* LASSON, *supra* note 41.

48. LASSON, *supra* note 41, at 106.

49. *Id.*

C. *Civil-Criminal Distinction*

Due to the early development of the fourth amendment in a criminal context, the Supreme Court had held that the amendment did not apply to a civil proceeding for the recovery of a debt.[50] Lower federal courts followed the Supreme Court's lead and refused to extend the amendment's protections to civil actions.[51] This treatment of the amendment led to the development of the civil-criminal distinction. In *Frank v. Maryland*,[52] although the majority held that an inspection by a municipal health official did not constitute a "search" within the meaning of the fourth amendment, there was a strong dissent by Justice Douglas advocating the application of the amendment. The majority in *Frank* restricted its application of the fourth amendment to situations involving evidence of criminal activity on the ground that "it was on the issue of the right to be secure from searches for evidence to be used in criminal prosecutions . . . that the great battle for fundamental liberty was fought."[53] Justice Douglas, however, supported the application of the amendment to all searches and found no basis for the civil-criminal distinction: "The Court misreads history when it relates the Fourth Amendment primarily to searches for evidence to be used in criminal prosecutions."[54] Justice Douglas stressed that the "fallacy in maintaining that the Fourth Amendment was designed to protect criminals only was emphasized by Judge Prettyman in *District of Columbia v. Little*:"[55]

The argument is wholly without merit, preposterous in fact. The

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50. *See* Murray's Lessee v. Hoboken Land and Improvement Co., 59 U.S. (18 How.) 272, 285 (1855) (where a distress warrant was issued by the United States treasury, authorizing a levy for the satisfaction of a debt to the government, the Court determined that the fourth amendment has no relation to the civil proceeding for the recovery of a debt).

51. *See, e.g.*, In Re Strouse, 32 F. Cas. 261, 262 (D. Nev. 1871) (No. 13,548) ("[T]he fourth amendment . . . is applicable to criminal cases only" and not to a "civil" proceeding under the revenue act which compelled production of books and papers of defendant's business before the assessor.); In Re Meador, 16 F. Cas. 1294, 1299 (N.D. Ga. 1869) (No. 9,375) ("[T]his is a civil proceeding and in no wise does it partake of a criminal prosecution . . . . Therefore, in this proceeding, the fourth amendment is not violated.").

52. 359 U.S. 360 (1959).

53. *Id.* at 365.

54. *Id.* at 376 (Douglas, J., dissenting).

55. *Id.* at 377.

> basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men, not merely to criminals, real or suspected. So much is clear from any examination of history, whether slight or exhaustive. The argument made to us has not the slightest basis in history. It has no greater justification in reason. To say that a man suspected of a crime has a right to protection against the search of his home without a warrant, but that a man not suspected of a crime has no such protection, is a fantastic absurdity.[56]

According to Judge Prettyman, "the Fourth Amendment applied alike to health inspectors as well as to police officers — indeed to every and any official of government seeking admission to any home in the country."[57]

Subsequently, in *Camara v. Municipal Court*,[58] the Supreme Court overruled *Frank* pro tanto. Although a routine inspection of private property may be "a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime,"[59] the *Camara* Court refused to characterize the fourth amendment interests in these inspection cases as "merely peripheral"[60] as did the Court in *Frank*. In applying the fourth amendment protections to a building code inspection, *Camara* eroded the civil-criminal distinction and its role in the application of the fourth amendment. *Camara* resulted in the emergence of:

> a three-point scale of values in granting warrants. First place in the hierarchy is accorded to protection against criminal searches; they are to be tested against an absolute standard of probable cause. Second place is accorded to protection against administrative searches of homes; they are to be subjected to the balancing

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56. *Id.* at 377-78 (quoting District of Columbia v. Little, 178 F.2d 13, 16-17, *aff'd on other grounds*, 339 U.S. 1 (1950)).

57. *Id.*

58. 387 U.S. 523 (1967).

59. *Id.* at 530.

60. *Id.*

test of public interest versus individual privacy. Third place is reserved for protection against administrative searches of commercial property; the balancing test is to be applied, with the proviso that the privacy interest will be considered less weighty than that of the home.[61]

Soon after *Camara*, *Wyman v. James*[62] came before the Supreme Court. There, the factual circumstances surrounding a caseworker's visit to the home of a welfare recipient and her child did not implicate the fourth amendment. The Court held that the visit did not constitute a search[63] and yet, felt compelled to hypothesize that if the visit had been a search, it would have been constitutional under a reasonableness analysis.[64] The purpose of the home visitation was to determine if there were any changes in the recipient's situation which might affect her eligibility to continue to receive welfare benefits under the Aid to Families with Dependent Children program (AFDC).[65] The court emphasized that the visit was not forced or compelled, and that denial of permission for the visit was not a criminal act.[66] If consent were withheld, the visitation would not have taken place and the recipient would no longer receive welfare benefits.[67] The fact that the visit was slightly "investigatory" in character was insufficient, according to the Court, to call the protections of the fourth amendment into play.[68] A strong dissent, however, construed the fourth amendment to govern "all intrusions by agents of the public upon personal security."[69]

D. *Determination of the Reasonableness of a Search*

Regardless of the nature of the search at issue, it cannot be valid under the fourth amendment unless it is reasonable. In

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61. Denenberg, *Administrative Searches and the Right to Privacy in the United States*, 23 INT'L & COMP. L.Q. VOL. 169, 175 (1974).

62. 400 U.S. 309 (1971).

63. *See infra* text accompanying notes 169-75.

64. *See infra* notes 70-97 and accompanying text.

65. *Wyman*, 400 U.S. at 314.

66. *Id.* at 317. *See also id.* at 321.

67. *Id.* at 317-18, 325.

68. *See id.* at 317.

69. *Id.* at 338 (Marshall, J., dissenting) (citing Terry v. Ohio, 392 U.S. 1, 18 n.15 (1968)).

Agnello v. United States,[70] the Supreme Court asserted that a "search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws."[71] Generally, warrantless searches are held to be unreasonable;[72] however, it is clear that "no fixed formula for determining reasonableness exists."[73] As a result, each case is decided on its own facts and circumstances. Due to the lack of "independent conceptual development or substantive content"[74] given to the term "reasonableness" under the fourth amendment, courts often utilize a balancing test to determine the "reasonableness" of a particular search.[75] A court weighs "the need to intrude a home to make a search . . . against the invasion of an individual's privacy interests which are necessarily implicated by such a search."[76]

Although a court may justify a particular governmental intrusion under the general standard of reasonableness when it finds that a warrant is not required in a certain situation,

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70. 269 U.S. 20 (1925) (the right to execute a search incidental to arrest does not extend to search of a man's dwelling, several blocks from the place of his arrest, after the offense has been committed and while he is in custody elsewhere).

71. *Id.* at 32.

72. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 311-13 (1978) (The rule that warrantless searches are generally unreasonable applies to commercial premises as well as homes.); Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967) (In overruling Frank v. Maryland, 359 U.S. 360 (1959) to the extent it sanctioned warrantless housing inspections, the *Camara* Court stated that "except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."); See v. City of Seattle, 387 U.S. 541, 543 (1967) ("[A] search of private houses is presumptively unreasonable if conducted without a warrant. The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.").

73. Comment, *The Fourth Amendment and Administrative Inspections*, 16 HOUS. L. REV. 399, 440 (1979). *See also id.* at n.277 (comparing cases which generally require a warrant with other cases that simply adhere to a reasonableness test).

74. *Id.* at 444.

75. *See* Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (no formula exists for determining reasonableness). *See also* Bell v. Wolfish, 441 U.S. 520 (1979) (In upholding body cavity searches of inmates, the Court balanced the security interests of the institution against the inmates' privacy interests.); United States v. United States District Court, 407 U.S. 297 (1972) (In holding that the fourth amendment requires prior judicial approval for domestic security surveillance, the Court balanced the duty of the government and the potential danger to individual privacy.); *Camara*, 387 U.S. at 535 ("In determining whether a particular inspection is reasonable . . . the need for the inspection must be weighed in terms of these reasonable goals of code enforcement.").

76. Evans, *supra* note 32, at 4 n.17.

nevertheless,

> the fourth amendment does not permit sanctioning government intrusions because they *seem* reasonable in the broad, vernacular sense of that word. Surely the amendment requires at a minimum, . . . that the government [sic] need to make a particular search or inspection must be balanced against the intrusion into individual privacy that the search occasions, and that the proposed intrusion be limited to the minimum justified by legitimate governmental interests.[77]

This balancing of interests has been essential in affording the protection of the fourth amendment to persons subjected to searches.[78]

The distinction between administrative searches and traditional searches results in different standards of "reasonableness."[79] In *Wyman v. James*,[80] reasonableness for fourth amendment purposes was determined by the public interest in protecting the dependent child, the procedural guidelines followed, and the noncriminal nature of the search.[81] Conversely, Justice Marshall's dissent in *Wyman* proposed that the home visit was indeed a search and, consequently, the imposition of a traditional probable cause standard and warrant requirement upon the caseworker was required by the fourth amendment.[82] Of primary importance is the privacy interest; if the objectives of the search can be achieved through less intrusive means, then such means must be employed.[83]

Other factors which may be relevant in an inquiry into the reasonableness of a search include: the scope of the intrusion, the manner in which the search is conducted, the justification for its initiation, and the location of the search.[84] The possibility of the exercise of unbridled discretion by the officials conducting

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77. Comment, *supra* note 73, at 446 (emphasis added).

78. "[R]easonableness is the ultimate standard in balancing these competing interests." Gerstein v. Pugh, 420 U.S. 103, 113-14 (1974); *See also Camara*, 387 U.S. at 539.

79. *See supra* text accompanying notes 50-69 and *infra* text accompanying notes 98-108.

80. 400 U.S. 309 (1971).

81. *See supra* notes 62-69 and accompanying text.

82. *Wyman*, 400 U.S. at 344 (Marshall, J., dissenting).

83. *See id.* at 343.

84. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

the search, whether police officers or government officials, is also relevant as to the reasonableness of the search and to the question of the need for a warrant.[85]

Some courts simply look to the purpose of the search to decide whether the search is reasonable. For example, administrative searches which served primarily to further the public welfare are generally upheld as constitutionally valid.[86] In *United States v. Rea*,[87] the Supreme Court noted that a supervisory visit to a probationer by a probation officer without a warrant was permissible.[88] Administrative searches which are part of a governmental regulatory scheme may be upheld without a warrant if the purpose is to protect the health and welfare of its citizens.[89] Regulatory schemes generally apply to fire or housing code inspections or federally licensed businesses.[90] However, the

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85. *See* Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967). *See infra* text accompanying notes 160-75.

86. *See, e.g.*, United States v. Martel, 654 F.2d 1356 (9th Cir. 1981) (upheld detention of suitcases at airport without probable cause, but with a well-founded suspicion, while awaiting the police narcotics dog); United States v. Schafer, 461 F.2d 856 (9th Cir. 1972) (upheld search of passenger's luggage at the airport as part of a screening inspection of all luggage and personal effects of passengers leaving Hawaii to prevent exportation of plants, pests and diseases).

87. 678 F.2d 382 (2d Cir. 1982).

88. *Id.* at 387.

89. *Martel*, 654 F.2d at 1360-61. "Warrantless searches without probable cause have been upheld when required as a condition for entering aircraft or public buildings as part of a regulatory scheme to assure public safety." *Id.* at 1361 (citing as an example, Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972) upholding search of briefcase for weapons and explosives pursuant to a rule which conditioned entry into a federal building upon submission to such a search)).

90. There is a recognized exception to the search warrant requirement for "pervasively regulated businesses," United States v. Biswell, 406 U.S. 311, 316 (1972) (sale of firearms) and for industries "long subject to close supervision and inspection," Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (sale of liquor). The Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) explained:

> These cases [*Biswell* and *Colonnade*] are indeed exceptions, but they represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation. . . . [B]usinessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade. . . . The closely regulated industry of the type involved in *Colonnade* and *Biswell* is the exception.

Id. at 313.

"[d]ecisions of the Court . . . have firmly established that where an individual's privacy interests are at stake, such interests outweigh governmental interests in avoiding a warrant requirement."[91]

Regardless of the nature of the search, consent is an exception to this general rule.[92] Only in exigent circumstances[93] such as "hot pursuit"[94] does the government's interest outweigh an individual's privacy interests. In *Warden v. Hayden*,[95] the Supreme Court upheld a warrantless search of a home when the police were in "hot pursuit" of an armed robber. The circumstances did not allow for delay. However, in *Vale v. Louisiana*,[96] where the suspect was arrested outside of his home, the Court invalidated a search of the inside of the house to determine if anyone was at home. The possibility of obtaining a warrant eliminated exigent circumstances as justification for the war-

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91. Evans, *supra* note 32, at 23.

92. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (where three stolen checks were discovered under the seat of a car after police officers had stopped the car and the occupants had complied with a request to get out of the car and to search the car and trunk, consent was valid); Bumper v. North Carolina, 391 U.S. 543, 548 (1968) (When seeking to rely upon consent to justify lawfulness of a search, a prosecutor "has the burden of proving that the consent was, in fact, freely and voluntarily given."); United States v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970) (Warrantless inspectorial search of business premises is reasonable when entry is gained with knowledge of its purpose and with manifestation of consent.); Darryl H. v. Coler, 585 F. Supp. 383 (N.D. Ill. 1984), *aff'd in part*, 801 F.2d 893 (7th Cir. 1986) (consent was voluntarily given where mother assisted a caseworker in examining her child for signs of abuse).

93. Michigan v. Tyler, 436 U.S. 499, 509 (1978) (warrantless entry to fight a fire and to remain thereafter in a building for a reasonable time to investigate the cause of the blaze after it has been extinguished is constitutional); Ker v. California, 374 U.S. 23 (1963) (warrantless and unannounced entry into dwelling by police to prevent imminent destruction of evidence is constitutional).

94. *See, e.g.*, United States v. Santana, 427 U.S. 38, 42-43 (1976) (where suspect attempted to defeat an arrest based on probable cause which began in a public place by retreating to a private place, the need to act quickly to prevent destruction of evidence constituted "hot pursuit" and warrantless entry to arrest was justified); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (warrantless entry into house by police in hot pursuit of armed robber is constitutional).

95. 387 U.S. 294 (1967).

96. 399 U.S. 30 (1970) (where police officers were not in hot pursuit of a felon or responding to an emergency, they were not authorized to search a dwelling without a warrant). The Court declined to hold that suspect's arrest on the street outside his home "can provide its own 'exigent circumstance' so as to justify a warrantless search of the arrestee's house." *Id.* at 35.

rantless search.[97]

E. *Administrative Searches versus Traditional Fourth Amendment Searches*

Not all searches involve instrumentalities of criminal activity; nor are they always conducted by police officers. Various types of regulatory inspections have been referred to as "administrative" searches[98] and they may be conducted by government officials. "Merely because the police are not searching with the express purpose of finding evidence of crime, they are not exempt from the requirements of reasonableness set down in the Fourth Amendment."[99]

In an early case involving an administrative search, *Frank v. Maryland*,[100] the Supreme Court held that an inspection by a municipal health inspector did not constitute an unreasonable search within the meaning of the fourth amendment.[101] Later, *Camara v. Municipal Court*,[102] overruling *Frank*, held that a warrantless administrative search of a personal residence (absent exigent circumstances) was a significant intrusion upon privacy interests and was a "search" within the meaning of the amendment.[103] According to *Camara*, an administrative search is "neither personal in nature nor aimed at the discovery of evidence of crime;"[104] however, it cannot be justified on the ground that it makes only minimal demands on the occupants.[105]

In *Marshall v. Barlow's, Inc.*, although the Supreme Court found that a warrantless inspection of business premises violated the fourth amendment, it also suggested that "probable cause justifying the issuance of a warrant may be based . . . on a showing that 'reasonable legislative or administrative standards

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97. *Id.*

98. *See* cases cited *supra* notes 86, 89 and 90.

99. Mozzetti v. Superior Court, 4 Cal. 3d 699, 706, 484 P.2d 84, 88, 94 Cal. Rptr. 412, 416 (1971).

100. 359 U.S. 360 (1959). For a discussion of *Frank* see *supra* text accompanying notes 52-57.

101. *Frank*, 359 U.S. at 373-74 (Whittaker, J., concurring). For a full discussion of *Frank* see *supra* text accompanying notes 52-57.

102. 387 U.S. 523 (1967).

103. *Id.* at 534, 539-40.

104. *Id.* at 537.

105. *Id.* at 531-33.

for conducting an . . . inspection are satisfied with respect to a particular [establishment].' "[106] The Court determined that the imposition of a warrant requirement on Occupational Safety & Health Administration (OSHA) officials would not impose any serious burden on their inspections.[107] The Court also found that "[i]f the government intrudes on a person's property, the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards. . . . [U]nless some recognized exception to the warrant requirement applies, . . . [a warrant is required] to conduct the inspection . . . ."[108]

III. *E.Z. v. Coler*

A. *The Facts*

In June 1982, parents and children who were subjects of investigations performed by the Illinois Department of Children and Family Services (DCFS) brought suit alleging that the "pattern and practice" followed by DCFS in the course of investigating child abuse and neglect violated their fourth amendment rights.[109] These investigations entailed conducting limited warrantless searches of homes and physical examinations of the bodies of suspected victims.[110]

Subsequent to the events which culminated in plaintiffs' suit, DCFS began using The Child Abuse and Neglect Investigations and Decisions Handbook.[111] Drafted by the American Bar Association and Data Management Associates, this Handbook provided guidelines for investigating reports of child abuse or neglect.[112] Although the investigations in question occurred prior to the changes set forth in the July 1982 Handbook, plaintiffs believed that current DCFS policy would permit similar searches to continue.[113]

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106. 436 U.S. 307, 320 (1978) (quoting *Camara*, 387 U.S. at 538).
107. *Id.* at 316.
108. *Id.* at 312-13.
109. E.Z. v. Coler, 603 F. Supp. 1546, 1547-48 (N.D. Ill. 1985).
110. *Id.* at 1548.
111. *Id.* at 1548-49.
112. *Id.* at 1549.
113. *Id.* at 1550-51.

In order to combat the growing problem of child abuse,[114] DCFS operates a 24-hour hotline for reports of child abuse or neglect.[115] Hotline calls must meet the following requirements before DCFS will begin an investigation of a particular situation:

> 1) A child less than 18 years of age must be involved;
> 2) The child must either have been harmed or be in danger of harm or of a substantial risk of harm;
> 3) A specific incident or circumstance which suggests the harm was caused by child abuse or neglect has been identified;
> 4) A parent or caretaker must be the alleged perpetrator of neglect;
> 5) A parent or other caretaker, an adult family member, an adult individual residing in the same house as the child, or the parent's paramour must be the alleged perpetrator of abuse.[116]

When these criteria are satisfied, the caseworker should visit with the reported child victim within twenty-four hours.[117] In an emergency situation, the investigation must begin immediately, at any hour of the day or night.[118]

In November 1980, S.H., mother of A.O., called the DCFS hotline and reported that her husband had become violent.[119] S.H. recounted an incident during which, while A.O. was attempting to defend his mother, A.O.'s father kicked him in the stomach and struck him on the arm leaving a bruise.[120] Four months later, A.O. was examined by a DCFS caseworker at school, despite S.H.'s request that the interview not take place there.[121] After A.O. denied that his father abused him, the caseworker proceeded to examine him and asked A.O. to lift his shirt.[122] Whether A.O. was also required to lower his pants re-

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114. During a recent 12-month period 71 children had lost their lives as the innocent victims of child abuse in Illinois. Defendants-Appellees' Supplemental Brief at 3, E.Z. v. Coler, 603 F. Supp. 1546 (N.D. Ill. 1985) (No. 85-1611).

115. *Coler*, 603 F. Supp. at 1549.

116. *The Child Abuse and Neglect Investigations and Decisions Handbook*, Part 302.5(b) [hereinafter HANDBOOK].

117. *Id.* pt. 302.5(g)(1).

118. *Id.* pt. 302.5(g)(2).

119. *Coler*, 603 F. Supp. at 1552.

120. *Id.*

121. Plaintiffs-Appellants' Brief at 11, E.Z. v. Coler, 603 F. Supp. 1546 (N.D. Ill. 1985) (No. 85-1611).

122. *Id.*

mains in dispute.[123] The report of suspected child abuse of A.O. by his father was later determined to be unfounded.[124] Plaintiffs' experts testified that the search had a harmful effect on the child.[125]

In January 1981, DCFS received an anonymous report that E.Z., a two-year old female, had an enlarged vaginal opening and bruises on her buttocks.[126] Immediately, a caseworker was sent to E.Z.'s home. After the caseworker had entered the home, he proceeded to search the bedroom area, the refrigerator, the basement and garage, without asking permission from E.Z.'s mother.[127] The caseworker explained that the examination was part of his job.[128] In the presence of E.Z.'s brother, the caseworker then examined E.Z.'s vaginal opening and anal area.[129] Subsequently, the report of abuse was also determined to be without basis.[130]

In April 1981, according to an anonymous report to the DCFS hotline, B.D., a ten-year old boy, had been beaten by his father with a belt on the back and the buttocks.[131] Pursuant to this report, the DCFS caseworker examined B.D. at school. After explaining to B.D. that he was there to find out if his father beat him, the caseworker requested that B.D. pull down his pants.[132] B.D. complied with the caseworker's request and the report was found to be without substance.[133]

In June 1981, a neighbor called the DCFS hotline to report that the D. children were not being adequately supervised.[134] Recognizing that her refusal might result in her children being taken away, the mother, Mary D., allowed the caseworkers to enter her home.[135] In response to Mary D.'s concern about her

123. *Id.*
124. *Id.*
125. *Id.* at n.18.
126. *Id.* at 12.
127. *Id.*
128. *Id.*
129. *Id.* at 13.
130. *Id.*
131. *Coler*, 603 F. Supp. at 1552.
132. *Id.*
133. Plaintiffs-Appellants' Brief at 10, *Coler* (No. 85-1611).
134. *Coler*, 603 F. Supp. at 1553.
135. *Id.* at 1557.

rights to refuse to permit the caseworker to examine her children and search the house, the worker explained that he could contact the police and force her to allow him access to her house and to examine the children.[136]

After looking around the house, the worker then lifted up the shirts of Mary D.'s three children.[137] Two of the allegations concerning the children were that Mary D. had been tying Kevin to his bed with a bathrobe sash and that Mary failed to meet Tommy at the bus stop on one occasion.[138] Mary D. explained that she would tie Kevin's foot to the bed because the eighteeen-month old Kevin had repeatedly tried to climb out his second floor window during his nap time.[139] Subsequently, DCFS did not take any further action regarding the allegations and did not provide any follow-up services to the D. family.[140]

In May 1982, an anonymous caller reported to DCFS that four-and-a-half-year old David K. had marks on his face from being slapped by his father and that his home was unclean.[141] A caseworker arrived at the K. home and stated that his purpose was to examine the children.[142] Although the report only concerned David, the caseworker also indicated the necessity for examinations of all the K. children, including David's brothers, Nathan and Jonathan. In the course of the examination, David's and Nathan's pants and underpants were pulled down and t-shirts removed.[143] Jonathan was examined with all his clothing removed.[144]

During the interview, the K. family explained that part of their disciplinary procedures included a few strokes with a "happy stick."[145] After being disciplined, the children would put the stick away and then discuss the problem with their parents.[146] The caseworker informed the K. family that he would

136. *Id.*
137. Plaintiffs-Appellants' Brief at 15, *Coler* (No. 85-1611).
138. *Id.* at 14, n.23.
139. *Id.* at 15, n.25.
140. *Id.* at 15.
141. *Coler*, 603 F. Supp. at 1553.
142. Plaintiffs-Appellants' Brief at 16, *Coler* (No. 85-1611).
143. *Id.*
144. *Id.*
145. *Coler*, 603 F. Supp. at 1553.
146. *Id.*

report an occurrence of child abuse in their home and that a follow-up visit would take place.[147] More than a month later, a follow-up worker contacted Mrs. K. During the follow-up visit — despite the lack of subsequent reports of abuse or neglect, the worker conducted new examinations of all three children during which time David and Nathan were completely stripped of their clothing.[148] Subsequently, after a petition seeking custody was denied to DCFS, there were no more follow-up visits and DCFS did not offer the K. family any further services.[149]

B. *Procedural History*

In June 1982, eight plaintiffs who were subjects of child abuse investigations conducted by the Illinois Department of Children and Family Services filed a class action suit against the Department, its directors, various administrators and caseworkers.[150] Plaintiffs were seeking injunctive relief to enjoin the DCFS from conducting searches of minor children without the consent of their parents or without probable cause and from conducting searches of the residences of such children and their parents or legal guardians without consent, or a search warrant issued upon probable cause.[151]

In August 1983, the District Court for the Northern District of Illinois denied plaintiffs' motion to certify a class. During December of 1983 and January and February of 1984, a preliminary injunction hearing was held.[152] After a review of the pleadings, opening statements, testimony of witnesses, final arguments, memoranda, evidence and the court's appraisals of the various witnesses and their credibility, the district court denied plaintiffs' request for relief.[153]

On March 12, 1985, the district court held that the plaintiffs had standing to challenge the investigative procedures of the

147. Plaintiffs-Appellants' Brief at 16-17, *Coler* (No. 85-1611).
148. *Id.* at 17.
149. *Id.*
150. *Coler*, 603 F. Supp. at 1548.
151. *Id.*
152. *Id.*
153. *Id.*

DCFS,[154] that the procedures followed by the DCFS caseworkers did not violate the fourth amendment rights of either the parents or the children[155] and that no probable cause requirement would be imposed upon the Department.[156] Emphasizing the importance of the objectives of the DCFS — to safeguard the life and health of child abuse victims — the court refused to impose a warrant requirement on DCFS investigations.[157] After the court also denied plaintiffs' motion to reconsider its denial of class certification, plaintiffs filed motions to add parties, to amend the complaint, and to amend the preliminary injunction motion and order.[158] On April 9, 1985 the district court denied plaintiffs' motions. Plaintiffs have since appealed from the district court's ruling to the United States Court of Appeals for the Seventh Circuit.[159]

C. *District Court's Analysis of the Searches*

Viewing the DCFS procedures as official intrusions into the home, the court considered whether fourth amendment protections were available to the plaintiffs.[160] Characterizing the DCFS' investigations as "administrative" searches,[161] the court looked to *Camara v. Municipal Court*,[162] for the standards applicable to such searches.

One such standard set forth in *Camara* was whether the officials responsible for a search had the opportunity to exercise unbridled discretion.[163] If the opportunity for the exercise of unbridled discretion did exist, (as the Court determined it did in *Camara*) a warrant would be necessary in order to protect fourth amendment interests at issue.[164] In order to determine whether the DCFS workers did or could have exercised unbridled discre-

154. *Id.* at 1551.
155. *Id.* at 1555-56.
156. *Id.* at 1558.
157. *Id.*
158. Plaintiffs-Appellants' Brief at 2, *Coler* (No. 85-1611).
159. *See infra* text accompanying notes 269-80.
160. *Coler*, 603 F. Supp. at 1553.
161. *Id.* at 1553, 1555-56.
162. 387 U.S. 523 (1967). For a full discussion of the *Camara* decision, see *supra* text accompanying notes 58-61 and 102-05.
163. *Camara*, 387 U.S. at 532.
164. *Coler*, 603 F. Supp. at 1554.

tion, the court looked to the Department's procedural guidelines.[165]

After examining the relevant DCFS procedures involving the entry into the homes and examinations of the children, the court concluded that DCFS workers were not free to exercise a significant amount of discretion.[166] The DCFS procedures provided sufficiently detailed guidelines as to the appropriate action to be taken by the workers in conducting the body searches of the children (if necessary) and searches of the residences.[167] Absent unbridled discretion, the searches at issue would not require warrants under a *Camara* analysis.[168]

The *Coler* court's analysis places a heavy reliance on *Wyman v. James*.[169] In *Wyman*, the Supreme Court declined to impose a warrant requirement on a state caseworker for a child welfare visit on the ground that the visit was not a "search" for purposes of the fourth amendment.[170] Alternatively, the *Wyman* Court proposed that even if it had found the visit to be a search, it would not have violated the fourth amendment.[171] The purpose of the visit — the welfare of the dependent child — justified the intrusion as reasonable under the fourth amendment even in the absence of a warrant.[172] The Court also noted that Mrs. James did not risk criminal sanction by her non-compliance with the social worker.[173] Similarly, in *Coler*, if the plaintiffs had not complied with the caseworker's request to enter the home, no criminal sanction would have been invoked.[174] As in *Wyman*, the court stressed the substantial governmental interest in the purpose of the searches in question.[175]

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165. *See supra* text accompanying notes 111-18.

166. *Coler*, 603 F. Supp. at 1556.

167. *Id.*

168. *See infra* text accompanying notes 210-21.

169. 400 U.S. 309 (1971). *See supra* text accompanying notes 62-69.

170. *Wyman*, 400 U.S. at 317-18.

171. *Id.* at 318.

172. *Id.*

173. *Id.* at 317.

174. *Coler*, 603 F. Supp. at 1556.

175. *Id.* at 1560.

1. *Consent*

Under the traditional "totality of the circumstances" test,[176] the court addressed the issue of consent by the plaintiffs' parents. The court's review of the entire record indicated that the plaintiffs had voluntarily consented to the searches. The court concluded that the plaintiffs had not been coerced into admitting the DCFS caseworkers into their homes or allowing the examination of their children.[177] Although there was testimony that the plaintiffs were not aware of their right to refuse to admit the caseworkers, the court quickly disposed of this argument by acknowledging that "in administrative searches . . . absent coercion, knowledge of the right to refuse entry was not required" to validate consent.[178] The court determined that the procedures followed by the DCFS workers prohibited the use of any force or coercive measures.[179] Despite plaintiffs' argument to the contrary, the court found that the plaintiffs' consent to the searches in question was valid.[180]

2. *Reasonableness of the Searches*

Notwithstanding the finding that the plaintiffs consented to the investigations, the court addressed the reasonableness of the intrusions. Fourth amendment jurisprudence prohibits only unreasonable searches.[181] Although the warrant requirement and the probable cause standard are usually necessary to insure reasonableness, if a warrant would frustrate the governmental purpose behind the search, it cannot be the sole measure of reasonableness.[182] Thus, reasonableness can only be ascertained by considering the purpose of the search.[183]

By subordinating the privacy interests of the family to the

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176. *Id.* at 1556 (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973) and Immigration and Naturalization Serv. v. Delgado, 466 U.S. 210 (1984)).

177. *Id.* at 1557.

178. *Id.* at 1556 (discussing United States v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970)).

179. *Coler*, 603 F. Supp. at 1557.

180. *Id.* at 1557-58.

181. *See supra* notes 9-49, 70-97 and accompanying text. *See Coler*, 603 F. Supp. at 1558.

182. *Coler*, 603 F. Supp. at 1558.

183. *Id.*

government's purpose for the searches, that is, to protect dependent children from harm, the court concluded that the entries into the homes and the body searches of the children were reasonable.[184] In assessing the Department's objectives, the court noted that "[t]he strong governmental interest in taking immediate action to protect the child justifies the immediate investigation and points up the fact that other delayed methods of investigation will likely hinder the governmental purpose — protection of the dependent child."[185]

The court not only upheld the purpose of the searches as reasonable, but also determined that the DCFS procedures provided sufficient safeguards for the fourth amendment rights of the parents and children.[186] In the cases presented, the court found that DCFS workers "acted reasonably in each situation to accomplish their statutorily mandated function, the protection of the dependent child."[187] Consequently, the fourth amendment did not prohibit the investigations by DCFS.

The court concluded that the plaintiffs did not satisfy the criteria necessary to obtain the preliminary injunction.[188] Addressing the substantive basis of the plaintiffs' claim, the court determined that the DCFS investigations were *searches* which thereby invoked the application of the fourth amendment.[189] Nevertheless, the fact that the plaintiffs had consented to these searches eliminated their constitutional claim.[190] However, the court alternatively asserted that even without plaintiffs' consent, it would not have found a fourth amendment violation on the theory that the searches were reasonable and therefore not violative of the fourth amendment.[191]

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184. *Id.*

185. *Id.* at 1560.

186. *Id.* at 1556, 1558.

187. *Id.* at 1552.

188. *Id.* at 1562.

189. *Id.* at 1553.

190. *Id.* at 1562.

191. *Id.* at 1558.

IV. Analysis

A. *An Official Intrusion Into the Home Requires the Protection of the Fourth Amendment*

In its memorandum opinion, the court in *E.Z. v. Coler* asserted that searches conducted by the DCFS workers implicated the fourth amendment.[192] An official intrusion into the home necessarily invokes the protection of the fourth amendment.[193] However, the standards which insure this protection depend upon the type of search involved.[194]

In its analysis of the DCFS searches, the court looked to *Camara v. Municipal Court*[195] for the Supreme Court's exposition of fourth amendment standards governing administrative searches. In *Camara*, although the Court found that a warrantless inspection of a residence pursuant to a municipal building code violated the fourth amendment, it also suggested that the degree of probable cause needed to support the issuance of a warrant to carry out a housing code inspection was less than the degree of probable cause needed to support a warrant in a criminal search.[196] Probable cause to issue a warrant for an administrative search exists when reasonable legislative or administrative standards for such an inspection are satisfied.[197] By adhering to a lesser standard than that required for a criminal search, the courts not only limit the protections granted by the Constitution to searches which serve to discover evidence of crime, but also ignore the value of the privacy interests of the average citizen. Hence the protections afforded the victims of an administrative search are less than those available with a criminal search.[198]

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192. E.Z. v. Coler, 603 F. Supp. 1546, 1553 (N.D. Ill. 1985).

193. *Id.*

194. *See supra* text accompanying notes 50-69, 98-108.

195. 387 U.S. 523 (1967).

196. *Id.* at 534-35.

197. *Id.* at 538.

198. Compare the standards for an administrative search in *Camara* with the traditional standard applicable to a criminal search. The Court in *Camara* reasoned that the purpose of the warrant procedure was to guarantee that a decision to search private property was justified by a reasonable governmental interest. Thus, reasonableness becomes the ultimate standard. However, before a warrant will issue for a criminal search, the only standard applied is that of probable cause, i.e., probable cause that a crime was

Clearly, however, physical examinations of children and searches of their homes are distinguishable from regulatory fire or housing code inspections. Nevertheless, the *Coler* court chose to characterize the body searches of the children[199] and the searches of their homes[200] as "administrative." In *Illinois Migrant Council v. Pilliod*,[201] application of administrative search standards as justification for searches of persons or their homes was rejected.[202] *Pilliod* involved Immigration and Naturalization Services (INS) procedures[203] which permitted the detention of individuals based solely on a reasonable suspicion that they were aliens and without any reason to believe that they were unlawfully in the country.[204] The district court found that administrative warrants do not authorize the search of a dwelling or seizure of persons on the basis of less than probable cause.[205] Applying *Camara* standards to its analysis of the procedures of INS, the court emphasized the intrusiveness and the personal nature of the searches conducted.[206]

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committed and probable cause that evidence of the crime is at a particular location. As a stricter test, probable cause assures the subject of a search more protection than mere reasonableness.

199. *See supra* note 5.

200. *See supra* note 6.

201. 531 F. Supp. 1011 (N.D. Ill. 1982).

202. *Id.* at 1022-23.

203. Plaintiffs challenged INS'

> systematic practice and policy of harassing . . . all persons of Mexican ancestry or Spanish surname lawfully in the Northern District of Illinois.
>
> . . . INS has statutory authority to interrogate aliens as to their right to remain in the United States, and to arrest aliens reasonably believed to be unlawfully present in the United States. Pursuant to this power, INS conducts "area control operations," which are law enforcement operations designed to detect aliens unlawfully present in the United States. Area control operations are initiated on the basis of information such as anonymous tips, reports from informants, prior experience with employers, and review of employment records.

Id. at 1014 (citations omitted).

Such operations were conducted at businesses, private homes, factories and airports. In addition, INS had a policy of stopping individuals on the street in order to inquire about their immigrant status. *Id.* at 1014-15.

204. *Id.*

205. *Id.* at 1022. "The only time the Court has approved the issuance of administrative warrants authorizing the search of dwellings was when it stated in *Camara* that administrative warrants could be issued authorizing searches of dwellings for building code violations pursuant to neutral area-wide inspection plan." *Id.* (citing *Camara*, 387 U.S. at 537-40).

206. *Id.* at 1023.

> [T]he balancing process mandated by *Camara* indicates that INS is not justified in obtaining warrants to search homes, those areas most highly protected by the fourth amendment, on the basis of anything less than probable cause to believe that evidence of violations of the immigration laws will be found on the premises.[207]

Pilliod distinguished "administrative" searches from the actual searches of persons and their homes. Under this analysis, the court in *Coler* should not have labeled the searches at issue as "administrative."

In *New Jersey v. T.L.O.*,[208] although the Supreme Court confirmed a modification of the traditional probable cause standard when such a standard would frustrate the government's purpose for the search, it did not label the searches of students at school as "administrative." The Court found that school officials need only reasonable grounds for suspicion that a student is violating the law in order to execute a search.[209] Although the *Coler* court rejected the traditional probable cause standard as applied to the searches in question, it neglected to apply such a reasonable suspicion test in the alternative. The very nature of the body searches demands more than the bare requirements of the DCFS hotline calls to justify such a search.

B. *Under an Administrative Search Analysis, the Court Upheld the Constitutionality of DCFS Procedures*

1. *Unbridled Discretion*

One of the reasons behind the Court's decision to impose a warrant requirement in *Camara* was based upon the unbridled discretion with which the inspectors were able to conduct their building inspections.[210] The potential for the exercise of unbridled discretion arose from the following circumstances: the lack of information which Mr. Camara had regarding the permissible scope of the inspection; the inspector's authority to conduct the search; and the harassment which might result from the absence of the interposition of a neutral party between the citizen and

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207. *Id.*

208. 469 U.S. 325 (1985).

209. *Id.* at 341.

210. Camara v. Municipal Court, 387 U.S. 523, 532-33 (1967). *See supra* text accompanying notes 163-68.

the inspector.[211] Applying the *Camara* analysis, the district court in *Coler* found that the DCFS procedures[212] did not permit the exercise of unbridled discretion by the caseworkers.[213] Whether these guidelines did in fact adequately restrict the discretion of the caseworkers is questionable; the families who were subjected to the searches were not aware of the scope and extent of the workers' authority in the performance of their duties.[214]

According to the DCFS procedures,[215] searches may be based solely on anonymous, vague, uncorroborated reports.[216] All that the caller must do is present a minimal amount of information. The caller need not provide identification or state whether his or her knowledge is firsthand; he or she must simply indicate a specific instance of possible abuse or neglect of a child less than eighteen years of age by an adult.[217] Thus, the DCFS procedures are far from stringent and hardly provide for the protection of the family's privacy interests.

The DCFS workers are to conduct the examinations of the children involved and the searches of their homes in a manner "reasonably related to the reported allegation of abuse or neglect."[218] Since the allegations are not detailed, the DCFS workers could in fact exercise unbridled discretion in the performance of their duties. Basically, the hotline reports amount only to a general suspicion of possible abuse or neglect; however, it is on the basis of these reports that a visit takes place during which DCFS workers may perform physical examinations of the children and inspections of their homes.[219] In addition, the workers may, in their discretion, search the bodies of unreported siblings.[220] Thus, the possible exercise of unbridled discretion was not precluded by the guidelines under which the DCFS workers were to operate.

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211. *Camara*, 387 U.S. at 532.

212. *See supra* text accompanying notes 109-18.

213. *Coler*, 603 F. Supp. at 1556.

214. *Id.* at 1557.

215. *See supra* text accompanying notes 109-18.

216. Plaintiffs-Appellants' Brief at 29, E.Z. v. Coler, 603 F. Supp. 1546 (N.D. Ill. 1985) (No. 85-1611).

217. HANDBOOK, pt. 302.5(b).

218. *Id.* pt. 302.5(g)(3)(v).

219. *Id.* pts. 302.5(g)(1) and 302.5(g)(3)(v). *See Coler*, 603 F. Supp. at 1549-50.

220. Plaintiffs-Appellants' Brief at 30, *Coler* (No. 85-1611).

The court suggests that there was no opportunity for the exercise of unbridled discretion simply because the DCFS worker can resort to obtaining legal assistance if the parent refused to cooperate.[221] However, the fact that a parent may not have been aware of the right to refuse to cooperate with the investigation at any point eliminated the protection against the exercise of unbridled discretion which the court attributed to the plaintiffs.

2. *Standards For Consent to an Administrative Search Are Less Stringent Than Standards for Consent to a Criminal Search*

Using a "totality of the circumstances" test,[222] the court determined that the plaintiffs consented to the home visits and examinations of the children.[223] The various factors considered included: the lack of coercion; voluntariness in the admittance of the workers into the homes; and the existence of procedures which prohibit the use of force by the caseworkers in gaining entry and in conducting the actual search.[224] If entry is refused in response to the worker's explanation that he or she is authorized to investigate allegations of child abuse, the worker must then seek a court order authorizing entry.[225] Plaintiffs denied the court's assertion that they had consented to the searches since they did not know of their right to refuse to admit the workers or their right to discontinue the investigation at any time.[226] However, the Supreme Court has held that the voluntariness of consent cannot be judged merely by the lack of knowledge of the right to refuse entry.[227] Although this rule has been applied to administrative as well as to criminal searches, ultimately "the standards for consent to an administrative search

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221. *Coler*, 603 F. Supp. at 1556.

222. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 226-27 (1973) ("[T]he question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.").

223. *Coler*, 603 F. Supp. at 1556-57.

224. *Id.* at 1557-58.

225. *Id.* at 1557.

226. *Id. See supra* text accompanying notes 176-80.

227. *See* cases cited *supra* note 92.

are less stringent than the standards for consent to a criminal search."[228] Perhaps this distinction can be justified on the ground that a finding of consent in a criminal search will have far-reaching consequences if the suspect is brought to trial. The ramifications of a determination of consent in a criminal search will affect the proceedings subsequent to the search. Nevertheless, due to the privacy interests at stake, consent in an administrative search situation must also be held up to a carefully defined standard. However, in *Coler*, the court quickly disposed of the consent issue.

The court failed to consider the consent issue in necessary detail — specifically, the possibility of coercion. It is well established that "the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force."[229] Evidence of intimidation, coercion or misrepresentation must be among the factors considered in a court's determination of consent in the context of an administrative search.[230] Although the court correctly noted that knowledge of the right to refuse a search alone is not determinative of the consent issue, nevertheless, it remains a relevant factor to be considered as part and parcel of the totality of the circumstances.

The arrival of a caseworker at the door explaining that he is authorized to physically examine a child's body and inspect the home for evidence of child abuse based upon a report made to the DCFS hotline is undeniably a stressful and potentially coercive situation.[231] The various explanations as to why the plaintiffs complied with the requests of the DCFS workers indicated impliedly coercive situations. A few examples of these explanations are illustrative: the parent felt that she "had to do what [the caseworker] told me to;"[232] they were "thunderstruck" at

228. *Coler*, 603 F. Supp. at 1556; United States v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 218, 228 (1973).

229. Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973).

230. *Id.* at 233.

231. This is especially true if the report turns out to be unfounded. *See, e.g.*, Plaintiffs-Appellants' Brief at 10 n.15, 11 n.18, *Coler* (indicating the harmful effects on the suspected (but not proven) victims of child abuse).

232. *Coler*, 603 F. Supp. at 1557.

the situation;[233] they felt that they "had no choice;"[234] and they thought that if they did not cooperate DCFS would take the children away.[235] One caseworker had asserted that he could get the police and then force the parents to allow him to look through the house and take the children away.[236] Although these responses resulted in plaintiffs' consent to the workers' entries into their homes, they reflected some degree of coercion which was not acknowledged by the court. Even if the sense of coercion were more imagined than real since DCFS workers were not authorized to use force to gain entry into the homes, it is, nevertheless, a factor that requires consideration if the court is to engage in a complete analysis of the consent issue.

Consent must be voluntarily and freely given.[237] If there is any coercion involved, there can be no valid consent.[238] In *Bumper v. North Carolina,*[239] the Court held that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search."[240] Clearly, it follows that there can be no valid consent in such a situation. Although *Bumper* involved a criminal search and a police officer, its theory can be analogized to a noncriminal situation. According to the rationale of *Bumper*, if the DCFS caseworkers asserted that they would procure a search warrant if they were not permitted to enter the home, this situation in its totality can be deemed sufficiently coercive as to eliminate the possibility of consent given freely and voluntarily. At a minimum, the possibility of coerciveness under these circumstances deserved more than a cursory glance by the court.

In *United States v. Thriftimart, Inc.,*[241] the Court distinguished an analysis of consent in a criminal search from that in an administrative search.[242] The Court upheld a warrantless in-

233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. United States v. Watson, 423 U.S. 411 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968).
238. *Bumper*, 391 U.S. at 550.
239. 391 U.S. 543 (1968).
240. *Id.* at 550.
241. 429 F.2d 1006 (9th Cir.), *cert. denied*, 400 U.S. 926 (1970).
242. *Id.* at 1009.

spection of business premises as reasonable because entry was gained not by force or misrepresentation, but with knowledge of the inspector's purpose and manifestation of assent.[243] According to the Court, in an administrative inspection a citizen is not likely to be surprised; the Food and Drug Administration (FDA) inspection is inevitable and nothing is gained by demanding that the inspector obtain a warrant.[244] For these reasons, the Court proposed to treat consent in criminal searches and administrative searches differently. However, *Coler* is clearly distinguishable from a routine inspection performed by the FDA. Most parents would be quite surprised to find a DCFS caseworker at their door seeking entrance to their homes in order to examine their children and look around the house. Furthermore, a visit from a DCFS caseworker is not inevitable.[245] Finally, parents do have something very real to gain by demanding a warrant — they can protect their privacy and force the caseworkers to seek more than bare allegations of abuse before coming to their homes. Thus, even if the court refused to apply the standards for consent to a criminal search to the facts in *Coler*, these facts required something more than the standards applied to a routine inspection of business premises.

3. *The Fourth Amendment Prohibits Only Unreasonable Searches*

a. *DCFS Searches Were Unreasonable Under the Fourth Amendment*

In its prohibition against unreasonable searches, the fourth amendment leaves open the possibility that reasonable searches may be constitutionally valid.[246] Although most courts usually engage in a balancing test to determine the reasonableness of a particular search,[247] in *Coler*, the district court simply looked to

243. *Id.* at 1010.

244. *Id.* at 1009.

245. *Compare Coler with* Wyman v. James, 400 U.S. 309 (1971). Visits are provided for by statute (N.Y. Soc. Serv. Law §§ 134, 134-a (McKinney 1983)) as a condition to continuing receipt of public assistance.

246. *See supra* text accompanying notes 181-90. *See also supra* notes 70-97 and accompanying text.

247. Bell v. Wolfish, 441 U.S. 520 (1979); United States v. United States District Court, 407 U.S. 297 (1972); Camara v. Municipal Court, 387 U.S. 523 (1967); Go-Bart

the purpose of the search and thereby found the searches to be constitutional.[248] The court justified this approach to the reasonableness test by characterizing the searches as "administrative."[249] If courts always resorted to a "purpose-oriented" approach to reasonableness, every search, regardless of how it was conducted, could be saved by advocating a noble purpose with the public interest at heart. The extent and the intrusiveness of the searches demand a more stringent analysis involving more than a cursory evaluation of the worthy public interest in the health and well-being of the dependent children. Instead, the court virtually ignored the tension between the state's interest in protecting the children from abuse in the home and the family's interest in the privacy of the home and the child's interest in his personal security.

In summarily disposing of the plaintiffs' claim to familial privacy, the court asserted the state's duty to protect dependent children from harm at the hands of a parent or guardian.[250] After addressing the state's interest, the court upheld the purpose behind the searches.[251] Rather than proceed with its analysis, the court simply ended its scrutiny of the searches. This approach serves only to trivialize the interest of the family in its privacy and its desire and right to be free from governmental intrusion into the home.[252]

The court neglects to consider the family's right to privacy in the home. This right to privacy "is not conditioned upon the objective, the prerogative or the stature of the intruding officer. His uniform, badge, rank, and the bureau from which he operates are immaterial. It is immaterial whether he is motivated by the highest public purpose or by the lowest personal spite."[253] Thus, whatever the nature of the search, the privacy interest is present and must be addressed in the court's analysis.

In light of the significant interests involved, the *Coler* court

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Importing Co. v. United States, 282 U.S. 344 (1931).

248. *Coler*, 603 F. Supp. at 1558.

249. *Id.* at 1556-58.

250. *Id.* at 1559.

251. *Id.* at 1559-60.

252. *See supra* text accompanying notes 28-97.

253. District of Columbia v. Little, 178 F.2d 13, 17 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950).

had a duty to utilize a true balancing test weighing "the need to search against the invasion which the search entails."[254] The state's interest is readily acknowledged. The state does have a need to search; it has an obligation to protect dependent children from harm.[255] Nevertheless, the court cannot simply ignore the second element of the balancing test — the invasion which the search entails. The privacy interests of the parents and children have clearly been invaded by the searches in question. For the children, in addition to the obvious embarrassment resulting from the removal of their clothing and a physical examination by a caseworker (a stranger to the children), evidence was submitted that these searches may have a long-term negative impact on the children mentally.[256] It cannot be doubted that a nude physical inspection is a serious and significant intrusion into the privacy of an individual — adult or child.

In addition to the privacy interest of the children in their bodily security, the family's interest in the privacy of the home is at stake.[257] It is essential that the court recognize "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child [and that this interest] does not evaporate simply because they have not been [or are *suspected* of not having been] model parents."[258]

Due to the weighty significance of the interests at stake, a resolution of the conflict appears almost impossible. However, because it is the court's duty to provide a resolution, each of the interests, including those of the parents and children, deserves careful consideration by the court — not cursory acknowledgement and hasty dismissal.

b. *Reliance on* Wyman v. James

Although the court purports to be guided by *Wyman v. James*,[259] the only thing it seems to have followed is its conclusion — a warrant requirement will not be imposed. Despite

254. Camara v. Municipal Court, 387 U.S. 523, 537 (1967).

255. State v. Perricone, 37 N.J. 463, 475, 181 A.2d 751, 758 (1962).

256. Plaintiffs-Appellants' Brief at 10 n.15, 11 n.18, *Coler* (No. 85-1611).

257. Santosky v. Kramer, 455 U.S. 745, 753 (1982); Stanley v. Illinois, 405 U.S. 645, 651 (1972).

258. *Santosky*, 455 U.S. at 753. *See also id.* at 754 n.7.

259. 400 U.S. 309 (1971).

their similar holdings, however, there is an obvious and significant distinction between *Wyman* and *Coler*. In *Wyman*, the Supreme Court determined that the home visit by a social worker was not a search.[260] In *Coler*, however, the district court found that the visits by DCFS workers were searches and, therefore, did involve the possibility of a constitutional violation.[261] This distinction requires the court to engage in a balancing test which weighs *all* the interests affected — not only the interests of the state.

The Court's analysis in *Wyman* gave short shrift to the privacy interests of Mrs. James;[262] and the *Coler* court followed this analysis, without acknowledging, much less undertaking, its duty to examine the privacy interests of the parents and their children.[263] An examination of these interests is essential to the performance of a true balancing test for reasonableness; without such an inquiry there can be no balancing. In essence, the court's purported balancing test becomes a pretext to a purpose-oriented approach. The inquiry goes no further than the purpose of the search at issue. If the purpose is a legitimate one, the court's analysis ends. This type of analysis can only have deleterious effects on the constitutional rights of individuals and their families; it severely diminishes the protections granted under the Constitution.

The fact that the Court in *Wyman* refused to import any real significance to Mrs. James' privacy interests can be rationalized to the extent that it did not find a "search" and, therefore, was not required to deal with the fourth amendment considerations. Conversely, in *Coler*, the court recognizes that various searches were in fact executed and that the fourth amendment was indeed implicated. Thus, the district court's analysis must necessarily continue beyond that of the Court in *Wyman* and include a comprehensive consideration of *all* the interests implicated by the searches which took place. Then, and only then, can the court determine if these rights and interests guaranteed by the fourth amendment have been violated. Logically, the

260. *Id.* at 317.
261. *Coler*, 603 F. Supp. at 1553.
262. *See supra* text accompanying notes 62-69 and 169-75.
263. *Coler*, 603 F. Supp. at 1559.

court cannot begin to determine whether there has been a constitutional violation if it ignores or does not appreciate the magnitude of the interests at stake. Unquestionably, the court's analysis falls short of that which the fourth amendment demands.

c. *A Warrant Requirement Would Not Frustrate the Purpose of the DCFS Investigations*

The court indicated that if the imposition of a warrant requirement would frustrate or hinder the purpose of DCFS investigations, it would not require one.[264] Due to the delicate nature of the problem of child abuse in the home, the court attributed an "emergency" quality to DCFS investigations.[265] However, this description can be misleading. All reported allegations of abuse are not emergencies; in fact, some reports are subsequently revealed to have no basis at all.[266] The DCFS procedures themselves distinguish between emergency and non-emergency reports of abuse or neglect.[267] Therefore, the emergency rationale of the *Coler* court did not in itself justify a refusal to afford parents and their children traditional fourth amendment standards of protection.

The *Coler* court insisted that the need for immediate action to protect the suspected victims supported the reasonableness of the searches as they are presently conducted.[268] While this analysis is supportable, it presents only one side of the issue. The court failed to adequately address the substantial interest of the family in freedom from governmental intrusion. Once the family's interest is acknowledged, the argument against imposition of a warrant requirement or a probable cause standard is weakened considerably. The imposition of a warrant does not in any way belittle the importance of the objectives of DCFS in pro-

264. *Id.* at 1560.

265. *See* United States v. Edwards, 498 F.2d 496 (2d Cir. 1974) ("[H]istory reveals that the initial steps in the erosion of individual rights are usually excused on the basis of an 'emergency' or threat to the public."). *Id.* at 502 (Oakes, J., concurring and quoting United States v. Bell, 464 F.2d 667, 676 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972) (Mansfield, J., concurring)).

266. *See supra* notes 80-147 and accompanying text.

267. HANDBOOK, pts. 302.5(g)(1) and 302.5(g)(2).

268. *Coler*, 603 F. Supp. at 1559-60.

tecting victims of child abuse, rather, it serves both to recognize the substantial interests at stake and to protect the interests of everyone involved.

V. Conclusion

In *E.Z. v. Coler,* the court characterized the physical examinations of suspected victims of child abuse and the inspection of their homes as "administrative" searches and thus refused to accord the proper degree of significance to the interests of the family in its privacy and in the integrity of the family unit. Consequently, the court simply rubber stamped the commendable objective of the DCFS to protect victims of child abuse as sufficient justification for refusing to impose a warrant or probable cause standard upon their investigations. Instead of engaging in a traditional balancing test of the interests at stake in order to determine the reasonableness of a search, the court perfunctorily looked at the importance of the purpose of the search, upheld its validity and consequently refused to find a fourth amendment violation. The traditional deference given to the sanctity of one's person and home appears to have vanished from the analysis of a search under the fourth amendment. All that remains is a question: What protection does the Constitution provide against searches of a noncriminal and non-regulatory nature?

Addendum

On September 9, 1986, the United States Court of Appeals for the Seventh Circuit affirmed the district court's denial of the plaintiffs' motion for a preliminary injunction in *E.Z. v. Coler.*[269]

The court of appeals fully expounded on the standard of review applicable to a review of a motion for a preliminary injunction. Although the court raised the weighty issues overlooked by the district court,[270] it refrained from suggesting any standards

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269. E.Z. v. Coler, 603 F. Supp. 1546 (N.D. Ill. 1985), *aff'd sub nom.* B.D. by C.D. v. Coler, 801 F.2d 893 (7th Cir. 1986). On appeal, plaintiff, E.Z., was no longer before the court.

270. On appeal, the court addressed only the body searches.

> Although the plaintiffs in B.D. by C.D., continued to challenge the constitutionality of the home search, . . . those plaintiffs actually subjected to the home search are no longer before the court. Therefore, the court can only address the DCFS

or making any determinations to assist the district court in the subsequent stages of litigation. The court readily acknowledged that which the lower court tried to ignore:

> a final resolution of [the fourth amendment] issue will require the reconciliation of very fundamental constitutional values: the privacy rights of the child; the privacy rights of the family in the important area of childrearing; and the obligation and right of responsible government to deal effectively with the stark reality of child abuse in our society . . . .[271]

However, while readily raising the constitutional interests at stake, the court, nevertheless, quickly abdicated any responsibility "to accomplish a definitive reconciliation of these competing constitutional value concerns."[272]

Although the court undertook a true balancing test of the conflicting interests, it again directed its discussion to the district court's propriety in denying the plaintiffs' preliminary injunction. The court found that the district court's denial of the injunction was proper. It did not, however, reach this conclusion without much reservation and skepticism about the investigative procedures employed by the DCFS. The court was quick to admit the imperfections of DCFS procedures: "Precision in the identification of the child abuse situation — no less than in the treatment of the perpetrator and the victim — is not yet, unfortunately, an achievement of our society."[273] Due to the delicate nature of the inquiry into child abuse in the home, "[t]he state caseworker . . . has an important responsibility not to disrupt salutary familial relationships through extensive interrogations."[274] Thus, "because over 60% of the reported cases of child abuse are subsequently labeled unfounded, '[i]n a number of instances, . . . the only family crisis which exists is that created by Department intervention.' "[275]

Repeatedly referring to standards governing its review of a

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policy which permits routine examinations of the child's body for evidence of abuse or neglect.

Id. at 896 n.2.

271. *Id.* at 894-95.

272. *Id.* at 895.

273. *Id.* at 902.

274. *Id.*

275. *Id.* (quoting HANDBOOK at 10).

preliminary injunction, the court asserted that "we cannot definitively say that the district judge is wrong."[276] Ironically, although the court bent over backwards to adhere strictly to the standards of review and thereby avoided arriving at a conclusion, it repeatedly voiced its skepticism regarding the reasonableness of DCFS procedures. "We are not convinced [at this stage in the litigation] that the Handbook, as it now exists, ensures that searches will always be reasonable."[277] The court, therefore, unequivocally expressed its misgivings about the Handbook procedures; however, it was willing to wait and see if its misgivings were answered at trial.[278]

In its discussion, the court of appeals repeated the concern of the lower court that "it is likely that some child abuse would go undetected and some innocent lives unprotected."[279] Both the district court and the court of appeals failed, however, to adequately consider the harm which results from the denial of the preliminary injunction against DCFS. Since more than one-half of the reports of child abuse are ultimately unfounded,[280] the risk of harm is actually greater with a denial of the preliminary injunction. Without the injunction, more children will be subjected to unreasonable and potentially unconstitutional physical examinations and searches of their homes. These practices could pose a threat of destruction for the family and may have long-term negative effects on the mental and emotional stability of all the subjects of child abuse investigations.

The court of appeals sent *E.Z. v. Coler* back to the trial court for a resolution of the conflict of the critical constitutional interests at stake without the benefit of guidelines. Due to the importance of the interests involved in the area of child abuse — the state's interest in protecting dependent children from harm and the respect for the dignity of the child and his family — the court of appeals had a duty to provide some assistance to the trial court. Time is an important factor in the resolution of this case for the suspected victims regardless of the

276. *Id.* at 903.
277. *Id.* at 904.
278. *Id.*
279. *Id.* (quoting E.Z. v. Coler, 603 F. Supp. 1546, 1563 (N.D. Ill. 1985)).
280. *Id.* at 903.

truth of the reported allegations. If the allegations are true, the investigation cannot be delayed — a child's life may be at stake. If the report turns out to be untrue, both the child and the family will have suffered needless embarrassment and humiliation. The negative impact of the physical examinations may have far-reaching consequences for both the children and their parents. Thus, these constitutional issues must be resolved as soon as possible.

If the court of appeals had taken a firmer stand on the issues involved, the interests at stake would be better served in subsequent stages of litigation.

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