1-1-1985

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COMMENTS

PROTECTING CHILDREN IN LICENSED FAMILY DAY-CARE HOMES: CAN THE STATE ENTER A HOME WITHOUT A WARRANT?

I. INTRODUCTION

In recent months, Americans have watched and listened in horror to a seemingly unending litany of day-care child abuse tragedies. In Manhattan Beach, California, at the McMartin day-care center, more than one hundred preschool children were raped and terrorized.¹ In Contra Costa County, California, Eleanor Nathan, operator of an unlicensed child-care center, was found guilty of the first-degree murder of an eleven-month-old boy, thirty-one counts of child abuse, and one count of mayhem.² In Greer, South Carolina, a teenage supervisor at a day-care center pleaded guilty to charges of sexually abusing seven boys and girls ranging in age from two to eleven years.³ In New York City, four workers at a day-care center were charged with sexually abusing the children in their care.⁴

An estimated two million children are enrolled in state-regulated day-care centers and day-care homes throughout the nation. Countless other children are cared for in unregulated facilities.⁵ Because of the sheer number of children enrolled in day-care, the concern for their safety is reaching epidemic proportions.⁶

Public outrage has contributed to a growing conflict between protecting the privacy rights of licensed family day-care providers

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5. See supra note 3. It is not known how many children are cared for by neighbors or friends who are unlicensed, but most licensing authorities believe that the numbers are growing.
6. An Epidemic of Child Abuse, Newsweek, Aug. 20, 1984, at 44. However, for a sobering reminder that most child abuse takes place in the child's own home by his parents or close family members, see Weinstein, Child-Care Centers Can Be Havens Against Abuse, L.A. Times, Oct. 29, 1984, § II, at 5, col. 5.
and protecting the health and safety of children within day-care homes. Parents and state officials, alarmed at the possibilities for child neglect and abuse by child-care providers, want to enter the day-care homes quickly and without prior warning to protect the welfare of the children. However, the home has always been a core area of privacy. It is afforded maximum protection by the fourth amendment of the United States Constitution against unreasonable searches and seizures.\(^7\) The fourth amendment requires that before a house search begins, a search warrant based on probable cause must be issued by a neutral, detached magistrate.\(^8\)

The growing conflict between the fourth amendment protection afforded to the family home and concern for the health and safety of the children must be resolved. In order to protect the children, a lawful search of the family day-care home may be essential. However, if the privacy rights of the day-care provider are to be protected, the search must be conducted in a manner that is minimally intrusive.

Clearly the public is concerned with the health and safety of children in child-care centers as well as in family day-care homes. However, the tension between privacy rights and the protection of the children is more pronounced in a private home as opposed to a public facility. Accordingly, this comment focuses on the family day-care home. The various standards applied by the courts in search cases will be reviewed. The requirement of a warrant based on probable cause as well as the applicable exceptions to the warrant requirement will be analyzed. The standards will then be applied to licensed family day-care settings to determine which standard is most appropriate. The balancing test,\(^9\) which is presently used to determine the applicable standard as new situations arise, will also be examined. This comment will recommend that, absent exigent cir-

\(^7\) The fourth amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

\(^8\) Payton v. New York, 445 U.S. 573, 574 (1980) (fourth amendment prohibits warrantless and nonconsensual entry into suspect's home in order to make an arrest). See also Shadwick v. City of Tampa, 407 U.S. 345 (1972) (fourth amendment requires that warrant be issued by a neutral and detached magistrate who must be capable of determining the existence of probable cause); Johnson v. United States, 333 U.S. 10, 14 (1948) (search of hotel room without a search warrant violates the fourth amendment).

\(^9\) Camara v. Municipal Ct., 387 U.S. 523 (1967) (with certain carefully defined exceptions, an unconsented, warrantless search of private property is "unreasonable").
cumstances, a search warrant based on "reasonable articulable suspicion" be issued before a search of a licensed family day-care home begins. Although this standard has never been used as a basis for a warrant, its adoption would prevent the erosion of the day-care provider's privacy rights, while helping to protect the health and safety of the children.

II. Licensed Family Day-Care Homes

The number of women who work outside the home has increased dramatically. Indeed, statistics reveal that the number of working women has almost doubled in the past ten years. As a result, parents are competing for a limited number of affordable, safe day-care facilities.

The California Child Care Resources and Referral Network divides child-care facilities into two main categories. The first category, child-care centers, includes day-care centers, preschools, nursery schools, infant centers and school-age programs. Child-care centers are regulated by the State Department of Social Services unless specifically exempted from licensure (i.e. park and recreation

10. Terry v. Ohio, 392 U.S. 1, 21-22 (1968) (an officer may make an intrusion short of arrest when he has reasonable apprehension of danger; and if he believes his safety or the safety of others is endangered, he may make a reasonable search for weapons).

11. Child Care, S.F. Chronicle, May 4, 1984, at 24, col. 1 (the proportion of working mothers increased from four in ten in 1970 to over one in two in 1980). See also Day Care in New York: A Growing Need, N.Y. Times, July 20, 1983, at C1, col. 3 (services lacking include sufficient day-care for low and middle income families and children under two years of age, and after-school programs for children ages five to 12).

12. See supra note 4. See Bureau of the Census, U.S. Dept of Commerce Current Population Reports, Population Characteristics Series P-23, No. 117, Trends in Child Care Arrangements of Working Mothers (June 1982) (report examines day-care arrangements of working and nonworking mothers). See also Child Care, S.F. Chronicle, May 4, 1984, at 24, col. 1, which states that statistics show that approximately 22% of arrangements made by working mothers for their children under the age of five are with family day care, a friend, or a neighbor. About 15% of the arrangements are with child-care centers, 29% with a relative, 5.5% with a baby sitter in the child's home and 23% with the mother or father. Over half of all mothers with young children work outside the home. Id.

13. The California Child Care Resources and Referral Network is a nonprofit public benefit corporation that represents 55 agencies located in 44 counties throughout California. Funded by the state since 1976, its services include helping parents fund child care, documenting community child care needs, providing technical assistance to new and existing providers of care, and facilitating communication between existing child care and child-related service providers. See Child Care Information Kit (available from California Child Care Resource and Referral Network, San Francisco, Cal.).

programs or private parent cooperatives). These centers must meet specific health, fire and building standards. In addition, they must have a qualified director who is a high school graduate with a minimum of fifteen semester units in early childhood education. The director must have at least four years of teaching experience in a licensed child care center. There also must be one teacher for every twelve students and at least seventy-five square feet of outdoor activity space for each child.\footnote{\textbf{15}}

The second category, family day care, is typically provided in private homes, sometimes by skilled professionals, but more often by women without professional training who care simultaneously for their own children as well.\footnote{\textbf{16}} There are no federal licensing requirements for family day-care homes, therefore each state is free to fashion its own regulations.\footnote{\textbf{17}}

In California, the State Department of Social Services also licenses family day-care homes. However, the family day-care homes are subject to fewer state and local regulations than child-care centers.\footnote{\textbf{18}} The regulations are designed to insure the health and safety of the children within the home. Family day-care operators do not have to meet any educational requirements.

A family day-care home is defined by statute in California as "a home which regularly provides care, protection, and supervision of 12 or fewer children, in the provider's own home, for periods of less than 24 hours per day while parents or guardians are away."\footnote{\textbf{19}} In
addition, the residential characteristics of day-care homes are recognized explicitly by the legislature's mandate that, unlike other child-care facilities, family day-care homes constitute a residential use of property for the purposes of local zoning ordinances and building codes. This distinction underscores the legislative intent to treat institutions and homes differently even when they both provide child care.

In California, the licensing requirements for family day-care homes are minimal. Anyone in good health who does not have a criminal record may apply. If more than six children are cared for

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20. CAL. HEALTH & SAFETY CODE § 1597.45 (West Supp. 1985) provides:
All of the following shall apply to small family day care homes:
(a) The use of single-family residence as a small family day care home shall be considered a residential use of property for the purposes of all local ordinances.
(b) No local jurisdiction shall impose any business license, fee, or tax for the privilege of operating a small family day care home.
(c) Use of a single-family dwelling for purposes of a small family day care home shall not constitute a change of occupancy for purposes of Part 1.5 (commencing with Section 17910) of Division 13 (State Housing Law) or for purposes of local building codes.
(d) A small family day care home shall not be subject to the provisions of Article 1 (commencing with Section 13100) or Article 2 (commencing with Section 13140) of Chapter 1 of Part 2, except that a small family day care home shall contain a fire extinguisher or smoke detector device, or both, which meets standards established by the State Fire Marshal.

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21. See CAL. ADMIN. CODE, supra note 18. See also CAL. HEALTH & SAFETY CODE § 1522 (West Supp. 1985) which reads in pertinent part:
It is the intent of the Legislature in enacting this section to require the fingerprints of those individuals whose contact with community care clients may pose a risk to the client's health and safety.
(a) Before issuing a license or special permit to any person or persons to operate or manage a community care facility, the state department shall secure from an appropriate law enforcement agency a criminal record to determine whether the applicant or any other person specified in subdivision (b) has ever been convicted of a crime other than a minor traffic violation. No fee shall be charged by the Department of Justice or the state department for the fingerprinting of an applicant for a license or special permit to operate a facility providing nonmedical board, room, and care for six or less children or for obtaining a criminal record of such an applicant pursuant to this section. If it is found that the applicant or any other person specified in subdivision (b) has been convicted of a crime, other than a minor traffic violation, the application shall be denied, unless the director grants an exemption pursuant to subdivision (e).
(b) In addition to the applicant, the provisions of this section shall be applicable to criminal convictions of the following persons:
(1) Adults responsible for administration or direct supervision of staff.
(2) Any person, other than a client, residing in the facility.
(3) Any person who provides client assistance in dressing, grooming, bathing, or personal hygiene.
in the home, a fire safety clearance must be obtained. In addition, no fees are charged for obtaining a license or for renewal.

Licensing reviews are limited by statute to health and safety considerations. They do not include evaluations of the quality of care or the education or training offered by the day-care provider. A licensing review is typically an unannounced visit and must be conducted at least every year. However, if a parent, neighbor, or citizen suspects a violation of applicable requirements, he may request an inspection of any community care facility, including a family day-care home. If a complaint is made, licensing authorities are required to make an on-site inspection within ten days.

(4) Any staff person or employee who has frequent and routine contact with the clients. In determining who has frequent contact, any volunteer who is in the facility shall be exempt unless the volunteer is used to replace or supplement staff in providing direct care and supervision of clients. In determining who has routine contact, staff and employees under direct on site supervision and who are not providing direct care and supervision or who have only occasional or intermittent contact with clients shall be exempt.

Id.

22. CAL. HEALTH & SAFETY CODE § 1597.54 (West Supp. 1985) provides in relevant part:

An applicant for initial licensure as a family day care home for children shall file with the department, pursuant to its regulations, an application on forms furnished by the department, which shall include, but not be limited to, all of the following: . . .

(b) Evidence that the small family day care home contains a fire extinguisher or smoke detector device, or both, which meets standards established by the State Fire Marshal under subdivision (d) of Section 1597.45 or evidence that the large family day care home meets the standards established by the State Fire Marshal under subdivision (d) of Section 1597.46.

Id. (emphasis added).

23. CAL. HEALTH & SAFETY CODE § 1596.97 (West 1985) provides:
A license or special permit for a day care center for children may be issued for a period not to exceed three years, providing the licensee has been found not to be in violation of any statutory requirements or rules or regulations during the preceding license period. No fee shall be required to accompany any application for a license, special permit, or license renewal of any such facility.

Id.

24. CAL. HEALTH & SAFETY CODE § 1597.05 (West Supp. 1985) provides in pertinent part:

“(a) Licensing reviews of care and services of a day care center shall be limited to health and safety considerations and shall not include any reviews of the content of any educational or training program of the facility.”

25. CAL. HEALTH & SAFETY CODE § 1597.09 (West Supp. 1985) provides:
“Site visitations shall be made as provided in this section as follows:
(a) A site visitation to all licensed day care centers shall be made annually.
(b) A site visitation shall be required for the renewal of a license.”

26. CAL. HEALTH & SAFETY CODE § 1596.853 (West Supp. 1985) provides:
(a) Any person may request an inspection of any child day care facility in accordance with this chapter by transmitting to the department notice of an alleged
and Safety Code sections 1533 and 1597.55 allow a state agent to enter and inspect any place providing personal care, supervision, and

violation of applicable requirements prescribed by the statutes or regulations of this state. A complaint may be made either orally or in writing.

(b) The substance of the complaint shall be provided to the licensee no earlier than at the time of the inspection. Unless the complainant specifically requests otherwise, neither the substance of the complaint provided the licensee nor any copy of the complaint or any record published, released, or otherwise made available to the licensee shall disclose the name of any person mentioned in the complaint, except the name of any duly authorized officer, employee, or agent of the department conducting the investigation or inspection pursuant to this chapter.

(c) Upon receipt of a complaint, other than a complaint alleging denial of a statutory right of access to a child day care facility, the department shall make a preliminary review and, unless the department determines that the complaint is willfully intended to harass a licensee or is without any reasonable basis, the department shall make an on site inspection within 10 days after receiving the complaint. In either event, the complainant shall be promptly informed of the department's proposed course of action.

(d) Upon receipt of a complaint alleging denial of a statutory right of access to a child day care facility, the department shall review the complaint. The complainant shall be notified promptly of the department's proposed course of action.

Id.

27. **CAL. HEALTH & SAFETY CODE** § 1533 (West Supp. 1985) provides in pertinent part:

Except as otherwise provided in this section, any duly authorized officer, employee or agent of the state department may, upon presentation of proper identification, enter and inspect any place providing personal care, supervision, and services at any time, with or without advance notice, to secure compliance with, or to prevent a violation of, any provision of this chapter.

Id.

28. **CAL. HEALTH & SAFETY CODE** § 1597.55 (West Supp. 1985) provides in pertinent part:

No site visitations, or unannounced visits or spot checks, shall be made under this chapter except as provided in this section.

(a) A site visitation shall be required prior to the initial licensing of the applicant.

(b) An unannounced site visitation shall be required for the renewal of a license.

(c) A public agency under contract with the department . . . may make spot checks if it does not result in any cost to the state. However, spot checks shall not be required by the department.

(d) The department or licensing agency shall make an unannounced site visitation on the basis of a complaint and a followup visit as provided in Section 1597.56.

(e) In addition to any site visitation or spot check authorized under this section, the department shall annually make unannounced visits on 10 percent of all family day care homes for children licensed under this chapter. The unannounced visits may be made at any time, including the time of a request for a renewal of a license.

Id.
services. These provisions will be discussed more fully in section IV C, infra.

Having discussed the purpose and regulatory scheme of family day-care homes, it is necessary to examine the protections offered by the fourth amendment to family day-care providers. The Supreme Court has outlined search and seizure standards and warrant requirements which protect citizens from unreasonable governmental intrusion. A review of these standards is necessary before determining which standard in particular is applicable to licensed family day-care homes.

III. THE FOURTH AMENDMENT

A. General Background

The fourth amendment protects individuals from unreasonable searches and seizures by requiring that all warrants must be based on probable cause.29 A valid warrant can be issued only upon a showing to a magistrate that there is probable cause for a search or an arrest.30 The prohibition against unreasonable searches and seizures has been construed to require probable cause for warrantless searches and seizures as well.31

Historically, the need for protection against unwarranted governmental intrusion developed from the concept that a man's home was his castle.32 Protecting a private dwelling from physical entry by the government was the primary objective of the fourth amendment,33 therefore, all searches and seizures in a home without a warrant were presumptively unreasonable and a fortiori unconstitutional.34 Justice Bradley, emphasizing that the fourth amendment prohibition against unreasonable searches and seizures is one of the most essential constitutional guarantees of liberty, stated in Boyd v. United States that the fourth amendment applies as follows:

[T]o all invasions . . . of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, . . . that

29. See supra note 7 for the text of the fourth amendment.
30. Wong Sun v. United States, 371 U.S. 471 (1963) (no reasonable ground or probable cause exists for arrest where information is so vague or untested that it could not be accepted as probable cause for issuance of a warrant).
32. Id.
constitutes . . . the offense; but it is the invasion of his indefensible right of personal security, personal liberty and private property . . . , it is the invasion of [a] sacred right.\textsuperscript{35}

In order to insure fourth amendment protection, the government requires that specific procedures be followed before a search begins.

B. Issuance of the Warrant

The general rule is that a search must be based on a valid warrant. A search warrant is an order in writing, signed by a magistrate, which directs a police officer to search for personal property and bring it before a magistrate.\textsuperscript{36} The places to be searched and the evidence to be seized must be described with "reasonable particularity" such that the officer need not rely on his own discretion in deciding where to search and what to seize.\textsuperscript{37} A search warrant "interposes an orderly procedure' involving 'judicial impartiality' whereby a 'neutral and detached magistrate' can make 'informed and deliberate determinations' on the issues of probable cause."\textsuperscript{38}

The Supreme Court has held that the warrant need not be issued by a lawyer or a judge. However, an issuing magistrate must meet two tests: "He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search."\textsuperscript{39} In Coolidge v. New Hampshire, the State Attorney General who was the chief prosecutor in the case was also authorized under state law to issue search warrants as a justice of the peace. The Supreme Court held that he was not the "neutral and detached magistrate required by the Constitution."\textsuperscript{40} Hence, the Court requires that someone removed from the immediate situation review the evidence in order to determine whether probable cause exists.

C. Requirement of Probable Cause

It is not entirely clear what constitutes probable cause. The Supreme Court stated in Brinegar v. United States that it is more than

\textsuperscript{35} Boyd v. United States, 116 U.S. 616, 630 (1885).
\textsuperscript{36} Allen v. Holbrook, 103 Utah 319, 331, 135 P.2d 242, 247-48 (1943) (search and seizure warrant for milk bottles did not give sheriff sufficient information to determine which bottles to seize).
\textsuperscript{37} Id. at 333, 135 P.2d at 249.
\textsuperscript{38} 2 W. LA FAVE, SEARCH AND SEIZURE 29 (1978) (footnotes omitted).
\textsuperscript{39} Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972).
\textsuperscript{40} Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971).
bare suspicion. Probable cause exists when an arresting officer has knowledge of reasonably trustworthy facts and circumstances which would warrant a man of reasonable caution to believe that an offense has been or is being committed. The standard for probable cause is often expressed in probabilities. Probable cause to arrest exists where there is a substantial probability that the person to be arrested has committed a crime. Probable cause to search exists when there is a substantial probability that evidence of a crime will be presently found at a specific place. However, the requirement of probable cause is not an inflexible rule. The court upholds searches and seizures on a lower standard of proof when the facts indicate that the search or seizure is reasonable.

D. Balancing Test

The fourth amendment does not prohibit all searches and seizures that are not based on probable cause, but only those that are unreasonable. In Camara v. Municipal Court, the Court held that the reasonableness of a search must be determined by balancing the intrusiveness of the search against public need. Narrowly defined exceptions to the probable cause requirement have developed as courts have applied the balancing test to new situations in order to test the reasonableness of a search or seizure. Notwithstanding the exceptions, the general rule is that probable cause is required as a basis for a search warrant, for an arrest warrant within a home, and to sustain a warrantless arrest outside the home.

42. Id. at 175-76.
44. La Fave, Fourth Amendment Vagaries, 74B J. Crim. L. & Criminology 1171, 1199 (1983).
46. Id.
48. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (state must demonstrate that consent to search a suspect who is not in custody is voluntary).
E. Administrative Probable Cause

The Supreme Court first applied the balancing test in situations when limited intrusions were outweighed by compelling public need. The Court held in *Camara v. Municipal Court* that inspections of residential buildings to assess compliance with fire, health or safety regulations will be upheld only if such inspections are based on a valid search warrant. In *Camara*, the defendant faced criminal charges because he violated the San Francisco Housing Code by refusing to allow building inspectors to inspect his residence without a warrant. The Court held that the defendant had a constitutional right under the fourth amendment to insist that the inspectors obtain a warrant to search. The rationale of *Camara* has been extended to inspections of commercial buildings as well. However, although a warrant is required for these inspections, a lesser showing of probable cause is required to sustain the warrant. All that is needed is either evidence of a regulatory violation or evidence of a reasonable legislative or administrative plan developed to serve a valid public need. The Court, applying the balancing test to determine the reasonableness of administrative searches, concluded that because the searches were not personal in nature and were not intended to uncover crime, a search warrant could be issued on less than traditional probable cause.

F. No Warrant Required

The probable cause and warrant requirements protect against unreasonable searches and seizures by limiting the power of the government to intrude into private lives. However, the Supreme Court, in addition to upholding administrative searches on less than probable cause, has recognized situations in which a warrant is not required at all. The Court has applied the balancing test and determined that when obtaining a warrant would be unduly burdensome and in contravention of the governmental interest in law enforce-

52. Id.
55. *Camara*, 387 U.S. at 538.
56. Id. at 537.
57. See infra notes 59-62 and accompanying text.
ment, and when the intrusion into privacy rights would be minimal, a search or brief stop of an individual may be upheld without a warrant. Warrants are generally not required if there are exigent circumstances, if free and voluntary consent is given, or if there is "implied consent." Warrants are also not required for a brief stop and pat-down search on the street if the officer has a "reasonable articulable suspicion" that the suspect is armed or that criminal activity is afoot.

A search or seizure without a warrant is "per se" unreasonable under the fourth amendment unless it can be justified under one of the exceptions to the warrant requirement. These exceptions are carefully drawn, and the burden is on the government to show that obtaining a warrant was impracticable or impossible in any given situation.

1. Exigent Circumstances

The exigent circumstances exception allows for immediate official action by the government in emergency situations. Exigent circumstances are usually found when there is an imminent danger of the destruction of evidence, when there is a risk of danger to police officers or others, or when there is a risk that the suspect will escape. A search incident to a lawful arrest is valid without a warrant and justified as an exigency because an arresting officer is al-

58. Id.
59. Exigent circumstances are present when police must act quickly and without prior judicial approval or they will be unable to make a search or seizure. United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978) (exigent circumstances justified warrantless arrests of defendants in their apartments when crime was armed robbery and when there was reason to believe that defendants might escape, destroy the evidence, or risk an armed confrontation). See also Warden v. Hayden, 387 U.S. 294, 298 (1967); Dorman v. United States, 435 F.2d 385, 392 (D.C. Cir. 1970). For examples of emergency situations see United States v. Santana, 427 U.S. 38, 42-43 (1976) (hot pursuit); Schmerber v. California, 384 U.S. 757, 768-70 (1966) (destruction of evidence); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (officer has reason- able cause to believe that his life or the lives of others may be in imminent danger).
64. Coolidge, 403 U.S. at 455 (quoting Jones v. United States, 357 U.S. 493, 499 (1958)).
65. Coolidge, 403 U.S. at 455.
66. Id. See also supra note 59.
ways in a potentially dangerous situation.\textsuperscript{67}

2. \textit{Consent}

If free or voluntary consent is given for a search (or an arrest within a home) no warrant is required.\textsuperscript{68} The Supreme Court has held that the government must justify an otherwise unconstitutional search based on consent by showing "that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied."\textsuperscript{69} The courts, however, are divided on the issue of whether the validity of the consent should be determined by the state of mind of the person giving the consent or the state of mind of the police officers.\textsuperscript{70}

3. \textit{Implied Consent}

The Supreme Court has carved out yet another exception to the warrant requirement for certain heavily regulated industries.\textsuperscript{71} When industries have had a long and consistent history of governmental regulation and attention, the Court has reasoned that personnel within those industries are "on notice." They have, therefore, impliedly consented to any reasonable search necessary to enforce code or statutory regulations.\textsuperscript{72}

4. \textit{No Warrant Required When Officer has Reasonable Articulable Suspicion}

In the seminal case, \textit{Terry v. Ohio},\textsuperscript{73} the Supreme Court recognized that if a search or seizure were only a limited intrusion, it could be based on less than probable cause. In \textit{Terry}, the defendant, who allegedly was "casing" a store, was subjected to a brief deten-
tion and pat-down search for weapons. The Court reasoned that because of the necessity for immediate action, the fourth amendment warrant requirement was inapplicable. Instead, the Court tested the police conduct under the reasonableness requirement of the fourth amendment. To comply with the reasonableness standard, the search or seizure must be justified in its inception, and it must be based on the officer's particularized, objective belief. The search or seizure also must be justified in scope and reasonably related in purpose to carrying out that belief. The Court applied the Camara balancing test in order to weigh the governmental need against the harm to the defendant and ultimately concluded that the search was reasonable.

The quantum of evidence necessary to sustain the limited intrusion in Terry under the reasonableness standard is "reasonable articulable suspicion." If a brief detention is involved, the reasonable, experienced police officer (reasonable) must be able to describe or point to facts (articulable) which give rise to his objective belief (suspicion). Although not precisely defined by the Court, the degree of suspicion must be more than a mere hunch but less than probable cause. Whereas probable cause is "more probable than not" or a "substantial probability," the degree of suspicion here may be a "substantial possibility." To justify a brief, pat-down search, the reasonable, experienced police officer (reasonable) must be able to describe or point to facts (articulable) which lead him to believe that there is a "substantial possibility" that the defendant is armed and dangerous (suspicion).

Thus, Terry v. Ohio and its progeny represent a departure by the Supreme Court from the traditional rule that under the fourth

74. Id.
75. Id. at 20.
76. Id. at 20-22.
77. Id. at 19-22.
78. Id. at 21-31.
79. Id. at 22.
80. Id.
81. Id. at 33 (Harlan, J., concurring).
82. See Basic Criminal Procedure, supra note 43.
83. Id.
amendment only probable cause can demonstrate reasonableness. The Court has shifted its focus from probable cause to a balancing of governmental need against the relative intrusiveness of the search or seizure. The reasonable articulable suspicion standard originally was carved out of the fourth amendment requirement of probable cause to protect the police and the general public during street encounters with criminal suspects. However, the standard has been extended from the Terry "stop and frisk" scenario to other carefully delineated limited intrusions as well.

Having analyzed the fourth amendment's requirement of probable cause as well as the various exceptions mapped out by the Court, it is necessary to apply the standards to family day-care homes. It is clear that each standard when applied to family day-care will have far-reaching implications. Accordingly, each standard must be carefully scrutinized in order to determine which one will most effectively balance the interests of children and day-care providers.

IV. WHICH STANDARD SHOULD BE APPLIED TO LICENSED FAMILY DAY-CARE HOMES?

A. A Warrant Based on Criminal Probable Cause

Rush v. Obledo is the only reported appellate court decision which addresses the issue of warrantless searches of licensed family day-care homes. In Rush, the plaintiffs sought relief against the State of California Department of Social Services for its practice of unannounced, warrantless inspections of private homes. At issue in the case was California Health and Safety Code section 1533 which allows any authorized agent of the State Department of Social Services to enter and inspect "any place providing personal care, supervision, and services at any time, with or without advance notice, to secure compliance with, or to prevent a violation of, any provision of this chapter." The district court in Rush held that California statutes and regulations which permit warrantless inspections of family day-care homes violate the fourth amendment. The district court reasoned that warrantless searches could not be justified under the

86. Id. at 1254-55.
87. Id. at 1255-56. For the most recent Supreme Court decision applying the reasonableness standard, see New Jersey v. T.L.O., 105 S. Ct. 733 (1985) (search of students without probable cause upheld under the reasonableness standard).
88. 756 F.2d 713 (9th Cir. 1985).
89. The plaintiffs included operators of a licensed family day-care home and an association of licensed family day-care providers. Id.
“closely regulated industry” exception to the warrant requirement for administrative searches or on a general “reasonableness” basis determined by balancing the state's interest against the provider's interest. The district court stated that “[T]he protections afforded to a private home are in no way diminished by the fact that the occupant of the home is paid to care for a few children from other people's families part of the day.” The court emphasized that because the licensing requirements are minimal, family day-care providers are not highly regulated. Accordingly, such providers have not impliedly consented to the intrusiveness of a search without a properly issued warrant simply because they are day-care providers. As Judge Patel quoted in Rush v. Obledo:

The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain enter; but the King of England cannot enter—all his forces dares not cross the threshold of the ruined tenement.

Applying this analogy to the plight of the day-care provider, Judge Patel further explained:

In this case, the King is the State of California, his force is a social worker, and the man in his cottage is the woman (in most instances) in her family day-care home. But the principle is no different. Under the fourth amendment to our Constitution, government representatives cannot enter a home uninvited without prior judicial authority in the form of a warrant. Nothing in the nature, history, or operation of California family day care homes warrant an exception to this rule, one of the most cherished values of our society.

Under the district court’s rationale, family day-care providers would be afforded the most protection from governmental intrusion. Courts would require a valid search warrant issued by a magistrate upon a showing of traditional “criminal” probable cause. However, under this standard, a warrant would not be issued unless a parent, neighbor, state official, or ordinary citizen convinced a magistrate that there was a substantial probability that evidence of a crime

91. 517 F. Supp. 905, 908.
94. 517 F. Supp. 905, 917 (citing Miller v. United States, 357 U.S. 301, 307 (1958) (quoting remarks attributed to William Pitt, Earl of Chatham in 1763)).
95. Id. The Ninth Circuit Court of Appeals' decision affirming in part Judge Patel's opinion is discussed infra notes 103-108.
would be discovered.\textsuperscript{96}

The criminal probable cause standard applied by the district court in \textit{Rush} affords the family day-care home maximum fourth amendment protection. But what about protecting the children? Clearly, if the police believe that children are being mistreated, an exigency exists, and entry will be immediate.\textsuperscript{97} But what if the suspected danger is not so obvious? Torture and abuse of children allegedly occurred at the McMartin School in Manhattan Beach for nearly ten years before it was brought to public attention.\textsuperscript{98} Moreover, potentially dangerous situations such as over-crowding or poor supervision may not appear serious to a magistrate who is accustomed to reviewing probable cause in a tradition criminal context. The magistrate may not be convinced that the amount of evidence presented meets the traditional probable cause standard. If the warrant is not issued, officials are forced to wait until they gather more evidence or until the situation escalates into an emergency before they can lawfully enter the day-care home.

Children in licensed family day-care homes are in special need of protection. They are away from their parents and are often secluded from public scrutiny behind closed doors for most of the day.\textsuperscript{99} Because they are young, the children may have difficulty communicating their problems to responsible adults. More importantly, the children may not understand what constitutes appropriate behavior for adults responsible for their well-being. Finally, it is possible that their parents are unaware of the problems which may exist within the day-care home. Such considerations render young children in licensed family day-care homes particularly vulnerable. Because the criminal probable cause standard is so difficult to meet, the standard ultimately fails to provide the protection these children require.\textsuperscript{100} Probable cause is too high a standard for the state to meet if it is to effectively protect the health and safety of children in family day-care homes. Therefore, it is necessary to consider the applicability of standards other than traditional probable cause.

\textsuperscript{96} \textit{Id.} at 917.
\textsuperscript{97} \textit{See supra} note 59.
\textsuperscript{98} S.F. Chronicle, May 4, 1984, at 24, col. 3.
\textsuperscript{99} \textit{See CAL. HEALTH \& SAFETY CODE} § 1596.78 (West Supp. 1985), \textit{supra} note 19.
\textsuperscript{100} \textit{But see Rush}, 517 F. Supp. 905 (because the state chooses to subject family day-care providers to criminal sanctions, an administrative inspection warrant based on probable cause must be issued before any inspection to determine whether or not a violation of statutes or regulations governing family day-care homes occurs). \textit{Id.} at 917.
B. A Warrant Based on Administrative Probable Cause

The Supreme Court in *Camara v. Municipal Court*\(^{101}\) held that under certain circumstances, periodic inspections of buildings will be upheld even when the search warrant is based on less than probable cause. However, to justify the application of the lower standard, there must be evidence of a violation or a showing that reasonable legislative or administrative standards are being satisfied.\(^{102}\)

Clearly, this lesser showing of probable cause would give the state easier access to the children within day-care homes and thus afford the children greater protection. However, unlike previous applications of an administrative search warrant, in the context of day-care, the government is not inspecting the home for code violations alone, but primarily to uncover criminal activity. Moreover, unlike the limited search allowed under *Camara*, a search of the family day-care home must be more thorough and extensive if it is to effectively protect the health and safety of the children. An administrative search warrant is always available for uncovering code violations. However, if the real purpose of the search is to detect criminal activity, the administrative search warrant is not appropriate.

C. No Warrant Required

The state in *Rush v. Obledo* argued that warrantless entry into licensed family day-care homes can be justified either under the "closely regulated industry" exception or on a general "reasonableness" standard (based on balancing the state's interest against the provider's interest.)\(^{103}\) While the case was pending appeal before the Ninth Circuit Court of Appeals, the California legislature enacted new statutes and implemented regulations to govern licensing and operation of family day-care homes.\(^{104}\) Section 1596.852 was enacted with language identical to section 1533, the statute initially challenged by the plaintiffs in *Rush*.\(^{105}\) Under another new section,

\(^{101}\) 387 U.S. 523.

\(^{102}\) *Id.* at 538.

\(^{103}\) *Rush*, 517 F. Supp. at 908.


\(^{105}\) Cal. Health & Safety Code § 1596.852 (West Supp. 1985) provides:

Any duly authorized officer, employee, or agent of the department may, upon presentation of proper identification, enter and inspect any place providing personal care, supervision, and services at any time, with or without advance notice, to secure compliance with, or to prevent a violation of, any provision of this chapter.
1597.55, limited unannounced inspections are now mandatory for license renewal and required annually for ten percent of all licensed day-care homes.\textsuperscript{108}

The court of appeals affirmed in part and reversed in part the district court’s decision in Rush. It held that because family day-care homes were pervasively regulated, limited warrantless inspections of family day-care homes do not offend the fourth amendment.\textsuperscript{107} It found, however, that section 1596.852 was invalid, but that section 1597.55 is sufficiently narrow to pass constitutional muster. The court did not further address the applicability of section 1533 because it determined that the section had been repealed and had been made inapplicable to family day-care homes under the new statutory scheme.\textsuperscript{108} The court of appeals’ decision mandates that in California, day care is now a “pervasively regulated business.” Therefore, under the statutes now in effect, limited warrantless searches of family day-care homes will be permitted.

The Rush decision does not represent a balanced solution. Clearly it affords more immediate access to the children. But if a warrant is not required to search a family day-care home for evidence of criminal activity, even when the search is limited by regulations as it is under present California law, the fourth amendment safeguard of a “neutral and detached” magistrate to determine the necessity for the search is bypassed.\textsuperscript{109} The decision regarding the propriety of home entry would be made by the licensing agency, usually the Department of Social Services, which is clearly not a neutral, detached party. The “dragnet searches” and “general exploratory rummaging” so abhorred by the framers of the Constitution could result because of unbridled governmental discretion.\textsuperscript{110} Although allowing entry into the home without a warrant may offer more protection for the children, fourth amendment protection for

\textit{Id. See also Cal. Health & Safety Code} § 1533 (West Supp. 1985), \textit{supra} note 27.
\textsuperscript{107.} Rush, 756 F.2d at 723.
\textsuperscript{108.} \textit{Id.} 714 n.1 and 715 n.3. This author has found no evidence that Cal. Health & Safety Code § 1533 has been repealed.
\textsuperscript{109.} Shadwick v. City of Tampa, 407 U.S. 345 (1972).
\textsuperscript{110.} Galloway, The Uninvited Ear: The Fourth Amendment Ban on Electronic General Searches, 22 SANTA CLARA L. REV. 993, 994-1000 (1982) (author concludes that extended electronic surveillance is a general search and seizure); Comment, The Erosion of Probable Cause, 13 N. Carolina Cent. L.J. 212 (1982) (arguing that expansion of the Terry standard to areas where there is little if any danger to law enforcement officials threatens to eliminate probable cause and fourth amendment protection against unreasonable search and seizure).
the home would be seriously eroded.\textsuperscript{111}

D. A Warrant Based on Reasonable Articulable Suspicion

Analysis of the various search standards and warrant requirements defined by the courts in other situations reveals that not one of them provides protection for both the children and the family day-care provider. Accordingly, this comment recommends that absent exigent circumstances, the courts require that a warrant based on reasonable articulable suspicion be issued by a neutral magistrate before entry into the family day-care home is permitted and a search begins.\textsuperscript{112} Clearly, a search of the family day-care home must be allowed if the children are to be adequately protected. However, the requirement of a warrant based on reasonable articulable suspicion will protect the day-care provider as well.

Although the courts have not used this standard as a basis for issuing a warrant, to do so in the context of licensed family day-care homes would fairly and effectively protect the strong interests of the children as well as the day-care providers. Reasonable articulable suspicion would require an objective, reasonable belief that is more than mere suspicion but less than probable cause. Unbridled governmental discretion would be avoided because the determination to enter a house would be made by the "neutral and detached" magistrate required by the Constitution.\textsuperscript{113} The children would be adequately protected because, in addition to the warrant based on reasonable articulable suspicion, the state could enter the home immediately if a true exigency exists. Moreover, the state could request an administrative search warrant if the purpose were to check licensing or code requirements. With the addition of a warrant based on reasonable articulable suspicion, the state would have a varied and more adequate arsenal to protect the well-being of the children.

If a reasonable articulable suspicion standard is adopted, and the government is allowed to intrude into the privacy of a home on less than probable cause, it is critical that carefully defined limits be

\textsuperscript{111} Payton v. New York, 445 U.S. 573 (1980). One might query as to whether knowledge of warrantless searches might discourage potential licensed day-care providers from ever offering their homes for child care.

\textsuperscript{112} In New Jersey v. T.L.O., the Supreme Court upheld the search of the student's purse by school officials acting without warrant or probable cause. The Court applied the \textit{Camara} balancing test and determined that the search was reasonable. Thus the Court has already extended the permissible search under the reasonable articulable suspicion standard from the brief pat-down in \textit{Terry} to a full-scale search in \textit{T.L.O.} New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

\textsuperscript{113} \textit{Shadwick}, 407 U.S. at 345.
established in order to guarantee that the search is minimally intrusive. Recalling that the pat-down search in *Terry* was limited to feeling outer clothing for the presence of a weapon, the house search must be carefully limited to the purpose of discovering danger or harm to children. The search should include immediate access to the children but no automatic right to search drawers or to read personal papers. The warrant based on reasonable articulable suspicion must specifically state which areas of the house may be searched. And finally, the "plain view doctrine" which allows for the admissibility of any evidence inadvertently discovered during a lawful search should not apply. An inadvertent discovery of evidence concerning a crime unrelated to the purpose for which the warrant is issued (i.e., health and safety of children) should not be admissible against the day-care provider. Because the government could enter the home on a lower standard than probable cause, it is only fair that the provider be held to answer only for illegal activities that relate to the health and safety of children. The suggested limits on the intrusiveness of the search would help to achieve the proper balance between the competing interest of the home owner's right to privacy and the protection of children. These limitations on the state are a small price to pay in return for entry into a family home on less than probable cause.

Because of the serious implications of entering a home on less than probable cause, it is critical that the recommendations in this comment be very narrowly consturred. The reasonable articulable suspicion standard is appropriate in the context of day care, because daycare providers arguably have given up some privacy rights by opening up their homes to children. It would be untenable, however, if this standard were extended out of the day-care context and the government attempted, for example, to enter a child's own home with only a reasonable articulable suspicion of child abuse. Justice Brennan, concurring in part and dissenting in part in *T.L.O.* states:

Moved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil. But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of the right to be
let alone—the most comprehensive of rights and the right most valued by civilized man.117

V. CONCLUSION

The urgent need to protect children in day care is unquestioned. The growing public outrage demands that immediate steps be taken. However, absent exigent circumstances, the fourth amendment stands guard at the threshold of the family day-care home. The state cannot be allowed to enter any home without a warrant.

Allowing the state to enter a home to search without a warrant, or with a warrant issued on less than reasonable articulable suspicion, has serious consequences. If a house search is permitted based only on suspicion or rumor, fourth amendment protections for day-care providers will be irreparably undermined. In addition, because privacy rights are rarely sacrificed lightly, people may be reluctant to provide day-care in their homes altogether. If people are discouraged from offering their homes for day-care because search warrants are issued on less than reasonable articulable suspicion, the governmental policy of encouraging the growth of day-care would be contravened.118

Alternatively, a search warrant which is based only upon a showing of probable cause has equally serious ramifications. It hinders the state in its efforts to protect children and ultimately fails to address the critical problem of child abuse. Given the present public outrage regarding child abuse, this standard is clearly unacceptable. However, a warrant based on reasonable articulable suspicion

118. CAL. HEALTH & SAFETY CODE § 1596.72 (West Supp. 1985) which provides in pertinent part:

The legislature finds all of the following:
(a) That day care facilities for children can contribute positively to a child's emotional, cognitive, and educational development.
(b) That it is the intent of this state to provide a comprehensive, quality system for licensing day care facilities for children to insure a quality day care environment.
(c) That this system of licensure requires a special understanding of the unique characteristics and needs of the children served by day care facilities.
(d) That it is the intent of the Legislature to establish within the State Department of Social Services an organizational structure to separate licensing of day care facilities for children from those facility types administered under Chapter 3 (commencing with Section 1500).
(e) That good quality child day care services are an essential service for working parents.

Id.
provides a solution which best serves the compelling interests of all concerned. The reasonable articulable suspicion standard will protect the health and safety of children in family day-care homes without sacrificing the privacy rights of family day-care providers.

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