

Winter 1980

## Fourth Amendment--Search of an Individual Pursuant to a Warrant to Search the Premises

Sandra J. Wall

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Sandra J. Wall, Fourth Amendment--Search of an Individual Pursuant to a Warrant to Search the Premises, 71 J. Crim. L. & Criminology 558 (1980)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

## FOURTH AMENDMENT—SEARCH OF AN INDIVIDUAL PURSUANT TO A WARRANT TO SEARCH THE PREMISES

*Ybarra v. Illinois*, 444 U.S. 85 (1979).

In *Ybarra v. Illinois*,<sup>1</sup> the Supreme Court clarified the standard which law enforcement officers must meet before searching persons found upon premises described in a warrant which does not name them. Until *Ybarra*, courts could formulate their own requirements as to the amount of suspicion a police officer must have before searching such persons.<sup>2</sup> Although in reality the Court based its decision on the paucity of evidence found to justify the search, the Court adhered to the principles of *Terry v. Ohio*,<sup>3</sup> announcing that police must have probable cause to search persons unnamed in a warrant in all cases except those where weapons are suspected. Although the Supreme Court appears to provide a clear and definite standard, the question still remains whether this determination can be applied effectively by lower courts when the fact situation is not so obviously lacking in suspicion as in *Ybarra*.

### I

On March 1, 1976, a reliable informant told police that during the previous weekend, while in the Aurora Tap Tavern in Aurora, Illinois, he had observed that the bartender had fifteen to twenty-five tinfoil packets on his person. The informant believed the packets contained heroin.<sup>4</sup> The resulting warrant authorized a search of the premises of the tavern and the person of the bartender for contraband and other controlled substances.

The eight officers who arrived at the tavern performed a "cursory search for weapons" of all twelve patrons present. One of those patrons, defendant Ventura Ybarra, was standing by a pinball machine when the police entered. An officer patted Ybarra down and felt "a cigarette pack with objects in it" in his pants pocket.<sup>5</sup> Instead of immediately removing the package, the officer searched the other patrons. Then the officer returned to Ybarra

and removed the cigarette pack from his pocket. Inside the pack the officer found six tinfoil packets containing a powdery substance which later analysis identified as heroin.

A grand jury indicted Ybarra for unlawful possession of heroin. His motion to suppress the evidence was made prior to trial but denied based on the Illinois detention and search statute, which read as follows:

In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:

- (a) To protect himself from attack, or
- (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.<sup>6</sup>

The motion was denied under the authority of subsection (b) and the trial court convicted Ybarra of possession of heroin.

The Illinois appellate court affirmed the conviction holding that the trial court constitutionally applied the Illinois detention and search statute to the facts as presented.<sup>7</sup> The court reached its result by comparing and contrasting the facts in *Ybarra* with cases containing similar fact patterns resolved by the courts in Illinois and other states.<sup>8</sup> Furthermore, the court adopted the interpretation given to the detention and search statute in *People v. Dukes*.<sup>9</sup> The *Dukes* court held that the statute did not authorize the search of persons "on the premises described in the warrant without some showing of a connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant."<sup>10</sup>

The Illinois appellate court held that the packets of heroin could be concealed easily, thus thwarting

<sup>1</sup> 444 U.S. 85 (1979).

<sup>2</sup> See *State v. Mendez*, 115 Ariz. 367, 565 P.2d 873 (1977); *People v. Dukes*, 48 Ill. App. 3d 237, 363 N.E.2d 62 (1977); *State v. Loudermilk*, 208 Kan. 893, 494 P.2d 1174 (1972).

<sup>3</sup> 392 U.S. 1 (1968).

<sup>4</sup> 444 U.S. at 88.

<sup>5</sup> *Id.*

<sup>6</sup> ILL. REV. STAT. ch. 38, § 108-9 (1975).

<sup>7</sup> 58 Ill. App. 3d 57, 64, 373 N.E.2d 1013, 1017 (1978).

<sup>8</sup> *Willis v. State*, 122 Ga. App. 455, 177 S.E.2d 487 (1970); *People v. Pugh*, 69 Ill. 2d 312, 217 N.E.2d 557 (1966); See *State v. Loudermilk*, 208 Kan. 893, 494 P.2d 1174.

<sup>9</sup> 48 Ill. App. 3d 237, 363 N.E.2d 62 (1977).

<sup>10</sup> *Id.* at 241, 363 N.E.2d at 64.

the purpose of the warrant, and that the defendant was not an innocent stranger with no connection to the premises.<sup>11</sup> In addition, the informant's disclosure indicated that heroin was being sold in the tavern.<sup>12</sup> The court was satisfied that no other evidence was necessary to sustain the search, and therefore upheld the conviction. Ybarra appealed to the Illinois Supreme Court but his petition was denied.

The United States Supreme Court granted certiorari to determine whether the search of the tavern patrons violated the fourth amendment.<sup>13</sup> In reversing the conviction, Justice Stewart's<sup>14</sup> majority opinion concluded that "[a]lthough the search warrant, issued upon probable cause, gave the officers authority to search the premises and [the bartender], it gave no authority whatever to invade the constitutional protections possessed individually by the tavern's customers."<sup>15</sup> The Court reiterated that the exception to the probable cause requirement espoused in *Terry v. Ohio*<sup>16</sup> was narrow: that a law enforcement officer may conduct a cursory pat down for weapons if he is in danger and he reasonably believes or suspects that the person he has detained possesses weapons.<sup>17</sup> In *Ybarra*, however, the searching officer testified at trial that he never felt any personal danger from the defendant. "Ybarra, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening."<sup>18</sup>

Given the state's inability to articulate any facts<sup>19</sup> justifying a reasonable belief that Ybarra

<sup>11</sup> 58 Ill. App. 3d at 61, 373 N.E.2d at 1016. However, the officers admitted that Ybarra in no way looked familiar to them.

<sup>12</sup> *Id.* at 62, 373 N.E.2d at 1017.

<sup>13</sup> The fourth amendment states:

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

U.S. CONST. amend. IV. It is made applicable to the states through the fourteenth amendment. *See* *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>14</sup> The majority included Justices Stewart, Brennan, White, Marshall, Powell, and Stevens.

<sup>15</sup> 444 U.S. at 91.

<sup>16</sup> 392 U.S. at 29. *See also* *Adams v. Williams*, 407 U.S. 143 (1972).

<sup>17</sup> 444 U.S. at 94.

<sup>18</sup> *Id.* at 93.

<sup>19</sup> The only fact the state pointed to at the suppression hearing was that Ybarra was wearing a three-quarter

was armed and dangerous, the Court held that the initial frisk of Ybarra constituted an unreasonable frisk for weapons under the *Terry* doctrine.<sup>20</sup> Since the preliminary search for weapons violated the fourth amendment, the Court cursorily struck down the second search which revealed the packages of heroin. Although recognizing the ease with which heroin and other dangerous drugs can be concealed, and the important governmental interest in controlling them, the Court refused to adopt the *Terry* "reasonable suspicion" standard for gathering evidence pursuant to a search warrant. Instead, it held for the first time that probable cause *must* be found before a person not mentioned in the warrant may be searched, even if the search is limited to the items specifically mentioned in the warrant. Only when the searching officer reasonably believes that his life is in danger may a *Terry* pat down for weapons take place.

Although seemingly without precedent, the *Ybarra* decision actually developed a line of reasoning which the Court had adopted in a previous opinion, *United States v. Di Re*.<sup>21</sup> In *Di Re*, the Court had struck down a warrantless search of occupants of an automobile based upon an informant's tip that they would be purchasing counterfeit gasoline coupons at a particular time and place. In attempting to gather support for the specific search, the government conceded that a warrant authorizing search of a residence would not empower the police to search all persons found in it. Rather than concede this point in *Ybarra*, the State of Illinois argued it.<sup>22</sup> By adopting a standard of probable

length lumber jacket which seems quite appropriate for early March weather in Illinois. *Id.*

<sup>20</sup> 444 U.S. at 92-93.

<sup>21</sup> 332 U.S. 581 (1948).

<sup>22</sup> The Court in *Di Re* stated:

The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?

*Id.* at 587.

cause, the *Ybarra* Court sought to eliminate all previous confusion concerning when police officers would be permitted to search persons unexpectedly found during a lawful search of the premises. In reliance upon *Dunaway v. New York*<sup>23</sup> and *Brinegar v. United States*,<sup>24</sup> the Court concluded that the requirement of probable cause embodied the most effective compromise for balancing the preservation of personal privacy with the protection of law enforcement personnel involved in maintaining peace in the community.<sup>25</sup>

Chief Justice Burger and Justice Rehnquist each filed a dissenting opinion in which Justice Blackmun joined. In weighing the interests of personal privacy and police protection, Chief Justice Burger supported the state's view "that when police execute a search warrant for narcotics in a place of known narcotics activity they may protect themselves by conducting a *Terry* search."<sup>26</sup> By distinguishing between the Aurora Tap Tavern and a ballroom at the Waldorf,<sup>27</sup> Burger implied that whether police may search depends on the type of environment and the type of people found on the premises. Although objective characteristics such as size and location of the premises merit consideration, combining them with such nebulous factors as type of the environment and people within would lead to erratic applications. Use of such elitist criteria as affluence of the premises and the persons within is hardly the type of prudent judgment which will escape scrutiny under the equal protection clause. Chief Justice Burger was also disturbed by the majority's failure to pass on the constitutionality of the Illinois statute.<sup>28</sup> He thought that the Court should have considered constitutionality because it granted certiorari upon the appellate court's finding that the statute was constitutional.<sup>29</sup>

The Court, however, often ignores facial validity of state statutes in criminal cases. For example, in *Sibron v. New York*,<sup>30</sup> the Court reversed the conviction of a defendant whose search was based on New York's stop and frisk law.<sup>31</sup> The Court declined to determine the constitutionality of the statute on its face.

<sup>23</sup> 442 U.S. 200 (1979).

<sup>24</sup> 338 U.S. 160 (1949).

<sup>25</sup> 444 U.S. at 95-96.

<sup>26</sup> *Id.* at 97 (Burger, C.J., dissenting).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 98.

<sup>29</sup> 28 U.S.C. § 1257(2) (1948). Brief for Appellant at 2, *Ybarra v. Illinois*, 444 U.S. 85 (1979).

<sup>30</sup> 392 U.S. 40 (1968).

<sup>31</sup> NEW YORK CRIM. PROC. LAW § 180-1 (McKinney 1971).

The constitutional validity of a warrantless search is pre-eminently the sort of question which can only be decided in the concrete factual context of the individual case. In this respect it is quite different from the question of the adequacy of *procedural* safeguards written into a statute which purports to authorize the issuance of search warrants in certain circumstances.<sup>32</sup>

Since, like the New York law, the Illinois statute is basically substantive, rather than procedural, the Court need not strike it down. Instead, it can provide guidelines for future reinterpretation by the courts or revision by the legislature to make the statute constitutional. The majority did provide a clear warning to the Illinois courts and legislature to modify the statute, explaining that "[t]his state law . . . falls within the category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches."<sup>33</sup>

In a separate dissent, Justice Rehnquist made tortured use of the literal language of the fourth amendment and concluded that the second clause does not require the warrant to specify the persons to be searched.<sup>34</sup> However, in a footnote relating to this statement, Rehnquist admitted that police must temporarily seize a person before they can search him.<sup>35</sup> Therefore, since the amendment requires a description of the "persons or things to be seized,"<sup>36</sup> and a person must be temporarily seized before he is searched, such a person must be named in the warrant.

Apart from this apparently egregious error, Rehnquist sought to uphold the conviction by noting that the warrant requirement had been fully satisfied in this case. Since a detached and neutral magistrate had found a search of the premises necessary,<sup>37</sup> and execution of the warrant in the dimly lit tavern potentially endangered police and innocent individuals,<sup>38</sup> the individualized suspicion that a particular person was armed and dangerous became unnecessary. Rehnquist would

<sup>32</sup> 392 U.S. at 59 (emphasis added).

<sup>33</sup> 444 U.S. at 96 n.11.

<sup>34</sup> *Id.* at 102 (Rehnquist, J., dissenting). Justice Rehnquist urged that the explicit language of the fourth amendment requires a description of "the place to be searched, and the persons or things to be seized." Therefore, only if the persons or things are seized, not merely searched, must they be described in the warrant.

<sup>35</sup> *Id.* n.1.

<sup>36</sup> U.S. CONST. amend. IV.

<sup>37</sup> 444 U.S. at 110 (Rehnquist, J., dissenting).

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

have upheld the frisk and the ensuing recovery of narcotics on the basis that the circumstances as a whole provided enough reasonable suspicion to justify the search under the *Terry* standard.

## II

In order to determine what effect the *Ybarra* decision will have on future case law, it is useful to examine the lower courts' treatment of similar cases in the past. In the following analysis these opinions will be divided into two categories: those decisions which have struck down the searches of individuals found on the premises (the minority position)<sup>39</sup> and those which have upheld these searches (the majority position). Although representing a diverse range of jurisdictions, these states were selected because each has a statute which is similar to the Illinois statute in language and in the interpretation given to it by the reviewing courts.

### A

Prior to *Ybarra*, several courts refused to admit evidence recovered from a person unnamed in a warrant pursuant to a lawful search of the premises. Though these cases are uniform in result, they vary greatly by factual context and reasoning involved. A survey of several of them reveals great confusion, and indicates that *Ybarra* could become a critical case in the future because it provides at least some certainty in this inconsistent area of the law.

In *State v. Mendez*,<sup>40</sup> the defendant's conviction for possession of narcotics in a situation similar to *Ybarra* was reversed by the Arizona Supreme Court. The Arizona statute concerning warrantless searches of persons pursuant to a warrant for the premises, similar to the Illinois law, was held inapplicable because the facts did not justify a reasonable assumption that narcotics were concealed on the defendant.<sup>41</sup>

The defendant had entered the premises while police were conducting a search pursuant to a warrant. He was immediately patted down for

weapons and subsequently ten packets of heroin were discovered on his person. The court, in articulating a standard similar to the majority in *Ybarra*, held that "[p]olice officers who are executing a search warrant of a particular place may not search persons incidentally on the premises without *probable cause* to do so."<sup>42</sup>

The *Mendez* court was confronted by a series of factors clearly absent in *Ybarra*. The police detected the smell of marijuana coming from the premises which were the subject of the warrant. Also, while the search was in progress, the defendant, sister of the missing apartment owner, entered the apartment without knocking. The court found these circumstances inadequate to establish the necessary probable cause.

Similarly, in two Illinois cases, *People v. Dukes*<sup>43</sup> and *People v. Miller*,<sup>44</sup> the Illinois appellate courts reversed convictions for possession of weapons and gambling paraphernalia, and for possession of controlled substances, respectively. In *Dukes*, the defendant entered the premises while police were lawfully searching for gambling materials. The police noticed a bulge that appeared to be a holster on the defendant's left side underneath his coat. They subsequently testified however that at no time did they feel themselves in danger. Nonetheless, an officer frisked the defendant, found a weapon, and made the arrest. A further search of the defendant revealed illegal horse racing bets. The court reversed the conviction because the record articulated no facts showing that the defendant had any connection with the premises described in the warrant.<sup>45</sup>

In *Miller*, the defendant also entered the premises during a lawful search by police. They questioned her regarding a large bulge in her pants and said she would be handcuffed until a police matron could search her. She then turned over packets of heroin to the police. As in *Ybarra*, the police testified that they never felt in danger.<sup>46</sup> In striking down the search the court construed § 108-9 of the Illinois statute:

The statute does not expressly state that the officer must have probable cause to believe one on the

<sup>39</sup> See cases in Part II.B. of this casenote.

<sup>40</sup> 115 Ariz. 367, 565 P.2d 873 (1977).

<sup>41</sup> ARIZ. REV. STAT. ANN. § 13-3916(E) (1977) provides:

A peace officer executing a search warrant directing a search of premises or a vehicle may search any person therein if:

1. It is reasonably necessary to protect himself or others from the use of any weapon which may be concealed upon the person, or
2. It reasonably appears that property or items enumerated in the search warrant may be concealed upon the person.

<sup>42</sup> 115 Ariz. at 369, 565 P.2d at 875 (emphasis added).

<sup>43</sup> 48 Ill. App. 3d 237, 363 N.E.2d 62 (1977).

<sup>44</sup> 74 Ill. App. 3d 177, 392 N.E.2d 271 (1979).

<sup>45</sup> 48 Ill. App. 3d at 240, 363 N.E.2d at 64. The court concluded that the defendant was not on the premises when the officers arrived, nor did it appear that the defendant lived or was related to anyone who lived on the premises.

<sup>46</sup> 74 Ill. App. 3d at 180-81, 392 N.E.2d at 274.

premises possesses a weapon or the items described in the warrant. However, the language 'reasonably detain to search' suggests that the officer must be prepared to show some reason to suspect that the person on the premises might attack him or attempt to dispose of or conceal items named in the search warrant.<sup>47</sup>

Based on this construction, the defendant lacked sufficient connection with the premises to justify her search and seizure. Indeed, both of these Illinois cases were premised on the finding that the defendants had no connection with the premises searched. Thus they seem to require some relationship between the defendant and the premises, such as ownership or residency, yet other Illinois courts have ignored this distinction entirely.<sup>48</sup>

In *Smith v. State*,<sup>49</sup> a Georgia court held that aside from the defendant's presence in a public place which was the object of a narcotics search there were no facts from which the officer could have suspected that the defendant was carrying drugs. Here also, the defendant entered while the search of the premises was in progress. The police recognized a bulge in his jacket pocket, patted him down for weapons, and found a plastic bag of heroin. The search, pursuant to a Georgia statute<sup>50</sup> with language comparable to the Illinois law, was found to be outside the scope of the statute; thus the evidence seized was deemed inadmissible.

Finally, in *State v. Helton*,<sup>51</sup> the New Jersey Supreme Court held that a warrantless search of the defendant and his conviction for possession of lottery slips was improper. Like *Ybarra*, all patrons of a tavern were searched pursuant to a warrant to examine the premises. An officer testified that the defendant made "furtive movements with his hands in relation to his pockets"<sup>52</sup> giving the officer suspicion of concealment of narcotics. The subsequent search revealed folded number slips. The court, however, found no probable cause to believe that the defendant was in possession of seizable

objects because the officers had no other suspicions apart from the furtive movements.

In these five cases, the courts, like the *Ybarra* Court, struck down convictions based on unlawful searches. All five cases reach the same conclusions, but the similarities between them abruptly stop at that point. Although in four of the five cases, the defendants, rather than being present when the search commenced, entered while the search was in progress, the significance of this pattern is virtually unknown. It is just one fact that courts examine, but its weight and importance has never been highlighted in any decision. In fact, other courts have ignored it altogether.<sup>53</sup>

The approaches taken by these courts also differ in emphasis and in the amount of evidence required. The Illinois courts in *Dukes* and *Miller* sought some connection between the defendant and the premises while the courts in *Smith* and *Helton* demanded more objective evidence than "mere presence on the premises" or "furtive hand movements." The courts have been unable to articulate any clearer standard than that the evidence in the cases before them is insufficient. The result is that prosecutors and defense attorneys must use their imaginations because emphasis on a seemingly unimportant factor could determine the outcome.

## B

The great majority of cases preceding *Ybarra* upheld the use of evidence against persons present at a lawful search of the premises. The rationale behind these decisions is quite muddled, being based solely on the facts of each particular case. Yet the policy behind each of these opinions is relative clear—"when a search is found to be 'unreasonable' the consequence is suppression of probative evidence and in many cases, acquittal or dismissal of a guilty defendant."<sup>54</sup> The fear of freeing the guilty lies at the root of many of these decisions. An analysis of a number of them demonstrates no clear-cut standard but rather some nebulous and extremely subjective criteria of nexus or connection with the premises searched.

Throughout the following discussion of cases it is apparent that the courts have developed no definitive approach or technique for reviewing these searches. The courts analyze the fact patterns, compare and contrast them to similar cases previ-

<sup>47</sup> *Id.* at 184, 392 N.E.2d at 275.

<sup>48</sup> See notes 58-60 *infra*.

<sup>49</sup> 139 Ga. App. 129, 227 S.E.2d 911 (1976).

<sup>50</sup> GA. CODE ANN. § 27-309 (1966) provides:

In the execution of the warrant the person executing the same may reasonably detain or search any person in the place at the time:

(a) To protect himself from attack, or  
(b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant.

<sup>51</sup> 146 N.J. Super. 98, 369 A.2d 10 (1975), *aff'd*, 72 N.J. 169, 369 A.2d 10 (1977).

<sup>52</sup> *Id.* at 99, 369 A.2d at 11.

<sup>53</sup> See note 58 *infra*.

<sup>54</sup> LaFave, *Search and Seizure: The Course of True Law ... Has Not ... Run Smooth*, 1966 ILL. L. REV. 255.

ously faced both by that court and by courts in other jurisdictions, and use these similarities and differences to provide support for their outcome. One gets the impression that the courts preliminarily decide to uphold these searches and then look for relevant case law to justify their findings. They take out of context and string together facts which seem to provide reasonable suspicion, but when these facts are examined within the totality of each case, it is obvious that their importance has been exaggerated.

In *United States v. Oates*,<sup>55</sup> the Second Circuit affirmed the defendant's conviction for possession of heroin.<sup>56</sup> The court recognized the special dangers inherently involved in searches in the narcotics area, and espoused the language so often quoted in sustaining such searches. "Indeed, even apart from the agent's personal experiences, we have recognized that to 'substantial dealers in narcotics' firearms are as much 'tools of the trade' as are most commonly recognized articles of narcotics paraphernalia."<sup>57</sup>

In three Illinois appellate court cases, *People v. Pugh*,<sup>58</sup> *People v. Kielczynski*,<sup>59</sup> and *People v. Boykin*,<sup>60</sup> searches similar to that in *Ybarra* were sustained by the reviewing courts. In *Pugh*, the defendant was convicted of unlawful possession of heroin. He sought to enter his brother's apartment while it was being searched pursuant to a valid warrant. He was immediately searched, and forty-two foil packages of heroin were removed from his pants pocket. In upholding the search, the court held that "the execution of search warrants in narcotics cases is risky business at best, and unless the police search all persons present on the premises they endanger both themselves and the search they are making."<sup>61</sup> The court sustained the conviction by concentrating on the presence of narcotics and their inherent danger, without even discussing whether the defendant had any connection with the premises.

In *Kielczynski*, the police, while conducting a lawful search of a service station for gambling materials, found the defendant on the premises and proceeded to search him. The court found the

search of the defendant necessary and reasonable under § 108-9 of the Illinois statute.<sup>62</sup> Finally, in *Boykin*, police, while executing a warrant to search a house, knocked on the front door, heard scuffling noises, entered, and saw the defendant running toward the kitchen. The police captured and searched him, discovering heroin upon his person. The court upheld the search based on § 108-9, interpreting it to mean that:

where probable cause had been found to search a place, every individual in that place could be subject to a reasonable detention and a search for the protection of the officers executing the warrant, and, also, for the preservation of evidence which the warrant authorizes, which may be seized pursuant to the warrant.<sup>63</sup>

*Boykin*, decided shortly after the appellate court decision in *Ybarra*, used *Ybarra* to show that the *Boykin* facts were far more compelling in their support of a finding of reasonableness than the circumstances in *Ybarra*.<sup>64</sup> The court admitted the lack of suspicious circumstances in *Ybarra* and concluded that if the search in *Ybarra* could be sustained under § 108-9, then surely the *Boykin* search was justified.

In all three of these Illinois cases, the courts sustained the searches without a close examination of individual facts. These decisions demonstrate that policemen must show very little evidence of suspicion in order for the court to uphold the searches. The cases were used to bootstrap one another—if a search in a previous case was sustained despite meager evidence, then a case which provides evidence of greater suspicion surely merits approval.

*State v. Loudermilk*,<sup>65</sup> where a conviction for possession of heroin was affirmed under the Kansas statute, is similar in approach.<sup>66</sup> The court held that where probable cause exists to believe that drugs are kept or concealed on certain premises (to the satisfaction of a neutral magistrate), the search of a person found on the premises in the execution of a search warrant is not only reasonable, but

<sup>62</sup> 130 Ill. 2d at 238, 264 N.E.2d at 771.

<sup>63</sup> 65 Ill. App. 3d at 743, 382 N.E.2d at 1373.

<sup>64</sup> *Id.*, 382 N.E.2d at 1372.

<sup>65</sup> 208 Kan. 893, 494 P.2d 1174 (1972).

<sup>66</sup> KAN. STAT. ANN. § 22-2509 (1974) provides:

In the execution of a search warrant the person executing the same may reasonably detain and search any person in the place at the time;

(a) To protect himself from attack, or  
(b) To prevent the disposal or concealment of any things particularly described in the warrant.

<sup>55</sup> 560 F.2d 45 (2d Cir. 1977).

<sup>56</sup> See also *Guzman v. Estelle*, 493 F.2d 532 (5th Cir. 1974), where the Fifth Circuit similarly denied a motion to suppress on grounds that probable cause to search the defendant was found independent from the warrant itself.

<sup>57</sup> 560 F.2d at 62.

<sup>58</sup> 69 Ill. App. 2d 312, 217 N.E.2d 557 (1955).

<sup>59</sup> 130 Ill. App. 2d 231, 264 N.E.2d 767 (1970).

<sup>60</sup> 65 Ill. App. 3d 738, 382 N.E.2d 1369 (1978).

<sup>61</sup> 69 Ill. App. 2d at 316, 217 N.E.2d at 559.

necessary to secure effective enforcement of the relevant drug laws.<sup>67</sup> Neglecting the facts of the case, the court determined that the existence of the warrant for the premises alone justified the search of the persons found within.

A number of cases pursue a slightly different technique of analysis. The following courts picked a series of facts out of each case and added them together to achieve the requisite suspicion to justify the search. In *Willis v. State*,<sup>68</sup> and several years later in *Campbell v. State*,<sup>69</sup> Georgia courts upheld convictions for possession of controlled substances, supporting the searches under the relevant statute.<sup>70</sup> The situations in both *Willis* and *Campbell* involved warrants which authorized a search of the premises, named residents and "any other person on said premises who reasonably might be involved in the commission of the aforesaid violations of the laws of Georgia."<sup>71</sup> The *Willis* court affirmed the conviction of the defendant, not named in the warrant, based on the following circumstances: the apartment had been under surveillance and the police had knowledge that drugs were used and sold there, the persons present were seated together in the same room, and the drugs involved were pills which easily could be passed from person to person.<sup>72</sup> Admitting that the evidence was "skimpy and marginal,"<sup>73</sup> the court nonetheless affirmed the search. The court picked a series of facts out of the case and added them together to achieve the requisite suspicion.

In *Campbell*, the police entered pursuant to a warrant for the apartment, found the defendant trying to hide behind a television set, searched him, and discovered two pistols and a small bottle of white powder. The court sustained the search based on the fact that police had observed several persons entering an apartment which they believed to be the situs of several cocaine sales, that their entry was impeded, that the defendant had tried to hide when officers entered, and that cocaine is frequently stored in small plastic bottles.<sup>74</sup> Like the *Willis* court, this court simply relied on a number of facts, the most important of them being the

defendant's attempt to hide, to uphold the search. The court displayed no discomfort at its inability to provide guidelines to the next court for a future case based on similar facts.

In *United States v. Miller*,<sup>75</sup> and *United States v. Graves*,<sup>76</sup> the courts upheld the admission of evidence based upon lawful searches of the premises involved.<sup>77</sup> In *Miller*, the police obtained a warrant to search for gambling paraphernalia. Upon entry, the police searched all twenty occupants and found narcotics on the defendant's person. This court sustained the search of the defendant because after giving notice of their purpose, the police were not admitted voluntarily into the premises, and they heard the sounds of people running inside.<sup>78</sup> These facts as presented, in combination with probable cause to believe that extensive gambling was being carried on inside, gave the officers sufficient grounds to search all individuals present. Once more, the court highlighted certain characteristics of the case without attempting to establish continuity or certainty in the case law.

The *Graves* case contains a fact pattern similar to *Ybarra*. All six persons on the premises of a one-room delicatessen were searched for gambling paraphernalia although the warrant authorized only the search of the delicatessen. Again the search was upheld, this time based on the information received by officers from a reliable informant, including a last minute tip that gambling was presently taking place.<sup>79</sup> However, in dicta, the court explained that the District of Columbia statute would not authorize the search of a large number of persons present in a supermarket or other such store when there was no reason to link them to the objects of the search.<sup>80</sup> "Although it could be argued that persons present in the customer area of a store are presumptively customers, here the informant's report could be reasonable (sic) taken as meaning that the

<sup>67</sup> 298 A.2d 34 (D.C. 1972).

<sup>68</sup> 315 A.2d 559 (D.C. 1974).

<sup>69</sup> D.C. CODE ENCYCL. § 23-254(a) (West 1977) provides:

An officer executing a warrant directing a search of premises or a vehicle may search any person therein:

- (1) to the extent reasonably necessary to protect himself or others from the use of any weapon which may be concealed upon his person, or
- (2) to the extent reasonably necessary to find property enumerated in the warrant which may be concealed upon the person.

<sup>78</sup> 298 A.2d at 36.

<sup>79</sup> 315 A.2d at 561.

<sup>80</sup> *Id.* This is similar to the logic Chief Justice Burger uses in his dissent in *Ybarra*, see note 27 *supra*.

<sup>67</sup> 208 Kan. at 893, 494 P.2d at 1178.

<sup>68</sup> 122 Ga. App. 455, 177 S.E.2d 487 (1970).

<sup>69</sup> 139 Ga. App. 389, 228 S.E.2d 309 (1976).

<sup>70</sup> See note 42 *supra*.

<sup>71</sup> 122 Ga. App. at 456, 177 S.E.2d at 488; 139 Ga. App. at 389, 228 S.E.2d at 310. Discussion of the validity of this so-called "general warrant" will not be examined in this casenote.

<sup>72</sup> 122 Ga. App. at 458, 177 S.E.2d at 489.

<sup>73</sup> *Id.* at 459, 177 S.E.2d at 490.

<sup>74</sup> 139 Ga. App. at 391, 228 S.E.2d at 312.

people inside were participants."<sup>81</sup> The court relied on the last minute tip to provide the necessary connection between the persons inside and the illegal gambling activities. The *Graves* court attempted to provide some boundaries to its decision by emphasizing the size of the store, but the court again evidenced its inability to determine what factors were important beyond the confines of the particular case.

Numerous state courts have faced and decided the issues confronted by the Supreme Court in *Ybarra*.<sup>82</sup> In the past, these courts have undertaken a complete factual analysis of the situations before them or else have upheld the searches almost summarily in order to reach a conclusion. These approaches may provide an answer to the particular case before the court but have no precedential value whatsoever. These courts have concentrated on subjective factors in each context to justify the searches and effectuate obvious compassion for the plight of law enforcement officials. Although *Ybarra's* value as a precedent rests upon the interpretations placed upon it by reviewing courts, it presents a beginning to the resolution of many of the ambiguities in this area of the law. By outlawing searches upheld on less than a finding of probable cause, *Ybarra* requires that courts support their findings of guilt on more than just "furtive movements," "scuffling," and the like.

### III

*Ybarra's* ultimate pronouncement is quite unequivocal—before police can search a person found on the premises when they have obtained a warrant for the premises only, they must demonstrate probable cause to search the person. Although this standard prescribes a clear conceptual line and is easily implemented when the situation is as devoid of suspicious quality as *Ybarra*, the factual line has yet to be established. Of the aforementioned state cases, many were sustained on little more factual basis than *Ybarra*. When the courts are presented with such situations today, the use of evidence acquired during those searches will certainly be overturned.<sup>83</sup>

<sup>81</sup> 315 A.2d at 561.

<sup>82</sup> For additional cases in this area with similar results see *Colding v. State*, 259 Ark. 634, 536 S.W.2d 106 (1976); *Samuel v. State*, 222 So. 2d 3 (Fla. 1969); *City of Olympia v. Culp*, 240 P. 360 (Wash. 1925); *State v. Slougher*, 14 Wash. App. 814, 545 P.2d 32 (1976); *State v. Chambers*, 55 Wis. 2d 289, 198 N.W. 377 (1972).

<sup>83</sup> See especially, *Willis v. State*, 122 Ga. App. 455, 177 S.E.2d 487; *State v. Loudermilk*, 208 Kan. 893, 494 P.2d 1174 (1972). These courts upheld these searches on little,

The Supreme Court in *Ybarra* demonstrates that it is unwilling to adopt many of the common sense inferences that state courts have utilized to uphold searches of persons not named in the warrant but present on the premises. *Ybarra* was present on premises where narcotics had been seen, yet that does not necessarily mean that he was a participant in any illegal transaction. That *Ybarra* was present in a tavern when a warrant was executed does not make him armed or dangerous absent additional circumstances. What those additional circumstances are can only be developed through future case law. Factors gleaned from the case law which will certainly prove to be relevant are nature of the surroundings, policeman-patron ratio, nature of the criminal activity, size of the premises, and suspicious actions taken by individuals.

In addition, the state statutes in question will have to be reconstrued or redrafted by legislatures and courts. Reasonable suspicion or connection with the premises is no longer sufficient to prevent an individual from concealing contraband—probable cause is now necessary before a policeman can execute the search. In this respect, § 108-9 and the other relevant statutes<sup>84</sup> have been overruled *sub silentio* and can only be applied by courts when this probable cause formula is added to them, either explicitly or by implication.

### CONCLUSION

In *Ybarra*, the Supreme Court finally articulated a decisive standard for a search of persons present on premises when a warrant has been issued for search of the premises only. That standard is probable cause and the Court will permit no deviation unless, as in *Terry v. Ohio*, the policeman has reasonable suspicion that the person is carrying a potentially dangerous weapon.

The facts in *Ybarra* were highly simplistic and insubstantial—the police searched *Ybarra* and all the patrons of the tavern for weapons and contraband without even reasonable suspicion, and thus certainly without probable cause for possession of narcotics or weapons. The police grounded the search of *Ybarra* and the patrons on the warrant for the premises and nothing more.

It is true that circumstances which have a dangerous and suspicious appearance to policemen during a confrontation may appear quite harmless to a judge or jury upon hindsight. The police

if any, more evidence than existence of the warrants for the premises themselves.

<sup>84</sup> See notes 51, 50, 66 & 77 *supra*.

officer cannot reflect upon and analyze many unknown situations confronting him in his daily duties, and his decision to delay action even for a few seconds may result in harm to himself or innocent individuals. However, the Constitution requires a balancing of interests so that "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."<sup>85</sup>

The standard of probable cause is no magical concept. Situations like *Ybarra*, where the search of all the patrons was merely mechanical and not based on any articulable suspicion, will surely be struck down, but confusion remains as to just how much evidence a policeman must show to meet the requirements of probable cause. The judicially au-

<sup>85</sup> *Katz v. United States*, 389 U.S. 347, 354 (1967).

thorized warrant for the premises surely provides some evidence toward such a determination, but uncertainty reigns as to how much more is necessary to establish the requisite cause. Whether, as many courts fear,<sup>86</sup> this will lead to miscarriages of justice and concealment of incriminating evidence, is determinable only through an analysis of future case law. Yet regardless of this outcome, the message of the Supreme Court in *Ybarra* remains clear in its commitment to the fourth amendment and the rights of individuals generally to be free from unreasonable searches and seizures.

SANDRA J. WALL

<sup>86</sup> *See, e.g., State v. Ryan*, 163 Wash. 496, 502, 1 P.2d 893, 896 (1931).