Loyola University Chicago Law Journal

Volume 25
Issue 2 *Winter 1994*

Article 4

1994

People, Places, and Fourth Amendment Protection: The Application of *Ybarra v. Illinois* to Searches of People Present During the Execution of Search Warrants on Private Premises

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Comment

People, Places, and Fourth Amendment Protection: The Application of *Ybarra v. Illinois* to Searches of People Present During the Execution of Search Warrants on Private Premises

I. INTRODUCTION

In *Ybarra v. Illinois*,[1] the United States Supreme Court ruled that under the Fourth Amendment, police officers executing a warrant for the search of a tavern may not search a tavern patron without either probable cause to believe the patron possesses evidence or a reasonable suspicion that the patron is armed.[2] Federal and state courts have since disagreed over whether to apply *Ybarra*, which involved a search of public premises, to searches of private residences.[3] In light of the "significant practical importance" of this issue to both law enforcement officers and citizens, this conflict among the courts should be resolved.[4]

This Comment urges that the rule of *Ybarra* should be applied to all searches under warrant, regardless of whether they are conducted on public or private premises. The Comment first reviews the Fourth Amendment probable cause requirement, its exceptions, and the *Ybarra* decision itself.[5] Next, it examines the conflict among the courts over whether to apply *Ybarra* to private premises searches.[6] This Comment then reasons that searches of visitors present on private premises are subject to the probable cause requirement and not to one of its exceptions.[7] The Comment concludes by proposing a method of conducting searches of private premises that comports with *Ybarra*

1. 444 U.S. 85 (1979).
2. *Id.* at 90-96.
3. *See infra* part III.
4. Guy v. Wisconsin, 113 S. Ct. 3020, 3021 (1993) (White, J., dissenting from a denial of certiorari to a case presenting this issue). For a complete discussion of *Guy*, see *infra* notes 129-35 and accompanying text.
5. *See infra* parts II.A through II.D.
6. *See infra* part III.
7. *See infra* part IV.

while also promoting safe and constitutionally sound law enforcement.[8]

II. BACKGROUND

A. *The Traditional Requirement of Probable Cause*

The Fourth Amendment of the United States Constitution prohibits "unreasonable searches and seizures" and requires that warrants for searches or seizures issue only upon "probable cause."[9] Probable cause to search exists where law enforcement officers reasonably believe that a crime has been or is being committed and that they will find evidence of the crime in the place to be searched.[10] Traditionally, courts have viewed probable cause as an indispensable element of the reasonableness the Fourth Amendment demands of all searches and seizures.[11] Because warrant-supported searches are necessarily based upon a neutral magistrate's formal finding of probable cause,[12] they have been preferred, in principle, to warrantless searches,[13] which are frequently initiated upon the ad hoc determinations of perhaps overzealous law enforcement officers.[14] Indeed, courts have long viewed warrantless searches skeptically,[15] routinely deeming them unreasonable and thus unconstitutional unless supported by both probable cause and pressing circumstances that excuse officers from

8. *See infra* parts V and VI.

9. 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. The Fourth Amendment applies to state actions through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

10. Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

11. Dunaway v. New York, 442 U.S. 200, 208 (1979); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1(a), at 541-43 (2d ed. 1987). The *Brinegar* Court characterized probable cause as a "practical, nontechnical conception affording the best compromise that has been found for accommodating [the] often opposing interests [of individual privacy and protection of the community from crime]." 338 U.S. at 176. The *Dunaway* Court further emphasized that probable cause is a balancing of these interests: "[T]he requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are 'reasonable' only if supported by probable cause." 442 U.S. at 214.

12. 2 LAFAVE, *supra* note 11, § 4.1 (Supp. 1993); *see supra* note 9 (setting forth the text of the Fourth Amendment).

13. 2 LAFAVE, *supra* note 11, § 4.1 (Supp. 1993).

14. 2 *id.*

15. 2 *id.*; Terry v. Ohio, 392 U.S. 1, 20 (1968).

obtaining a warrant.[16] Thus all searches, whether accompanied by a warrant or not, must as a general proposition be founded upon probable cause to satisfy the Fourth Amendment.[17]

B. The Sliding Scale Alternative to Probable Cause

The Supreme Court has established exceptions to the general proposition that reasonableness requires probable cause. These exceptions are typically based upon a sliding scale of search reasonableness, rather than the traditional probable cause test of reasonableness.[18]

The Supreme Court first applied this approach to a non-criminal, administrative search in *Camara v. Municipal Court.*[19] In *Camara*, a housing inspector conducting a routine inspection of a building approached Camara and demanded to inspect his apartment.[20] Camara refused to grant the inspector access without a search warrant and was subsequently arrested for preventing an inspection in violation of a municipal housing code.[21]

In determining whether the Fourth Amendment prohibited the proposed inspection, the Court somewhat curiously defined probable cause in terms of reasonableness.[22] The Court then assessed reasonableness by balancing the need for the search against the personal

16. 1 LAFAVE, *supra* note 11, § 3.1(a), at 541-43; *see Terry*, 392 U.S. at 20 (stating that failure to obtain a warrant usually can be excused only by "exigent circumstances"). Thus, law enforcement officers may properly search an individual without a warrant where the contraband to be seized appears in plain view on the individual's person or in his possession. State v. Lambert, 710 P.2d 693, 698 (Kan. 1985). Officers may also perform a warrantless search of an individual incident to a valid arrest, or where probable cause to search the individual exists along with exigent circumstances. *Id.* The insistence on probable cause for warrantless searches is based in part on the preference for warrant-supported searches: if officers are allowed to perform warrantless searches upon less than probable cause, they will have little reason to mount the effort needed to obtain warrants, which may not issue unless the officers establish probable cause. Wong Sun v. United States, 371 U.S. 471, 479-80 (1963).

17. 1 LAFAVE, *supra* note 11, § 3.1(a), at 541-43.

18. *See infra* notes 19-46.

19. 387 U.S. 523 (1967).

20. *Id.* at 526.

21. *Id.* at 526-27.

22. *Id.* at 535. The Court stated that "[i]n determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighed in terms of these reasonable goals of code enforcement." *Id.* The Court's use of reasonableness to define probable cause was thus circular since probable cause is itself traditionally used to define the Fourth Amendment's reasonableness requirement. *See supra* notes 9-17 and accompanying text for a discussion of the traditional definition of reasonableness through the use of probable cause.

invasion the search entailed.[23] Under this approach, the Court weighed the governmental interest in discovering housing code violations through warrantless administrative inspections against the intrusion on individual privacy caused by such inspections.[24] Because the inspections were reasonable on a generalized level, the Court maintained, probable cause for an administrative warrant to conduct the individual inspections would exist if officials satisfied reasonable administrative standards in performing them.[25] The Court concluded that Camara had a Fourth Amendment right to demand that the inspector obtain an administrative warrant to search his apartment.[26] The Court maintained that its balancing test did not nullify the probable cause requirement, but, rather, honored the Fourth Amendment reasonableness standard which has always governed intrusions on private property.[27]

In *Terry v. Ohio*,[28] the Court expanded the *Camara* sliding scale approach in the context of a criminal search. The *Terry* sliding scale assessed search reasonableness with a balancing test that abandoned probable cause as a criterion of reasonableness.[29] Thus the Court established a narrow exception to the probable cause requirement for searches of individuals whom police officers believe to be armed and dangerous.[30]

In *Terry*, a police officer stopped three men he believed were surveying a store before robbing it.[31] Concerned that the men might be

23. *Camara*, 387 U.S. at 536-37. The Court stated that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.*

24. *Id.* at 534-37. The Court distinguished between searches made in criminal investigations, in which police officers are only authorized to recover specific evidence, and regulatory inspections, which are made to protect public health and safety. *Id.* at 535, 537.

25. *Camara*, 387 U.S. at 538.

26. *Id.* at 540.

27. *Id.* at 539. One commentator, however, has stated that the Court's treatment of the probable cause concept changed the Fourth Amendment's orientation from protecting individual privacy to favoring government intrusion. Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 401 (1988).

28. 392 U.S. 1 (1968).

29. *Id.* at 27. The *Terry* Court noted that "the notions which underlie . . . the requirement of probable cause remain fully relevant in [the] context" of evaluating searches made for officer protection. *Id.* at 20. *But cf.* Sundby, *supra* note 27, at 402 n.64 (stressing that prior to *Terry* probable cause was "not only relevant, . . . [but] controlling").

30. *Terry*, 392 U.S. at 27. *See infra* text accompanying notes 35-39 (describing the balancing test).

31. *Terry*, 392 U.S. at 6-7.

carrying weapons, the officer conducted a patdown of their outer clothing and found guns on the persons of two of them.[32] Those two men were then charged with and convicted of carrying concealed weapons.[33] Defendant Terry challenged the conviction and contended that admitting the guns into evidence violated his Fourth Amendment rights.[34]

In affirming Terry's conviction, the Court balanced the governmental interest in protecting police officers against the individual interest in remaining free from unreasonable governmental intrusions.[35] The Court acknowledged that even a brief patdown of a suspect's outer clothing constitutes a severe invasion of individual privacy.[36] Nevertheless, invoking the strong governmental interest in protecting police officers, the Court held that a police officer may stop and frisk[37] a person for weapons even where the officer does not have probable cause to arrest the person.[38] Rather, officers need only demonstrate: (1) a reasonable and articulable suspicion that the individual to be searched is involved in criminal activity; and (2) a reasonable belief that the suspect is armed and presently dangerous.[39]

Although *Terry* created an exception to the probable cause requirement, the Court has narrowly restricted the situations in which an offi-

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32. *Id.*

33. *Id.* at 7-8.

34. *Id. See also id.* at 5 n.2 (detailing the procedural history of the case).

35. *Id.* at 23-27.

36. *Terry*, 392 U.S. at 24-25.

37. The government's primary argument was that a stop-and-frisk is not a search and seizure. *Id.* at 10-11. The Court stressed, however, that "it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search.'" *Id.* at 16.

38. *Id.* at 27.

39. *Terry*, 392 U.S. at 30. The Court remarked that it would actually be unreasonable to prohibit an officer from "neutraliz[ing] the threat of physical harm" if the officer reasonably believes the suspect whom he is investigating at close range is armed and presently dangerous. *Id.* at 24. One commentator has identified the following as factors used by courts in a "totality of the circumstances" test to determine whether the requisite reasonable and articulable suspicion exists: (1) the ease with which a search warrant could have been obtained; (2) the source of the officer's information regarding the individual to be searched; (3) the extent of the officer's experience; (4) the extent of the officer's personal knowledge regarding the individual to be searched; (5) the type of criminal activity in which the individual to be searched is allegedly involved; (6) the relationship of the individual to be searched to the premises where the search occurs; (7) the time of the stop; (8) the location of the stop; and (9) the conduct of the person to be searched prior to the stop. Gretchen Slosser, Note, *Unreasonable Suspicion: The Minnesota Supreme Court Extends* Terry *to Nonsuspects Arriving at Premises Being Searched Under Warrant:* State v. Gobely, 70 MINN. L. REV. 1208, 1214-16 (1986).

cer may conduct a *Terry* stop-and-frisk.[40] A major limiting principle is that *Terry* only authorizes searches for the protection of law enforcement officers and bystanders.[41] Accordingly, *Terry* searches must be reasonably fashioned to uncover weapons.[42] Only a limited patdown of the individual's outer clothing is permitted, and officers may not search pockets unless the patdown of the outer clothing indicates the presence of a weapon.[43] Further, unlike searches authorized by other exceptions to the warrant or probable cause requirements, a *Terry* search may not be used to prevent the loss or destruction of evidence.[44] *Terry* also requires that law enforcement officers be able to justify their protective searches by identifying with particularity the facts that aroused their suspicion.[45] Although the *Terry* Court maintained that its exception was a narrow one, the Court's subsequent expansive use of the balancing approach to measure the reasonableness of police actions has led to a widespread acceptance of searches founded upon a level of suspicion less than probable cause.[46]

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40. *Terry*, 392 U.S. at 29; *see also Dunaway*, 442 U.S. at 210 (stating that the Court has been careful to preserve *Terry*'s narrow scope).

41. *Terry*, 392 U.S. at 29.

42. *Id.*

43. Sibron v. New York, 392 U.S. 40, 65-66 (1968). *Sibron* was a companion case to *Terry*. The Supreme Court recently held in Minnesota v. Dickerson, 113 S. Ct. 2130, 2139 (1993), that a law enforcement officer may seize non-threatening contraband discovered during a protective *Terry* patdown if the search was performed within the limits established in *Terry*.

44. *Terry*, 392 U.S. at 29. The Court has also mandated *Terry* stops be brief in duration. United States v. Sharpe, 470 U.S. 675, 684-86 (1985).

45. *Terry*, 392 U.S. at 21. Thus, an officer's generalized suspicion of an individual is insufficient to validate a *Terry* search. *Id.* at 27. *See also Sibron*, 392 U.S. at 64 (stating that officers must be able to show particular facts reasonably used to determine that the suspect was threatening). A court may consider rational inferences drawn from the facts surrounding a search in determining the reasonableness of officers' actions. *Terry*, 392 U.S. at 21.

46. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (applying a balancing test to find a sobriety checkpoint lawful); Maryland v. Buie, 494 U.S. 325 (1990) (holding lawful a protective sweep justified with mere reasonable suspicion based on specific facts); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (permitting drug testing of railroad employees without a showing of any individual suspicion of involvement in specific incidents); Colorado v. Bertine, 479 U.S. 367 (1987) (permitting inventory searches of autos without warrant, probable cause, or reasonable suspicion); New Jersey v. T.L.O., 469 U.S. 325 (1985) (holding the search of a student's purse reasonable after applying a balancing test); Delaware v. Prouse, 440 U.S. 648 (1979) (requiring only reasonable suspicion that a motorist is unlicensed or a car unregistered to justify stopping the motorist); Bell v. Wolfish, 441 U.S. 520 (1979) (using a balancing test to demonstrate that prison inmates have no legitimate privacy expectation in preventing cell searches); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (holding stops at fixed border checkpoints lawful under a balancing test); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (permitting a roving patrol to stop a

C. *Reaffirmation of the Requirement of Probable Cause:* Ybarra v. Illinois

Eleven years after *Terry*, the Court underscored the "narrow scope" of the *Terry* exception to the probable cause requirement in *Ybarra v. Illinois*.[47] The Court ruled in *Ybarra* that officers executing a premises search warrant violated the Fourth and Fourteenth Amendments when they searched Ybarra without a warrant, probable cause, or reasonable suspicion that Ybarra was dangerous.[48]

In *Ybarra*, police officers obtained a warrant authorizing the search of the Aurora Tap Tavern and its bartender for evidence of possession of controlled substances.[49] Seven or eight officers entered the tavern in the late afternoon to execute the warrant.[50] After the officers announced that they intended to perform a "cursory search for weapons," one officer patted down each of the nine to thirteen patrons present while the other officers searched the premises.[51]

When the officer designated to frisk the customers patted down Ventura Ybarra,[52] the officer felt what he described as a "cigarette pack with objects in it."[53] He did not then remove the object, but instead finished frisking the other customers.[54] The officer then returned to Ybarra and patted him down again, at which time he retrieved the cigarette pack from Ybarra's pants pocket.[55] The officer opened the

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vehicle where supported by reasonable suspicion that the vehicle contained illegal aliens).

47. 444 U.S. 85 (1979).

48. *Ybarra*, 444 U.S. at 96.

49. *Id.* at 88. A special agent of the Illinois Bureau of Investigation based the Complaint for a Search Warrant on a reliable informant's report. *Id.* at 87. The informant reported not only that he observed the bartender in possession of foil packets of the type commonly used to package heroin, but also that the bartender had told him that he planned to sell heroin on the date on which the officers executed the warrant. *Id.* at 87-88.

50. *Id.* at 88.

51. *Id.*

52. The officers had sufficient light to observe the patrons of the bar. *Ybarra*, 444 U.S. at 93. They did not recognize Ybarra as an individual with a criminal record, nor did they have reason to believe he was dangerous. *Id.* One officer testified that Ybarra's hands were empty, that Ybarra did not indicate that he possessed a weapon, and that Ybarra made no threatening gestures. *Id.* The officer's only ground for suspicion was that Ybarra was wearing a three-quarters length jacket, which the State acknowledged was not an uncommon item of springtime clothing. *Id.*

53. *Ybarra*, 444 U.S. at 88.

54. *Id.*

55. *Id.* at 89. The officer performed the second search approximately two to ten minutes after the first. *Id.*

pack and discovered six foil packets of heroin inside.[56]

On review, the Supreme Court held that the warrantless search of Ybarra violated the Fourth Amendment.[57] The Court rejected the State's argument for application of the *Terry* exception to the probable cause requirement, stressing that *Terry*'s narrow scope does not permit a "generalized 'cursory search for weapons'" and, moreover, does not allow a search for anything but weapons.[58] The Court reiterated that officers must base their *Terry* searches on particular facts which support a reasonable belief that the specific individual frisked is armed and dangerous—even when the individual is present where a search under warrant is taking place.[59]

Additionally, the Court refused to hold that persons present on premises being searched under warrant and whom officers reasonably believe may be trafficking in drugs always engender a *Terry*-type suspicion that they possess evidence.[60] The Court reasoned that this contention was foreclosed by its earlier decision in *United States v. Di Re*,[61] which held that an individual's mere presence in an automobile does not justify an otherwise illegal search of the individual's person.[62] Although *Di Re* involved a warrantless search of automobile

56. *Id.* at 89. Ybarra was indicted for the unlawful possession of a controlled substance. *Id.* The trial court denied Ybarra's motion to suppress the contraband seized from him at the tavern because it found the search and seizure proper under the applicable Illinois statute. *Id.* The statute provided: "In the execution of [a] warrant the person executing the same may reasonably detain to search any person in the place at the time: . . . (b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant." ILL. REV. STAT. ch. 38, § 108-9 (1975) (current version at ILL. COMP. STAT. ch 725, § 5/108-9 (West 1992)). The trial court found Ybarra guilty. *Ybarra*, 444 U.S. at 89. The Illinois Appellate Court affirmed the conviction and the Illinois Supreme Court denied Ybarra's petition for leave to appeal. *Id.* (citing People v. Ybarra, 373 N.E.2d 1013 (Ill. App. Ct. 1978)).

57. *Ybarra*, 444 U.S. at 90-93, 96. Although the question of whether Ybarra had standing to pursue a Fourth Amendment claim was not before the Court, the majority expressly stated that the patrons present in the tavern were entitled to Fourth Amendment protection. *Id.* at 91. A person has Fourth Amendment standing if he or she has a reasonable expectation of privacy in the area searched. Rakas v. Illinois, 439 U.S. 128, 138-40 (1978). The Court did not reach the question of whether seizing the contraband from Ybarra's pocket would have been lawful, since it held that the search of Ybarra itself was unlawful. *Ybarra*, 444 U.S. at 93 n.5. The Court recently held that seizing contraband does not violate the Fourth Amendment if the search that precedes the seizure satisfies *Terry*. Minnesota v. Dickerson, 113 S. Ct. 2130 (1993). *See supra* note 43 for a brief discussion of *Dickerson*.

58. *Ybarra*, 444 U.S. at 92-94.

59. *Id.* at 94.

60. *Id.*

61. *Id.* (citing United States v. Di Re, 332 U.S. 581 (1948)).

62. *Di Re*, 332 U.S. at 587. The *Di Re* Court declined to address whether the car itself could have been lawfully searched. *Id.* at 585-86.

occupants rather than a warrant-supported search of a tavern, the *Ybarra* Court observed the principle expressed in *Di Re* that an individual does not forfeit Fourth Amendment protection by virtue of presence in a closed area that is subject to a lawful search.[63] The *Ybarra* Court thus concluded that the State could not justify the search of Ybarra solely by his presence in the tavern.[64]

Because it had determined that the search of Ybarra did not fall under the *Terry* exception, the *Ybarra* Court required probable cause particular to Ybarra to justify the search of his person.[65] The Court reasoned that neither probable cause to search or seize one individual, nor probable cause to search the premises where that individual is present, can, by itself, constitute probable cause to search another individual.[66] Upon concluding that the State could not demonstrate probable cause to search Ybarra himself, the Court ruled that the search of Ybarra had violated his Fourth Amendment right to be free from unreasonable searches.[67]

In dissent, Justice Burger took the position that the reasonableness of a search should be determined with a sliding scale that balances the degree of intrusion into individual privacy against the justification for the intrusion.[68] Justice Burger viewed the search of Ybarra as reasonable under this test.[69] He maintained that the *Terry* rationale legitimized a general search in *Ybarra* because of the acute law enforcement safety interest raised by the location of the search.[70] Specifically, he asserted that when searching a compact room that is a possible setting

63. *Ybarra*, 444 U.S. at 95. In fact, the *Ybarra* Court quoted the government's concession in *Di Re* that it could not search all persons present in a home where it had obtained a search warrant for the home. *Id.* at 95 n.9 (quoting *Di Re*, 332 U.S. at 587).

64. *Id.* at 95-96.

65. *Id.* at 92-94. The Court reasoned that probable cause historically represents the best available balance of governmental and individual interests. *Id.* at 95. In response to the government's argument that the *Terry* standard of reasonable suspicion should suffice to allow "evidence" searches of individuals present on "compact" premises subject to warrant, the Court stated:

> The "long-prevailing" constitutional standard of probable cause embodies "'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.'"

Id. at 95-96 (citing *Dunaway*, 442 U.S. at 208 (quoting *Brinegar*, 338 U.S. at 176)).

66. *Ybarra*, 444 U.S. at 95-96.

67. *Id.* at 90-93, 96.

68. *Id.* at 97 (Burger, C. J., dissenting). Justices Blackmun and Rehnquist joined in Chief Justice Burger's dissenting opinion. *Id.* at 96.

69. *Ybarra*, 444 U.S. at 98 (Burger, C. J., dissenting).

70. *Id.* at 97 (Burger, C. J., dissenting).

for narcotics trafficking, officers may have bona fide cause to believe their safety is so endangered as to necessitate a search of persons present in the room.[71]

In a separate dissent, Justice Rehnquist maintained that the core issue was the proper scope of police power under a search warrant.[72] He asserted that the search of Ybarra was permissible under *Terry* even without a showing of individualized suspicion.[73] He reasoned that individualized suspicion is unnecessary where: (1) a neutral magistrate has found a search of the premises necessary, which obviates the need for individualized suspicion to prevent arbitrary police action; and (2) a small but potentially dangerous group is present.[74] Justice Rehnquist concluded that literally applying *Terry*'s individualized suspicion requirement, which was fashioned in response to a warrantless and on-street stop-and-frisk, to a case involving the execution of a closed premises search warrant would not assess reasonableness based on the totality of the circumstances, as *Terry* dictates.[75]

Notwithstanding the Court's subsequent use of the balancing test recommended by Justice Rehnquist in *Ybarra*,[76] *Ybarra* stands as a reaffirmation of the viability of the traditional approach of treating probable cause as an absolute criterion of Fourth Amendment reasonableness.

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71. *Id.* at 97-98 (Burger, C. J., dissenting).

72. *Id.* at 99 (Rehnquist, J., dissenting).

73. *Ybarra*, 444 U.S. at 107 (Rehnquist, J., dissenting). Justice Rehnquist maintained that the officer's actions in *Ybarra* were objectively reasonable, whatever the officer's level of suspicion. *Id.* at 109. He acknowledged that the objective reasonableness of a search will depend on the circumstances of the case: "[I]t might well not be reasonable to search 350 people on the first floor of Marshall Field [department store], but we're talking about, by description, a rather small tavern." *Id.* (quoting the *Ybarra* trial court).

74. *Ybarra,* 444 U.S. at 107 (Rehnquist, J., dissenting). Justice Rehnquist stated that the Court need not have measured the reasonableness of the search against the "jealously drawn" exceptions to the warrant requirement. *Id.* at 104 (Rehnquist, J., dissenting). Since the second clause of the Fourth Amendment does not require that warrants specify the "persons" to be searched, Justice Rehnquist found the warrant requirement fully satisfied in *Ybarra*. *Id.* at 102 (Rehnquist, J., dissenting).

75. *Ybarra*, 444 U.S. at 107 (Rehnquist, J., dissenting). Justice Rehnquist noted that in a search of private premises, the officers are close to the individuals present for a longer period than was the officer in *Terry* and must direct their attention to the search of the premises rather than the activities of the individuals. *Id.* at 107 (Rehnquist, J., dissenting) (citing 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.9, at 150-51 (1st ed. 1978)). Quoting the Second Circuit, Justice Rehnquist pointed out that among narcotics dealers, "'firearms are as much "tools of the trade" as are most commonly recognized articles of narcotics paraphernalia.'" *Ybarra*, 444 U.S. at 106 (Rehnquist, J., dissenting) (quoting United States v. Oates, 560 F.2d 45, 62 (2d Cir. 1977)).

76. *See supra* note 46.

D. Michigan v. Summers: *Sliding Scale Justification for the Detention of Owners and Occupants of Private Premises*

Despite the *Ybarra* Court's rejection of the use of the sliding scale approach to justify the search of persons on public premises, in *Michigan v. Summers*[77] the Court used a balancing test of reasonableness to determine whether the temporary detention of the owner or occupant of a residence being searched under warrant violates the Fourth Amendment.[78] Applying that test, the Court rejected Summers's claim that his pre-arrest detention during the search of his residence violated the prohibition against unreasonable seizures.[79] The Court did not address, however, whether the warrant for the search of Summers's residence authorized the officers to search persons they found within the residence.[80] Indeed, the Court stated in a footnote that the issue raised in *Summers* differed from the issue raised in *Ybarra*: in *Summers*, the seizure of a person, rather than the search of a person, was at issue.[81]

As in *Terry*, the *Summers* Court used a balancing test to assess the reasonableness of Summers's seizure.[82] The Court cited *Terry*, *Adams v. Williams*,[83] and *United States v. Brignoni-Ponce*[84] to support its conclusion that the Fourth Amendment reasonableness requirement permits some seizures constituting limited intrusions on individual privacy where substantial law enforcement interests are at

77. 452 U.S. 692 (1981).

78. *Id.* at 699-705. In *Summers*, police officers obtained a warrant to search a private residence for narcotics. *Summers*, 452 U.S. at 693. When they arrived at the house, they detained Summers, the owner of the house, while they executed the search warrant. *Id.* Upon discovering narcotics in the basement, the officers arrested Summers. *Id.* They discovered additional drugs when they searched his person. *Id.* The state charged Summers with possession of the drugs found on his person. *Id.* at 694. Although *Summers* involved a seizure rather than a search, it is relevant to the present discussion because some courts have extended its holding to justify searches of owners and occupants present on private premises during the execution of a search warrant. *See infra* notes 136-45 and accompanying text.

79. *Summers*, 452 U.S. at 705.

80. *Id.* at 695.

81. *Id.* at 695 n.4. Under Chimel v. California, 395 U.S. 752 (1969), police may search an arrestee's person for evidence or weapons.

82. *Summers*, 452 U.S. at 699-700 & n.12.

83. 407 U.S. 143 (1972). In *Adams*, the Court ruled that the removal of a gun from the waistband of a defendant sitting in a car constituted a reasonable seizure even though the officer lacked probable cause to arrest the defendant at the time. *Id.* at 147-48.

84. 422 U.S. 873 (1975). In *Brignoni-Ponce*, the Court held that an officer may briefly stop a vehicle to question the driver and passengers regarding their citizenship if the stop is supported by a reasonable suspicion that the vehicle contains illegal aliens. *Id.* at 881-82.

stake.[85] Under this balancing approach, the Court stressed, officers may seize an individual based on less than probable cause if they can show an "articulable basis for suspecting criminal activity."[86]

The *Summers* Court began its balancing exercise by evaluating the scope of the intrusion on Summers's privacy.[87] The Court reasoned that the fact that the officers had obtained a search warrant for the premises was "[o]f prime importance," in that a "neutral and detached magistrate" had authorized the invasion of Summers's privacy upon a finding of probable cause that a criminal offense had occurred in his residence.[88] The Court also allowed that police may base their suspicion of an individual on the connection between that person and his or her residence.[89] In light of these circumstances, the Court reasoned that the detention of an occupant constitutes a lesser personal intrusion than does the search of his or her residence.[90]

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85. *Summers*, 452 U.S. at 699-700. In dissent, Justice Stewart, joined by Justices Brennan and Marshall, criticized the majority's expansion of *Terry*, *Adams*, and *Brignoni-Ponce* to allow a seizure not supported by probable cause. *Id.* at 706 (Stewart, J., dissenting). Justice Stewart maintained that these cases represent special exceptions to the general requirement of probable cause, rather than a broad authorization for the Court to gauge reasonableness through a balancing test. *Id.* (Stewart, J., dissenting). *Summers*, unlike *Terry*, *Adams*, and *Brignoni-Ponce*, failed to present special governmental interests other than the usual law enforcement interest in investigating crimes and catching criminals, which were sufficiently important to override the general probable cause requirement. *Id.* at 706-08 (Stewart, J., dissenting). Justice Stewart concluded that "the government must demonstrate an important purpose beyond the normal goals of criminal investigation, or must demonstrate an extraordinary obstacle to such investigation" to justify a seizure unsupported by probable cause. *Id.* at 708 (Stewart, J., dissenting).

86. *Summers*, 452 U.S. at 699.

87. *Id.* at 701.

88. *Id.*

89. *Id.* at 703-04.

90. *Summers*, 452 U.S. at 701. The Court also observed that an occupant of a residence being searched will most likely prefer to remain on the premises to observe the search, unless he or she wants to avoid arrest. *Id.* Moreover, because officers will likely obtain the evidence they seek through the search rather than through the occupant's detention, officers executing the warrant will be unlikely to exploit or unreasonably prolong the detention. *Id.*

The majority further urged that the type of detention at issue in *Summers* was less intrusive than other types of seizures, such as an arrest or removal to a police station for interrogation. *Id.* at 702. The Court compared the circumstances of Summers's seizure with the seizure of the defendant in Dunaway v. New York, 442 U.S. 200 (1979). *Summers*, 452 U.S. at 696-98, 702. In *Dunaway*, the Court held that officers illegally seized a defendant when they took him into custody at a neighbor's house and then removed him to the police station for interrogation. *Dunaway*, 442 U.S. at 203. The *Summers* Court stated that compared to the seizure in *Dunaway*, the detention of Summers in his own home "add[ed] only minimally to the public stigma associated with the search itself and . . . involve[d] neither the inconvenience nor the indignity associated with a compelled visit to the police station." *Summers*, 452 U.S. at 702. In dissent, Justice

Turning to the law enforcement interest in Summers's seizure, the Court examined both the interest promoted by the seizure and the "articulable facts" supporting it.[91] The Court found that the law enforcement interests promoted by detaining the occupant of a private residence while executing a search warrant include preventing flight, minimizing the risk of harm to the police and others present on the premises, and facilitating the search.[92] The Court also reasoned that the combination of a search warrant based on probable cause and the relationship between an occupant and the premises to be searched provides sufficient articulable facts to support a detention.[93] After balancing the intrusion suffered by Summers against the law enforcement interests advanced by his detention, the Court held the detention was reasonable because a search warrant for illegal drugs based on probable cause "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."[94]

III. DISCUSSION

Since *Ybarra*, federal and state courts have disagreed over whether *Ybarra*'s probable cause requirement should be applied to searches of persons present during warrant-supported searches of private residences.[95] Some courts apply *Ybarra* to all cases involving searches of

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Stewart criticized the majority's conclusion that Summers's detention was limited and unintrusive. *Id.* at 710-12 (Stewart, J., dissenting). Justice Stewart asserted that under the majority holding, "[t]he police . . . [may] make the person a prisoner in his own home for a potentially very long period of time" because the majority authorizes a detention that "can be as long as the police find it necessary to protract the search." *Id.* at 711-12 (Stewart, J., dissenting).

91. *Summers*, 452 U.S. at 702.

92. *Id.* at 702-03.

93. *Id.* at 703-04.

94. *Id.* at 705. The Court stated that its holding that the officers in *Summers* could detain the occupant of the premises they were searching under warrant does not "preclude the possibility that comparable police conduct may be justified by exigent circumstances in the absence of a warrant." *Id.* at 702 n.17. *Summers* implies that the Court would not permit the detention of non-occupants without the demonstration of other compelling governmental interests, such as the need for a protective *Terry* stop. *See Summers*, 452 U.S. at 701-05 (stressing importance of connection of occupant to home); *see also* Slosser, *supra* note 39, at 1217 (stating that *Terry* requirements must be fulfilled as to non-occupants). *See also* Lippert v. State, 664 S.W.2d 712, 720 (Tex. Crim. App. 1984) (stating that *Summers* cannot be extended to a non-occupant to justify a search without first satisfying *Ybarra*'s standards); 2 LAFAVE, *supra* note 11, § 4.9(e), at 309-10 (stating that the word "occupant," as used by the Court in *Summers*, must be interpreted literally to include only occupants or residents, rather than to cover anyone present).

95. For a discussion of similarly inconsistent applications of *Ybarra* in cases involving office searches and seizures, see Jeffrey D. Winter, Comment, *Pondering the Scope*

bystanders incident to the execution of a search warrant.[96] These courts deem searches of bystanders without either a warrant or probable cause unreasonable, regardless of the public or private character of the site of the search.[97] Other courts distinguish the public place search in *Ybarra* from searches of private residences, maintaining that searches of bystanders present on private premises may pass constitutional muster under a balancing test.[98] Still other courts extend the *Summers* holding[99] to validate searches of the owners or occupants of private residences searched under warrant.[100] Each of these views is discussed below.

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of Premises Search Warrants After Ybarra v. Illinois, 26 SAN DIEGO L. REV. 661 (1989).

96. *See, e.g.*, Rivera v. United States, 928 F.2d 592 (2d Cir. 1991); United States v. Clay, 640 F.2d 157 (8th Cir. 1981); United States v. Sporleder, 635 F.2d 809 (10th Cir. 1980); White v. United States, 512 A.2d 283 (D.C. 1986); People v. Gross, 465 N.E.2d 119 (Ill. App. Ct. 1984); State v. Lambert, 710 P.2d 693 (Kan. 1985); State v. Coons, 627 A.2d 1064 (N.H. 1993); Bell v. State, 608 P.2d 1159 (Okla. Crim. 1980); State v. Weber, 668 P.2d 475 (Or. Ct. App. 1983); Lippert v. State, 664 S.W.2d 712 (Tex. Crim. App. 1984); State v. Broadnax, 654 P.2d 96 (Wash. 1982); *see also* United States v. Harvey, 897 F.2d 1300, 1304 n.2 (5th Cir. 1990) (emphasizing that the court does "not countenance the search of any individual who happens to be no more than on the premises where a narcotics warrant is being executed"); United States v. Vaughan, 718 F.2d 332, 335 n.7 (9th Cir. 1983) (agreeing *Ybarra* should be applied to searches although not to detentions); State v. Banks, 720 P.2d 1380 (Utah 1986) (explaining "that a person's mere presence in the company of others whom the police have probable cause to search does not provide probable cause to search that person").

97. *See supra* note 96.

98. *See, e.g.*, United States v. Reid, 997 F.2d 1576 (D.C. Cir. 1993); United States v. Pace, 898 F.2d 1218 (7th Cir. 1990); People v. Thurman, 257 Cal. Rptr. 517 (Cal. Ct. App. 1989); State v. Harris, 384 S.E.2d 50 (N.C. Ct. App. 1989); State v. Zearley, 444 N.W.2d 353 (N.D. 1989); State v. Alamont, 577 A.2d 665 (R.I. 1990); State v. Guy, 492 N.W.2d 311 (Wis. 1992); *see also* People v. Hughes, 767 P.2d 1201, 1203 (Colo. 1989) (distinguishing *Ybarra* because in *Ybarra* the police conducted a search on *all* individuals present on *public* premises); State v. Beals, 410 So. 2d 745, 748-49 (La. 1982) (involving an occupant of a residence and not a bystander); People v. Coleman, 461 N.W.2d 615 (Mich. 1990) (dicta); State v. Ferrell, 266 S.E.2d 869, 871 (S.C. 1980) (justifying a search as incident to arrest although lacking particularized probable cause). When determining the applicability of *Ybarra*, some courts also distinguish between cases involving persons already present on the premises when the officers arrive and persons who arrive during the execution of the search warrant. *See* 2 LAFAVE, *supra* note 11, §4.9(c) at 295. Some courts require that for a search to satisfy *Ybarra*, the individual searched must have had the opportunity to conceal items on the premises before the warrant is executed. 2 LAFAVE, *supra* note 11, §4.9(c) at 295. Therefore, these courts generally do not allow searches of persons arriving on the premises after the arrival of the officers. *Id.* Professor LaFave has criticized courts that allow searches of late arrivals, except where the search warrant authorizes a search for goods that are part of an ongoing criminal activity. *Id.*

99. *See supra* notes 77-94 and accompanying text.

100. *See infra* notes 136-45 and accompanying text.

A. Ybarra *Followed: Probable Cause Required*

Courts that apply *Ybarra* to searches of both private and public premises measure search reasonableness solely by the presence or absence of probable cause, rather than with a sliding scale approach.[101] These courts decline to distinguish between the public nature of the premises searched in *Ybarra* and private premises.[102]

For example, in *State v. Broadnax,*[103] the Washington Supreme Court applied *Ybarra*'s probable cause requirement to the search of an individual present on private premises during the execution of a search warrant.[104] The court emphasized the narrow scope of the exceptions to the probable cause requirement, as typified by the *Terry* exception.[105] Applying *Ybarra*, the court found that petitioner Thompson's mere presence at a private residence during a search was insufficient to justify the frisk of his person.[106]

The *Broadnax* court stated that even the officers' reasonable belief that narcotics trafficking was occurring on the premises and that per-

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101. *See, e.g.*, White v. United States, 512 A.2d 283, 286 (D.C. 1986) (stating that appellant's presence in a private home did not give police probable cause to believe he was committing a crime).

102. *See, e.g.*, State v. Broadnax, 654 P.2d 96, 101 (Wash. 1982) (describing the distinction between private and public as "fallacious"). Typically, cases following this approach cite Justice Stewart's admonition in *Katz v. United States*, 389 U.S. 347, 351 (1967), that the Fourth Amendment protects people rather than places. *E.g.*, Lippert v. State, 664 S.W.2d 712, 718 (Tex. Crim. App. 1984).

103. 654 P.2d 96 (Wash. 1982).

104. *Broadnax*, 654 P.2d at 101. In *Broadnax*, a narcotics detective obtained a warrant authorizing the search of a private residence. *Id.* at 98. Although the warrant did not authorize the search of any persons, the supporting affidavit stated that the detective had information that a "male known as Clifford," who lived at the residence, had offered narcotics for sale within the previous day. *Id.* Four police officers went to the residence to execute the warrant; three entered the house, and one remained outside. *Id.* at 98-99. The three officers who entered the house instructed Clifford Broadnax, a resident of the house, and petitioner Thompson "to put their hands on their heads." *Id.* at 99. The fourth officer, Detective Buckland, who had been standing guard outside, then entered the house. *Broadnax*, 654 P.2d at 99. When Buckland saw the two men with their hands on their heads, Buckland assumed Thompson was under arrest and asked if Thompson should be searched. *Id.* Another officer responded that Thompson had not been frisked. *Id.* Although neither of the officers indicated that they suspected Thompson was armed, Detective Buckland frisked Thompson. *Id.* During the patdown, Buckland felt a small bulge in Thompson's shirt pocket. *Broadnax*, 654 P.2d at 99. Although Buckland did not believe the object was a weapon, he removed it from Thompson's pocket; he discovered the bulge was a balloon containing heroin. *Id.* Thompson was charged with possession of heroin and found guilty after the trial court denied his motion to suppress the evidence. *Id.* at 98.

105. *Broadnax*, 654 P.2d at 99-100. See *supra* notes 28-46 and accompanying text for discussion of the *Terry* exception.

106. *Broadnax*, 654 P.2d at 100-01.

sons present in the house could conceal or remove contraband did not justify searching Thompson.[107] The court rejected the lower court's distinction between the public premises searched in *Ybarra* and the private premises searched in *Broadnax* as "fallacious," stating that such a distinction ignores *Ybarra*'s teachings.[108] Noting the *Ybarra* Court's observation that persons possess constitutional protection individually, the court deduced that this protection prohibits frisking individuals without probable cause, unless a reasonable suspicion exists that the specific person to be searched is armed and dangerous.[109] The court concluded that because the officer searched Thompson for contraband without a warrant, probable cause, or any belief that he was armed, the search was impermissible.[110]

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107. *Id.* at 105. In Lippert v. State, 664 S.W.2d 712 (Tex. Crim. App. 1984), the court observed that the police may establish individualized probable cause (1) when the person to be searched makes furtive gestures or attempts to flee the premises; (2) when the person to be searched has a prior criminal record of which the police officers are aware at the time of the search; or (3) when there is a nexus between the person to be searched and contraband on the premises. *See Lippert*, 664 S.W.2d at 721 (discussed *infra* notes 111-16 and accompanying text). Professor LaFave has commented that during the search of private premises under warrant, probable cause will most likely be found if the person to be searched is the resident of the premises, is engaged in suspicious conduct, or is found in immediate proximity to contraband in plain view. 2 LAFAVE, *supra* note 11, § 4.9(c) at 296. Yet these circumstances do not provide probable cause to search an individual when the items listed in the search warrant cannot be concealed on the individual's person because of size or other factors. 2 *Id.* at 295.

108. *Broadnax*, 654 P.2d at 101. *See also* Slosser, *supra* note 39, at 1233-34 n.178 (stating that the public nature of the premises was not a factor in the *Ybarra* decision; the *Ybarra* frisk was found unconstitutional because there were no reasonable grounds to believe that Ybarra was armed and dangerous).

109. *Broadnax*, 654 P.2d at 101. This individualized suspicion can be established by an individual moving suddenly toward a pocket. United States v. Clay, 640 F.2d 157, 160 (8th Cir. 1981). The reasonable belief required by *Terry* must arise prior to the search, rather than as a product of it. United States v. Sporleder, 635 F.2d 809, 814 (10th Cir. 1980). The *Broadnax* court also cited Supreme Court decisions which acknowledge that the Fourth Amendment more affirmatively recognizes the zone of privacy in an individual's home, since this zone "'finds its roots in clear and specific constitutional terms.'" *Broadnax*, 654 P.2d at 104 (quoting Payton v. New York, 445 U.S. 573, 589 (1980)).

110. *Id.* at 101. Citing *Ybarra*'s declaration that *Terry* cannot be read to allow a search for anything except weapons, the *Broadnax* court stated:

> We are aware of no instance in which the [United States] Supreme Court has condoned the use of a "frisk" to search for evidence of an independent crime. All of its pronouncements have made it clear that such a warrantless personal intrusion is justified only to assure the safety of the officer and others.

Broadnax, 694 P.2d at 101 (quoting State v. Hobart, 617 P.2d 429, 434 (Wash. 1980) (footnote omitted)). Even assuming the legality of the frisk, the officer could not remove an object from Thompson's person unless he believed it was a weapon: "[O]nce it is ascertained that no weapon is involved, the government's limited authority to invade the individual's right to be free of police intrusion is spent." *Broadnax*, 694 P.2d at 101 (quoting State v. Allen, 606 P.2d 1235, 1237 (Wash. 1980)) (citations and

Applying a test similar to the probable cause test used in *Broadnax*, a Texas appellate court ruled in *Lippert v. State*[111] that appellant Lippert's mere presence in a house when officers executed a search warrant, without more, did not justify a frisk of Lippert.[112] The *Lippert* court first determined that the warrant to search the residence did not authorize Lippert's arrest.[113] It then reasoned that discovery of evidence in a house during the execution of a warrant is insufficient to establish probable cause to arrest everyone present.[114] The court explained that regardless of the setting of a search, *Ybarra* made clear that a person possesses constitutional protections individually.[115] Accordingly, the *Lippert* court concluded that due to the lack of a warrant, probable cause, or a basis for reasonable suspicion that Lippert was armed and dangerous, the frisk of Lippert was unreasonable and thus unconstitutional.[116]

B. Ybarra *Distinguished: Sliding Scale Analysis Applied*

Courts that authorize searches of individuals based on their mere presence on private premises being searched under warrant distinguish private premises searches from the public premises search in *Ybarra*.

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emphasis omitted).

111. 664 S.W.2d 712 (Tex. Crim. App. 1984).

112. *Id.* at 721-22. In *Lippert*, a police officer obtained a warrant to search a private residence and to arrest and search persons named in the affidavit. *Id.* at 714. Subsequently, the officer and two deputy sheriffs went to the residence to execute the warrant. *Id.* at 714-15. Approximately fifteen minutes after the officers began to search the house, one officer discovered Lippert, who had either arrived at the house after the officers began to execute the warrant or had been hiding in the house during the search. *Id.* at 715. The officer immediately frisked Lippert for weapons, but found neither weapons nor narcotics. *Lippert*, 664 S.W.2d at 715. Later, before the officers placed Lippert in the squad car to take him to the police station, an officer searched him again for weapons. *Id.* The officer discovered a case containing methamphetamine in Lippert's shirt pocket. *Id.* at 715-16. After the trial court overruled Lippert's motion to suppress, he was convicted of possession of a controlled substance with intent to deliver. *Id.* at 714.

113. *Lippert*, 664 S.W.2d at 716. The warrant authorized the arrest and search of persons in control of the premises, who were named as follows in the supporting affidavit: "Sherry Fourtner, and Mike (last name unknown—but sound is phonetically similar to 'Euling'), and person or persons whose names, identities and descriptions are unknown to affiant." *Id.* at 714. The trial court record indicated that Lippert was not in control of the premises. *Id.* at 716. Moreover, the Court of Criminal Appeals agreed with the appellate court finding that the warrant only authorized the arrest of persons named in the affidavit, rather than all persons found on the premises. *Id.*

114. *Id.* at 722.

115. *Lippert*, 664 S.W.2d at 718. In stating that the setting of the search is irrelevant to determining the extent of constitutional protection of individuals, the court stated that "The Fourth and Fourteenth Amendments protect persons, not places." *Id.*

116. *Id.* at 721-22.

These courts evaluate the reasonableness of private premises searches with a sliding scale approach, rather than a probable cause test.

In *People v. Thurman,*[117] a California appellate court balanced the governmental interest in a search of an individual present on private premises against the extent of the resultant intrusion on individual privacy.[118] Since the court determined that the governmental interest significantly outweighed the personal intrusion, the court deemed the search lawful even though it was made without probable cause.[119] The court viewed *Ybarra* as inapplicable to searches on private premises for three reasons.[120] First, an individual present in a residence where narcotics transactions are taking place is likely to be involved in drug trafficking, inasmuch as private residences do not attract visitors off the street as do public taverns.[121] Second, private surroundings are generally more dangerous than public locations, such as taverns.[122] Finally, suspected narcotics traffickers found in a residence are more likely to be armed than are customers in a tavern.[123]

Instead of requiring probable cause as in *Ybarra*, the *Thurman* court applied a balancing test similar to the one applied in *Terry* and the test Justice Burger advocated in his *Ybarra* dissent.[124] The court thus

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117. 257 Cal. Rptr. 517 (Cal. Ct. App. 1989).

118. *Id.* at 520. In *Thurman*, police officers obtained a warrant to search a private apartment for drugs, narcotics paraphernalia, and various documents. *Id.* at 518. When the officers entered the apartment, they found Thurman sitting quietly and passively on a sofa. *Id.* Although the officers realized that the warrant did not authorize a search of Thurman, one of the officers patted him down for weapons. *Id.* During the frisk, the officer felt a large object in Thurman's jacket pocket which he believed was a weapon. *Thurman,* 257 Cal. Rptr. at 518. The officer then reached into the pocket, felt the object, and realized it was not a weapon. *Id.* Believing the object to be a plastic bag filled with rock cocaine, the officer removed the object; he discovered that the object was a plastic bag containing twelve large rocks of cocaine. *Id.* After the trial court denied his motion to suppress, Thurman pled guilty to one count of possession of cocaine for sale. *Id.*

119. *Thurman,* 257 Cal. Rptr. at 520, 522.

120. *Id.* at 520-21.

121. *Id.*

122. *Id.*

123. *Thurman,* 257 Cal. Rptr. at 521. The court stated that the risk involved in this type of search "corresponds to, if not exceeds, ' . . . the inordinate risk confronting an officer as he approaches a person seated in an automobile.'" *Id.* at 520 (quoting Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977)). *But see Katz,* 389 U.S. at 360 (Douglas, J., concurring) (stating that the Fourth Amendment recognizes no distinctions among types of crimes).

124. *Thurman,* 257 Cal. Rptr. at 520. *See supra* notes 28-46 (discussing the test applied in *Terry*) and 68-72 (discussing Justice Burger's test) and accompanying text. The *Thurman* court observed that there is "'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Thurman,* 257 Cal. Rptr. at 520 (quoting *Terry,* 392 U.S. at

assessed the reasonableness of the officer's actions by weighing the extent of the intrusion on the individual searched against the safety concerns of law enforcement officials.[125] The court characterized the search of a person present on private premises during the execution of a search warrant as brief and relatively private.[126] It found this intrusion insignificant compared to police officers' need to protect themselves from potentially armed narcotics traffickers.[127] Accordingly, the *Thurman* court concluded that law enforcement officers may lawfully perform a *Terry*-type weapons frisk of persons present in a private residence during a search for narcotics under warrant.[128]

Following the *Thurman* court's reasoning, the Wisconsin Supreme Court, in *State v. Guy,*[129] upheld the search of a person on private premises on the ground that *Ybarra* does not apply to private premises searches.[130] Using a *Terry*-type balancing test of reasonableness, the

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21).

125. *Thurman,* 257 Cal. Rptr. at 520.

126. *Id.*

127. *Id.*

128. *Thurman,* 257 Cal. Rptr. at 520. The court stated that conducting a protective search in such circumstances is "manifestly reasonable," even if the individual to be searched does not appear threatening at the moment. *Id.* It would be "utter folly," observed the court, to require an officer to wait until the individual became overtly hostile before taking protective action. *Id.* Professor LaFave appears sympathetic to this reasoning:

> It is likely . . . that *Ybarra* will not be the last word on this issue. The majority, after all, *only* required adherence to the *Terry* reasonable suspicion formula, and did not say that assessment of the reasonableness of the suspicion may never take into account the facts attending a particular search warrant execution which properly bear upon the magnitude of the danger to the police *if* those present are armed. Moreover, the facts of *Ybarra* hardly made it an especially compelling case for establishing the unique dangers which often attend warrant execution: the search warrant was executed by a contingent of eight police officers in a public place where drugs were apparently being sold retail in limited amounts.

2 LAFAVE, *supra* note 11, § 4.9(d) at 302 (emphasis in original) (citations omitted).

129. 492 N.W.2d 311 (Wis. 1992), *cert. denied* 113 S. Ct. 3020 (1993).

130. *Id.* at 316. In *Guy*, a detective obtained a warrant to search a single-family home for cocaine, scales, other indicia of narcotics trafficking crimes, and a man identified as "John Doe." *Id.* at 312. The next day, ten to fifteen police officers entered the house to execute the warrant. *Id.* The officers took the persons present in the house, including Guy, a woman not named in the warrant, to the front porch and handcuffed them. *Id.* An officer then frisked Guy even though Guy stood motionless and did not appear armed. *Guy*, 492 N.W.2d at 312-13. The officer felt a bulge in Guy's front pants pocket and asked Guy what the object was. *Id.* When Guy replied, "[f]ind out for yourself," the officer removed a plastic bag containing eleven paper "bindles" of cocaine. *Id.* After the trial court denied her motion to suppress the evidence, Guy was convicted of possessing cocaine with intent to deliver. *Id.* The *Guy* court did not address the legality of the search for contraband in this case, but only the legality of the initial frisk for weapons. In dissent, Justice Heffernan noted that "the United States Supreme Court clearly distin-

Guy court noted that a neutral magistrate had already determined that the officers had probable cause to search the house, thereby supplying the reasonable and articulable suspicion of criminal activity required by *Terry*.[131] The court then emphasized the risk involved in executing a warrant to search for narcotics and the danger involved in law enforcement work generally.[132] The court viewed the searching officer's suspicion that Guy was armed as reasonable, based not upon a suspicion particular to Guy, but on the officer's personal experience regarding the violence associated with narcotics trafficking and the reasonable inferences the officer could have drawn from the facts surrounding the search.[133]

Although it found the search of Guy constitutional, the court cautioned that its decision did not categorically legitimize searches of all persons present during the execution of a search warrant.[134] Rather, the court stated, it would determine the constitutionality of future searches according to the facts of each case.[135]

C. *The Extension of* Michigan v. Summers *to Searches of Owners and Occupants*

Some courts have relied on *Michigan v. Summers*[136] to justify the

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guishes between the probable cause necessary to initiate a search for contraband and the reasonable suspicion needed to support a limited self-protective search for weapons." *Id.* at 318 (Heffernan, C. J., dissenting).

131. *Guy*, 492 N.W.2d at 313-16.

132. *Id.* The court noted that the danger involved in law enforcement has increased since *Terry*. *Id.* Courts have occasionally considered the apparent size of a drug transaction as a factor in determining the reasonableness of a *Terry* stop. For instance, in United States v. Santana, 485 F.2d 365, 368 (2d Cir. 1973), the Second Circuit relied on the fact that a defendant stopped under *Terry* was a major drug dealer in determining the reasonableness of the stop. In contrast, the *Guy* court declined to consider that the case before it involved a minor drug dealer. *Guy*, 492 N.W.2d at 316. Instead, the court stated that requiring police officers to distinguish between major and insignificant drug deals in evaluating whether grounds for a *Terry* frisk exist would inhibit flexibility in law enforcement, would be impractical, and might unreasonably endanger officers. *Id.*

133. *Guy*, 492 N.W.2d at 316. The State argued that in determining whether the officer had a reasonable suspicion that Guy was armed, the court could also impute the knowledge within "the collective mind of the police force" to the officer. *Id.* at 315. This collective knowledge could include knowledge gained in the experience of the detective who had obtained the warrant and who found weapons in most cases in which he executed search warrants for drugs. *Id.* at 314-15. The court disregarded this notion, concluding that the facts known to the officer when she conducted the search and the inferences she could draw from the facts sufficed to support a conclusion that the officer reasonably suspected Guy was armed. *Id.* at 315.

134. *Guy*, 492 N.W.2d at 316.

135. *Id.* The *Guy* court did not indicate, however, what type of facts would cause a search on private premises to be unconstitutional.

136. 452 U.S. 692 (1981). For a discussion of *Summers*, see *supra* notes 77-94 and

search of the owner or occupant of private premises being searched under warrant.[137] For instance, in *State v. Beals*[138] the Louisiana Supreme Court concluded that *Summers* authorizes the search of an individual's person where a warrant for searching that person's residence is based on probable cause information that he or she has committed a crime in the residence.[139] Relying on the *Summers* reasoning that a magistrate-issued warrant that authorizes a substantial intrusion into an occupant's home justifies the lesser intrusion of detaining the occupant, the *Beals* court held that a warrant authorizing the search of a private residence based on probable cause that an occupant has engaged in illegal activities on the premises also authorizes the lesser intrusion of a search of the occupant's person.[140]

In asserting that its decision was not inconsistent with *Ybarra*, the *Beals* court distinguished *Ybarra* on the ground that the search warrant in that case did not mention the customers of the tavern, much less allege that customers had been observed purchasing drugs.[141] The court noted that in contrast, the officers in *Beals* based their search warrant application on knowledge that an occupant of the premises to be searched had been observed participating in a drug transaction on the premises, and that Beals had a special connection with the premises

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accompanying text.

137. *See, e.g.*, State v. Beals, 410 So. 2d 745, 748 (La. 1982) (holding search of resident permissible under *Michigan v. Summers*). *But see Broadnax*, 654 P.2d at 103 (stating that, although occupant may be seized under *Summers*, search of occupant must satisfy *Ybarra* standards); *Lippert*, 664 S.W.2d at 720 (approvingly citing the *Broadnax* reasoning regarding this issue).

138. 410 So. 2d 745 (La. 1982).

139. *Beals*, 410 So. 2d at 749. In *Beals*, law enforcement officers obtained a warrant that authorized the search of a private residence for controlled substances. *Id.* at 747. The officers based the warrant on an application which stated that an informant had observed an occupant of the residence participating in a drug transaction on the premises. *Id.* at 748. When the officers entered the house, they searched resident Beals and discovered a package containing Dilaudid tablets on her person. *Id.* at 747. Beals was charged with possession of a controlled dangerous substance. *Id.* at 746. The trial court denied Beals's motion to suppress the evidence and found her guilty of the possession charge. *Id.*

140. *Beals*, 410 So. 2d at 748.

141. *Id.* The *Ybarra* Court stated:

> There is no reason to suppose that, when the search warrant was issued on March 1, 1976, the authorities had probable cause to believe that any person found on the premises of the Aurora Tap Tavern, aside from [the bartender] would be violating the law. The search warrant complaint did not allege that the bar was frequented by persons illegally purchasing drugs. It did not state that the informant had ever seen a patron of the tavern purchase drugs from [the bartender] or from any other person. Nowhere, in fact, did the complaint even mention the patrons of the Aurora Tap Tavern.

Ybarra, 444 U.S. at 90 (footnote omitted).

as a resident.[142] The court reasoned that although the Fourth Amendment protects the legitimate privacy expectations of persons rather than places,[143] "[i]t is equally true that crimes are committed by persons, not places."[144] Therefore, the court concluded, a warrant for the search of a residence that is based on probable cause information that the occupant of the residence has committed a crime on the premises authorizes the search of the occupant's person.[145]

IV. ANALYSIS

Courts that allow law enforcement officers to search an individual with no justification other than the individual's presence on private premises contravene the principles established in *Ybarra*. These courts improperly apply a *Terry*-type balancing test to determine the reasonableness of searches of persons present during the execution of a warrant for the search of private premises.[146] As with any other search not within an established exception to the general requirement of probable cause, reviewing courts must make particularized probable cause an essential criterion of reasonableness for searches of private premises.[147] The alternative test of reasonableness, the balancing test, invariably compromises individual privacy rights in favor of promoting governmental interests.[148]

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142. *Beals*, 410 So. 2d at 748.

143. *See Katz*, 389 U.S. at 351 (cited in *Ybarra*, 444 U.S. at 91).

144. *Beals*, 410 So. 2d at 749.

145. *Id.*

146. The sliding scale approach used by *Thurman* and *Guy*, discussed *supra* notes 117-35 and accompanying text, exemplifies this improper bypassing of the probable cause requirement.

147. *See supra* notes 9-17 and accompanying text. The traditional probable cause approach used in *Broadnax* and *Lippert*, discussed *supra* notes 103-116 and accompanying text, best evaluates the reasonableness of police action. One observer has noted that under *Terry*, individuals might threaten officers' safety merely because of their presence in a certain group or at a certain location. Thomas A. Kiriakos, Comment, *Fourth Amendment Rights of Persons Present When a Search Warrant is Executed:* Ybarra v. Illinois, 66 IOWA L. REV. 453, 461 (1981). Kiriakos disagrees with the *Ybarra* dissent's position, discussed *supra* notes 68-75 and accompanying text, that a presumptive threat existed in *Ybarra* merely because Ybarra was present in a location where controlled substances had been sold. *Id.* at 461-62. Kiriakos argues that no such presumption existed in *Ybarra* because: (1) the bartender was only suspected of participating in a minor drug deal; (2) the search of the tavern took place during the day; and (3) the warrant did not indicate that the bartender or customers would be armed or that the customers would be hostile to law enforcement officers. *Id.*

148. One commentator has stated that the Court's broad reasonableness standard and "ill-defined" balancing test set forth in *Camara* and *Terry* have "significantly undermined the role of probable cause and set the stage for the long-term expansion of the reasonableness balancing test without proper justification or limits." Sundby, *supra* note 27,

Since the introduction of the sliding scale in *Camara* and its expansion in *Terry*, the Court has frequently measured Fourth Amendment reasonableness with a sliding scale instead of the traditional probable cause test.[149] Yet this trend does not entitle lower courts to abandon probable cause—a constitutionally expressed and traditional reasonableness criterion[150]—in favor of applying their own balancing test of reasonableness to searches of persons present during execution of private premises search warrants.[151]

Arguably, a balancing test might better account for the threat to officer safety posed by private premises searches, which may be greater than that posed by the public premises search in *Ybarra*. Still, the fact remains that the *Ybarra* Court, when reviewing a search of a person whose only link to premises targeted by a warrant was his mere presence, refused to forego the probable cause requirement in favor of a balancing test.[152] If probable cause is the standard by which the reasonableness of *Ybarra* searches must be measured, probable cause should similarly be the standard by which the reasonableness of searches of persons present on private premises should be measured, regardless of the relative weight of the governmental interest involved. In sum, despite the Court's now-pervasive use of the sliding scale approach to assessing search reasonableness,[153] *Ybarra* remains a strong example of the limits on using that approach to evaluate searches purportedly justified by a person's mere presence at the scene of a premises search.[154]

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at 385. According to Sundby, "the definition of a reasonable search or seizure should be sufficiently stringent to preclude the temptation to undervalue privacy rights in comparison to important government objectives." *Id.*

149. For a list of post-*Terry* cases using the sliding scale approach, see *supra* note 46.

150. *See supra* part II.A.

151. Using a balancing test to determine reasonableness presents serious problems. First, it ignores the Fourth Amendment's second clause, which requires warrants based on probable cause. Second, it produces uncertainty by removing warrant and probable cause requirements as limits on police activity. Finally, it forces the Court to evaluate each government intrusion on an ad hoc basis. Sundby, *supra* note 27, at 417. The sliding scale approach "ultimately threatens privacy protections by taking away the amendment's sole restraint on the Court's definition of reasonableness—a warrant based on probable cause." *Id.* If not restrained, this approach thus risks becoming "one immense Rorschach blot." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393 (1974).

152. *Ybarra*, 444 U.S. at 94-96.

153. *See supra* note 46.

154. Recall the *Ybarra* Court's admonition that "[t]he 'long-prevailing' constitutional standard of probable cause embodies 'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforc-

As for protective frisks during private premises searches, allowing them without individualized suspicion improperly extends the principles established in *Terry*.[155] As the *Ybarra* Court firmly stated, *Terry* does not allow a search for weapons without a reasonable suspicion that the specific person to be frisked is armed and dangerous—even when police encounter the person during an authorized premises search for narcotics.[156] Consequently, courts may not justify protective searches of individuals on private premises based on threats perceived to be inherent in investigations of drug trafficking or other crimes typically perpetrated by violent people.[157]

Nor should any exception to the general rule requiring particularized probable cause be made for searches of individuals who occupy premises searched under warrant. *Summers* merely provides that an occupant may be detained during the execution of a warrant for the search of the premises; it specifically does not address whether such a warrant also authorizes searching the person of the occupant or any other individual present on the premises.[158] Indeed, the *Summers* Court explicitly distinguished between the seizure issue before it and the search issue raised in *Ybarra*. This distinction indicates that *Ybarra*'s requirement of individualized probable cause must still be satisfied where an officer would search a private premises occupant, even though such probable cause need not be demonstrated for a

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ing the law in the community's protection.'" *Ybarra*, 444 U.S. at 95-96 (citing *Dunaway*, 442 U.S. at 208 (quoting *Brinegar*, 338 U.S. at 176)).

155. *See, e.g.*, *Thurman*, 257 Cal. Rptr. 517 (1989); *Guy*, 492 N.W.2d 311 (Wis. 1992). Dissenting in *Guy*, Wisconsin Supreme Court Chief Justice Heffernan stated:

> I do not dismiss the dangers confronting our cities' police officers. I cannot, however, accept the majority's willingness to attribute the incidents of violence surrounding drug transactions generally to all non-suspect individuals who are present at a drug raid. Despite Wisconsin's neighborhoods' increasing entanglement in the country's drug trade, this court must remain resolute in protecting against these "severe . . . intrusion[s] upon cherished personal security . . . ."

Guy, 492 N.W.2d at 320 (Heffernan, C. J., dissenting) (quoting *Terry*, 392 U.S. at 24-25).

156. *Ybarra*, 444 U.S. at 93-94. The Court stated: "The 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." *Id.* at 94.

157. *See, e.g.*, *Broadnax*, 654 P.2d at 101 (stating that "[m]erely associating with a person suspected of criminal activity does not strip away the protections of the fourth amendment to the United States Constitution"). For a contrary view, see *supra* note 128.

158. *Summers*, 452 U.S. at 695. The *Summers* Court stated that if the detention was permissible, "there is no need to reach the question whether a search warrant for premises includes the right to search persons found there, because when the police searched respondent, they had probable cause to arrest him and had done so." *Id.*

seizure of the occupant.[159]

Granted, as a practical matter, probable cause for searching an occupant may often arise during the course of executing a warrant for the search of the occupant's residence. Nonetheless, courts must be careful not to substitute the probable cause supporting the warrant to search the premises for the independent probable cause needed to extend the search to the occupant. To illustrate, the *Beals* court may have been ultimately correct in deeming the search of that occupant lawful—the officers had probable cause to believe the occupant had participated in a drug sale on the premises searched.[160] Properly reasoned, however, the court's ruling would have justified the search of the occupant's person on a ground independent of the warrant authorizing the search of the occupant's premises.[161]

V. PROPOSAL

The search of any person present during the execution of a search warrant in a private residence should be held to the standards established in *Ybarra*. An individual would thus be subject to search only upon circumstances that arouse a reasonable and articulable suspicion that the individual is armed and dangerous, or that establish traditional probable cause. Individuals should not be subject to search merely because they happen to be present where police are executing a warrant to search a private residence.

Applying *Ybarra's* strictures to private premises searches will still allow law enforcement officers to safely execute search warrants. First, pursuant to *Terry*, officers may conduct a protective search for weapons if they possess a reasonable belief that an individual to be searched is armed and dangerous.[162] Second, under *Summers*, officers may detain under guard an occupant of the residence searched.[163]

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159. *See Summers*, 452 U.S. at 695 n.4. The *Broadnax* court stated that this *Summers* footnote "suggests that while occupants of private residences may be 'seized' while a proper search of the premises is conducted, any search of those occupants or others on the premises must meet the standards of *Ybarra*." *Broadnax*, 654 P.2d at 103.

160. *Beals*, 410 So. 2d at 748-49. *See supra* notes 138-45 and accompanying text.

161. As the *Ybarra* Court stated, the probable cause requirement "cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be." *Ybarra*, 444 U.S. at 91. *But see* 2 LAFAVE, *supra* note 11, § 4.9(e) at 306:

> [W]hen the Court in *Summers* says that the "risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation," it reflects a clearer understanding of the need for self-protection than was manifested in the earlier case of *Ybarra v. Illinois*.

162. *See supra* notes 28-46 and accompanying text.

163. *See supra* notes 77-94 and accompanying text.

If the officers discover evidence linking the occupant to criminal activity, they may at that time arrest the occupant and perform a search of his or her person incident to the arrest.[164] Finally, officers may choose to remove any visitors from the premises during the search.[165] Taken together, these measures will foster safe and constitutional searches.

In addition to ensuring safety, the limits proposed here will not unduly frustrate law enforcement officers in their search for evidence. To be sure, denying officers broad authority to search may ultimately prevent them from discovering evidence which they may otherwise find. Yet even where they impede law enforcement, the dictates of the Fourth Amendment, as embodied in *Ybarra*, must be honored.[166]

VI. CONCLUSION

Under *Ybarra*, law enforcement officers may not search individuals merely because they happen to be present in a public place, or a private one. Courts may not evade *Ybarra*'s requirements by substituting balancing tests for *Ybarra*'s requirement of reasonableness defined by probable cause. Nor may they circumvent the general probable cause requirement through an overly expansive reading of the narrow *Terry* or *Summers* exceptions. Despite the Supreme Court's growing use of the sliding scale test of reasonableness, for searches of individuals present on searched premises, Fourth Amendment protection must be preserved uniformly and without regard to the character of the place searched.

ANGELA S. OVERGAARD

164. *See supra* note 81.

165. *See* Kiriakos, *supra* note 147, at 472 (stating that officers could legitimately protect themselves by removing individuals from the place to be searched). Kiriakos also suggests the use of the exclusionary rule to prohibit the introduction of non-weapon evidence discovered during a *Terry* frisk. *Id.* at 464-65.

166. As Justice Stewart stated in his *Summers* dissent: "[T]he Fourth and Fourteenth Amendments impose significant restraints upon . . . traditional police activities, even though the police and the courts may find those restraints unreasonably inconvenient." *Summers*, 452 U.S. at 709 (Stewart, J., dissenting).