Pondering the Scope of Premises Search Warrants after Ybarra v. Illinois

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Pondering the Scope of Premises Search Warrants After *Ybarra v. Illinois*

The problem of isolating the person from the place in a premise search has always been vexing. The Supreme Court has rejected the notion that people are safe from searches only in certain “constitutionally protected areas,” and has advanced to the doctrine of “reasonable expectation of privacy.” Some cases have added a new twist to this theory by considering the expectation of privacy and probable cause to search in terms of a person’s relationship to the place being searched.

This Comment will attempt to analyze these cases in the framework provided by the United States Supreme Court in *Ybarra v. Illinois*. Although some of these cases appear to contradict *Ybarra*, their holdings are, in fact, consistent with it and serve to further define the permissible scope of searches. This Comment will suggest that a premises search warrant for a workplace includes within its scope the belongings of the people employed there.

I. INTRODUCTION

Historically, the law has accorded office searches and seizures varying treatment. This is due, in part, to a conflict between the idea that the workplace is less private than the home, so one’s expectation of privacy is less there than in the home, and the intuitive appeal of the argument that one’s fourth amendment rights apply at the

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* The student writer gratefully acknowledges the guidance and assistance provided by Professor Phillip L.B. Halpern.
2. *Id.* at 360 (Harlan, J., concurring).
3. The fourth amendment provides that:
   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 person or things to be seized.
   U.S. Const. amend. IV.
workplace as well as at the home. This is especially true where the searches have been conducted pursuant to premises search warrants.

In 1979, in *Ybarra v. Illinois*, the United States Supreme Court held that a search warrant authorizing a search of a bar's premises and the bartender's person did not permit the police to search the bar's patrons. This decision seemed to reinforce the argument advanced in *Katz v. United States* that "the Fourth Amendment protects people, not places." And yet, the scope of *Ybarra* remains unsettled.

In fact, with increasing law enforcement against economic or "white collar" crime, the place—especially the workplace—poses some significant problems. First, even small corporations typically have quite a few employees working for them. This creates an immediate problem because the authorities must exercise some control over these people to prevent disruption of the search and loss of evidence. Second, evidence of white collar crime can often be concealed easily. Papers, cassette tapes, or computer records containing evidence of crime can easily be pocketed or put in someone's purse or briefcase, thus thwarting the search if that person is not named in the warrant. Moreover, it is not easy to predict who, within the corporation, actually has the evidence. Depending on the crime, any number of people—from the highest executive to any lower level employee—may exercise some control over the relevant documents. In these cases it is often impossible to identify initially any one person against whom the government can assert a "particularized" probable cause. Therefore, it would be unrealistic to require the government to anticipate and name, in advance, all persons it wishes to search.

How far did the Court intend to go with *Ybarra*? Consider the following situation: Government authorities have obtained a warrant to search a corporation’s premises. They have probable cause to believe certain documents providing evidence of fraud are on the premises. Once the authorities arrive on the premises, to what extent is their search limited by *Ybarra*? May they search an employee not named in the warrant? If so, may the search include the employee's briefcase? A pat down of the employee's person?

A literal interpretation of *Ybarra* would mean the government may only search those persons named in the warrant. Such a ruling, however, would severely restrict white collar investigations, and does not consider the practicalities of conducting a corporate search. Re-

5. Id.
7. Id. at 351.
recent decisions in lower courts, particularly in the Ninth Circuit, seem to indicate that *Ybarra* may not have the expansive influence previously believed. Should *Ybarra* stand as a precedential model for the permissible corporate search, or should it be limited to its facts?

This Comment will analyze the permissible scope of searches in two respects: first, the conditions under which a premises search warrant rightfully authorizes the search of persons present on the premises; and second, the extent to which such a search may be conducted.

**II. BACKGROUND**

The Supreme Court has had relatively little difficulty in concluding fourth amendment rights apply at the workplace as well as at home. The problem is defining the extent of such rights. Logic and common sense advise that places of business do not afford the same degree of privacy that a home offers. "It is a fair generalization...that business and commercial premises are not as private as residential premises, and that consequently there are various police procedures which may be directed at such premises without the police conduct constituting a Fourth Amendment search." This notion that a person's fourth amendment rights relate to the locality eventually led to several key Supreme Court decisions attempting to clarify the idea.

A. Warrantless Searches

The 1967 decision in *Katz v. United States* led to more expansive fourth amendment protections for the individual, regardless of where he was located. The Court held that the "Fourth Amendment protects people, not places." This pronouncement was, in effect, a double-edged sword—what a person sought to keep private should
remain so under the protection of the fourth amendment, yet what
that person exposed to the public would not be protected even if in
his home.\textsuperscript{14} Thus, fourth amendment rights came to depend on the
more subjective test of a person's expectation of privacy, and not
merely upon that person's location.\textsuperscript{15}

One year later, the Court had the opportunity to squarely address
the issue of privacy in the workplace. In \textit{Mancusi v. DeForte},\textsuperscript{16}
the Supreme Court ruled that a union employee had standing to object
to the seizure of records belonging to the union, and that the war-
rantless search of his office was unconstitutional. In \textit{Mancusi}, the
respondent, Mr. DeForte, was the vice president of Teamsters Union
Local 266. He was indicted on charges of conspiracy, coercion, and
extortion for using his office to compel owners of juke boxes to pay
"tribute."\textsuperscript{17} Before the indictment was returned, the state issued a
subpoena duces tecum to the union office to produce certain books
and records. Respondent DeForte refused to comply. The state offi-
cials then searched his office, which he shared with other union offi-
cials, and seized the records. The search and seizure were conducted
without a warrant and over respondent's protest.\textsuperscript{18}

The Court, citing \textit{Katz}, held that respondent DeForte's right to
assert the protection of the fourth amendment did not depend upon
property rights;\textsuperscript{19} rather, it depended on whether the area searched
was one in which respondent maintained a reasonable expectation of
privacy.\textsuperscript{20} The only question left for the Court was whether the
search was reasonable. The Court noted that, with few exceptions, a
nonconsensual search of private property is per se unreasonable un-
less authorized by a search warrant.\textsuperscript{21} Since there was no valid
search warrant, the Court found the search unreasonable.\textsuperscript{22}

\begin{itemize}
\item \textsuperscript{14} Id.
\item \textsuperscript{15} See infra note 23.
\item \textsuperscript{16} 392 U.S. 364 (1968).
\item \textsuperscript{17} Id. at 365 (here, "tribute" appears to be a euphemism for kickback).
\item \textsuperscript{18} Id.
\item \textsuperscript{19} In its decision, the Court held that "the word 'houses,' as it appears in the

\item \textsuperscript{20} In this respect, the Court did not find it dispositive

\item \textsuperscript{21} See Camara v. Municipal Court, 387 U.S. 523, 539 (1967) (no warrant re-

\item \textsuperscript{22} In this case, the subpoena did not qualify as a valid search warrant because it

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Although not entirely subjective, the decision in Mancusi served to reinforce the already inclusive standard of fourth amendment protection announced in Katz. Interestingly, in spite of the Court’s proclamation that “[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures,” the determination of whether a person has a reasonable expectation of privacy is by necessity framed in the context of the person’s location. The Court’s language in these cases is strong, but it is important to consider that in neither case were the police acting under the authority of a valid search warrant.

B. Warrant Searches

After the Supreme Court holdings in Katz and Mancusi, lower courts seemed to have trouble determining the permissible scope of search warrants. In 1973 the First Circuit Court of Appeals decided United States v. Micheli. In Micheli, the court upheld a warrant and admitted the evidence obtained by searching the appellant under its authority, even though the warrant did not name him. The court admitted the evidence on the basis of the appellant’s relationship to the place being searched.

In that case, the appellant and his brother co-owned the Hillside Press, a business suspected of counterfeiting Federal Reserve Notes. The United States Secret Service obtained a warrant to search the office of the Hillside Press and a warrant to arrest the appellant’s brother. One-half hour after observing the appellant enter the premises with a brown briefcase, the agents arrested the appellant’s brother and searched the premises. During the search, the agents discovered the brown briefcase under a table. On finding counterfeit notes inside the briefcase, the agents arrested the appellant. At trial, the appellant attempted to suppress the notes by claiming the agents knew the briefcase was his personal property, and therefore it fell

was issued by the District Attorney, thus failing to meet the requirement that a search warrant be issued by a neutral magistrate. Mancusi, 392 U.S. at 371.

23. Fourth amendment protection depends on whether the area being searched is one in which there is a reasonable expectation of privacy. Id. at 368. (A “reasonable expectation” is objective in that it must be an expectation that a reasonable person could assert, and not simply any expectation of privacy claimed by the defendant. Nevertheless, it is still a more subjective test than one that addresses only the physical fact of location.)


25. A warrantless search attracts much closer scrutiny because it is unreasonable per se. See supra notes 19-22 and accompanying text.

26. 487 F.2d 429 (1st Cir. 1973).

27. Id.
outside the permissible scope of the premises search the warrant authorized. The district court denied the appellant’s motion to suppress.

In permitting the personal belongings of an individual not named in the warrant to be searched, the First Circuit stated: “[i]n so doing, we do not mean to suggest that anything found on the premises would necessarily fall within the scope of a warrant to search the premises. Nor would we imply that the result would be different if . . . appellant was physically holding the briefcase.” The court went on to suggest, however, that had the appellant been a doctor on call, and had the agents known the briefcase belonged to him, the result would have been different. The court acknowledged that a warrant to search premises does not permit a personal search of one who “merely happens to be present at the time,” but proceeded to formulate a method of distinguishing between the two situations. The court rejected the approach of some other jurisdictions, immunizing any item in an individual’s possession from search, as being too narrow in scope. “The Fourth Amendment’s basic interest in protecting privacy and avoiding unreasonable governmental intrusions is hardly furthered by making its applicability hinge upon whether the individual happens to be holding or wearing his personal belongings after he chances into a place where a search is underway.” Instead, the court based the search’s validity on the relationship between the person and the place searched.

Under this formulation, whatever is found on the premises is no longer assumed to be “fair game.” The court must examine why a person’s belongings are there. Although the court admitted that this blurred rather than focused the rule, it did decide a search of a person’s clothing currently worn was “plainly within the ambit of a personal search and outside the scope of a warrant to search the premises.”

The court’s rationale was based not on the appellant’s briefcase being out of his reach at the time of the search, but on appellant being the co-owner of the business. Searches of personal effects were to be evaluated against the reasonable expectation of privacy

28. Id. at 430.
29. Id.
30. Id. (emphasis added).
31. Id. at 431.
32. Id.
33. Id. (citations omitted).
34. Id. The Micheli court apparently declined to follow a rigid interpretation of Katz by recognizing that the place may have some bearing on one’s expectation of privacy.
35. Id. at 432.
36. Id. at 431.
37. And “not in the position of a mere visitor.” Id. at 432.
the person brought to the premises, rather than assigning significance to the premises themselves. The appellant's relationship to the premises meant it was reasonable to expect some of his personal belongings would be there.\(^{38}\) The court concluded "the showing of probable cause and necessity which was required prior to the initial intrusion into his office reasonably comprehended within its scope those personal articles, such as his briefcase, which might be lying about the office."\(^{39}\)

This particular approach was not adopted universally. For example, three years after *Micheli*, the Court of Appeals for the District of Columbia decided *United States v. Branch*.\(^{40}\) *Branch* involved a narcotics arrest in which the police, acting under a warrant authorizing the daytime search of appellant Branch's apartment, discovered quantities of cocaine and marijuana. Later that evening, while the police were still searching, appellant Garrison arrived carrying a shoulder bag. Although there was conflicting testimony as to whether Garrison set the bag down or kept it in his possession, the police searched the bag and discovered narcotics. Both appellants were indicted for, and convicted of, possession with intent to distribute. Both parties appealed the trial court's denial of their suppression motions.\(^{41}\)

The appellate court reversed the trial court.\(^{42}\) In discussing the scope of the premises warrant, the court relied on two cases in which exclusion of the evidence depended on whether the item searched was in the physical possession of the defendant at the time of the search.\(^{43}\) While it did not expressly reject *Micheli*, it adopted the holdings of the two cases stating: "while such personal items as the shoulder bag under consideration may, in some circumstances, be found to be within the ambit of a premises search warrant, we are persuaded otherwise."\(^{44}\) In spite of this language, the court went on,

\[\text{References:}\]

38. *Id.*
39. *Id.*
40. 545 F.2d 177 (D.C. Cir. 1976).
41. *Id.* at 178-81.
42. *Id.* at 186.
43. See *Walker v. United States*, 327 F.2d 597 (D.C. Cir. 1963) (search of a wallet and paper bag in defendant's hands held to be within the scope of a premises search warrant); *United States v. Teller*, 397 F.2d 494 (7th Cir.) (search of a woman's purse during a premises search upheld because the purse was found laying on a bed and was not in the woman's possession), *cert. denied*, 393 U.S. 937 (1968).
44. *Branch*, 545 F.2d at 182 (emphasis added) (the court's reference is to the holding in *United States v. Johnson*, 475 F.2d 977 (D.C. Cir. 1973), in which the search of a woman's purse, laying on the table in front of her, was held not to be a search of her person).
using the very rationale it implied it was rejecting, to find that appel-

lant Garrison was “apparently a mere visitor; his relationship to the

premises was not known, but was at best the subject of specula-
tion.” The court concluded that under any test, the search of appel-
lant Garrison’s shoulder bag was not authorized by the warrant.46

Micheli and Branch are representative of the inconsistent treat-

ment given to the permissible scope of premises search warrants. 

Courts had moved from “constitutionally protected areas,” before 

Katz, to “reasonable expectations of privacy.” When, and to what 

extent, an individual present at the scene of a premises search could 

be personally searched remained to be decided by the United States 

Supreme Court.

III. YBARRA V. ILLINOIS

A. Facts

In Ybarra v. Illinois 47 the Supreme Court acted to further refine 
the doctrine of personal expectation of privacy established in 
Katz. Illinois investigators, acting on an informant’s tip that drugs were 
being sold at the Aurora Tap Tavern, obtained a warrant to search 
the premises and the person of the bartender. The warrant author-
ized the police to search for evidence of possession of heroin and 
other narcotics. On entering the bar, the officers announced their in-
tent to search the patrons for weapons and proceeded to pat down 
each of the customers. The officer who searched appellant Ybarra 
felt what he thought was “a cigarette pack with objects in it,” but he 
did not remove it until he later returned to Ybarra. During the sec-
ond frisk the officer removed the cigarette pack, finding six tinfoil 
packets inside which contained heroin. Ybarra was later indicted for 
possession of a controlled substance.48

In response to Ybarra’s suppression motion, the state relied on a 
statute 49 providing for such searches to “prevent the disposal or con-
cealment of [the] things particularly described in the warrant.”50 
The trial court denied Ybarra’s motion. On appeal, the appellate 
court found the statute was not unconstitutional, interpreting it to

45. Id.
46. Id.
48. Id. at 87-89.
49. ILL. ANN. STAT. ch. 38, para. 108-09 (Smith-Hurd 1980) provides:
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.
50. Ybarra, 444 U.S. at 89.
authorize searches of persons found at the bar only if there was some relationship between the person and the bar. The appellate court affirmed Ybarra's conviction because he was connected to the bar, and not a mere stranger.

B. The Majority Opinion

For its part, the Supreme Court framed Ybarra in the context of probable cause—or rather the lack thereof. The majority began its decision by noting that when the warrant issued, the police had no reason to suspect Ybarra was breaking the law. Furthermore, the Court stated, "[h]ad the issuing judge intended that the warrant would or could authorize a search of every person found within the tavern, he would hardly have specifically authorized the search of [the bartender] alone." The Court also explained that Ybarra did nothing during the search to give the police reason to suspect him. His only "crime," in the eyes of the Court, was happening to be present in the bar during the search. The majority made clear that this was not sufficient reason to search him: "[A] person's mere proximity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. . . . Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person."

True to form, the Court did not discuss constitutionally protected areas, but referred, instead, to the patrons as being "clothed with constitutional protection against an unreasonable search or an unreasonable seizure." While it was evident that this protection could not be stripped away simply because the person was present at a place of suspected criminal activity, the Court went on to state that the individualized protection required for the patrons "was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by [the bartender]."

Since the proprietor was not named in the warrant, it is unclear why

51. Id.
52. The appellate court found a connection in that the defendant was present in a one-room bar where drugs were being sold, and was not an "innocent stranger." Id. at 89-90.
53. Id. at 90.
54. Id. at 90 n.2.
55. Id. at 91 (emphasis added) (citation omitted).
56. Id.
57. Id. at 91-92 (emphasis added).
the Court would distinguish him from the customers in that case. One possible explanation is that the Court implicitly recognized that because the proprietor exercised some amount of control over the premises, he had less of a reasonable expectation of privacy during a warranted search of the bar than did the patrons. If this is so, the decision in *Ybarra* leaves room for further refinement.

C. Justice Rehnquist’s Dissent

Because the particular crime involved narcotics, the focus of the majority and of the dissent was on the requirement of probable cause and on searches authorized by the Supreme Court’s holding in *Terry v. Ohio*. The majority limited the *Terry* exception, finding that “*n*othing in *Terry* can be understood to allow a generalized ‘ cursory search for weapons’ or, indeed, any search whatever for anything but weapons.” The dissent was not convinced that *Terry* should be so narrowly construed.

Rehnquist said the true question was not whether the police are entitled to conduct reasonable searches without a warrant, but “whether and under what circumstances the police may search a person present at the place named in the warrant.” He allowed that some searches—such as those expanding beyond the limits of the warrant—were per se unreasonable. *Ybarra*, he claimed, did not fall into this category because the fourth amendment does not require that the warrant specify the persons to be searched, only the places to be searched and what is to be seized. He noted the practi-
cal problems posed by requiring the police to specify all persons to be searched in advance, and a particular problem with the majority rule in *Ybarra*: it would permit "a person to frustrate the search simply by placing the contraband in his pocket."  

Rehnquist argued that, under some circumstances, authority to search premises must include authority to search persons present therein. He cited precedent that attempted to resolve the issue by requiring the person searched have a "connection" with the premises, but noted that these and other attempts were somewhat lacking in precision. According to Justice Rehnquist, the "Court need look no further than the first clause of [the Fourth] Amendment and need ask no question other than whether, under all the circumstances, the actions of the police in executing the warrant were reasonable."  

Justice Rehnquist thought the reasonableness test under a valid warrant was different than that for warrantless searches. In cases where the warrant requirement is satisfied, Rehnquist thought the search should not be judged against the "jealously drawn exceptions to that requirement." He stated that the majority's decision threatened to restore the rigidity the Court previously rejected in *Terry*. In addition, he thought the majority's opinion would make the search warrant moot since, if the police had probable cause to believe the third parties possessed narcotics, they would need no warrant to conduct a body search. They could simply arrest that person and conduct the search incident to the arrest.  

Rehnquist concluded that the officer in *Ybarra* acted properly because he was acting under the authority of a valid search warrant issued by a neutral magistrate. In his opinion, which seems to diverge from the holding in *Katz*, the premises warrant need only describe the place to be searched. Anyone present at the place would then be subject to the search.

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68. *Ybarra*, 444 U.S. at 103 (Rehnquist, J., dissenting).
69. Id. at 104.
70. Id.
71. Id. at 105.
72. That is, moot as to the analysis of the permissibility of searching third parties present. Of course, the warrant would still be required to authorize the search of the physical premises.
73. *Ybarra*, 444 U.S. at 104 (Rehnquist, J., dissenting).
74. A more moderate view, previously articulated for the United States government by Asst. U.S. Attorney Phillip L. B. Halpern, is that one's relationship to the premises can supply individualized probable cause.
D. Analysis of Ybarra

Ybarra now stands for the premise that police may not conduct personal searches of the patrons of a business establishment unless they can demonstrate a "particularized" probable cause to search each patron. The decision was based on the patrons being mere visitors. Accordingly, the police had no basis for suspicion other than the patron's presence at a bar suspected of drug activity.75 A person's mere presence at the scene of a premises search does not, by itself, provide a sufficient basis to establish probable cause; therefore the search was unreasonable. The visitors to a business establishment have a reasonable expectation of privacy. This expectation of privacy was breached when the police frisked the visitors.

Actually, Ybarra provides no clear guidelines after all. The facts in that case were extreme: the police conducted pat down searches of people who, as far as the police knew, were simply visiting a bar. Thus Ybarra did not address whether the police could have searched the briefcases or purses of the patrons, even if they were not permitted to search the patrons themselves,76 or whether the police would have been entitled to search someone who was more than a casual visitor—such as an employee not named in the warrant.

Not surprisingly, lower courts still disagree about the permissible scope of premises search warrants. Some focus on the relationship between the person searched and the place for which the warrant was issued. Others look to whether the item searched was in the possession of the defendant.

IV. Scope of Premises Searches After Ybarra

A. Persons Subject to Business Searches

1. Visitors

No cases involving business visitors have come after Ybarra. However, it is clear that visitors to residences are accorded Ybarra protection. In United States v. Neet,77 a federal district court for Colorado upheld the search of one visitor to a house suspected of harboring drug activity, yet disallowed the search of another visitor present at the same house during the same search.78 In Neet, local police and United States Drug Enforcement Agency (DEA) agents

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75. Ybarra, 444 U.S. at 90-92.
76. Although, given the decision in Ybarra, there is no reason to suspect the police would be entitled to do so, since such a search would still amount to an invasion of the customer's privacy.
77. 504 F. Supp. 1220 (D. Colo. 1981); see also United States v. Robertson, 833 F.2d 777 (9th Cir. 1987) (search of a visitor's backpack not justified by warrant to search the premises).
78. Neet, 504 F. Supp. at 1228.
arranged a buy from defendant Neet. Neet told the agents he was to meet later with his supplier to obtain additional cocaine. Some agents followed Neet to his supplier's home where they set up surveillance. Some time later, the agents observed defendant Van Omen enter the house carrying a briefcase. Approximately thirty minutes later, Neet left the residence. After another thirty minutes, the agents observed defendant Mary Miller enter the house. The agents then went to the front door and identified themselves. At this point they saw Van Omen nod his head toward a door which then closed. The agents entered the premises to prevent destruction of the evidence. During this time the agents requested and received a search warrant authorizing a search of the premises and "all persons" located there. Once the warrant was obtained, the agents conducted a search of the premises, eventually discovering narcotics in Miller's purse and large amounts of money in Van Omen's briefcase.79

Among the issues presented to the district court was whether the evidence seized from the briefcase and the purse should be admitted. The court found that the warrant was overbroad because it authorized the search of all persons on the premises, when the officer's affidavit related only to white males. Thus, the affidavit did not give the issuing judge probable cause to permit a search of Miller, a female.80 For this reason, the court had to look to the scope of that part of the warrant permitting a search of the premises.

In analyzing the scope of a premises warrant, the court acknowledged the prior decisions in Walker and Teller, but relied primarily on the rationale set forth in Micheli.81 The court noted that neither the briefcase nor the purse were in the possession of their owners, but also indicated that "mere physical possession is not the sole criterion which should determine whether a personal item may be searched pursuant to a premises search warrant."82 In addition, the court intimated that "there may be situations where a 'mere visitor' may find his or her personal belongings subjected to a search of the premises despite the fact that he or she has a legitimate expectation of privacy in those belongings. . . ."83

Having laid this framework, however, the court proceeded to distinguish between the evidence seized from the briefcase, and that

79. Id. at 1222-24.
80. Id. at 1226.
81. Id. at 1228.
82. Id.
83. Id.
seized from Miller's purse. The court concluded that Van Omen could not maintain a legitimate expectation of privacy for his briefcase because he was not a "mere visitor." The officers had seen him enter the house at a time when defendant Neet expected to receive cocaine for delivery. Van Omen was further tied to the transaction by his nod to the defendant attempting to destroy the evidence. Accordingly, the court found that the warrant to search the house "also reasonably encompassed a search of the briefcase carried into the house by the defendant Van Omen." 84

Miller, though, stood on different ground. The court stated that in her case, the police had no way of knowing who she was or what relationship, if any, she bore to the premises. Miller did not arrive at the house when defendant Neet was present; therefore there was no "inference . . . that she could be involved as a courier." 85 This lack of relationship meant the search of her purse was without authority. 86

For defendant Miller, the analysis is much the same as in Ybarra. The police had no probable cause to suspect her of being involved in the narcotics transaction, therefore any search of her, or her purse, would be unreasonable. As a "mere visitor," she was entitled to a reasonable expectation of privacy. Her privacy was then breached when the police searched her purse. 87

It is worth noting the court began its analysis in terms of probable cause, and concluded by examining the relationship between the person and the premises. When one party, Van Omen, had an identifiable relationship to the premises searched, the permissible scope of the warrant encompassed him; but when the other party had no such relationship, she was outside the permissible scope of the warrant. Since the scope of a warrant is necessarily determined by probable cause, a natural inference is that probable cause is logically connected to a person's relationship to the place being searched. Furthermore, the analysis in this case implies that, for the purposes of probable cause based on that relationship, the relationship must be one identifiable by the police at the time of the search.

84. Id.
85. Id.
86. Id. at 1228, 1229.
87. Defendant Van Omen was treated differently because the court found he was related to the drug transaction by virtue of the timing of his arrival and his subsequent actions while in the residence. This relationship to the premises served to extend the probable cause to encompass Van Omen and his briefcase. Accordingly, Van Omen's expectation of privacy was not an issue.
2. Owners of a Business

*Ybarra* represented one extreme: a search of persons visiting a bar and having no apparent relation to the bar other than patronage. Other decisions, based on *Micheli*, have permitted searches when the scene of the search has been the workplace.88

Most recently, in *United States v. McLaughlin*,89 the Court of Appeals for the Ninth Circuit held that the permissible scope of a premises search warrant encompassed the briefcase of the co-owner of the business for which the warrant was issued.90 In that case, police obtained warrants to search McLaughlin’s apartment and Bathcrest, a business owned by McLaughlin and his friend, Bernauer. While searching Bathcrest, the police found cocaine in Bernauer’s briefcase. After indictment for possession of narcotics, both appellants moved to suppress the evidence discovered during the search on the grounds of lack of probable cause, and the search of Bernauer’s briefcase exceeded the permissible scope of the premises warrant. The trial court denied these motions, and convicted both appellants.91

In his appeal, appellant Bernauer relied on *Ybarra*, arguing, in effect, that his mere proximity to McLaughlin did not give rise to probable cause. The Ninth Circuit rejected this argument, relying on *Micheli*.92 The court distinguished *Ybarra*, stating “‘[c]o-owners have control over premises not available to patrons, and their relationship to the location is more predictable and permanent.’”93

The appellants then attempted to distinguish their situation from that in *Micheli* by noting that the business in *Micheli* was believed to be a criminal enterprise, where in their case the business was legitimate. The court rejected this distinction, stating that the warrant was issued on the assumption that evidence of criminal activity would be found at Bathcrest, and since “Bernauer was co-owner of Bathcrest and had control over the location, the entire location was subject to search even though police had no probable cause to sus-

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88. See Chester v. State, 162 Ga. App. 10, 290 S.E.2d 117 (1982) (warrant for premises included suitcase located in the defendant’s office, even though the defendant was not named in the warrant).
89. 851 F.2d 283 (9th Cir. 1988).
90. *Id*.
91. *Id*. at 284.
92. *Id*. at 287.
93. The court added, however, that “*Micheli* need not extend to guests. Its rule seems reasonably applicable to owners.” *Id*. 675
pect Bernauer.  

Here, the police had no probable cause at the outset to name Bernauer in the warrant. However, because he was a co-owner of Bathcrest, Bernauer’s expectation of privacy apparently was less than that of a visitor. The relationship, in effect, imputed the probable cause needed to search Bernauer’s briefcase. Once the court found the necessary probable cause existed, the search of the briefcase no longer constituted an unreasonable infringement of Bernauer’s privacy.

The result of this case represents, perhaps, the farthest departure yet from Ybarra, which was thought to be a limiting decision. However, the two cases can be reconciled if one examines them in the context of probable cause being a function of the relationship between the person and the place searched.

3. Analysis—Who can be Searched?

As has been demonstrated, case law is neither clear nor consistent in this area. Furthermore, while it addresses the extreme situations of visitors and owners, there are no cases directly addressing employee searches pursuant to a premises search warrant.  

Still, some determination can be made as to whether a valid search warrant authorizing the search of corporate premises encompasses the search of its employees, and, if so, to what extent.

The idea articulated in Micheli was that a person’s expectation of privacy depends not on where he is—a theory rejected by Katz—but on his or her relationship to that place. In the words of the court: “A visitor in a private home stands in a different position from an habitué of a ‘shooting gallery.’”

The Supreme Court implicitly acknowledged this in Ybarra when it framed its ruling in terms of the appellant’s lack of relation to the bar. The warrant did not mention the patrons of the bar; therefore the police had no probable cause to search the patrons. The Court required something more than mere presence to establish probable

94. Id.; see also United States v. Miller, 753 F.2d 1475 (9th Cir. 1985) (warrant to search entire premises not overbroad because the entire premises were suspect and the defendant exercised dominion and control over the entire premises).

95. Although one Ninth Circuit decision upheld the search of an office and employees, the decision was strictly limited to whether the search was void in its entirety, and not whether the search of the employees was valid. See United States v. Offices Known as 50 State Distrib. Co., 708 F.2d 1371 (9th Cir. 1983), cert. denied, 465 U.S. 1021 (1984).

96. United States v. Micheli, 487 F.2d 429, 432 (1st Cir. 1973). A possible unstated rationale behind this statement is that although the place is not a controlling factor in assessing the expectation of privacy, it is a factor nonetheless. This is consistent with the court’s “relationship” test, because in order to ascribe some meaning to a person’s relationship to a place, there must first be some significance to the place itself.

97. Ybarra, 444 U.S. at 90.
cause to search.\textsuperscript{98} However, while the Court noted “a warrant to search a place cannot \textit{normally} be construed to authorize a search of each individual in that place,” it did not rule out the possibility of a search of unnamed persons based on probable cause to believe that “persons who will be in the place at the time of the search will be in possession of illegal drugs.”\textsuperscript{99} Furthermore, it must be remembered that \textit{Ybarra} involved the personal search of someone who was no more than a visitor to a bar.

Nor has the relationship test lost any of its vitality after \textit{Ybarra}. The holdings in \textit{Neet}, and most recently in \textit{McLaughlin}, are evidence that courts since \textit{Micheli} continue to examine the individual’s relationship to the premises. The next question, then, is this: Assuming one’s relationship to the premises searched may determine one’s expectation of privacy, how close a relationship would be required to impute probable cause?

\textit{Ybarra} served to set a lower limit: in order to be searched, one must be more than a mere visitor to the premises. Cases like \textit{Micheli} and \textit{McLaughlin} show probable cause may be imputed when the person being searched is the owner or co-owner of the business to be searched. The area in between, however, is undecided. As the \textit{Micheli} court commented, “[b]etween the extremities, no crisp formula can substitute for reasonable judgments.”\textsuperscript{100} Language found in \textit{McLaughlin} may prove useful in making reasonable judgments. In \textit{McLaughlin}, the court determined there are two factors to be examined. The first was the owner’s control over the premises. The second was that the owner’s relationship to the premises was more “predictable and permanent.”\textsuperscript{101}

Applying these rules to a corporate search, the question, according to \textit{McLaughlin}, would be whether an employee is closer to an owner or closer to a patron. While an employee has less control over the premises than an employer or an owner of the business, the employee could still be expected to exercise a greater degree of control over his or her workspace than a mere visitor.

As to the second factor, the employee’s relationship to the premises seems more “predictable and permanent” than a visitor’s. However, even here there is room for question. What, for example, about a temporary employee of the corporation, or an independent contrac-

\textsuperscript{98} \textit{Id.} at 91.
\textsuperscript{99} \textit{Id.} at 92 n.4. (emphasis added).
\textsuperscript{100} \textit{Micheli}, 487 F.2d at 432.
\textsuperscript{101} United States \textit{v. McLaughlin}, 851 F.2d 283, 287 (9th Cir. 1988).
tor? What guidelines are the police to follow in these cases? Although these situations would undoubtedly stretch the definition of "relationship," searches have been upheld on the basis of much more tenuous connections than these.

The court in Neet, for instance, was willing to uphold the search of Van Omen's briefcase because he was apparently connected with the drug deal. This was determined by virtue of the timing of Van Omen's arrival, and his nodding to a codefendant, signaling him to destroy the evidence. These facts alone were enough to show the police that Van Omen was not a "total stranger" to the premises.102 These facts alone were enough to show the police that Van Omen was not a "total stranger" to the premises.103

Under this standard, even temporary employees and independent contractors could be included within the search if they exercised some control over the areas being searched. Such a standard calls for discretion on the part of the police to be able to determine who, among those present at a search, is an employee; this is no different than the current requirement that the police be able to discern who are "mere visitors."104

The problem, of course, is that employees—even temporary employees—are entitled to be free from unreasonable invasions of their privacy in the workplace. This expectation must be balanced against the public's increasing interest in pursuing white collar crime. In order to effectively prosecute corporate offenders, the police must be able to search for evidence in those places where they have probable cause to believe it will be found. As previously mentioned, because the documents are not actually controlled by the "corporation," but by the individuals that comprise the corporation, it is possible that any number of employees may exercise control over the documents or records containing the evidence sought. Therefore, the search should not be barred because the police failed to anticipate who, among the employees, held the evidence. To the extent employees bear an identifiable relationship to the premises being searched, this relationship should serve as the "particularized" probable cause required by Ybarra. If so, searches of employees should not be considered unreasonable infringements on their expectations of privacy.

Thus, presuming police establish probable cause to believe evidence of a crime may be found on corporate premises, and further assuming they have reason to believe some of the employees are in possession of this evidence, a warrant for the search of the premises

103. Id. In another case, a federal court held that a premises search warrant authorized the search of defendants' pocketbooks and briefcase because they had spent "at least one night" at the premises being searched and were therefore "not mere passersby [sic]." United States v. Hilton, 469 F. Supp. 94, 111 (N.D. Me. 1979).
104. In fact, the use of employee rosters and pay records could serve both to facilitate the search and to protect the rights of any nonemployees present during the search, by clearly identifying the employees of the corporation.
should be found to encompass a search of the employees.

**B. Scope of Business Searches**

Assuming that we know who may be searched, the next question is: To what extent may the search be conducted? In any search, there are competing interests that define the limits of the search. Generally, a warrant issued by a neutral magistrate is the result of balancing these competing interests; the public's interest in prosecuting criminal conduct is weighed against the individual's interest in being free from intrusive searches. Thus, police must demonstrate they have probable cause to believe that evidence of criminal activity will be found at the premises. The warrant limits where the police may search and what may be seized. However, it is possible that even if the police are reasonable in where they search, the search may become unreasonable because of the manner in which it is conducted. Too aggressive a search will surely be unreasonable and therefore void.\(^1\)

1. **Pat Down Searches**

In *Terry v. Ohio*,\(^2\) the Supreme Court held that police are entitled to conduct a limited search of a person's outer clothing if they reasonably believe the person is armed and dangerous. This exception to the warrant requirement, however, was not easily extended. The Court found the governmental interest in preventing crime, combined with the more significant interest of protecting officers and others from immediate harm, outweighed the individual's interest in being free from intrusive searches. It stated, however, that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience."\(^3\) By such language, the Court made clear that personal searches of this nature require substantial justification. It is no wonder, then, the Court reacted the way it did in *Ybarra*, when the police could not show they had reason to believe the patrons were armed.

The search in *Ybarra* was clearly "personal." The police searched

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105. See *Rochin v. California*, 342 U.S. 165 (1952) (obtaining evidence by forcing the defendant to vomit violates the due process clause of the fourteenth amendment).
106. 392 U.S. 1 (1967).
107. *Id.* at 24, 25.
the pockets and clothing of each patron. Significantly, the *Micheli* court would probably have ruled in the same manner as the Supreme Court did in *Ybarra*. In examining the nature of a personal search, the court in *Micheli* carefully pointed out that "[a] search of clothing currently worn is plainly outside the scope of a warrant to search the premises."

This is consistent with *Ybarra*'s holding to the extent physical searches—pat downs or frisk searches—of third parties would not be authorized under a premises search warrant.

There is no authority, then, for the proposition that police may frisk or pat down persons pursuant to a premises search warrant. Because of the "severe" nature of a pat down search, *Terry* and *Ybarra* limit it to only those situations in which police have reason to believe the person being searched is armed. Therefore, in the context of a corporate search, police should not be entitled to pat down anyone present unless they have reason to believe that person is armed.

2. Personal Belongings

The question of searching personal belongings is not as clearly defined as the question of permissible pat down searches. Depending upon the jurisdiction, the validity of the search may turn on the type of belonging being searched; whether the belonging was in the physical possession of the owner at the time of the search; or whether the belonging was locked.

The type of belonging may become important during a corporate search because the police must still have probable cause to believe that the evidence may be found in that type of belonging. The question is one of intensity. Can the police search only those items in which the evidence would *probably* be found, or may they search those items in which the evidence *could* be found? In one case, for example, a court ruled against searching a woman's purse when police were looking for business records. The weight of authority, however, seems to support the proposition that police may search those containers in which the evidence *might* be found. In addition:  

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109. *See also* United States v. Sporlder, 635 F.2d 809 (10th Cir. 1980) (pat down search of defendant not authorized by premises search warrant).
110. It may be argued that such a limitation would allow someone to defeat the search merely by putting a document or computer disk inside her coat pocket. While this is no doubt true, it must be remembered that searches are limited by the judicial balance of the government's interests against those of the individual. Here, the balance tips in favor of the individual when the search intrudes upon her physical person.
112. For a summary of cases illustrating this proposition, see Burkoff, *Search Warrant Execution: Scope and Intensity*, 13 SEARCH & SEIZURE L. REP., Apr. 1986, at 25, 29.
tion, the Supreme Court has held that "a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found."\(^{113}\)

In a search for documents, it makes little sense to say police are authorized to intrude on an employee's privacy by searching his or her briefcase, but are not authorized to search the same employee's purse or athletic bag. Once the threshold question of probable cause has been resolved in favor of permitting the search, the police should be allowed to search any personal containers in which the document could be found.

Although some courts\(^ {114} \) still bar searches of belongings when they are in the physical possession of the owner, the better view has been expressed in *Micheli*. The validity of the search should not rest on whether a person's briefcase was on a desk or in the person's hand,\(^ {115} \) but on whether that person's reasonable expectation of privacy precluded a search at all. If there is no relationship to the premises, the belonging should not be searched at all, whether or not it was in the owner's immediate possession. On the other hand, if such a relationship does exist, the police can search the belonging.\(^ {116} \)

Finally, there is the question of belongings, such as briefcases, that may be locked during the time of the search. By locking a briefcase, the owner takes an extra step to ensure his or her privacy in the workplace. In doing so, that person is manifesting a higher expectation of privacy than in leaving the briefcase unlocked. The rationale in *Micheli* hints that the higher expectation of privacy displayed by keeping a container locked might be sufficient to defeat the premises search warrant. Closer examination, however, shows the *Micheli*

\[^{114}\text{The Robertson court, for example, ruled against a search both because the defendant was a visitor to the premises and because the search of the backpack—"a container so closely associated with one's person"—should have been supported by a warrant which satisfied the particularity requirement. United States v. Robertson, 833 F.2d 777, 784 (9th Cir. 1987).}\]
\[^{115}\text{Otherwise, the search could be defeated simply by taking the briefcase in hand.}\]
\[^{116}\text{In permitting the appellant's briefcase to be searched, the *Micheli* court reasoned that, because of the appellant's "special relationship" to the premises: [I]t could reasonably be expected that some of his personal belongings would be there. Thus the showing of probable cause and necessity which was required prior to the initial intrusion into his office reasonably comprehended within its scope those personal articles, such as his briefcase, which might be lying about the office. United States v. Micheli, 487 F.2d 429, 432 (1st Cir. 1973).}\]
court was addressing the privacy rights of a mere visitor rather than someone who belonged at the place being searched: "A different situation exists when a personal effect is so secreted that police could reasonably assume that the visitor did not harbor a normal expectation of privacy but, indeed, took extraordinary measures to insure that the effect would be hidden from view." 117

Post-Micheli case law supports the idea that a search authorized by warrant may authorize the opening of locked containers. 118 Once the individual's privacy interest has been overcome by the search warrant, the fact that the container is locked seems inconsequential. Indeed, if the search is to be conducted with any efficiency, this must be the rule. Giving the police the authority to search an employee's belongings would be meaningless if the authority could be defeated merely by locking the belonging. 119 Consequently, assuming the employee's relationship to the premises provides probable cause to search that employee's belongings, the permissible scope of the search should extend to the employee's locked belongings.

V. CONCLUSION

What, then, happened to Ybarra? The answer depends on how that case is construed. If, as some say, Ybarra held that people not named in a search warrant cannot be searched, 120 then there has been an identifiable contraction of that holding. On the other hand, if Ybarra is limited to its facts, subsequent decisions have not undermined it. 121

What happened is that, in an attempt to further refine the ruling in Katz, some courts adopted the Micheli test—that of the relation-

117. Id. at 432 n.2 (emphasis added). This also raises the question of whether the Micheli court would consider locking a briefcase an "extraordinary measure."

118. See, e.g., United States v. Gomez-Soto, 723 F.2d 649 (9th Cir.) (upholding a search in which police cut open defendant's locked briefcase), cert. denied, 466 U.S. 977 (1984); United States v. Morris, 647 F.2d 568 (5th Cir. 1981) (search warrant for home authorized opening of a locked jewelry case in which the items being sought might have been found); State v. Thisius, 281 N.W.2d 645 (Minn. 1978) (police executing a warrant to search a residence not required to obtain a second warrant to open a locked box that might have contained the items described in the warrant). But cf. State v. Starke, 81 Wis. 2d 399, 260 N.W.2d 739 (1978) (excessively broad search warrant did not permit search of defendant's locked file cabinet).

119. Here, unlike the hypothetical in which the employee attempts to evade the search by placing the document in his or her pocket, the physical act of locking a briefcase is likely to go undetected. If the employee were to take the document and hide it on his person, the physical act is more likely to be noticed and may, if seen by an officer, give rise to probable cause to search the employee.


121. The question is raised as to how the current Court would construe Ybarra.
ship of the person to the place being searched. This test is consistent with both *Katz* and *Ybarra*, and offers a great degree of flexibility in determining the validity of searches.

Under this test,122 if an individual has an identifiable relationship to the premises being searched, this relationship may supply the probable cause necessary to search that individual. Therefore, because an employee has an identifiable relationship to a corporation, a search of the employee is authorized by a warrant authorizing a search of the corporation.

However, the permissible scope of this search is limited. While the employee's expectation of privacy may be somewhat reduced because of his relationship to the premises, even the *Micheli* court would protect the employee from search of his or her physical person. Thus, during a premises search the police may search the employee’s briefcase or purse, but they may not bodily search the employee.

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122. This view of the permissible scope of a premises search warrant is more moderate than that Justice Rehnquist proposes. He would uphold a search like the one in *Ybarra* so long as the warrant properly described the premises to be searched. Under the test proposed by this Comment, third parties may be searched only if they have some relation to the premises, and even then the search would be limited to their belongings.