State v. Reeves: Interpreting Louisiana's Constitutional Right to Privacy

Jon Wesley Wise
STATE V. REEVES: INTERPRETING LOUISIANA'S CONSTITUTIONAL RIGHT TO PRIVACY.

The process of defining and developing rights of privacy has been, until recently, the province of the United States Supreme Court through its interpretation of the Bill of Rights. In the area of electronic surveillance, a right of privacy has been inferred from the fourth amendment's protection from unreasonable search and seizure to preclude warrantless wiretapping. This right, as interpreted by the Court in *Katz v. United States*,\(^1\) was premised on the theory that "the Fourth Amendment protects people, not places"\(^2\) and that those matters which an individual seeks to preserve as private are often the proper subject of constitutional protection.\(^3\) *Katz* left unresolved the issue of whether the same right of privacy extends to conversations in which an individual voluntarily discloses incriminating information to another party who is concealing a bugging device. In this situation the individual's intent to preserve the privacy of his words is less obvious than in the case of wholly external wiretapping. The Supreme Court faced the problem in *United States v. White*\(^4\) and found that the right guaranteed by the fourth amendment is not broad enough to protect an individual from the possibility that those with whom he converses might be equipped with a monitoring device.

The decision in *White* has been regarded by some state courts as one more instance in which the United States Supreme Court has been unwilling to read certain protections into the Bill of Rights that appear consistent with the Court's prior opinions.\(^5\) As a result, a

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2. *Id.* at 351.
3. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.*
5. See *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (the California Supreme Court, dissatisfied with the minimum standards concerning search incident to arrest described in *United States v. Robinson*, 414 U.S. 218 (1973), held that the California Constitution provided greater protection than the fourth amendment); *State v. Collins*, 297 A.2d 620 (Me. 1972) (the Maine Supreme Court considered the proof required to establish the admissibility of a confession alleged to be obtained illegally; the court rejected *Lego v. Twomney*, 404 U.S. 477 (1972), which accepted the standard of "preponderance of evidence" instead of "without a reasonable doubt"); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975) (the New Jersey Supreme Court chose a higher standard for determining voluntariness in consent searches than the fourth amendment standard of *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)); *Commonwealth v. Richman*, 458 Pa. 167, 320 A.2d 351 (1974) (the Pennsylvania Supreme Court found that the right to counsel under the Pennsylvania Constitution attached
renewed interest has developed in looking to state constitutions as an alternate basis for providing greater protections in state court criminal procedure. In the recent case of State v. Reeves, the Louisiana Supreme Court considered the issue of one party consensual surveillance in light of article I, section 5 of the Louisiana Constitution of 1974, the state provision analogous to the fourth amendment. On original hearing, the court determined that the provisions of article I, section 5 were broader in their protection of individual privacy than the fourth amendment, and that the warrant requirement applied to all instances of government electronic surveillance. The court reversed itself on rehearing, however, and finally concluded that although textual differences in article I, section 5 require a type of analysis distinct from the fourth amendment, the Louisiana Constitution does not provide greater protection from consensual bugging than the United States Constitution.

The two opinions produced by the Louisiana Supreme Court's consideration of State v. Reeves raise two distinct issues. First, Reeves fosters a reexamination of the right to protection from electronic bugging and the appropriateness of the limitation on the right imposed by the United States Supreme Court. Second, the Louisiana Supreme Court's willingness to read broader substantive guarantees into the Louisiana Constitution poses the question of when and by what process a state court should refer to its own constitution to supplement or extend the body of rights provided by the United States Constitution. To determine which, if either, of the court's resolutions of these issues is the most desirable, an initial examination must be made of


7. 427 So. 2d 403 (La. 1983).

8. The case was originally heard by a court that included three justices ad hoc. The court voted six to one, with one regular justice dissenting. On rehearing, all three absent justices voted with the one original dissenter to reverse.
the theoretical bases for interpreting state constitutions and their implementation in Louisiana and other states. Likewise, a review of fourth amendment jurisprudence is necessary to clarify the federal constitutional standards and identify any perceptible conflicts. Having established an evaluative background, an analysis may be made of the methodology used in Reeves, both on original hearing and rehearing, to ascertain the correctness of attributing to article I, section 5 a protection of privacy interests greater than the fourth amendment.

INTERPRETING STATE CONSTITUTIONS

The idea of finding in state constitutions an untapped source of civil liberties might have seemed superfluous to defense lawyers ten years ago. During the years when the United States Supreme Court was systematically incorporating most of the guarantees of the Bill of Rights into the fourteenth amendment's due process clause, the need to go elsewhere than the United States Constitution to support a claim of violation of personal freedoms was hardly apparent. The intervening ten years, however, have seen a considerable decrease in the Court's enthusiasm for extending constitutional protections in the area of criminal procedure. However one views the Court's most recent philosophical bent, it is clear that, for the moment, the freedom with which the Court had previously interpreted the Constitution with respect to civil liberties has been sharply curtailed. Given this change of mood on the Court, it is easy to speculate that, in the near future, appeals urging extension of established doctrines will meet with diminishing success.

In response to this trend, an increasing number of cases are being argued in state appellate courts on both federal and alternative state constitutional grounds. The reasoning behind such a "dual rights"

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The approach is simple—if the decision is ultimately based on a state constitutional provision, it is not subject to review by the United States Supreme Court. The Supreme Court has observed that "a State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards." Given a state court's ability to interpret its constitution in a manner broader than the United States Constitution, an inquiry must be made into the history and purpose of state constitutional interpretation in order to determine when it is appropriate or desirable for a state court to do so.

To understand fully the role of state constitutions as guarantors of civil liberties, it is necessary to place them in their historical perspective. The guarantees contained in the Bill of Rights all had antecedents in one or more state or colonial constitutions. Historically, state constitutions which accorded state citizens the same personal freedoms that the Bill of Rights later guaranteed at a national level were already in place at the time the federal constitution was enacted. As one commentator has tersely observed, "Far from being the model for the states, the Federal Bill of Rights was added to the Constitution to meet demands for the same guarantees against the new central government that people had secured against their own local officials." Only when the Supreme Court began to broaden the

12. Herb v. Pitcairn, 324 U.S. 117 (1945). "This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.... Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights." Id. at 125-26 (emphasis added).
14. The following provisions of state constitutions of the Revolutionary era embody fundamental liberties later incorporated in the federal Bill of Rights, as discussed in F. Thorpe, The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies, Now or Heretofore Forming the United States of America (1909). Md. Declaration of Rights (1776), art. VIII (freedom of speech), art. XIX (right to counsel, confrontation, and speedy trial by an impartial jury), art. XXIII ("[A]ll warrants, without oath or affirmation... are illegal... ."); 3 F. Thorpe, supra, at 1686-88. Mass. Const. of 1780, Declaration of Rights, art. XIV ("Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions... ."); 3 F. Thorpe, supra, at 1891. N.J. Const. of 1776, art. XVI (right to trial by jury); 5 F. Thorpe, supra, at 2597-98. Pa. Const. of 1776, Declaration of Rights, art. X (right to be free from warrantless searches and seizures); 5 F. Thorpe, supra, at 3083. For a brief analysis of the bills of rights in the Southern states during the Confederation and early National eras, see generally F. Green, Constitutional Development in the South Atlantic States, 1776-1860 (1930).
substantive rights found in the Bill of Rights and to apply them to the states through the fourteenth amendment, did the state constitution assume a secondary function. Once a broad rule had been established under the federal constitution, state courts had no need to look to a state constitutional provision to infer the same right.\(^8\) In a sense, then, the role of the state constitution has been somewhat cyclical: its original role as the prime guarantor of state citizens' rights was slowly overtaken and subsumed by the rapid expansion of federal constitutional law, and now, arguably, the state constitution is re-emerging as a source of new freedoms and rights.\(^7\)

The extent to which state constitutions should be viewed as the primary source of individual rights or as mere refinements on the broad base of federal constitutional protections must be determined.\(^18\) Acceptance of the former view implies interpretation of state constitutions independently from and without reference to the federal Constitution.\(^19\) Several problems are inherent in this "primacy model" approach. Although the federal scheme theoretically permits the states to be the primary source of individual rights,\(^20\) the history of civil liberties over the last fifty years has been the history of the federal Constitution. Many of the basic rights which state courts now customarily read into their constitutions are the products of federal constitutional interpretation.\(^21\) The theory that state constitutions are primary and self-sufficient sources of individual rights ignores the reality of federal constitutional hegemony; additionally, such an approach disregards the importance of the federal constitutional jurisprudence as guiding principles for state constitutional interpretation.\(^22\)

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16. See, e.g., Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial for serious crimes); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in all criminal cases); Mapp v. Ohio, 367 U.S. 643 (1961) (the exclusionary rule). Neither could a state court interpret its constitution more narrowly than the federal constitution, since this would be in violation of the supremacy clause. \(U.S.\text{ Const. art. VI, cl. 2.}\)


18. See \textit{Developments}, supra note 17, at 1356.


20. This could occur whenever the state court wished to extend rights beyond the basement of federal constitutional rights. \textit{See id.}


22. Often a state's bill of rights may contain articles which are quite similar to the analogous provisions of the Bill of Rights. For example, in Louisiana's Declaration
Finally, the "primacy model" does not reflect the most significant limitation on state constitutional interpretation: under the fourteenth amendment's notion of due process, the Bill of Rights serves as a foundation of individual rights, a set of standards below which state constitutions cannot fall. Clearly, state constitutions cannot be viewed in total isolation from their federal counterpart.

An alternative method of state constitutional interpretation is one wherein state courts accord a fundamental role to the United States Constitution and seek, in selected instances, to extend the state constitution's protections beyond those of the federal constitution. This approach has been referred to as an interstitial model because it recognizes the role of the state constitutions as one of gap-filling, that of extending state protections into areas where the United States Supreme Court has declined to extend a prior doctrine or create a new rule which would have uniform nationwide application. State constitutions could play a useful role in the development of individual rights in this manner for several apparent reasons. Unlike the federal Constitution, which must be interpreted so as to achieve realistic nationwide standards and at the same time express a concern for state autonomy, a state constitution is more susceptible of experimentation in the form of increased personal freedoms. The smaller size of state jurisdictions, coupled in most cases with the fact of an elected judiciary, tends to make state courts more responsive to public feeling. More importantly, since most state constitutions are amended more easily than the federal Constitution, the popular will of the electorate can override clearly opprobrious or unpopular constitutional interpretations. Finally, state constitutions may contain more explicit guarantees than the analogous federal provisions in order to reach interstices in federal law that state constitutional drafters considered deserving of protection. If an appropriate function of state constitutions is to add to the basement of rights presently applied to the states by federal constitutional law, the guidelines which a state court should use in expanding the reach of its constitutional provisions beyond the federal counterparts need to be determined. Clearly, some of the divergence between state and federal judges will be based on differing values and social policy choices. Nevertheless, to avoid the appearance of arbitrarily second guessing the Supreme Court and to ensure effectiveness as a workshop for the refinement of civil liber-

23. See Developments, supra note 17, at 1356.
ties, a state court should consider the following factors, in varying degrees, in deciding whether to reach an interpretation different from the federal Constitution.

First and foremost, a state court should examine the textual provision itself; often state constitutions contain provisions which are analogous to the Bill of Rights but include additional or different language which may be grounds for a different interpretation. An example of such a textual difference occurs in article I, section 5 of the Louisiana Constitution of 1974, which provides for automatic standing in the case of possessory offenses. The Louisiana Supreme Court has considered the provision several times, indicating that the state constitution grants a procedural right that the United States Supreme Court recently declared to be unavailable at the federal level.

Closely aligned with consideration of a constitution's text is the need to examine a provision's legislative history, as well as relevant state history and traditions, which might assist a court in understanding the functions which the constitutional provision was intended to serve. A state court is on much more defensible footing when its interpretation is based on clear textual differences and a legislative record reflecting the intent of the drafters to give the provision as broad a reach as that given by the court.

When a state court is interpreting a provision analogous to an identically worded federal constitutional guarantee, the grounds for divergence become less a matter of legislative intent and more a matter of policy choice. The most obvious legislative inference would be that the state provision was intended to mirror the antecedent federal provision. In this situation, however, a state court may be dissatisfied with the result achieved by the federal court's interpretation of the federal provision and may desire to rewrite the Supreme Court opinion by basing the opinion on the state constitution. While this type of state constitutional interpretation has been labeled "evasive" by its critics insofar as it often seeks to avoid conservative opinions

24. See Fla. Const. art. I, § 12 (1968, amended 1982) ("No warrant shall be issued except upon probable cause . . . describing . . . the communication to be intercepted . . . "); Mont. Const. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." This right is in addition to section 11, which tracks the fourth amendment.).
by the Supreme Court, it is certainly the legitimate function of a state
court to be the final judge of that state's constitution. If, in fact, as
Justice Brandeis suggested, states are "to serve as a laboratory . . .
and try novel social and economic experiments," a state court must
occasionally reject the philosophy articulated by its federal counter-
part in favor of its own considered opinion. The problem with state
court interpretation of this type, if conducted too frequently, is that
it creates varying standards—a problem common enough when only
one court's determinations must be followed. In this respect, inter-
pretation of state constitutional provisions identical to federal provi-
sions arguably should be limited to those situations in which the Supreme
Court has withdrawn from prior expansive interpretations, or in which
there are clear flaws or inconsistencies in a line of federal cases and
the state court interpretation attempts to resolve them.

FEDERAL JURISPRUDENCE ON ELECTRONIC SURVEILLANCE

The United States Supreme Court was first confronted with the
problem of consensual electronic eavesdropping in On Lee v. United
States. The factual circumstances in On Lee were quite similar to
those in White. The defendant was approached at his own place of
business by an undercover agent who was wearing a transmitting
device. The defendant engaged in conversation with the agent and
made several incriminating statements which were later admitted into
evidence through the testimony of the eavesdropping officers. The
Court, basing its holding on the fact that there was no trespass on
defendant's premises, concluded that such surveillance did not violate

29. For instance, the United States Supreme Court's philosophy changed dramati-
cally twice because of presidential appointments: President Franklin D. Roosevelt's ap-
pointments resulted in a Court majority favorably disposed towards New Deal legisla-
tion and President Richard M. Nixon's four appointments resulted in a retrenchment
from the Warren Court's liberalism.
30. State ex rel. Dino, 359 So. 2d 586 (La. 1978). The court interpreted article
I, section 13 of the Louisiana Constitution to provide broader Miranda coverage in
the case of voluntary detentions than the United States Supreme Court was willing
to provide in Oregon v. Mathiason, 429 U.S. 492 (1977), reasoning that since the Loui-
siana Constitution of 1974 was adopted after Miranda but before Mathiason, the "framers
intended to adopt the Miranda edicts full-blown and unfettered." 359 So. 2d at 590.
31. State v. Reeves appears to fall into this category. See infra text accompanying
notes 37-50.
32. 343 U.S. 747 (1952).
any fourth amendment interest of the defendant. In addition to a discussion of the common law notion of trespass, however, the Court made a point of distinguishing traditional wiretapping from the eavesdropping activity in question. The Court analogized eavesdropping through a bug planted on an agent to peering at the defendant from a distance with a pair of binoculars. The Court simply did not recognize that any privacy interests of the defendant were affected.

Although the holding in On Lee was not subject to the Court’s serious scrutiny until White, two decisions were rendered in the interim which would ultimately become the bases for the two opposing views toward consensual surveillance. In Hoffa v. United States, the Court examined the situation in which an individual confides in one who in fact is an undercover agent for the police and who subsequently testifies against the person at trial. The informant in Hoffa was an acquaintance of the defendant who had been invited to the defendant’s hotel suite. The defendant argued that the presence of the agent constituted an illegal seizure, since the defendant was not aware that the person he was speaking to was employed by the police. The Court rejected the argument, concluding that once an individual voluntarily confides in another, he can have no expectation that the other person will not divulge the information to others. The informant in Hoffa was not wired for sound; the only evidence obtained from this activity was his own testimony. However, Hoffa established an important predicate for considering the effect of consensual electronic surveillance: once a person confides in another, he risks disclosure. Given this premise, the permissibility of consensual electronic surveillance

34. The Court stated that defendant could not raise the trespass issue since “Chin Poy entered a place of business with the consent, if not by the implied invitation, of the petitioner [defendant].” The Court in White cited Katz v. United States, 389 U.S. 347, 352-53 (1967) in rejecting the trespass rationale of On Lee. 401 U.S. at 751.

35. After making the analogy, the Court observed that “it would be dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies.” 343 U.S. at 754 (emphasis added).

36. Frankfurter’s dissent, wherein he decries the surreptitious monitoring, illustrates that the court’s attention was elsewhere. “Of course criminal prosecution is more than a game. But in any event it should not be deemed to be a dirty game in which ‘the dirty business’ of criminals is outwitted by ‘the dirty business’ of law officers.” Id. at 758.


39. Id. at 302.
would depend on whether the risk of disclosure includes the risk that that individual is equipped with a bug.\footnote{40}

In \textit{White}, the Court ultimately concluded that a logical extension of \textit{Hoffa} would permit third party monitoring of conversations, provided the informant consents.\footnote{41} Nevertheless, wedged chronologically between \textit{Hoffa} and \textit{White} is the Court's expansive prohibition of warrantless wiretapping in \textit{Katz v. United States}.\footnote{42} \textit{Katz}, although addressing an instance of nonconsensual electronic surveillance,\footnote{43} introduced the concept of an individual expectation of privacy as an aspect of fourth amendment protection. \textit{Katz} involved the wiretapping of a pay telephone used by defendant to place bets. In holding that the defendant's communications were protected by the warrant requirement, the Court announced its view that the fourth amendment "protects people, not places" and rejected the prior doctrine of a "constitutionally protected area" as insufficient to delineate the privacy interests guaranteed by the federal Constitution.\footnote{44} The Court chose to consider what an individual seeks to preserve as private, and then to determine whether society would recognize that expectation as reasonable. This test, which emerged from Justice Harlan's concurrence, suggests that two factors should be considered in determining whether a constitutional right of privacy exists, so as to come within the warrant requirement of the fourth amendment: (1) whether the individual possesses an actual (or subjective) expectation of privacy, and (2) whether the individual's expectation is one that society is prepared to recognize as "reasonable."\footnote{45} In \textit{Katz}, the Court found that an individual always possesses an expectation of privacy when he enters a phone booth and locks the door behind him. Likewise, the Court concluded that society in general regards as reasonable an individual's expectation of privacy when he purposefully shuts out the public, as in the case of a phone booth, home, or office.

The first prong of the \textit{Katz} two-part test suggests that privacy is at least partially self-determined.\footnote{46} An individual, by limiting where

\footnotesize
\begin{itemize}
  \item 40. This argument was later used by the Louisiana Supreme Court on rehearing in \textit{State v. Reeves}. See infra text accompanying notes 76-78.
  \item 41. 401 U.S. at 751.
  \item 42. 389 U.S. 347 (1967).
  \item 43. Nonconsensual electronic surveillance occurs when no party to the conversation is aware of such surveillance. By contrast, when a party to a conversation consents to having a bugging device placed on his person so others may eavesdrop or record the conversation, the electronic surveillance is called "consensual."
  \item 44. 389 U.S. at 351-52.
  \item 45. 389 U.S. at 361.
\end{itemize}

and with whom he speaks, has demonstrated a subjective expectation of privacy within these limits. Hoffa, by contrast, applies only an objective standard: if an individual confides in another, he assumes the risk of subsequent disclosure, regardless of his subjective expectations. Consequently, some inconsistency results when both decisions are applied to the case of an informant who conceals an electronic bug. On the one hand, a pure Hoffa analysis would imply a single presumption that the risk of disclosure includes the risk that the informant is wired for sound. On the other hand, application of Katz to the same facts would require, as a minimum initial consideration, a determination of how far the individual's subjective expectation of privacy extended. The Katz and Hoffa tests might ultimately result in the same holding, since Katz applies a reasonableness test as well as a subjective test. Nevertheless, Hoffa, by omitting any consideration of a subjective expectation, represents a more limited view of privacy interests than Katz.

Ultimately, the Supreme Court relied on Hoffa in resolving the constitutionality of warrantless electronic consensual surveillance. In White, the Court held that "the risk of disclosure" described in Hoffa did include the additional risk that the party with whom a person converses is transmitting the conversation to government agents and that such recordings by third parties may be admissible into evidence against the speaker. The Court did not apply the two-part Katz test; instead, the Court relied on what could be described as an assumption of the risk to conclude that the defendant possessed no "constitutionally justifiable expectation of privacy."[48]

At present, White is the accepted standard for applying the fourth amendment to instances of consensual electronic surveillance.[49] However, a conflict appears to exist between Katz and White with regard to the correct approach to evaluating privacy as it is protected by the fourth amendment. On the one hand, Katz appears to define the parameters of privacy, at least in part, in terms of an individual's expectations and his own efforts to exclude others. By contrast, White would allow this self-determination of privacy to be vitiated by another individual's consent. Under Katz, a person's actual expectation of privacy may ultimately be considered unreasonable; however, reasonableness is an additional standard which balances the degree of intrusion against social interests advanced by such intrusion. White, however, de-emphasizes actual expectations and imposes a "reasonable

47. 401 U.S. at 752.
48. Id. at 752-53.
man" standard for expectation of privacy which determines for the individual what he could reasonably conclude was private.50

STATE V. REEVES

The factual circumstances of State v. Reeves51 are quite similar to those of White. Charles W. Reeves, an employee of the Department of Elections, was suspected of planning to raise campaign contributions by means of false expense vouchers. Acting on information received from Alvin Pilley, a fellow employee of Reeves, state investigators obtained Pilley's consent to participate in surveillance of Reeves' conversations and equipped Pilley with an electronic bug. The investigators then proceeded to intercept three separate conversations between Reeves and Pilley in October and November of 1979. Subsequent to these interceptions, Reeves appeared before a Calcasieu Parish Grand Jury, where he testified that he had not had any conversation regarding false vouchers. Reeves was thereafter indicted for perjury before the grand jury. At trial, Reeves moved to suppress the introduction of the taped recordings of the conversations with Pilley, arguing that the recordings were made without his consent and without the interposition of a warrant, in violation of the right to privacy guaranteed by article I, section 5 of the Louisiana Constitution. The trial court denied the motion, observing that since article I, section 5 was substantially similar to the fourth amendment, the holding of White was controlling. Reeves was subsequently convicted on October 28, 1980 of two counts of perjury and sentenced concurrently on each count to six months in jail and fined one thousand dollars.

Reeves on Original Hearing

On original hearing, the Louisiana Supreme Court held that the warrantless surveillance of Reeves' communications was an invasion

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Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. . . . In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other.

401 U.S. at 752 (emphasis added). The White opinion, in effect, replaces the Katz subjective expectation with a single standard for every instance of consensual electronic surveillance. Rather than undertaking a case-by-case analysis of an individual's privacy expectations, White articulates a standard expectation that everyone will be presumed to possess.

of privacy prohibited by article I, section 5 of the Louisiana Constitution of 1974. The court's justification for interpreting article I, section 5 more broadly than the fourth amendment rested on the textual differences between the two provisions and the intent of the drafters which inspired such differences. As additional support for its decision, the court examined the jurisprudence of other states whose constitutions have been held to contain guarantees of privacy broader than the fourth amendment.

Textual Analysis of Article I, Section 5

The court began by examining the literal language of the state constitutional provision. Article I, section 5 provides:

Every person shall be secure in his person, property, communications, houses, papers, and effects against unreasonable searches, seizures, or invasions of privacy. No warrant shall issue without probable cause supported by oath or affirmation, and particularly describing the place to be searched, the persons or things to be seized, and the lawful purpose or reason for the search. Any person adversely affected by a search or seizure conducted in violation of this Section shall have standing to raise its illegality in the appropriate court.

This language is substantially similar to article I, section 7 of the Louisiana Constitution of 192152 (which in turn is nearly identical to the fourth amendment), with the exception of the automatic standing provision in the last sentence and the inclusion of the words "communications" and "invasions of privacy" in the first. The Reeves court maintained that the addition of the terms "communications" and "invasions of privacy" affir-

52. Article I, section 7 of the Louisiana Constitution of 1921, reads:

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 such search or seizure shall be made except upon warrant therefor issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

The 1921 Provision should be compared with the corresponding provision in article VII of the Louisiana Constitution of 1913, a verbatim transcription of the fourth amendment:

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 warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Identical language was used in earlier Louisiana constitutions. LA. CONST. of 1898, art. VII; LA. Const. of 1879, art. II; LA. Const. of 1868, art. CVII. Interestingly, no analogous provision existed in the pre-civil war constitution of 1852.
matively established a right to privacy in a person's communications.

In support of this conclusion, the court adopted the following rationale: (1) formerly, under article I, section 7 of the Louisiana Constitution of 1921, the expressly protected areas of the home, person, property, and effects could not be invaded without a warrant based upon probable cause; (2) article I, section 5 of the Louisiana Constitution of 1974 has specifically elevated "communications" to the status of a protected interest; (3) therefore, no communications may be intercepted except by means of a warrant. The argument is well crafted, and if one is willing to accept the first two premises, the third must follow. The problem lies in accepting the initial premises. The warrant requirement, although always the basic protective device in search and seizure situations, has never been constitutionally compelled, either under the Louisiana Constitution or the fourth amendment, except where the search and seizure has been declared unreasonable.53 Neither the fourth amendment nor article I, section 5 contains any statement that the term "unreasonable" is equivalent to "no warrant." The second sentence of article I, section 5, which states that "no warrant shall issue without probable cause," does not state that a warrant is required in every situation.54 Likewise, the court's second premise—that communications were elevated to a "protected interest" not subject to any type of balancing process—assumes that by adding the word "communications," the drafters intended without reservation that the search and seizure jurisprudence apply to all warrantless invasions of private communications. However, this assumption is questionable in light of the inclusion in section 5 of the adjective "unreasonable" before "invasions of privacy." The presence of "unreasonable" as a modifier suggests two important propositions: first, that the court must inquire into the nature of unreasonableness when an invasion of privacy is alleged;55 second, that such an analysis

53. In article I, section 7 of the Louisiana Constitution of 1921, the critical language was the word "unreasonable." To invoke the protections of article I, section 7 (and for the warrant requirement to apply), a search had to be considered "unreasonable." Clearly, a search conducted with probable cause under exigent circumstances satisfied the "reasonableness" test. See State v. Bourg, 248 La. 844, 182 So. 2d 510 (1966).
54. See infra text accompanying note 58.
55. One contemporary chronicler of the 1973 Louisiana Constitutional Convention's work observed:
"The key element is that the invasions of privacy must be unreasonable to merit constitutional protection, and the courts are given flexibility to determine which invasions of privacy are supported by sufficient societal interests to be considered reasonable. In this inquiry, the courts are guided by the
might appropriately read greater individual freedoms into each provision than similar provisions of the United States Constitution. In its pursuit of the latter goal, the court on original hearing neglected to make the initial examination of reasonableness. The court opted instead for a questionable formula establishing a constitutionally compelled warrant requirement, though such a formula finds no support in either the language of section 5 or prior search and seizure jurisprudence.

The Intent of the Drafters

Though additional text might not of itself entirely justify a particular interpretation, a court may call upon the legislative history of a provision to substantiate its reading of the language. Consequently, the court looked to the language of the Bill of Rights and the records of the Elections Committee of the Constitutional Convention of 1973 to determine what types of communications were protected by the warrant requirement. The court noted the drastic first draft of section 5, which provided that: "No law shall permit the interception or inspection of any private communication or message." This outright ban on all types of electronic surveillance, the court concluded, was indicative of the committee's heightened concern about invasions of communications, and it demonstrated the desire of committee members to greatly increase the guarantees of the Louisiana Constitution in this area. However, the first draft was rejected and replaced by a provision that, according to the court, placed "communications on an equal footing with other expressly protected interests and [interposed] the requirement of a warrant before any interception can be conducted." In support of this conclusion, the opinion refers to the following colloquy between committee members:

Mr. Vick:
I just have a point of information. The way you have it now, it would allow under certain circumstances, and with a court order, wire tapping.

57. 427 So. 2d at 405-06.
Mr. Guarisco:
Yes, it would.

Let me make this comment, that before we adopted "communications" you could do it without a warrant. Now we are at least requiring a warrant to do it. So we have improved upon it.58

The statement of delegate Guarisco, when viewed in isolation, could conceivably lend support to the court's position. However, such an interpretation is questionable for several reasons. First of all, the question of whether consensual bugging should be included as an unreasonable invasion of private communications was never discussed by the committee. Further, almost every reference to the warrant requirement as it affected communications was addressed to the issue of wiretapping. The court displayed no interest in the transcription of the debate over the first draft; however, one exchange between delegate Guarisco and a testifying law professor tends to limit the scope of Guarisco's statement:

Dr. Shieber:
[A]nd I think if this committee and the convention adopt language which is similar to that of the federal constitution, the courts would say that they were going along knowing . . . they were going along with the federal interpretation.

Mr. Stinson:
Why should we put it in [referring to communications]?

Mr. Guarisco:
Why make a mistake about it? It won't hurt to put it in.

Dr. Shieber:
All right sir, I agree, but the last sentence should be eliminated.59

The above exchange indicates more of a desire to incorporate the fourth amendment jurisprudence on wiretapping (presumably *Katz*), by including the word communications, than to place all communications on a protected level, as the *Reeves* court (on original hearing) determined.

58. *Documents* at 917 (emphasis added).
59. *Id.* at 905.
Clearly, no discussion ever occurred as to the potential application of the provision to a Reeves situation; in all likelihood, there was no consensus on the degree to which communications would be protected. Even the most fervent opponent of electronic surveillance among the committee members could only aspire that "when we put in this language, 'invasion of privacy,' given our new supreme court in this state, I think the courts are going to take care of things real well. I really do." Such a pronouncement reinforces the notion that the provision is purposefully vague in defining certain terms and dispels the court's conclusion that the drafters considered that section 5 necessarily imposed a blanket warrant requirement upon all interceptions of communications.

The choice of textual dissimilarities as a rationale for interpreting state constitutions, as aforementioned, presents much less difficulty than a complete re-examination of federal doctrine. Nonetheless, an argument based on text ought to be supported by legitimate inferences from wording and sentence structure, as well as by the drafter's intent. Examined in this light, the court's choice appears ill-advised, both because of the absence of dispositive language in section 5 and the lack of any clear legislative intent in the records of the Constitutional Convention of 1973.

As its survey of other state court jurisprudence indicates, the court might have simply cited the textual differences as a basis for re-examining the reasoning of White itself. The court in Reeves cited the constitutions of four other states which contain affirmative recognition of a right to privacy and which have been interpreted by the respective state supreme courts as forbidding warrantless electronic surveillance "even when one of the parties to the conversation consents to the surveillance." In addition, the court discussed the Michigan Constitution's search and seizure provision, which is nearly identical to the fourth amendment, and noted that the Michigan

60. Id. at 917 (Mr. Jenkins, speaking).
61. See supra text accompanying notes 24-26.
62. See supra text accompanying notes 41-50.
63. 427 So. 2d at 406-07. Alaska Const. art. I, § 22 (1956, added 1972) ("The right of the people to privacy is recognized and shall not be infringed."); Fla. Const. art. I, § 12 (1968, amended 1982) (emphasis added) ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communication by any means, shall not be violated."); Hawaii Const. art. I, § 5 (1950, amended 1968) (protects against "invasion of privacy"); Mont. Const. art. II, § 10 ("The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.").
64. Reeves, 427 So. 2d at 406-07.
Supreme Court nevertheless construed the provision to forbid warrantless bugging even though one party consents.\textsuperscript{65}

The reasoning of other states' jurisprudence is quite instructive when compared to Reeves itself. In \textit{State v. Brackman},\textsuperscript{66} the Montana Supreme Court noted the additional language in the Montana Constitution on the right to privacy, as did the Louisiana Supreme Court in Reeves. Unlike Reeves, Brackman moves from the initial language difference between state and federal constitutions to a detailed examination of the reasoning in \textit{White}, resuming the debate over whether a nonconsenting party has a justifiable expectation of privacy when the other party has consented to the bugging. In deciding what expectations of privacy were protected by its constitution, the Montana Supreme Court weighed "what effect a decision favorable to the defendant would have on law enforcement abilities against this intrusion of privacy and what consequent effect that may have on freedom of speech."\textsuperscript{67} The Alaska, Florida, and Hawaii decisions cited by the court in Reeves ultimately rely on similar balancing tests, even though originally resting their holdings on the specific inclusion of a right to privacy.\textsuperscript{68} In this regard, the court in Reeves might well have looked to their opinions, not only for support for the proposition that greater rights may be inferred from state constitutions, but for insight into the appropriate analysis for inferring such rights.

\textit{Reeves on Rehearing}

On rehearing, the court reversed its prior findings and held that although the intercepted conversations of the defendant were communications within the meaning of article I, section 5, the manner in which the conversations were monitored did not constitute an "invasion of privacy." The court observed that the addition of the terms "communications" and "invasion of privacy" to an otherwise identical restatement of the fourth amendment required the court to determine the extent to which these terms might enlarge the protection from warrantless electronic surveillance provided by the fourth amendment. The court considered whether the defendant's conversations

\textsuperscript{65} Id. at 407. The court cited People v. Beavers, 393 Mich. 554, 227 N.W.2d 511 (1975). However, the Michigan Supreme Court noted: "We do not address those situations which include ... the use of an electronic device by a third party only to eavesdrop upon a conversation between two parties, one of whom is cooperating with the authorities." 393 Mich. at 562-63 n.2, 227 N.W.2d at 514 n.2.

\textsuperscript{66} 178 Mont. 105, 582 P.2d 1216 (1978).

\textsuperscript{67} 582 at 1221.

\textsuperscript{68} See State v. Glass, 583 P.2d 872 (Alaska 1978) (the Alaska Supreme Court adopted the Harlan test in \textit{Katz} of an actual expectation of privacy that society is prepared to recognize as reasonable); State v. Sarmiento, 397 So. 2d 643 (Fla. 1981).
were "communications" within the meaning of article I, section 5, and whether the manner in which the conversations were intercepted constituted an "invasion of privacy.\textsuperscript{69}

\textit{Communications}

After observing that no jurisprudence existed which could provide guidance, the court began its examination of the term "communications" by reviewing the transcripts of the constitutional convention.\textsuperscript{70} The court concluded that the committee members had included the word in order that "each person's communications would be free from unreasonable searches, seizures, or invasions of privacy."\textsuperscript{71} Thus, the court's analysis is essentially textual; because "communications" is accompanied by no modifier, the drafters obviously meant all communications. Further, because "communications" is placed along with other areas traditionally protected from unreasonable searches and seizures, all communications are protected by the warrant requirement. Thus, the court concluded that Reeves' communications were of the type protected under article I, section 5.

\textit{Invasion of Privacy}

Examining the transcripts of the convention, the court found nothing which would reveal a clear intent as to the meaning of "invasion of privacy."\textsuperscript{72} Observing that "invasion of privacy" is an elusive term, the court expressly refused to define privacy as a general concept, but confined itself to defining invasion of privacy in terms of consensual electronic surveillance. This limited determination, the court suggested, avoided "the almost impossible task" of defining privacy.\textsuperscript{73}

Bereft of any Louisiana constitutional jurisprudence upon which to rely in examining the effect of consensual electronic surveillance upon a person's privacy interests, the court turned to the federal jurisprudence. The court expressed agreement with the result reached in \textit{White}\textsuperscript{74} but declined to employ its rationale. Instead, the court chose to examine the effect of consensual electronic monitoring upon privacy by applying the two-part test of Justice Harlan's concurrence in \textit{Katz}.\textsuperscript{75}

\textsuperscript{69} 427 So. 2d at 412.
\textsuperscript{70} Id. at 412-14.
\textsuperscript{71} Id. at 413.
\textsuperscript{72} Id. at 413-14. Interestingly, the court did not discuss whether the invasion of privacy at issue was "unreasonable" but treated the word "communications" as if it were modified only by the term "invasion of privacy." See infra note 86.
\textsuperscript{73} 427 So. 2d at 414.
\textsuperscript{74} Id. at 416.
\textsuperscript{75} "My understanding of the rule that has emerged from prior decisions is that
The court concluded that Reeves exhibited no actual expectation of privacy which could be invaded.

The court demonstrated Reeves' lack of a subjective expectation of privacy by posing three hypothetical situations. In the first hypothetical, the informant Pilley did not act as an agent, but voluntarily reported his conversation with Reeves to the police. The court pointed out that Reeves could have no expectation that Pilley would not go to the police, since a person is always aware that his confidence may be violated after a conversation. In the next hypothetical, Pilley acted as an agent of the police but carried no electronic device. The court observed that the risk of disclosure presented in this situation is identical to that presented in the first hypothetical.76

As the third "hypothetical," the court described the actual circumstances of Reeves: Pilley was acting as an agent of the police and was equipped with a bugging device. The same risk of disclosure is presented in the last situation, the court concluded, because "the risk of disclosure includes the manner of disclosure."77

The court refused to distinguish between situations in which only two parties are present and those in which a third party is present via an electronic monitor. According to the court, "disclosure could take any form. . . . [Speculation] as to which form of disclosure a person risks and which one he does not anticipate when entering into a conversation . . . is result oriented."78 The opinion suggests that once a party has disclosed to another person, he has no control over further disclosure through the medium of the person in whom he has confided.

Finally, the court declared that, assuming Reeves would have possessed an actual expectation of privacy, it was not an expectation which society ought to recognize as "reasonable." Reasoning that society's interest rests in exposing truth, rather than in concealing it, the court observed that an electronic transmitter simply tapes what was in fact said and preserves for later ears a more accurate, unbiased record than would be possible through the testimony from memory of a participant in the conversation. The court discounted the "speculative" claim of a chilling effect which might result from warrantless consensual surveillance, and observed that in the ten years there is a two-fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'” 389 U.S. at 361.

76. 427 So. 2d at 417.
77. Id. (emphasis added).
78. Id.
since the White decision was rendered no perceptible effect on freedom of discourse has been demonstrated.

CRITICISM

The court on rehearing initially recognized the textual differences between the state and federal constitutions. Unquestionably, the strongest basis for interpreting a state constitutional provision more broadly than its federal counterpart is the presence of additional or different language\(^7\) which, on the surface, indicates the inclusion of greater rights. The court correctly recognized that simply reversing its prior holding and applying federal jurisprudence without examining the purpose for the additional language in section 5 would not adequately resolve the problem.\(^8\)

The two-step analysis employed by the court to determine if there had been a communication and, if so, an invasion of privacy seems logical at first. Upon closer scrutiny, however, the value of the test as a means for analyzing the problem of consensual surveillance becomes suspect. The court had no difficulty in determining that the term "communications," without limitation or modification, clearly means all communications. The court in its second step attempted to address the problem by determining whether there had been an invasion of privacy. The problem with this approach, insofar as it purports to be a separate, state-defined test, rests in the total absence of any state jurisprudence or legislative history which may be of use in defining "invasion of privacy."\(^9\) The court instead returned to the federal standards for measuring the right to privacy, suggesting that the two-part test was not a test at all, but rather a means of steering the inquiry into consensual surveillance back into more familiar federal waters.

Given the different approaches taken by Hoffa and Katz,\(^8\) the court's decision to rely on federal authorities raises the issue of which standard to apply. The court, interestingly enough, chose to apply the Harlan test expressed in Katz.\(^3\) The selection of the Katz test

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79. See supra text accompanying notes 24-26.
80. Furthermore, since the court was reversing itself, the issue of the additional language was too well defined to simply ignore without considered argument.
81. 427 So. 2d at 414.
82. See supra text accompanying notes 46-48.
83. "However, we choose not to adopt the analysis of the Supreme Court in White. Rather, we prefer to follow our previous decisions and examine the effect of the constitutional guarantee against 'invasions of privacy' on consensual electronic surveillance in light of the test articulated by Justice Harlan in Katz." 427 So. 2d at 416.
is particularly unexpected after the opinion's lengthy elaboration (and ultimate approbation) of the holding in White. Possibly, the court felt that if the case were resolved by applying a Katz rationale rather than the White approach, future critics could not dispute the correctness of White as a basis for reexamining Reeves. By thus embracing the "expectation of privacy" approach of Katz, the court could maintain that in molding its policy towards consensual electronic surveillance, it had given full consideration to the privacy interests reflected in section 5.

However, it is unclear whether the court is actually applying the Katz test. The court's announcement that Reeves possessed no actual expectation of privacy is premised on the three hypothetical situations posed by the court and the corresponding risks of disclosure in each. However, the reasoning is nearly identical to the reasoning in White. By stating that the risk of disclosure includes the manner of disclosure, the court has essentially equated the White test of a "constitutionally justifiable expectation of privacy" with the Katz requirement of an actual expectation of privacy, and determined that neither were satisfied in Reeves' case. Such a determination resolves the issue without ever considering whether the expectation harbored by Reeves was one which society would recognize as reasonable. By avoiding a reasonableness inquiry, the court is not forced to consider the problem in light of the traditional conflicting values of societal interest in law enforcement and the individual's personal privacy interests. These considerations inevitably accompany discussion of a warrant requirement although they are dealt with by courts uncomfortably at best. Nevertheless, if Katz stands for the proposition that privacy interests are in part self-determined, then the initial disposition of the case on the grounds that Reeves lacked an actual expectation of privacy is incorrect. The whole purpose of establishing an actual expectation of privacy is to ascertain the degree of disclosure a person is contemplating when he speaks. The court, however, abjures drawing lines between different forms of disclosure on the grounds that such distinctions are "result oriented." The thrust of the court's position is that while it is appropriate for the court to discern an actual expectation of privacy from external acts manifesting an intent to obtain privacy (such as entering a phone booth), it is not proper to base such an expectation on the unverifiable thoughts entertained by an individual concerning the degree to which his conversation will be disclosed. The implication that the average citizen appreciates the risk of disclosure via a government

84. See the concurrence of Justice Harlan in Katz, 389 U.S. at 360.
bugging device each time he engages in a private conversation is questionable. Certainly, most adults are conscious of the possibility that their conversations may be tape recorded by the individuals with whom they converse. However, it is equally certain that when an individual speaks privately to only one person, he does not expect that a third party such as the government is monitoring the conversation. The court indicates that such an interpretation is speculative; however, what could more readily evidence an expectation of privacy than a deliberate attempt to limit the number of parties to a conversation?

By focusing its attention on the first prong of the Katz test and concluding that Reeves did not possess an actual expectation of privacy, the court was able to avoid basing its opinion on whether Reeves' expectation was one society would recognize as reasonable. The court concluded in dicta that the expectation was not reasonable, since the tape recording furthered the societal interest in discovering the truth. The importance of discovering the truth is a vital policy consideration which should be included in a reasonableness determination. However, the opinion fails to recognize that "truth," as an absolute value, is often sacrificed in search and seizure cases in favor of countervailing considerations of privacy. The statement that society seeks to discover the truth is not enough; to effect a reasonableness determination, a court must consider the individual interest encroached upon in addition to the needs of effective law enforcement and the difficulty of procuring a warrant. Wiretapping, like consensual surveillance, is a reliable source of truth, and arguably an invaluable aid in combatting organized crime. Nevertheless, a warrant is re-


86. Cf. "Although the Constitution expressly protects 'communications' against 'unreasonable invasions of privacy,' the real issue is whether the presence of the surreptitiously invited electronic 'third ear' . . . is an unreasonable invasion of the speaker's privacy, without the establishment of probable cause and prior judicial approval of its presence." 427 So. 2d at 419 (Lemmon, J., concurring).

87. See supra text accompanying note 78.

88. As a practical matter, the exclusion of illegally obtained evidence will often result in the acquittal of a defendant whose guilt might have been demonstrated by the evidence. See generally Giday, The Exclusionary Rule: Down and Almost Out, 4 N. KY. L. REV. 1 (1977); Note, Excluding the Exclusionary Rule: Congressional Assault on Mapp v. Ohio, 61 GEO. L.J. 1453 (1973).


quired before a wiretap can constitutionally be used.  

A traditional reasonableness inquiry would attempt to balance the interests of the individual against those of society. In this instance, the individual's interest is his right to be free from intrusion upon his privacy, while society's interest is in controlling and deterring the criminal activity which threatens individual freedoms.  

Thus, to determine whether warrantless one-party consensual bugging is an unreasonable invasion of privacy, it is necessary to consider the activity's impact on privacy and the effect a prohibition of this activity would have on integral aspects of law enforcement.  

The individual's interest in privacy cannot be undervalued. Individual privacy allows a person the freedom to move in society free from constant public scrutiny. Privacy is of course critical to the development of individuality; it permits emotional and intellectual development by allowing a person to say things which he would not say in public.  

The unfettered use of warrantless, consensual bugging could severely and adversely impact both the individual and society. Uncontrolled surveillance could constrain the individual from speaking his mind, thus chilling his freedom to think independently without fear of public exposure. The importance of preserving an area in which one need not conform to public expectations has been recognized, by Justices Brandeis and Douglas among others, as simply "the right to be let alone."  

As Justice Douglas urged in his dissent in White: "Free discourse . . . may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance."  

The impact on society is conceivably even greater. Warrantless, indiscriminate bugging could stifle autonomy of thought and become a tool of repression by a more authoritarian government. As the population becomes increasingly aware of noteworthy instances of surveillance, it may come to fear that it is not safe to confide in anyone.

92. See Shieber, supra note 90, at 1324.
93. For a discussion of the values which are generally associated with privacy, see Bazelon, Probing Privacy, 12 GONZ. L. REV. 587 (1977).
95. 401 U.S. at 762 (Douglas, J., dissenting). Justice Douglas' allusion to the first amendment right to freedom of speech typifies his view of privacy as an agglomeration of first, fourth, and fifth amendment values. See Griswold v. Connecticut, 381 U.S. 479 (1965). Conceivably, in adopting article I, section 5, the drafters of the Louisiana Constitution may have had in mind a broader philosophical basis for the right than simply the fourth amendment protection from unreasonable searches and seizures. The drafters may have attempted to give one aspect of Justice Douglas' penumbral right to privacy a more concrete existence in the Louisiana Constitution.
96. Greenwalt, supra note 85, at 218.
Proponents of bugging in the area of law enforcement argue, quite persuasively, that we do not live in a police state, and that the warrantless monitoring which does take place is invariably directed at law breakers and not at the average citizen. This argument, however accurate, overlooks the key notion behind the warrant requiremnt: that the protection of individual rights is best left to the discretion of a neutral, detached magistrate rather than the (justifiably) biased law enforcement officer. Such an argument fails to recognize that the overriding purpose behind most of the Bill of Rights guarantees is to prevent future abuse of certain freedoms, as well as to provide present protection.

On the other hand, a prohibition of warrantless, one-party consensual bugging would not appear to impose serious restraints on effective law enforcement. The same activity could be undertaken pursuant to a judicially approved warrant, avoiding the charge that the activity was undertaken indiscriminately and without probable cause. Certainly, in most cases (including Reeves) no exigent circumstances exist which would make procuring a warrant impracticable. The warrant requirement functions as a limit on the number of intrusions on privacy and ideally protects innocent citizens from the harrassment of government eavesdropping.

97. Justice Lemmon, in his concurrence in Reeves, suggests that the legislature, in enacting the Louisiana Electronic Surveillance Act (which explicitly exempts consensual electronic surveillance from its coverage), did not feel that consensual monitoring was an unreasonable invasion of privacy. Should public sentiment determine in the future that consensual electronic surveillance is an unreasonable invasion of privacy, the proper solution might be, as Justice Lemmon suggests, amendment of the act by the legislature to require a warrant for such surveillance. See 427 So. 2d at 419-20 (Lemmon, J., concurring).

98. One concern voiced by law enforcement officials is the need for quick action when an informant arranges a drug transaction with little advance warning. To deprive the police the right to bug might jeopardize the conviction, if the case rests in part on the nature of the verbal transaction. Arguably, this situation would justify an exception to the warrant requirement, since both probable cause and exigent circumstances would exist.

99. The discussion thus far has been couched in terms of warrant versus no warrant. Conceivably, a middle ground might exist in instances where police or government investigators are attempting to crack a large criminal operation but lack information amounting to probable cause with respect to the particular individuals involved. In this situation, "reasonableness" under article I, section 5 might be satisfied by some type of judicial approval based on less than probable cause. See, e.g., Almeida-Sanchez v. United States, 413 U.S. 266, 275 (1973) (Powell, J., concurring) (Powell suggests that area warrants for particular roads or particular times in the case of border searches would satisfy fourth amendment standards of reasonableness.); Camara v. Municipal Court, 387 U.S. 523, 533 (1967); See v. City of Seattle, 387 U.S. 541 (1967) (exception to probable cause requirement for warrants in cases of administrative searches or inspections). Such an approach arguably allows law enforcement to conduct activity...
CONCLUSION

The two opinions in Reeves are both an encouragement and a disappointment. Quite significantly, the court has endeavored to address a provision of the Declaration of Rights of the Louisiana Constitution of 1974 as a separate guarantor of individual liberties rather than as a mirrored restatement of the Bill of Rights. The court examined the text, legislative history, and federal antecedents to the provision under scrutiny in its effort to determine what, if any, extension of rights beyond the fourth amendment was contemplated by the drafters of the 1974 constitution. Ultimately, however, the court concluded that, though the words "communications" and "invasions of privacy" were intentionally added to the traditional fourth amendment language, the additional language provided no additional protection.100 This result is unfortunate, particularly since the phrasing of section 5 appears to offer an opportunity to re-examine a federal attitude toward privacy which is inconsistent with prior federal jurisprudence.101

Several aspects of the court's foray into state constitutional interpretation are instructive. The court's original opinion demonstrates an awareness of the proper sources that might provide a gloss on the general language of a constitution, such as the legislative history of the provisions and contemporaneous constructions of other state constitutions. Unfortunately, in its decision to utilize the former factor, the court proceeded to find a legislative intent where none could clearly be demonstrated.102 The net result was an opinion unsupported by a sound textual, historical, or policy argument and which was destined not to survive rehearing. When the court desires to reexamine the policy behind a controversial rule, such as that in White, it ought to do so openly on policy grounds when the legislative intent

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100. The concurrence by Justice Lemmon suggests a limitation on the absolute rule of the majority opinion. "Moreover, this decision merely holds that probable cause and a warrant are not absolute requirements for interception of communications. Whether there was an 'unreasonable ... invasion of privacy' must be determined in each case." 427 So. 2d at 420 (Lemmon, J., concurring) (emphasis added). Justice Lemmon goes on to suggest that the opinion should be read in light of the factual situation it addresses; this suggestion implies that reasonableness is still a factor, despite the majority's construction of subjective expectations of privacy.

101. See supra text accompanying notes 49-50.

102. See supra text accompanying notes 59-60.
is ambiguous or nonexistent. To do otherwise undermines the integrity of the court's analysis and casts doubt on the propriety of a broader state constitutional interpretation.

The court on rehearing displayed more discretion in selecting tools by which to interpret article I, section 5. Commendably, the court recognized the dichotomy between Katz and White and attempted to reconcile the federal jurisprudence to achieve a result consistent with the supplemental language in section 5. Lamentably, the opinion on rehearing does not achieve this lofty goal. Instead, the opinion declares that by adding the words "communications" and "invasions of privacy," the drafters of the constitution created a provision requiring application of the Katz test in a manner providing less protection than that provided by the application of the same test under the fourth amendment. If the court was determined, as it seems that it was, to return to the White standard, it might have done so by simply stating that the additional words meant nothing and that the Louisiana standard for consensual surveillance is coextensive with the federal standard.

The court, however, apparently recognized that the extra language did mean something, for it felt constrained to interpret the language so as to negate the implications which were so obvious to the court on original hearing. In so doing, the court bypassed an opportunity to impose a uniform warrant requirement on all invasions of communications, a result which would have been consistent with both the language of the Louisiana constitution and the expectations of the average citizen.

Jon Wesley Wise