THE AFTERMATH OF “THE DETROIT CONTROVERSY”: EAVESDROPPING ON ACTING PUBLIC OFFICIALS AND THEIR PRIVACY RIGHTS

Eric Turnbull

Table of Contents

I. INTRODUCTION .................................................................#

II. BACKGROUND .................................................................#
    A. The Conversation ......................................................#
    B. The DVD Bonus Footage .............................................#
    C. The Lawsuits ............................................................#
    D. The Bowens Decision ................................................#

III. ANALYSIS .............................................................................#
    A. The Michigan Eavesdropping Statute .............................#
    B. What Constitutes “Consent”? .......................................#
        1. One-Party Versus All-Party Consent .........................#
        2. Implied Consent ....................................................#
        3. The Sullivan Exception ............................................#
        4. Consent in Bowens ................................................#
    C. What Constitutes a “Private Conversation”? .....................#
        1. The Dickerson Standard ..........................................#
        2. The Stone Standard ...............................................#
        3. Private Conversation in Bowens ...............................#
    D. What Constitutes a “Reasonable Expectation of Privacy”? #
        1. General Application ..............................................#
        2. Application to Public Officials in Other States ..........#
            a. Federal Cases ................................................#
            b. One-Party Consent States ................................#
            c. All-Party Consent States .................................#
        3. Reasonable Expectation of Privacy in Bowens .............#
    E. Holding with No Teeth ................................................#

IV. CONCLUSION ........................................................................#

1 Juris Doctor Candidate, May 2012, Wayne State University Law School. The author would like to thank Professor Jonathan Weinberg for advising him on this Note. Professor Weinberg received his J.D. from Columbia Law School, and has published numerous articles on issues of Internet law and policy and the regulation of electronic media.
I. INTRODUCTION

On July 6, 2000, the *Up in Smoke* tour came to Joe Louis Arena in Detroit, Michigan. Headlined by Andre Young (also known as and hereinafter referred to as “Dr. Dre”), this tour featured world-renowned rap music artists, Calvin Broadus (a.k.a. Snoop Dogg), O’Shea Jackson (a.k.a. Ice Cube), and Marshall Mathers (a.k.a. Eminem). For the feat of presenting all these popular artists together in one show over a series of 44 summer nights, the *Up in Smoke* tour gained national recognition.

Prior to the tour’s arrival in Detroit, word spread about the show’s introductory video. The video featured Dr. Dre and Snoop Dogg, and followed their adventurous quest to purchase marijuana after their supply had run out. In the process of this adventure, they came across marijuana (obviously) and multiple naked women, and ultimately escaped with their newly purchased marijuana after a bloody shootout with robbers in a liquor store. The video concluded with Snoop Dogg looking at the camera and asking the audience if he should kill the final robber (to which the excited crowds, anticipating the start of the concert, screamed with approval). Finally, Dr. Dre and Snoop Dogg raised guns to the camera, the screen went black with the sound of a gunshot, and the concert began.

At this point, a reasonable viewer could conclude that a video containing illegal drug use, pornography, and execution-style murder is not best defined as family-friendly material. Gregory Bowens (then press secretary of former Detroit mayor Dennis Archer), Paula Bridges (former Detroit police department spokesperson), and Gary Brown (former Detroit police deputy chief) (collectively and hereinafter referred to as “the Detroit officials”) likely shared this view. Upon notification that this video would be

---

3 Id.
5 See DVD: The Up in Smoke Tour (Eagle Rock Entertainment 2000) (“The Detroit Controversy” bonus feature track). In “The Detroit Controversy” bonus footage, Dr. Dre states that an individual who attended the *Up in Smoke* concert in Cleveland, Ohio, the night before the show came to Detroit tipped Detroit Police as to the content of the introductory video. Dr. Dre further states his belief that the individual notified police in an attempt to draw media attention and coverage of the ensuing conflict.
6 Id.
7 Id.
8 Id.
shown to a capacity crowd at Joe Louis Arena, the Detroit officials went to the concert to prevent its showing.9

When the Detroit officials arrived at Joe Louis Arena they went backstage and requested a meeting with concert representatives to discuss the video. The concert representatives were Kirdis Tucker, Phil Robinson, and William Silva.10 During this meeting, the Detroit officials stated their concern about showing this video, maintaining that its content violated city ordinances and could not be shown to attendees under the age of seventeen.11 After more discussion and negotiation between the parties, and after the Detroit officials threatened to cut off power to the arena and legal sanctions, the concert representatives agreed to proceed without the introductory video.12

The conflict and subsequent lawsuit in this Note does not concern the removal of the video, but rather the taping of the conversation between the Detroit officials and concert representatives. After the Up in Smoke tour concluded, a DVD containing footage from the tour, including a clip entitled “The Detroit Controversy” in the bonus features section, was released.13 This segment included parts of the discussion between the Detroit officials and the concert representatives, and summarized the altercation from the concert representatives’ points of view. The segment was critical of the Detroit officials’ actions and gave no opportunity for the Detroit officials to defend or explain themselves.14

After the release of this DVD and the discovery of the bonus footage, the Detroit officials brought suit against a multitude of parties (including the concert representatives, Aftermath Entertainment, Dr. Dre, the cameraman recording the conversation, the camera manufacturer, and retailers who sold the DVD) in Wayne County Circuit Court.15 The circuit court granted defendants’ motion for summary disposition on all counts, including plaintiffs’ allegation that Aftermath Entertainment, the concert

10 Brief on Appeal-Appellees at 11, Bowens, 794 N.W.2d 842 (No. 140296) (hereinafter “Appellees”).
11 Supra note 5.
12 Id.
13 See id.
14 Id.
representatives, and Dr. Dre violated the Michigan Eavesdropping Statute. On appeal, the Michigan Court of Appeals reinstated plaintiffs’ eavesdropping claim and ordered the parties to continue discovery, after denying defendants’ request for a rehearing, the court of appeals remanded the case back to Wayne County Circuit Court, which again granted defendants’ motion for summary disposition. After a second appeal, plaintiffs’ eavesdropping claim came before the Michigan Supreme Court, which, until this case came to bar, had yet to rule on an eavesdropping claim made by acting public officials.

This Note will discuss the intricacies of the Michigan Eavesdropping Statute, an all-party consent statutory tort, which allows for both damages to a victorious plaintiff and criminal sanctions for a losing defendant. Interpreting this statute requires an analysis of exactly who is entitled to bring suit under this statute as an individual citizen. The Appellants (Bowens defendants) argued that public officials, while acting in their public capacity, have no reasonable expectation of privacy that would allow for the pursuit of this remedy. On the other hand, the Appellees (Bowens plaintiffs) argued that, as a matter of statutory interpretation, nothing in the statute explicitly bars a public official from bringing suit for eavesdropping.

After analyzing issues of party consent laws, common law understandings of a private conversation, and a reasonable expectation of privacy, and comparing this case with common law rulings in other states involving public officials and eavesdropping claims, this Note will conclude that the Michigan Supreme Court’s reversal and reinstatement of summary disposition on the eavesdropping claim, though correctly ruled, was made for the wrong reasons. Instead of ruling that there was no private conversation for an eavesdropping claim and disposing of the case, the Court should have created a standard in which there is a presumption of diminished capacity for the reasonable expectation of privacy of public officials, which is then weighed against individual circumstances of the case.

---

17 Id. at *2.
18 Appellants, supra note 9, at 11-12.
20 Appellants, supra note 9, at 38-44.
II. BACKGROUND

A. The Conversation

Neither party in this dispute denied that a conversation took place between the Detroit officials and concert representatives. The dispute centered on the nature of the conversation, specifically whether the conversation was private. The Detroit officials argued that Gregory Bowens had requested a private meeting to which the concert representatives agreed. The concert representatives argued that this fact was irrelevant because the actual atmosphere that resulted was one that any person could reasonably discern as not private in nature.

The dialogue relevant to this extensive litigation began when Bowens approached the concert representatives and requested a meeting. According to the concert representatives, the dialogue began as follows:

Did you have a good time running to get MTV? Good. I’m glad you did. We’re still gonna have a private meeting. We can have a private meeting here. We can have a private meeting someplace. You know we’re gonna need to. Cause you guys are out in the hallway, this and that meeting, telling me this, that, and the other.\(^\text{22}\)

The Detroit officials stated that the dialogue (between Detroit official Gregory Bowens and concert representative Phil Robinson) began in the following manner:

Bowens: “Did you have a good time running to get MTV?”

Robinson: “We can come in here and shut the door.”

Bowens: “Good. I am glad you did. We’re still going to have a private meeting. We can have a private meeting here, or we can have a private meeting someplace else.”

Robinson: “OK.”\(^\text{23}\)

From the outset, the existence of a private conversation was in question. On one hand, the Appellants argued that Bowens did all the talking and

\(^{22}\) Appellants, \textit{supra} note 9, at 7 (plaintiff Bowens speaking).

\(^{23}\) Appellees, \textit{supra} note 10, at 12.
demanded a private conversation. On the other hand, the Appellees argued that Bowens and Robinson had a more equitable exchange in which both parties agreed to a private conversation. Concert representative William Silva testified in his deposition that he heard Bowens’ request, stating that he “heard [Bowens] say at least one occasion that he wanted — something to the effect that he didn’t want cameras in there.” However, the concert representatives also contested that, despite this request, the room was never cleared and unidentified persons remained within earshot of the conversation. On second appeal, the Michigan Court of Appeals did find that the doors to the room were open and that people who were not a party to the conversation were at some point present in the room.

What then followed was a conversation about the appropriateness of the introductory video. Gary Brown stressed to the concert representatives that the video could not be shown to concert attendees under the age of seventeen, while Paula Bridges quoted violations under Michigan law, stating that the video would constitute an “exhibition of obscene matter in front of children.” The concert representatives then attempted to negotiate with the Detroit officials. Silva stressed that this video had been running uninterrupted in other arenas, and then posed the hypothetical question of a parent taking their child to an R-rated movie in Detroit. The Detroit officials held their position, assuring Silva that any parent who contributed to the delinquency of a minor would be arrested, and that the Up in Smoke tour would be shut down if the concert representatives did not remove the video.

Later stating that they feared a possible riot if the Detroit officials shut off power to the building at the beginning of the concert, the concert

24 Appellees, supra note 10, at 21.
26 Bridges specifically cited MICH. COMP. LAWS § 750.143 (2004), which provides that:

[a]ny person who shall exhibit upon any public street or highway, or in any other place within the view of children passing on any public street or highway, any book, pamphlet or other printed paper or thing containing obscene language or obscene prints, figures, or descriptions, tending to the corruption of the morals of youth, or any newspapers, pamphlets, or other printed paper or thing devoted to the publication of criminal news, police reports or criminal deeds, shall on conviction thereof be guilty of a misdemeanor.

27 Appellants, supra note 9, at 7.
28 Id.
29 Id.
30 Supra note 5 (Kirdis Tucker alleged that the Detroit officials threatened to shut off power to the building, and feared that the power outage would prompt a riot which would endanger the safety of everyone in Joe Louis Arena).
representatives agreed to the Detroit officials’ terms and displayed an alternate video.

During the recorded parts of this conversation many people entered and left the room. In their brief to the Michigan Supreme Court, Appellants provided several stills from the recording highlighting unidentified persons standing outside the doorway, standing inside the room and watching intently, or walking in between the parties to enter or exit the room.\(^{31}\) The door was left open at all times and it was estimated that over 400 people had backstage passes and access to this room.\(^ {32} \)

The concert representatives claimed the camera used to record this conversation was a Sony PD150 camera.\(^ {33} \) This video camera is generally shoulder-mounted when used. The specific camera in this case had an attached spotlight; furthermore, the concert representatives claimed that an assistant held a boom microphone (a large “fluffy” microphone on a pole) over the camera to record sound.\(^ {34} \) Since there was a large mirror on one of the walls of the room, the Detroit officials argued that “[d]efendants could have easily resolved this case years ago by producing the unedited footage of the private meeting to demonstrate that the Sony PD150 camera, boom microphone, and their two operators were in the room . . . [i]nstead, the Gangster Rap Defendants have played ‘hide the ball.’”\(^ {35} \) In furtherance of their argument, Appellees provided an affidavit of an expert in photography that the footage of the conversation was consistent with “covert camera techniques.”\(^ {36} \)

B. The DVD Bonus Footage

In December 2000, after the conclusion of the Up in Smoke tour, Eagle Rock Entertainment released a DVD, which highlighted tour performances, interviews with performers, and extra footage in its bonus features. Entitled “The Detroit Controversy,” this track lasted approximately 12 minutes and discussed the events at Joe Louis Arena.\(^ {37} \) The track contained interviews with the concert representatives and a recording of the conversation about the introductory video.\(^ {38} \) Included in the bonus footage were segments of the recorded conversation with the Detroit officials, as well

\(^ {31} \) Appellants, supra note 9, at 39-42.
\(^ {32} \) Id. at 38.
\(^ {33} \) Appellees, supra note 10, at 6.
\(^ {34} \) Id.
\(^ {35} \) Id.
\(^ {36} \) Id. at 13 n.16.
\(^ {37} \) See supra, note 5.
\(^ {38} \) Id.
as accounts of an unusually bizarre police escort back to the hotel after the show. In their appellate brief, the Detroit officials noted that “[o]ne study showed that 63% of consumers surveyed said bonus footage was important to their decision to purchase a DVD,” and that “[t]he Gangster Rap DVD has become one of the hottest-selling concert videos of all time . . . [and t]his is due, in part, to the exclusive backstage bonus footage in general and The Detroit Controversy bonus footage in particular.”

In the bonus footage, Dr. Dre, Kirdis Tucker and Phil Robinson told the concert representatives’ side of events. Dr. Dre contended that an individual who had seen a prior show in Cleveland caused the controversy in Detroit by waiting until the doors were about to open at the concert venue before attempting to have the show shut down. Tucker then began recounting the events that took place upon the concert representatives’ arrival at Joe Louis Arena. Although they anticipated the possibility of a dispute with public officials when arriving in Detroit, the Detroit officials were actually waiting for them when they arrived at the concert venue. Simply put, the ensuing exchange between the concert representatives and the Detroit officials was on less than amicable terms.

The concert representatives stressed that the Detroit officials were unreasonably concerned about attendees under the age of seventeen being exposed to the introductory video, as the minimum age to purchase a ticket was eighteen. Concert representative Silva pointed out that the introductory video had run with no problems in multiple arenas around the United States (including Anaheim’s arena, owned by family-friendly Disney), and voiced his concern about Dr. Dre’s First Amendment right to free speech. At one point, the concert representatives offered to erect stands and verify the age of every entrant to the arena. The Detroit officials initially agreed to this, but the concert representatives stated that the Detroit officials later changed their minds and re-imposed their position of disallowing any use of the introductory video.

Tucker then attempted to get in touch with their legal department to figure out what to do. Tucker spoke to Dr. Dre to discuss the options presented by the Detroit officials. Dr. Dre stressed that he would not perform if he could not perform his show in its artistic entirety. Meanwhile, Silva attempted to contact Mayor Archer to validate and understand the position taken by Bowens, then his press secretary. Upon talking to Mayor Archer’s son, who was hosting a post-concert party for Dr. Dre, the concert representatives learned that Mayor Archer was in New York and was likely unaware of the Detroit officials’ actions at Joe Louis Arena. Ultimately,

39 Appellees, supra note 10, at 14 n.18.
40 For this note and the rest of § II.B, see supra note 5.
however, the concert representatives and Dr. Dre acquiesced and removed the introductory video from the *Up in Smoke* line-up.

Perhaps the most contentious of the concert representatives’ arguments was their fear that the Detroit officials were willing to cause a riot to prevent the display of the introductory video. Tucker stated in “The Detroit Controversy” bonus footage that she believed a dangerous riot would ensue if the Detroit officials either stopped the concert or shut off the power. Tucker stated that this was the ultimate reason for Dr. Dre’s decision to do the show without the introductory video, and felt that the conduct of the Detroit officials was a power play for bragging rights about having the show shut down. The bonus footage concluded with Tucker’s account of an overly dramatic police escort, in which she stated that at least 16 police cars escorted their bus back to the city of Dearborn by blaring their sirens and weaving through traffic on the highway.

C. The Lawsuits

On July 14, 2000, the concert representatives sued the city of Detroit and Gregory Brown for civil rights violations.41 The city settled and paid attorneys’ fees to the concert representatives. Mayor Archer also released a statement declaring the Detroit officials’ actions to be a violation of the First Amendment, stating: “I have directed my staff to be sensitive to any prior restraints of freedom of expression, and that they must seek judicial review before requesting changes in the content of constitutionally protected expression.”42

However, after the release of the DVD, the Detroit officials filed suit in Wayne County Circuit Court against 41 defendants for 15 causes. Most notably, the Detroit officials brought claims against Dr. Dre, Aftermath Entertainment, Chronic 2001 Touring, Geronimo Film Productions, and Phillip Atwell (director of “The Detroit Controversy”) under the Michigan Eavesdropping Statute.43 Wayne County Circuit Court granted summary disposition in favor of the concert representatives, holding that the Detroit officials had no reasonable expectation of privacy to allow for eavesdropping claims.44 The court reasoned that the Detroit officials knew they were being videotaped, and the open door and unidentified people wandering around confirmed that the conversation was not a private one.45

43 Appellants, *supra* note 9, at 8.
44 Id.
45 Id.
On appeal, the Michigan Court of Appeals affirmed the dismissal of all claims except for the eavesdropping claim, which they remanded for continuance of discovery.\textsuperscript{46} The Detroit officials appealed to the Michigan Supreme Court, but their application was denied.\textsuperscript{47} After further discovery on the remaining claims at the circuit court level, the circuit court again granted summary disposition in favor of the concert representatives, holding that, under the circumstances, “the plaintiffs could not have a reasonable expectation of privacy.”\textsuperscript{48} On second appeal, the Michigan Court of Appeals again reversed and remanded the circuit court’s decision with respect to the Detroit officials’ eavesdropping claim.\textsuperscript{49} Judge Murray, sitting on the three judge panel at the Michigan Court of Appeals, dissented, arguing that “no reasonable juror could conclude that [these] plaintiffs had a reasonable expectation of privacy in this recorded conversation.”\textsuperscript{50} The concert representatives again appealed to the Michigan Supreme Court, who, this time, granted leave to appeal.\textsuperscript{51}

\textbf{D. The Bowens Decision}

On January 19, 2011, the Michigan Supreme Court heard oral arguments from attorneys representing their respective parties. Hershel Fink argued for Appellants that public officials should never have a reasonable expectation of privacy when performing their public duties, and that there was no plausible way for the Detroit officials to be unaware of the large cameras and boom microphones hovering near the conversation.\textsuperscript{52} Chief Justice Robert Young stated his concern that the grounds for summary disposition were flimsy at best, as there were too many critical areas of dispute.\textsuperscript{53} For Appellees, Glenn Oliver argued that the issue was whether the Detroit officials intended the conversation to be private, and that the concert representatives violated the eavesdropping statute with their recording of the conversation.\textsuperscript{54} Chief Justice Young again voiced his concerns, stating that

\begin{footnotesize}
\textsuperscript{46} Bowens, No. 250984, 2005 WL 900603, at *1.
\textsuperscript{47} Bowens v. Aftermath Entertainment, 711 N.W.2d 751 (Mich. 2006).
\textsuperscript{48} Appellants, supra note 9, at 11-12.
\textsuperscript{49} Bowens, No. 282711, 2009 WL 3049580, at *8.
\textsuperscript{50} Id. at *11 n.6; see also Appellants, supra note 9, at 12.
\textsuperscript{51} Bowens, 782 N.W.2d at 842.
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\end{footnotesize}
after viewing the taped conversation in the DVD, it was difficult to find where there would be any expectation of privacy.\textsuperscript{55}

On March 18, 2011, more than ten years after the conversation took place, the Michigan Supreme Court issued its ruling, reversing in favor of the concert representatives and reinstating the circuit court’s dismissal of the eavesdropping claim on summary disposition.\textsuperscript{56} In its holding, the Court agreed with court of appeals Judge Murray’s dissent – that the Detroit officials could not reasonably have expected their conversation with defendants to have “be[en] free from casual or hostile intrusion or surveillance.”\textsuperscript{57} The Bowens Court, looking at the individual circumstances of the case, stated the following reasons for concluding that a private conversation did not exist:

(1) [t]he general locale of the meeting was the backstage of the Joe Louis arena during the hectic hours preceding a high-profile concert, where over 400 people, including national and local media, had backstage passes; (2) the concert-promoter defendants were not receptive to the public-official plaintiffs' requests and, by all accounts, the parties' relationship was antagonistic; (3) the room in which plaintiffs chose to converse served as defendants' operational headquarters with security personnel connected to defendants controlling the open doors; (4) there were at least nine identified people in the room, plus unidentified others who were free to come and go from the room, and listen to the conversation, as they pleased; (5) plaintiffs were aware that there were multiple camera crews in the vicinity, including a crew from MTV and a crew specifically hired by defendants to record backstage matters of interest; (6) and video evidence shows one person visibly filming in the room where the conversation took place while plaintiffs were present, thereby establishing that at least one cameraman was openly and obviously filming during the course of what plaintiffs have characterized as a “private conversation.”\textsuperscript{58}

Justice Marilyn Kelly dissented, arguing that under Dickerson v. Raphael, the determination of whether a conversation is private depends on the intent and reasonable expectation of the plaintiff, and accordingly, there remained

\begin{itemize}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Bowens}, 794 N.W.2d at 843.
\item \textsuperscript{57} \textit{Id.} at 844.
\item \textsuperscript{58} \textit{Id.} at 843-44.
\end{itemize}
issues of fact concerning the conversation.\textsuperscript{59} Though the \textit{Bowens} Court ruled in favor of the concert representatives, it did not agree with Appellants’ argument that acting public officials never have a reasonable expectation of privacy. Rather, the Court held that the facts of this case could not support a finding that a private conversation took place; thus, Appellee’s eavesdropping claim could not continue past a motion for summary disposition.\textsuperscript{60} Essentially, the \textit{Bowens} Court analyzed the issue of whether there was a private conversation and nothing else; at no point in the majority’s opinion did it comment on the rights of acting public officials under the Michigan Eavesdropping Statute.

III. Analysis

\textbf{A. The Michigan Eavesdropping Statute}

The relevant section of the Michigan Eavesdropping Statute provides:

\begin{quote}
[anyone] who is present or who is not present during a private conversation and who willfully uses any device to eavesdrop upon the conversation without the consent of all parties . . . is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000.00, or both.\textsuperscript{61}
\end{quote}

Further, the statute allows for civil remedies, including an injunction against further eavesdropping, actual damages, and punitive damages.\textsuperscript{62} For this reason, the Michigan Eavesdropping Statute can be classified as a statutory tort, as it allows for individuals to pursue civil remedies while the state retains the ability to pursue criminal sanctions.

For purposes of this Note, the most important segment of the statute is the definitions section, in which the term “eavesdrop” is defined to include the recording of a conversation or “private discourse of others without the permission of all persons engaged in the discourse.”\textsuperscript{63} This is what is commonly referred to as the all-party consent rule, as it requires everyone involved in a recorded conversation to consent to the recording before it is removed from the realm of eavesdropping. The all-party consent rule is

\textsuperscript{59} \textit{Id.} at 845 (citing Dickerson v. Raphael, 601 N.W.2d 108 (Mich. 1999)).
\textsuperscript{60} \textit{Id.} at 843-45.
\textsuperscript{61} \textsc{Mich. Comp. Laws} § 750.539c (2010).
\textsuperscript{62} \textit{Id.} at § 750.539h.
\textsuperscript{63} \textit{Id.} at § 750.539a (emphasis added).
distinguished from the Federal Wiretap Act, which only requires that one party consent to the recorded conversation. 64 Under the one-party consent rule, police and other enforcement agencies can more easily obtain evidence through electronic recordings and communications. Like the Michigan Eavesdropping Statute, the Federal Wiretap Act is also a statutory tort, allowing for both civil remedies and federal sanctions up to five years in prison. 65 The difference between these statutes is crucial, as the State of Michigan requires that all parties to a conversation, whether they are the recording party or a target party, must consent to the recording. Application of the Michigan Eavesdropping Statute has two essential hurdles for a plaintiff to overcome: (1) that all parties in the conversation had consented to the recording of the conversation, and (2) that the plaintiff had a reasonable expectation that the conversation was a private one. The second hurdle often requires courts to look at both (1) whether the conversation itself was a private one and (2) whether the parties to the conversation had a reasonable expectation of privacy.

B. What Constitutes “Consent”?

1. One-Party Versus All-Party Consent

As noted above, the difference between one-party consent and all-party consent for eavesdropping purposes is quite significant. Under Michigan law, all who are involved in a recorded conversation must consent to its recording, as anyone who eavesdrops on the conversation “without the consent of all parties thereto . . . is guilty of a felony.” 66 The all-party consent rule contrasts starkly with the Federal Wiretap Act, where “[i]t shall not be unlawful . . . for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent.” 67 This distinction is critical when there is a recorded conversation between two individuals. Under the Federal Wiretap Act, even citizens outside of law enforcement are afforded the same one-party consent protection as law enforcement officials in recording conversations. Under Michigan law, however, a private citizen must have consent from all parties to the same conversation to record it.

While every state has its own eavesdropping statute, Michigan stands in the minority concerning party consent. Most states have chosen to follow

65 See 18 U.S.C. § 2511 (2006) (criminal sanctions); see also id. at § 2520 (civil remedies).
66 Supra note 61 (emphasis added).
the lead of the federal government; 38 states utilize one-party consent. Michigan and the remaining 11 states have all-party consent statutes. The language and context of minority state statutes widely differ; Michigan puts the all-party consent restriction right at the top of the statute, 68 Massachusetts lists the restriction in their definition of “interception,” 69 and Florida and Pennsylvania list the restriction in a specific subchapter for exceptions to the statute. 70 Regardless of their form, these statutes all come to the same result: that requiring all parties to a private conversation must consent to any recording.

2. Implied Consent

In eavesdropping claims, the first element the plaintiff has to establish is whether either one or both parties to the conversation did not consent to its recording (depending on whether a one-party consent or all-party consent statute applies). Consenting to the recording of a private conversation operates as an affirmative waiver of rights under eavesdropping statutes; one must “opt-in” to the recording of a private conversation to be a consenting party to the conversation. Generally, consent is understood to exist “where a person’s behavior manifests acquiescence or comparable voluntary diminution of his or her otherwise protected rights.” 71 This makes explicit consent relatively straightforward; if someone allows one to record the conversation, then she has consented. Implied consent, however, is another accepted form of consent, which allows for a party to the conversation to consent to her recording, even though she may have not given explicit permission.

Because consent operates as a waiver to one’s eavesdropping claims, a high burden must be met to demonstrate that a party acted in a way to imply consent to the recording of a private conversation. The Michigan Court of Appeals held in Doe v. Mills that, although implied consent acts as a waiver as if it were explicit consent, it “requires a ‘clear, unequivocal, and decisive act of the party showing such a purpose.’” 72 Furthermore, the court stated in Lewis v. LeGrow that consent “does not have a zero-sum answer,” but is to be determined by the independent “facts and circumstances of the case.” 73 Therefore, with a high burden of proof taken from the factual

---

circumstances of the case, one’s conduct must be quite obvious or blatant to imply consent to a recorded conversation, as waiver through consent cannot be “cavalierly implied” or from “knowledge of the capability of monitoring alone.”\textsuperscript{74}

For example, if a hypothetical person named Bob pulled out a tape recorder and asked a police officer if he could record the conversation immediately before it began, the officer could consent without giving express consent (from the surrounding facts and circumstances instead of saying “yes, you may”). If the officer said “no” and told Bob to turn off the tape recorder, there would not be consent from all parties to allow Bob to record the conversation. If, however, the officer merely grunted something unintelligible and began the conversation, Bob would have legitimate grounds to argue that he had obtained consent from all parties because the actions of the officer clearly indicated his consent to the recording.

3. The Sullivan Exception

In Michigan, one important exception to consent was made by the court of appeals in \textit{Sullivan v. Gray}.\textsuperscript{75} In \textit{Sullivan}, defendant Gray recorded a phone conversation stemming from the breakdown of relations in an attempt to purchase the plaintiff’s automobile dealership. Without Sullivan’s consent, Gray tape recorded their conversation and transcribed it for the ensuing contract dispute involving the sale of the dealership.\textsuperscript{76} The Oakland County Circuit Court granted summary judgment in favor of the defendants (Gray and his attorney); the Michigan Court of Appeals affirmed the circuit court’s ruling 2-1.\textsuperscript{77} The \textit{Sullivan} Court reasoned, since “[t]he issue here is strictly one of statutory construction,” the Michigan Eavesdropping Statute regulates the actions of third parties, not those who are participants to the conversation.\textsuperscript{78}

Thus, the \textit{Sullivan} holding carves out a specific exception in the Michigan Eavesdropping Statute for those who are privy to the conversation. Although this allows for a participant of a conversation to surreptitiously record it, the \textit{Sullivan} Court stated that:

\begin{quote}
[A]bsent a request the discussions be held “off the record,” it is only reasonable to expect that a conversation may be repeated, perhaps from the memory or from the handwritten
\end{quote}

\begin{itemize}
\item \textsuperscript{74} Watkins v. L.M. Berry & Co., 704 F.2d 577, 581 (11th Cir. 1983).
\item \textsuperscript{75} Sullivan v. Gray, 324 N.W.2d 58 (Mich. Ct. App. 1982).
\item \textsuperscript{76} Id. at 59.
\item \textsuperscript{77} Id. at 61.
\item \textsuperscript{78} Id. at 59-60.
\end{itemize}
notes of a party to the conversation . . . [a] recording made by a participant is nothing more than a more accurate record of what was said.\footnote{Id. at 60.}

Since Sullivan never reached the Michigan Supreme Court, it did not bind the Bowens Court. Furthermore, Chief Justice Young noted during the Bowens oral argument that the Sullivan holding conflicted with the language of the statute, and implied that Sullivan ought to be overturned.\footnote{Supra note 52.}

4. Consent in Bowens

The Detroit officials certainly did not explicitly consent to the recording of their conversation. This is obvious from Bowens’ statement at the beginning of the conversation that he wished to have a private meeting “here” or “someplace.”\footnote{See Appellants, supra note 6, at 7.} While one could argue that Bowens’ somewhat confusing statement about the location of the meeting could mean that the private meeting had not yet begun, this inference alone would not be enough to form a basis for express consent.

However, there is enough under the circumstances surrounding the conversation and the Bowens Court’s factual findings to make the Detroit officials’ actions “clear, unequivocal, or decisive”\footnote{See Doe, supra note 72.} enough to form a basis for implied consent. The Bowens Court noted that several individuals in the bonus footage were unidentified and that the concert representatives’ actions amounted to a denial of the request for a private meeting. Furthermore, the Bowens Court noted that the Detroit officials were aware of the presence of cameras throughout the conversation and did not direct any of the cameramen to leave the room.\footnote{See Bowens, 794 N.W.2d at 843-44.}

Since the factual circumstances analyzed here are similar to the circumstances the Bowens Court used to determine that there was no reasonable expectation of privacy, it was unnecessary for the Court to address issues of consent. The Detroit officials had to clear both hurdles, and their failure to establish a reasonable expectation of privacy made the issue of consent irrelevant to the outcome of the case. If, however, the Court had addressed consent, these circumstances, which imply consent on behalf of the Detroit officials, favored the Bowens Appellants, regardless of whether or not Sullivan is good law.
C. What Constitutes a ‘Private Conversation’

1. The Dickerson Standard

After considering issues of consent, a recorded conversation must be considered private in nature to be covered under the Michigan Eavesdropping Statute. The key aspect of evaluating the private nature of a conversation for eavesdropping purposes in the State of Michigan is one of reasonableness. The Sullivan Court also touched on issues of privacy, stating that “[w]hether an individual should reasonably expect that an ostensibly private conversation will be related by a participant to third parties depends on that individual’s relation to the other participant.” While Sullivan itself remains a standard that the Michigan Supreme Court refuses to follow, it nonetheless shows that courts have attached the notion of reasonableness to the issue of a private conversation in eavesdropping claims.

This standard first began its modern refining process in Michigan with the court of appeals’ ruling in Dickerson v. Raphael. In Dickerson, the plaintiff brought suit against a television broadcasting network when it aired recordings of her discussions with her daughter about Scientology. Unbeknownst to Dickerson, her daughter, distraught with the effect that the Church of Scientology was having on her family, secretly arranged a meeting with her while wearing a transmitting microphone. The conversation was transmitted to a nearby van in which the television network was recording the conversation, and four parts of the conversation were replayed on the Sally Jesse Raphael show. The court of appeals remanded the case in favor of Dickerson for a hearing on damages, adopted the Sullivan holding, and held that the defendant television network violated the eavesdropping statute by recording the private nature of the discourse between Dickerson and her daughter. On appeal, the Michigan Supreme Court reversed, in part, to clarify the proper jury instructions for determining a reasonably private conversation:

[t]he instruction was erroneous because it focused on the ‘substance’ of plaintiff’s conversation. The proper question is whether plaintiff intended and reasonably expected that the

---

84 Sullivan, 324 N.W.2d at 482.
85 Dickerson v. Raphael, 564 N.W. 2d 85 (1997), rev’d in part, Dickerson, 601 N.W. 2d at 108.
86 Id. at 87-88.
87 Id.
88 Id. at 91-92.
conversation was private, not whether the subject matter was intended to be private.\textsuperscript{89}

Thus, the \textit{Dickerson} standard for whether a conversation is private depends on whether the party to the conversation justifiably intended the conversation to be private, not on what is being said at any particular moment.

\textbf{2. The Stone Standard}

In \textit{People v. Stone}, an estranged ex-husband was charged with criminal sanctions of the Michigan Eavesdropping Statute for monitoring his ex-wife’s phone calls.\textsuperscript{90} Though the circuit court granted Stone’s motion to quash the charges on grounds that the ex-wife had no basis to reasonably expect her phone conversations to be private, the Michigan Court of Appeals reversed and the Michigan Supreme Court affirmed.\textsuperscript{91} In its holding, the \textit{Stone} Court noted the Michigan legislature’s ambiguity concerning the term “private place” and defined a private conversation to be “a conversation that a person reasonably expects to be free from casual or hostile intrusion or surveillance.”\textsuperscript{92}

The \textit{Stone} Court also noted its reliance on \textit{Dickerson}, stating that its conclusion in \textit{Stone} was supported by its previous decision in \textit{Dickerson} where it stated “whether a conversation is private depends on whether the person conversing ‘intended and reasonably expected that the conversation was private.’”\textsuperscript{93} Thus, the \textit{Stone} Court refined the \textit{Dickerson} holding by extending the scope of a private conversation to situations where a party to a conversation, although aware that technology has made recording of the conversation possible, still has a reasonable expectation that the conversation is private.\textsuperscript{94} This case further shows the connection between standards of a private conversation and a reasonable expectation of privacy; the second hurdle of the eavesdropping claim requires not only that the conversation be private in nature under the \textit{Dickerson} and \textit{Stone} standards, but also that those parties to the conversation had a reasonable expectation of privacy.

\textsuperscript{89} \textit{Dickerson}, 601 N.W. 2d at 108.
\textsuperscript{90} \textit{People v. Stone}, 621 N.W.2d 702, 703 (Mich. 2001).
\textsuperscript{91} \textit{Id.} at 706.
\textsuperscript{92} \textit{Id.} at 704-705.
\textsuperscript{93} \textit{Id.} at 706.
\textsuperscript{94} \textit{Id.}
3. Private Conversation in Bowens

The Bowens Court held that “[a]fter considering all the evidence of record in the light most favorable to plaintiffs . . . no genuine issue of material fact exists to warrant a trial concerning whether the conversation at issue constituted a ‘private conversation.’” In reaching this conclusion, the Bowens Court relied on the definition of private conversation enunciated in Stone. When looking at the circumstances of this case, the Court’s decision certainly seems to be right. The conversation was held in an open room of a crowded backstage area, unidentified people were casually walking in and out of the room, and the cameras recording the conversation were “openly and obviously filming during the course of what plaintiffs have characterized as a ‘private conversation.’” Under these circumstances, it is quite easy to conclude that this conversation was not one that was “free from casual or hostile intrusion or surveillance.” However, upon applying Stone to determine that there was no private conversation, the Bowens Court failed to address the issue of the reasonable expectation of privacy for acting public officials. Although the Bowens Court correctly ruled to reinstate summary disposition in favor of the concert representatives, it missed an opportunity to establish precedent on the treatment of the reasonable expectation of privacy of acting public officials.

D. What Constitutes a “Reasonable Expectation of Privacy”?

1. General Application

The first major holding on the reasonable expectation of privacy for acting public officials came in 1985, when a Nevada district court held that the reasonable expectation standard is an objective standard, based on balancing factors and an appraisal of how a prudent person would view the factual circumstances. Specifically, that court held that one’s “expectation of privacy must . . . [be] one that society is prepared to recognize as reasonable.” This understanding of reasonable expectation affords Nevada courts a wide discretionary factor in determining whether one’s expectation of privacy is objectively reasonable under the circumstances.

---

95 Bowens, 794 N.W.2d at 843.
96 Id. at 844.
97 Id. (quoting Stone, 621 N.W.2d at 702).
99 Id.
2. Application to Public Officials in Other States

Many other jurisdictions have adopted common law regarding public officials and the reasonable expectation of privacy. In Bowens, the concert representatives presented the argument that public officials, while acting in their official capacities, can never have a reasonable expectation of privacy. Meanwhile, the Detroit officials maintained that under Michigan’s all-party consent statute, public officials retain the same reasonable expectation of privacy as any other individual under the statute. In the end, however, the Bowens Court made its decision without considering the reasonable expectation of public officials. Meanwhile, the issue of the reasonable expectation of privacy for public officials has been addressed in multiple jurisdictions, some being one-party consent states and some being all-party consent states.

a. Federal Cases

In federal jurisdiction, the Eighth Circuit ruled on the reasonable expectation of privacy in Angel v. Williams. In Angel, three police officers were terminated from their employment after an audiotape surfaced which incriminated the officers in the use of excessive force against a prisoner of the city jail. The officers sued Webb City, Missouri, in federal court, alleging civil violations under the Federal Wiretap Act. The Eighth Circuit overturned judgment in favor of the city, holding that when looking at the “objective reasonableness of the subjective expectations of the officers,” their objective expectation of privacy was unreasonable in a public jail, even when they subjectively believed their words to be private. Though most federal courts have held in similar fashion, the United States Supreme Court has yet to take up this issue on appeal.

b. One-Party Consent States

In Hart v. City of New Jersey, the New Jersey Supreme Court held that because police officers “occupy positions of public trust and exercise special powers, [they] have a diminished expectation of privacy.” New Jersey further refined its common law in Hornberger v. American

---

100 Angel v. Williams, 12 F.3d 786 (8th Cir. 1993).
101 Id. at 787.
103 Angel, 12 F.3d at 790.
104 Id.
Broadcasting Companies, Inc.,\textsuperscript{106} when police officers sued American Broadcasting Companies, Inc. ("ABC") for violation of the New Jersey Wiretapping and Electronic Surveillance Control Act (a one-party consent statute).\textsuperscript{107} In this instance, the local television station hired three African American men to drive expensive cars to see if they would be pulled over, and recorded the traffic stops made by police. In one of these stops, the police officers pulled over a Mercedes luxury car with two African American men inside, frisked them, and motioned to a paper bag in the back seat, inquiring, “What’s in the bag, forties?” (refering to 40-ounce beers).\textsuperscript{108} The recordings were broadcast under the title “DWB” (Driving While Black).\textsuperscript{109} The Court dismissed the eavesdropping claim against ABC, holding that the circumstances of the case indicated that the police officers had “no reasonable expectation of privacy.”\textsuperscript{110} To determine this, the Hornberger Court enunciated a two-prong test: (1) “whether the plaintiffs had a subjective expectation of privacy” (a question of fact), and (2) “whether their expectation [of privacy] was [objectively] reasonable” (a question of law).\textsuperscript{111} Although this holding is based on individual circumstances, the Hornberger Court also reinforced the ruling in Hart, stating in dicta that police officers have a restricted expectation of privacy because of their public status as police officers, and that they “cannot expect the same level of privacy as a private citizen in a private place” when on duty.\textsuperscript{112}

The Hornberger Court also noted State v. Flora, a case from the Washington Court of Appeals. In Flora, police officers noticed a tape recorder hidden in a stack of papers while arresting the defendant for allegedly violating a restraining order.\textsuperscript{113} Flora was charged for recording the arrest, and was convicted in the Superior Court of Skagit County after an unsuccessful motion to dismiss.\textsuperscript{114} Flora appealed the conviction to the Washington Court of Appeals, which then reversed on the ground that there was no private conversation to allow for an eavesdropping claim.\textsuperscript{115} However, the issue of a private conversation was not addressed alone. The Flora Court noted the Washington Supreme Court’s explanation that the state eavesdropping statute “reflects a desire to protect individuals from the

\textsuperscript{108} Hornberger, 799 A.2d at 575.
\textsuperscript{109} Id. at 571.
\textsuperscript{110} Id. at 595.
\textsuperscript{111} Id. at 592.
\textsuperscript{112} Id. at 594.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
disclosure of any secret illegally uncovered by law enforcement.”\textsuperscript{116} With this in mind, the Flora Court stated that it “decline[d] the State’s invitation to transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity.”\textsuperscript{117} Although Washington is a one-party consent state, this case presents a ruling based more on the policy and purpose of the law than the strict language of the statute.

When looking at \textit{Hornberger} for the purposes of examining reasonable expectations of public officials in the \textit{Bowens} case, \textit{Bowens} comes out heavily in favor of Appellants. Since New Jersey is a one-party consent state, the defendants who purposefully recorded the conversation easily cleared the consent hurdle. For the second hurdle, the \textit{Hornberger} Court employed the two-prong subjective and objective test and applied it to an already diminished expectation of privacy for on-duty police officers. With this strong stance against on-duty police officers, the \textit{Hornberger} Court applied the two-prong test to come to the conclusion that the officers did not have a reasonable expectation of privacy in their conversation.

The \textit{Hornberger} case is analogous to \textit{Bowens}, as it involves public officials bringing suit under the state eavesdropping statute for being recorded while carrying out their public duties. The motive behind the suit is similar, as the public official plaintiffs likely took offense to a recording that was released to the general public and which criticized them without the opportunity to present their side of the story. \textit{Hornberger} is distinguishable from \textit{Bowens} in that the controlling eavesdropping statute contains the one-party consent rule, not the all-party consent rule as in \textit{Bowens}. The one-party consent rule was an easy element for the defendants to in \textit{Hornberger} to meet, as the individuals being questioned in the traffic stop obviously consented to the recording of the conversation. Under Michigan’s all-party consent rule, the \textit{Bowens} Court’s holding indicated that, under the circumstances, the Detroit officials must have implied consent to the recording of the conversation.

c. All Party Consent States

Several all-party consent states also have addressed the issue of a reasonable expectation of privacy for public officials. Closest to Michigan is Illinois, whose eavesdropping statute lists all-party consent as an affirmative defense to any violation of the statute.\textsuperscript{118} In 1978, the Illinois courts made their first ruling on the issue of the reasonable expectation of privacy for

\textsuperscript{116} Id. at 1357 (emphasis in original).
\textsuperscript{117} Id. at 1358.
acting public officials in *Cassidy v. American Broadcasting Companies, Inc.*\(^{119}\). In *Cassidy*, a police officer brought an eavesdropping claim against a television network for recording him while acting as an undercover agent in a massage parlor suspected of prostitution.\(^{120}\) While the undercover officer attempted to solicit sex from the lingerie model to make an arrest, Chicago Channel 7 News cameras were recording from the adjacent room. The officer brought suit for eavesdropping when he discovered Channel 7 News filmed him for a “movie” it was planning to air.\(^{121}\) After the network’s motion for summary judgment was granted, the officer appealed, and the Illinois Court of Appeals affirmed in favor of the network. The court reasoned that the officer “was a public official performing a laudable public service and discharging a public duty,” and therefore, “no right of privacy against intrusion can be said to exist with reference to the gathering and dissemination of news concerning discharge of public duties.”\(^{122}\)

Though *Cassidy* did not advance to the Illinois Supreme Court, the issue was later heard in *People v. Beardsley*.\(^{123}\) In this case, Beardsley was pulled over for speeding and demanded to speak with counsel when asked for his driver’s license.\(^{124}\) The police officer noticed Beardsley holding a small microphone and asked him to stop recording the conversation; however, Beardsley insisted that he did not need consent of the other party to a conversation to record it under Illinois law.\(^{125}\) Beardsley’s statement, of course, was incorrect, as Illinois is an all-party consent state. Nonetheless, Beardsley maintained that he had the right to record the conversation with the officers, and kept the recorder on throughout the arrest (for speeding and failure to produce a driver’s license) and the ride in the squad car to the police station.\(^{126}\) After being convicted of eavesdropping under the state statute, Beardsley appealed. Though this case occurred after the appellate court’s holding in *Cassidy*, the Illinois Court of Appeals upheld the conviction.\(^{127}\) Applying *Cassidy*, the Illinois Supreme Court reversed the conviction, holding that the officers had no reasonable expectation of privacy. However, the Court came to this conclusion under a different standard; rather than holding that public officials never have a reasonable expectation of privacy in performing their public duties (or at least a

---

120 Id. at 128.
121 Id. at 128-29.
122 Id. at 131-32.
124 Id. at 347.
125 Id.
126 Id. at 348.
127 Id.
diminished capacity), the Court held that the officers had no reasonable expectation of privacy under the circumstances of the specific facts at hand. In Beardsley, the Court determined that the officers were fairly aware of Beardsley’s recording and could have asked Beardsley to step out of the vehicle to have a private conversation if they so wished.

Lastly, the Beardsley Court, though declining to address the issue of implied consent, held that:

> [t]he primary factor in determining whether the defendant in this case committed the offense of eavesdropping is not, as the appellate court reasoned, whether all of the parties consented to the recording of the conversation. Rather, it is whether the officers/declarants intended their conversation to be of a private nature under circumstances justifying such expectation.

Thus, while the Beardsley Court held that individual circumstances must be looked at to determine any expectation of privacy for public officials, the subjective intent of the public official is dominant over issues of consent in an eavesdropping claim. This effectively clarified the relationship between consent and expectations of privacy in Illinois, an all-party consent state, as the Beardsley Court set forth a two-part standard for a reasonable expectation of privacy based on both the subjective intent of the public official and the objective circumstances surrounding the case.

Other states employing all-party consent eavesdropping statutes also have held that – at the very least – public officials have a diminished capacity for a reasonable expectation of privacy. In California, the court of appeals held that prison officers did not have a reasonable expectation of privacy when videotaped while in a prison’s release office. In Montana, the supreme court held that although “law enforcement officers . . . may have] a subjective or actual expectation of privacy relating to the disciplinary proceedings against them . . . law enforcement officers occupy positions of great public trust,” and their expectation of privacy “is not one which society recognizes as a strong right.” Three years later, the Montana Supreme Court strengthened its stance by holding that a mayor does not have a reasonable expectation of privacy in preventing the public disclosure of

---

128 Id. (emphasis added).
129 Beardsley, 503 N.E.2d at 350.
130 Id.
sexual misconduct because he is an elected public official “and as such is properly subject to public scrutiny in the performance of his duties.”

Though the majority of all-party consent states have held against public officials when bringing eavesdropping claims, courts are not unanimous. Among the all-party consent jurisdictions ruling on the reasonable expectation of privacy of public officials, the State of Massachusetts remains an outlier. In Commonwealth v. Hyde, the defendant was pulled over for a routine traffic stop. After the routine stop became heated and confrontational, the police decided it was best to release the driver with no charges and a warning. Six days later, the defendant entered the police station and produced a tape recording of the conversation with the officers to file a complaint. The police found no violations by the officers on the tape, but brought charges against the defendant for violating Massachusetts’ wiretap provisions.

In contrast to other decisions made by courts on this issue in all-party consent states, the Massachusetts Supreme Court upheld the defendant’s conviction, holding that public officers, even if acting within the scope of their public duty, are afforded the same privileges of the state wiretap statute. The rationale behind the Hyde Court’s ruling was one premised on legislative intent and strict statutory interpretation, as the Court inferred that “the plain language of the statute, which is the best indication of the [l]egislature’s ultimate intent, contains nothing that would protect, on the basis of privacy rights, the recording that occurred here.” Thus, under Massachusetts law and the Hyde ruling, public officers have the same privacy rights as any other individual because the legislature did not explicitly state otherwise in the statute. The Hyde Court noted the importance of deference to statutory language, and stated that:

[i]f the tape recording here is deemed proper on the ground that public officials are involved, then the door is opened even wider to electronic “bugging” or secret audio tape recording. . . of virtually every encounter or meeting between a person and a public official . . . [, the] result would contravene the statute’s broad purpose.

---

135 Id. at 964-65.
136 Id. at 965.
137 Id. and generally see MASS. GEN. LAWS 272, § 99A (West 2000).
138 Hyde, 750 N.E.2d at 967.
139 Id. at 967-68.
140 Id. at 970.
Writing for the dissent, Chief Justice Marshall told the story of the videotaped beating and arrest of Rodney King in 1991, and stated his fears that the role of public officials “cannot be performed if citizens must fear criminal reprisals when they seek to hold government officials responsible by recording – and secretly recording on occasion – an interaction between a citizen and a police officer.” Chief Justice Marshall’s dissent, rather than being based on statutory deference, was based on a notion of proactive attitude toward social policy. For this reason, Hyde is extremely helpful in pointing out the different outcomes a court may reach based on the underlying interests. The Hyde ruling, juxtaposed against other state standards set forth in Hornberger and Beardsley, also serves to point out the issue which faced the Bowens Court: whether the Court should defer to legislative intent in treating acting public officials as individual citizens or whether the Court should view public officials as having a diminished capacity for purposes of the Michigan Eavesdropping Statute’s reasonable expectation of privacy element.

3. Reasonable Expectation of Privacy in Bowens

As reviewed earlier, three common law standards have emerged for determining whether public officials have a reasonable expectation of privacy when performing their public duties. The Hornberger standard provides that public officials have a diminished reasonable expectation of privacy when performing their public duties and that this diminished capacity is subject to both the public officials’ intent and the surrounding circumstances; the Beardsley standard provides that public officials’ reasonable expectation of privacy when performing public duties depends on both their subjective intentions regarding the privacy of the conversation and the objective factual circumstances surrounding the conversation (without a diminished capacity); and the Hyde standard provides that public officials have the same reasonable expectation of privacy as private individuals so long as the state statute does not explicitly say otherwise.

Turning to the specific facts of Bowens, the first glaring factual aspect of the conversation was its location and surroundings. While Beardsley involved two police officers and the defendant alone, the conversation in Bowens took place in a crowded backstage area of Joe Louis...
Arena. Multiple parties were constantly walking in and out of the room where the conversation took place, with unidentified people hovering around the conversation or watching from a short distance. Furthermore, the cameras allegedly used to record the conversation were not small and inconspicuous, but larger “over-the-shoulder” cameras accompanied with large boom microphones. This was strong evidence weighing in favor of the concert representatives, and in the end, the Bowens Court agreed and reversed in their favor.\footnote{Bowens, 794 N.W.2d at 843-44.} However, the problem remains that the Bowens Court used none of these facts to establish Michigan’s stance on the reasonable expectation of privacy for public officials.

\textit{E. A Holding with No Teeth}

By purely addressing the issue of a private conversation, the Bowens Court came to what should be the right outcome of this case. However, they ignored a great opportunity to set forth the state’s standard for the reasonable expectation of privacy of acting public officials. Adopting a stance similar to that in Hornberger would have been a positive step forward for privacy law in Michigan. With a presumption of a diminished capacity for acting public officials, Michigan courts could evaluate the factual circumstances of an eavesdropping claim by a public official with the necessary grain of salt. In effect, a standard such as this would ensure accountability on behalf of acting public officials, while still allowing eavesdropping claims in situations where privacy of public officials is a legitimate priority. The standard set forth in Bowens is silent on the issue of the reasonable expectation of privacy for acting public officials. Where Michigan should have received a ruling to chew through the fat around privacy rights for public officials, it received a ruling without teeth.

Consider the following scenarios. In the first scenario, you are an on-duty police officer discussing an undercover operation with your partner in a closed interrogation room. The door is shut and locked, and the cameras are turned off. Unbeknownst to you, someone has hidden a tape recorder underneath the table, later collects it, and provides this tape to a news station. Under Bowens, and putting aside other criminal violations, the circumstances of the recording would likely lead to a successful eavesdropping claim. And, with a standard of a diminished capacity and individual circumstances, this would be an allowable eavesdropping claim because even with the diminished capacity, the circumstances weigh heavily in favor of your reasonable expectation of privacy under the circumstances. By being in a locked room at the police station, turning off the cameras, and
conversing with a well-known and trusted party about confidential information, one can see these circumstances overcoming a presumption of diminished capacity for a reasonable expectation of privacy.

However, in a second scenario, you are pulled over by a police car in the middle of the day on an empty street. You see no one else around, and cannot discern any reason for why you were pulled over. Imagine you tape record the conversation with the officer when he approaches your car. Regardless of what is said during the conversation, the officer eventually notices the tape recorder, walks away, and later brings an eavesdropping claim against you. Under *Bowens*, there is a strong likelihood that you will be found liable for eavesdropping; after all, there was no one near you during the conversation and the officer did not notice the small tape recorder until the conversation stopped. However, a standard with a diminished capacity for public officials’ reasonable expectation of privacy would not need so many factors to preclude the officer from bringing an eavesdropping claim. Under a diminished capacity standard similar to that in *Hornberger*, one could easily come to the conclusion that there was no reasonable expectation of privacy because the officer was speaking to you outside of closed doors in an area where anyone could hear the conversation (even if they were out of sight).

It is easy to think of different hypothetical situations where eavesdropping statutes can be open to debate, and most cases that come before the Michigan Supreme Court involve cases with questionable issues under the law. By ruling that there was no private conversation in *Bowens* and not holding on the issue of the reasonable expectation of privacy of public officials, there now remains the possibility that this unsettled aspect of the Michigan Eavesdropping Statute will again rear its ugly head and present itself to the Michigan Supreme Court in the future. For this reason, the *Bowens* Court needed to take a solid stance on the state of acting public officials in eavesdropping claims — and that stance should have been a *Hornberger* presumption of a diminished capacity of reasonable expectation coupled with an objective analysis of the individual circumstances.

**IV. Conclusion**

In summary, the *Bowens* Court came to the right outcome, but did not go far enough. While it was correct to conclude that there was no private conversation between the Detroit officials and concert representatives under the *Stone* standard, the significant issue of the reasonable expectation of acting public officials remains unresolved. The *Bowens* Court, instead of ignoring this issue, should have set forth a standard similar to that in *Hornberger* and create a presumption of diminished capacity for public
officials’ reasonable expectation of privacy. This is the solution that would best encourage accountability for public officials while still protecting them against the most egregious cases of eavesdropping.

The ruling would not only reflect a sound standard of law, but also reflect a sound social policy for the State of Michigan. Bowens is a case where acting public officials should have reasonably concluded they had no reasonable expectation of privacy under the circumstances, and where the recorded conversation revealed a blatant and unconstitutional abridgment of the First Amendment. This was even the opinion of former Mayor Archer, who stated that it was poor public policy for public officials to do anything to restrain the freedom of speech in the city of Detroit.147

When considering these events removed from the law, it seems obvious that “The Detroit Controversy” recording is quite damaging to Detroit’s already tarnished reputation. It may be debatable which party is more to blame for any negative depiction of Detroit, but this does not change the result that it is negative nonetheless. There is no mistake that the biggest loser in this suit between the Detroit officials and the concert representatives is the reputation of Detroit. From what was supposed to be a highly anticipated concert event in front of a sold out audience came a video which was highly critical of not only the Detroit officials in Bowens, but also Detroit public policy in general. At one point in the bonus footage, William Silva, in a state of confusion about the Detroit officials’ staunch opposition to the introductory video, sarcastically asked in front of the cameras “[t]his is the one city that decides that it violates their community standards?”148 The implication here is that Detroit is a city with lesser standards, a place where drug use and gunfire is a more common occurrence than other major cities in the United States. This negative view of the Detroit is only exemplified by the actions recorded in the DVD bonus footage. For a city that prides itself on the arts, it is certainly a step backwards to act in a manner which deters performing artists from coming to display their talents to a sold out audience of willing and paying citizens.

Thus, the best choice before the Michigan Supreme Court in Bowens was to reverse the court of appeals and dismiss the case on grounds that, under the circumstances and with a presumption of diminished capacity for acting public officials, the Detroit officials had no reasonable expectation of privacy for which an eavesdropping statutory tort may be brought. By ruling in this manner, the Court would have placed Michigan with other states adopting limits on eavesdropping statutory torts and ensured that public officials remain accountable for their actions should they be recorded.

147 Armstrong, supra note 42.
148 Supra note 5.
Unfortunately, this did not happen, though it does not mean it will never happen. There is sure to be another case in Michigan in which an acting public official brings an eavesdropping claim against a citizen after being recorded doing her job in public. At that time, the Michigan courts should recognize the opportunity to rule on the reasonable expectation of privacy for public officials and hold in a manner that ensures accountability of acting public officials. As Commander Brown (a Bowens plaintiff) stated, when asked about his policy behind installing cameras in Detroit Police patrol cars: “[i]t is for accountability.”149

149 Appellants, supra note 9, at 2 (emphasis in original).