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Commentary

# Prof. Gates' Unconstitutional Arrest

Harvey A. Silverglate, 07.28.09, 4:51 PM ET

The now-infamous Gates story has gone through the familiar media spin-cycle: incident, reaction, response, so on and so forth. Drowned out of this echo chamber has been an all-too-important (and legally controlling) aspect: the imbroglio between Harvard Professor Henry Louis Gates, Jr., and Cambridge Police Sgt. James Crowley has more to do with the limits (or breadth) of the First Amendment than with race and social class.

The issue is not how nasty the discourse between the two might have been, but whether what Professor Gates said--assuming, for argument's sake, the officer's version of events as fact--could by any stretch of both law and imagination constitute a ground for arrest for "disorderly conduct" (the charge leveled) or any other crime. Whether those same words could be censored on a college campus is a somewhat different--though related--question.

First, a quick recap. Gates returned to his Cambridge residence from an overseas trip to find his door stuck shut. With his taxi driver's assistance, he forced the door open. Shortly thereafter, a police officer arrived at the home, adjacent to the Harvard University campus--in my own neighborhood, actually--responding to a reported possible burglary.

Upon arrival, the officer found Gates in his home. He asked Gates to step outside. The professor initially refused, but later opened his door to speak with the officer. Words--the precise nature of which remains in dispute--were exchanged. Gates was arrested for exhibiting "loud and tumultuous behavior." The police report, however, in Sgt. Crowley's own words, indicates that Gates' alleged tirade consisted of nothing more than harshly worded accusations hurled at the officer for being a racist. The charges were later dropped when the district attorney took charge of the case.

It is not yet entirely clear whether there was a racial element to the initial decision by a woman on the street--working for *Harvard Magazine*, no less!--to call the police, although that is looking unlikely. It remains disputed whether Sgt. Crowley treated Professor Gates any differently than he would treat a white citizen in the same position. (In fact, if one accepts Crowley's claim that he dished out to Gates equal treatment under the law, this case stands as a dire warning to all citizens as to the dangers inherent in exercising one's constitutional right to free speech when in an exchange with a police officer--but more on that below.)

Indeed, Crowley did not arrest Gates for breaking and entering, for by then he was clearly convinced that the professor did live in the building. (For one thing, Harvard University Police officers had by that time arrived at the scene, and they easily could have checked not only that Gates was on the faculty, but that he lived in the Harvard-owned residential building. Gates is one of the most widely known faces in the Harvard community.) Instead, Crowley arrested the diminutive and disabled professor (he uses a cane to walk and bears a passing resemblance to the French painter Henri de Toulouse-Lautrec) for disorderly conduct--the charge of choice when a citizen gives lip to a cop.

By longstanding but unfortunate (and, in my view, clearly unconstitutional) practice in Cambridge and across the country, the charge of disorderly conduct is frequently lodged when the citizen restricts his response to the officer to mere verbal unpleasantness. (When the citizen gets physically unruly, the charge is upgraded to resisting arrest or assault and battery on an officer.) It would appear, from the available evidence--regardless of whether Gates' version or that of Officer Crowley is accepted--that Gates was arrested for saying, or perhaps yelling, things to Crowley that the sergeant did not want to hear.

As one of Crowley's friends told *The New York Times*: "When he has the uniform on, Jim [Crowley] has an expectation of deference." Deference and respect, of course, are much to be desired both in and out of government service--police want it, as do citizens in their own homes or on their porches or on the street. However, respect is earned and voluntarily extended; it is not required, regardless of rank.

Some have posited that Crowley's tolerance for citizen vituperation was lower because the speaker was a black man, or a

member of the city's economic and social elite. As a four-decade (and counting) criminal defense and civil liberties lawyer, I can say with reasonable assurance that while there might have been some degree of racial or, more likely, class animus that underlay the contretemps between citizen and officer here, fundamentally the situation can, and should, be analyzed as a free speech case.

Why? Because any citizen--white, black, yellow, male, female, gay, straight, upper or middle or lower class--who deigns to give lip to a police officer during a neighborhood confrontation or traffic stop stands a good chance of being busted. And this is something in police culture nationally--and probably all around the world (I've observed Frenchmen giving lip to Paris *flics* and *gendarmes*, also with bad results for the civilians)--that begs for change.

And so, before the dreaded thought-reform charlatans start coming out of the woodwork in order to prescribe yet more "sensitivity training" for Cambridge's finest, everyone should take a step back and ask why so many citizens--including Professor Gates, who, it is conceded, did not assault Officer Crowley--end up being arrested for uttering mere words. Because, whether the words were as perfunctory and non-objectionable as Gates' claim that he asked for Crowley's name and badge number, or as heated as Crowley's claim that Gates let loose a stream of loud and offensive insults, they were, well, just words. Put more simply, why do we as a society so often ignore traditional notions of First Amendment freedom to speak one's own notion of truth to power when one party to the confrontation is wearing a uniform, a badge and a gun?

Some of the media commentary is quite remarkable, replete with claims that Crowley had a right to arrest Gates because the professor was loud and offensive. Yet what has happened to the notion that under the First Amendment, loudness is OK as long as one is not waking up neighbors in the middle of the night (known as "disturbing the peace"), and offensiveness is fully protected as long as it stops short of what the Supreme Court has dubbed "fighting words"?

This gets us to the heart of the matter. Under well-established First Amendment jurisprudence, what Gates said to Crowley--even assuming the worst--is fully constitutionally protected. After all, even "offensive" speech is covered by the First Amendment's very broad umbrella. Think about it: We wouldn't even need a First Amendment if everyone restricted himself or herself to soothing platitudes. I've been doing First Amendment law for a long time and I've never had to represent someone for praising a police officer or other public official. It is those who burn the flag, not those who wave it, who need protection.

The test for the limits of such freedom was first and most famously enunciated by Justice Oliver Wendell Holmes, who wrote of the need for protecting "the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country." Holmes wrote this dissenting opinion in a 1919 Supreme Court case in which a majority affirmed the espionage conviction of five Russian-born Jewish radicals for publishing a pamphlet that sought to provoke resistance to the American war effort as well as to American efforts to undermine the Russian Revolution. Holmes' view eventually became the law of the land as other Supreme Court justices came to agree with him.

Today, the law recognizes only four exceptions to the First Amendment's protection for free speech: (1) speech posing the "clear and present danger" of imminent violence or lawless action posited by Holmes, (2) disclosures threatening "national security," (3) "obscenity" and (4) so-called "fighting words" that would provoke a reasonable person to an imminent, violent response.

Supporters of Sgt. Crowley's power and right to arrest Professor Gates--assuming the worst version of what Gates spewed at the officer--rely on the "fighting words" doctrine. But there is a problem with such reliance: The Supreme Court's affirming of a conviction for disturbing the peace based upon "fighting words" directed to a police officer has never been replicated since the original 1942 fighting words doctrine was announced in Chaplinsky v. New Hampshire.

In that infamous speech case, Walter Chaplinsky, proselytizing on the street in Rochester, N.H., denounced organized religion as a "racket." When Chaplinsky would not moderate his verbal attack, and when the crowd got angry and restive, a police officer took Chaplinsky toward the police station (but did not yet arrest him). During this trip, Chaplinsky accused the city marshal of being "a goddamned racketeer" and "a damned Fascist," and went on to charge that "the whole government of Rochester are Fascists or agents of Fascists." For this, Chaplinsky was arrested and charged under a statute prohibiting anyone from addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call[ing] him by any offensive or derisive name."

The Supreme Court upheld the conviction on the ground that Chaplinsky had used "fighting words" likely to provoke an immediate violent response from the listener. The high court deemed such language to be "insulting or 'fighting' words--those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."

"Such utterances are no essential part of any exposition of ideas," the court ruled, and they could be banned in "the social interest in order and morality."

However, a conviction for the use of such language has never since been upheld, and First Amendment lawyers and

constitutional scholars widely deem it a dead letter. In fact, in 1943--only one year after its decision in Chaplinsky--the high court had obvious second thoughts about part of its earlier "fighting words" rationale. The court in Cafeteria Employees Local 302 v. Angelos, said that the use of the word "Fascist" (the precise "fighting word" used by Chaplinsky) is "part of the conventional give-and-take in our economic and political controversies." Thus, the word was protected under federal labor laws.

The dam holding back "bad" words having thus been broken, by 1949 the Court took the further step of reversing the disturbing-the-peace conviction of a suspended Catholic priest and followers of the notorious anti-Semite Gerald L. K. Smith. Father Arthur Terminiello gave a speech in Chicago attacking "Communistic Zionist Jews," moving an unsympathetic crowd to violence against him. Justice William O. Douglas wrote, in an opinion for the high court that reversed the conviction, that the "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."

Thus, the Court sent a message that the First Amendment prohibits the punishment of words merely because they might produce an angry reaction. Terminiello was particularly important because the offensive language, even though it in fact produced a violent reaction, was not viewed as "fighting words." It was the job of the police to arrest the violent members of the crowd, not the speaker.

And, to the extent that tossing an expletive at some hothead on the street might conceivably produce a violent reaction, surely such words directed to a trained police officer should not be expected to incite such a response. To be sure, much of police training is specifically directed at producing a peace officer who knows how and when to keep a violent response wrapped under a highly polished discipline. It would be an insult to any law enforcement agent to assume that he or she would respond, with violence, to unpleasant--even offensive--words. Hence, even at its worst, Gates' reaction to the officer's presence and questioning cannot by any stretch be deemed grounds for an arrest. Professor Gates, in other words, was fully protected by the First Amendment. It was the officer's duty to restrain his own response, particularly the exercise of his official powers of arrest.

Indeed, the expansive nature of First Amendment rights, even in a confrontation with official power, was made vivid in the 1971 Supreme Court case, Cohen v. California. Paul Cohen was arrested in the Los Angeles County Courthouse for wearing a jacket emblazoned with the words "Fuck the Draft." He was convicted for "offensive conduct" because, the state court ruled, "offensive conduct" meant "behavior which had a tendency to provoke others to acts of violence." Even though no one actually threatened Cohen, said the state court, an attack was "reasonably foreseeable."

The Supreme Court reversed. The great conservative justice John Marshall Harlan wrote that "Fuck the Draft" was not "obscene" and that its offensiveness did not render it unprotected--even in the corridors of a courthouse! In Cohen, the high court essentially recognized the emotive function of expression, placing emotion alongside logical argument as political speech worthy of constitutional protection. The court spoke to the value, in a free society, of allowing the individual citizen to choose how to express himself. This recognition of the value of self-expression was coupled, in the Court's view, with an inability of the state to make a principled distinction between "offensive" language and other language, because it is "often true that one man's vulgarity is another's lyric."

There is a certain irony, however, that Professor Gates should be caught up in a controversy that, at bottom, is about the limits of free speech in confronting official power. The irony grows out of the fact that two of the major ways in which an American can run into big trouble for mouthing off without adequate self-censorship are: (1) let a police officer know that you're not happy with being, or feeling, hassled, or (2) say something politically incorrect on a college campus. In this regard, both Cambridge and Harvard are more typical than special.

University censorship in the name of not "offending" others, including (perhaps especially) members of "historically disadvantaged groups" is now an old story. Professor Alan Charles Kors and I elucidated the sorry state of free speech on campuses of higher education, including Harvard, in our 1998 book *The Shadow University: The Betrayal of Liberty on America's Campuses*. Soon thereafter we co-founded The Foundation for Individual Rights in Education to battle the contagion of censorship in the academic world.

Subsequently, I've written from time to time about the infliction of penalties for speech that is too frank and potentially found offensive by various categories of students deemed (often degradingly so) by censorious college administrators to be particularly sensitive to insults or even insulting ideas.

Indeed, Professor Gates, to his enormous credit, has parted ways with the ubiquitous speech police on his own and other campuses. In September 1993, Gates wrote for *The New Republic* a powerful critique of campus "harassment codes" that outlaw unpleasant speech. Gates was dealing with a typical university speech code, such as the one in force at the time (and still in force on campuses all around the country) at the University of Connecticut, that banned "treating people differently solely because they are in some way different from the majority, … imitating stereotypes in speech or mannerisms, … [or] attributing objections to any of the above actions to 'hypersensitivity' of the targeted individual or group."

Gates labeled this hypersensitivity provision "especially cunning" because "it meant that even if you believed that a complainant was overreacting to an innocuous remark, the attempt to defend yourself in this way could serve only as proof of your guilt." In other words, self-defense against claims of uttering "harassing" speech only furthered the culpability of the accused in the Orwellian world of academic censorship.

Under Gates' own analysis of the University of Connecticut "harassment" speech code, neither Officer Crowley's words to Gates, nor the professor's responses, nor the officer's replies to those responses, should prove the guilt of either. There was no violence. There were only words, some of which might have been insulting and otherwise unpleasant. And in a free society, verbal expression--even if disagreeable--should never lead to clamped handcuffs.

This is the long and short of it. For whatever significance that columnists, bloggers and commentators project onto the Gates-Crowley confrontation, it was, and likely should remain in the absence of new and compelling evidence to the contrary, a free speech matter governed by the First Amendment to the Constitution.

This will not, perhaps, please those who would like to turn it either into a "teachable moment" for either racial profiling (a phenomenon that doubtless exists, but likely played no role in this case and certainly did not account for Officer Crowley's initially confronting Professor Gates, whose actions sparked a citizen's 911 call to the police rather than a spontaneous police stop) or into an example of why police need to protect themselves while on duty (words may wound, but not in any sense recognized by the Constitution).

The Cambridge Police Department and the District Attorney of Middlesex County wisely agreed with Gates and his lawyers to dismiss the charge of "disorderly conduct." Perhaps the dismissal was occasioned by the discomfort prosecutors--and perhaps both sides--were feeling about proceeding to a criminal trial where both Gates' and Crowley's words would be on public display. But the D.A. had another reason for dismissing the charge: Had Professor Gates and his lawyers raised a First Amendment defense, the defendant almost certainly would have prevailed--if not at the trial court level, then in the appellate courts--and the scope of the "disorderly persons" statute would have been severely limited in all future citizen-police confrontations. The future use of handcuffs to penalize a citizen mouthing-off against official authority would have been, at long last, curtailed. Perhaps the common good would have been better served had the case proceeded to trial after all.

There is a serious problem in this country: Police are overly sensitive to insults from those they confront. And one can hardly blame the confronted citizen, especially if the citizen is doing nothing wrong when confronted by official power. This is, after all, a free country, and if "free" means anything meaningful, it means being left alone--especially in one's own home--when one is not breaking the law.

Sgt. Crowley had every right to check on what was reported as a possible break and entry. But as soon as he realized that the occupant was entitled to be in the house, he should have left. He admits in his own police report that he was indeed able to ascertain Professor Gates' residency and hence right to be in the house.

As for Professor Gates' inquiries into the officer's identity and badge number (as Gates describes the confrontation) or his tirade against the officer (as Crowley reports), the citizen was merely--even if neither kindly nor wisely--exercising his constitutional right when faced with official power. Even if Professor Gates were wearing a "Fuck You, Cambridge Police" jacket, the officer would have been obligated to leave the house without its occupant in handcuffs.

*Harvey A. Silverglate is co-author of* The Shadow University: The Betrayal of Liberty on America's Campuses *(HarperPerennial paperback, 1999), from which some of the First Amendment analysis in this article is taken, and the author, most recently, of* Three Felonies a Day: How the Feds Target the Innocent *(Encounter Books, 2009). (Kyle Smeallie assisted in the preparation of this piece.)*