

THE PROFESSOR WITH THE LIMP AND THE CANE AND THE COP WITH THE GUN AND THE BADGE

Author: Donald E. Wilkes, Jr., Professor of Law, University of Georgia School of Law.
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Police forces tend to be among the most secretive and least accountable of all organizations. When pressed for accountability or sued for malfeasance, obfuscation and evasiveness are the typical response. The phenomenon is hardly limited to certain countries or societies—the unassailability of police organizations seems to be universal.—Michael H. Fox

The serve-and-protect model of police motivation that was drummed into police corps across the country in the aftermath of the response to anti-war demonstrations in the sixties and seventies has been heavily encroached on by the control-and-suppress model.—J. Ackerman

The best motto for a police officer is that sticks and stones will break my bones, but words will never hurt me.—George Kirkham

The recently published *Presumption of Guilt: The Arrest of Henry Louis Gates Jr. and Race, Class, and Crime in America* (2010), by Charles J. Ogletree, Jr., a Harvard law professor and friend of Gates, tells the story of Gates' arrest as well as the stories of other black Americans who, like Gates, have been arrested or accosted by police officers acting suspiciously. The publication of this book started me thinking again about the whole Gates affair and motivated me to undertake the following probe into aspects of the Gates arrest that general public may not be aware of or fully understand.

Infamously, Henry Louis Gates, Jr., Alphonse Fletcher Jr. University Professor at Harvard University, Director of the W.E.B. Du Bois Institute for African and African American Research, the author of a

dozen scholarly books and editor of half a dozen more, the prominent literary historian, theorist and critic, the renowned intellectual with a worldwide reputation, and currently this country's most noted black scholar, was arrested for disorderly conduct on the front porch of his Cambridge, Massachusetts home by Sgt. James P. Crowley, a Cambridge police officer, shortly before 1 p.m. on Thursday, July 16, 2009.

Police mugshots of Prof. Gates, as well as a photograph of him in handcuffs on his porch, surrounded by armed policemen, appeared in news stories on the incident and were seen all around the world.

Reactions to the arrest of Gates varied. To liberals and civil liberties advocates, the arrest was unconstitutional, unjustified, and outrageous. To these people, the arrest resulted from vindictiveness, pettiness, and racism. To conservatives and apologists for the crime control establishment, the arrest was appropriate, proper, and perfectly legal. To the defenders of the arrest, Crowley was just a hardworking cop doing his duty, a blue-collar type simply performing his job, whereas Gates was an arrogant, pointy-headed, pampered elitist who breached the peace and deserved arrest.

Predictably, Crowley's fellow police officers circled the wagons in his defense. "I believe that Sgt. Crowley acted in a way that is consistent with his training at the department and consistent with national standards of law enforcement protocol," said Robert Hass, Commissioner of the Cambridge Police Department. "We stand by whatever the officer said in his report," announced Sgt. James DeFrancesco, spokesman for the Cambridge Police Department. And the Cambridge Police Superior Officers Association issued a statement expressing it "full and unqualified support" for Crowley, adding that Crowley is "a highly respected veteran supervisor with a distinguished record. His actions at the scene of this matter were consistent with his training, with the informed policies and practices of the department and with applicable legal standards." Doubtlessly police officers throughout

America overwhelmingly shared these pro-Crowley views.

Crowley himself dismissed suggestions that he should apologize to Gates for arresting him: “I have nothing to apologize for. It will never happen.”

Undisputed Facts Regarding the Arrest

Many of the facts surrounding the arrest are hotly disputed, but I begin my analysis with the undisputed basic facts, which are:

1. On the day in question, July 16, 2009, the 56-year old Gates arrived at Boston’s Logan Airport, returning from a trip to China where he had been filming a PBS documentary. He was met there by his usual chauffeur from a Boston car service, and driven to his home (which he was renting from Harvard) at 17 Ware Street in Cambridge, arriving there about 12:30 p.m.. Gates and the chauffeur carried the luggage to the front porch of the house. They then discovered the front door to the house was jammed, perhaps due to an attempt to jimmy the door lock while Gates was away. Gates was able to enter his house via the back door but found the front door could not be opened from the inside. He then went around to the front and with the chauffeur forced the door open. The chauffeur departed. Gates then got on the phone with the Harvard Real Estate Office to report that the lock on his front door was defective and needed replacement.

2. Shortly after the front door had been pushed in, 40-year old Ms. Lucia Whalen, a *Harvard Magazine* employee, dialed 911 on her cell phone. Whalen, a 40-year old Harvard alumni magazine employee, had been walking through the neighborhood on her way to lunch when an elderly woman without a cell phone stopped her to report that a break-in might have just occurred at 17 Ware Street.

3. In its entirety the transcript of Whalen’s 911 call reads as follows:
Dispatcher “Tell me exactly what happened.”

Whalen “Umm, I don’t know what’s happening. I just have an elderly

woman here, uh, standing here, and she had noticed two gentlemen trying to get in a house at that number, 17 Ware Street, and they kind of had to barge in. And they broke the screen door and they finally got in, and when I looked, I went further, closer to the house a little bit, after the gentlemen were already in the house, I noticed two suitcases, so I'm not sure if these are two individuals who actually work there, I mean who live there."

Dispatcher "You think they might've been breaking . . ."

Whalen "I don't know, 'cause I have no idea, I just noticed . . ."

Dispatcher "So you think the possibility might have been there or . . . ? What do you mean by barged in? Did they kick the door in or . . .?"

Whalen "No, they were pushing the door in, like uh, like the screen part of the front door was kind of like cut."

Dispatcher "How did they open the door itself, the lock?"

Whalen "I didn't see a key or anything 'cause I was a little bit away from the door. But I did notice that they pushed their . . ."

Dispatcher "And what did the suitcases have to do with anything?"

Whalen "I don't know. I'm just telling you that's what I saw. I just [inaudible]."

Dispatcher "Do you know what apartment they broke into?"

Whalen "No, it's just the first floor. I don't even think that it's an apartment. It's 17 Ware Street. It's a house. It's a yellow house. Number 17. I don't know if they live there and they just had a hard time with their key, but I did notice that they had to use their shoulder to try to barge in and they got in. I don't know if they had a key or not 'cause I couldn't see from my angle . . ."

Dispatcher "[inaudible] black or Hispanic? Are they still in the house?"

Whalen "They're still in the house I believe, yeah."

Dispatcher "Are they white, black, or Hispanic?"

Whalen "Umm, there were two larger men, one looked kind of Hispanic, but I'm not really sure. And the other one entered, and I didn't see what he looked like at all. I just saw it from a distance, and this older woman was worried, thinking someone's breaking in someone's house. They've been barging in, and she interrupted me, and that's when I had noticed. Otherwise, I probably wouldn't have noticed it all, to be honest

with you. So I was just calling 'cause she was a concerned neighbor, I guess . . .”

Dispatcher “All right, well, police are on the way, you can meet them when they get there.”

4. Around 12:44 p.m. Sgt. Crowley, who was in uniform in an unmarked patrol car, received a police radio broadcast about the possible break-in at 17 Ware Street and drove there. Exiting his car, he spoke briefly with Whalen and then walked up the steps onto the porch of 17 Ware Street and went to the front door where through the glass pane he saw Gates inside in the foyer of the house. He asked Gates to step out onto the porch. Gates refused. During all or most of the encounter between the two men Gates vehemently protested and criticized Crowley’s actions. At some point Gates requested Crowley to provide his name. At some point Crowley entered the home (although whether Gates opened the door for Crowley, or whether Crowley entered with Gates’ consent, is disputed). At some point Gates told Crowley that he lived there and Crowley requested some identification. In response to Crowley’s request for identification, Gates produced his Harvard faculty photo ID card. At some point Crowley radioed this message to headquarters: “I’m up with a gentleman who says he resides here but uncooperative. . . . He gave me the name of Henry Louis Gates Jr. on Harvard property.” At some point Crowley left the house and Gates came out onto the front porch, whereupon Crowley arrested him on the porch for disorderly conduct and handcuffed him.

5. The elapsed time from Crowley’s first arrival at Gates’ front door and his arrest of Gates was approximately six minutes.

6. Taken away, manacled, to the police station where he was booked, fingerprinted, and photographed, Gates was later released after four hours of detention there. Five days later the district attorney dismissed the charges.

Swearing Contest Between Gates and Crowley

Although neither Gates nor Crowley would disagree with the above-stated facts, in almost all other respects the two men have vastly disparate accounts of events leading to Gates' arrest.

In his arrest report completed an hour after the arrest Crowley claims that throughout the encounter Gates was rude and abusive, yelling at him and accusing him of being a racist police officer; that he was surprised and confused by Gates' uncivil behavior; that at some point Gates opened the front door; that Gates initially refused to produce any identification but eventually showed Crowley the Harvard faculty ID card; that on Gates' request Crowley did give Gates his name; that Gates behaved arrogantly, picking up a phone and telling the person on the other end of the line to "get the chief"; that Gates leveled threats to Crowley, telling him that he, Gates, was not someone to mess with; that Crowley told Gates that he was leaving the residence and that if Gates had any more questions he would answer them outside; that Gates replied, "ya, I'll speak to your mama outside"; that Gates followed Crowley outside; that as Crowley descended the front stairs Gates, who was now on the porch, continued to yell at him and told him that he had not heard the last of Gates; that Gates' yelling drew the attention of and surprised and alarmed the police officers and bystanders who had gathered in front of the house; that immediately before the arrest Crowley twice "warned" Gates; and that Gates ignored these warnings and continued his "tumultuous" (a word Crowley uses three times in his report) behavior until arrested.

Gates, on the other hand, claims that Crowley's version of the facts, as embodied in the arrest report, reflects the officer's "broad imagination." "Well," Gates says, "the police report was an act of pure fiction. One designed to protect him . . . from unethical [conduct charges]. I was astonished at the audacity of the lies in the police report, and almost the whole thing from start to finish was just pure fabrication."

Specifically, Gates says that he was on the phone with the Harvard Real Estate Office arranging for his broken front door lock to be repaired when Crowley suddenly appeared; that on noticing the policeman outside

the door he said, “Officer, can I help you?”; that Crowley immediately asked Gates to step outside, to which Gates replied, “No, I will not,” triggering the officer’s anger; that the manner of the officer’s request made the hairs on the back of Gates’ neck stand up; that Crowley presumed Gates’ guilt, apparently because Gates is black; that he told the officer that he lived there and was a member of the Harvard faculty; that Crowley entered the house without permission; that three times Crowley refused Gates’s request for his name and badge number; that Gates handed over to Crowley not only his Harvard ID but also his driver’s license (which gave 17 Ware Street as his address); that Gates requested Crowley to call the chief of the Harvard police to confirm that Gates was in his own home, which Crowley did not do; and that Crowley asked him to step outside and that as he did so Crowley said, “Thank you for accommodating my earlier request. You are under arrest.”

Gates, whose right leg is two inches shorter than his left because of a childhood injury and walks with a cane, also denies saying anything about Crowley’s mama: “I weigh 150 pounds and I’m 5’ 7”. I’m not going to give flak to a big white guy with a gun. I might wolf later, but won’t wolf then. . . . Does it sound logical that I would talk about the mother of a big white guy with a gun?”

Resolving This Swearing Contest

We have, then, diametrically different descriptions of the brief encounter between the professor with the cane and the limp and the cop with the gun and the badge. We have, in other words, a textbook example of what is known as “the swearing contest.” A citizen has an unpleasant encounter with a police officer under circumstances in which there are no neutral witnesses to the encounter. Afterwards the citizen complains that the officer violated his rights or mistreated or disrespected him, and recounts what happened. The officer gives an entirely version of the encounter—a version which clears the officer and casts the blame for whatever may have happened on the complaining citizen. (Such disputes, it should be noted, are almost always resolved in favor of the

policeman's version of the facts even though it is often the citizen rather than the officer who is telling the truth. Police know this, and are thereby emboldened to abuse their powers.)

How should we deal with the swearing contest between Gates and Crowley? Can the truth ever be known? Should we throw our hands up in despair?

My answer, based on the undisputed facts and the facts reasonably to be inferred from them, is that we can be pretty sure that both the scholar and the officer are tweaking the truth, but that on the whole it is the policeman, and not the professor, who has significantly departed from verity.

I turn first to the police report, and note that the original report prepared shortly after the arrest differs in a number of ways from the version of the report that appears in Ogletree's book, which suggests that subsequent to preparing the report Crowley may have edited it. In the rest of this article I shall rely on the original, unaltered report.

Supporters of Crowley accept that report as gospel truth, describe it as a "highly revealing narrative," and chortle over what they call "the damning picture" of Gates that it depicts. Based on that report and various postarrest statements by Crowley, they label Gates a criminal and absolve Crowley of allegations of misconduct. Are they correct in displaying confidence in Crowley's report?

Unreliability of Police Reports

The narrative portions of police reports are notoriously unreliable, as attorneys who represent criminal defendants know from experience. They are full of self-serving statements. They are classic cover-your-ass documents. As Lt. Steve Rose of the Sandy Springs Police Department revealingly explained to a newspaper reporter a few years ago: "Most [police] reports are written in a way that defense attorneys won't have

too many holes to poke in them.”

The reports, incidentally, are written in the lingo used by the police profession, a dehumanized bureaucratese known as copspeak under which, for example, persons suspected of crime are not citizens but “subjects” or “individuals,” pot smokers are “weedsuckers,” and persons shot dead by police are “taken down.”

A decade ago the Georgia Supreme Court, following the lead of many other courts, held that police report narratives are inadmissible hearsay evidence because they do “not have the reliability inherent in other documents that courts have traditionally considered to be [excepted from the hearsay rule]. The court explained: “Some information recorded by police officers cannot be said to be ‘routine facts’ . . . Police work by its very nature is adversarial and police investigations are inherently accusatorial. Complete accuracy in recording the sensitive facts involved in police investigations is not easily attained even by the most objective observer. Many of the incidents which police investigate involve human attitudes and emotions which are subjective in nature and susceptible to many interpretations. . . . [P]olice work is often heavily influenced by the beliefs, impressions, and, at times, hunches of the investigating officer.”

Police Reports and Testilying

What is known about testilying is another reason why police reports of officers who have acted improperly cannot be trusted. Testilying is the common practice of misbehaving police officers to perjure themselves in court when testifying about what they did. That testilying exists is well known by those familiar with the criminal justice system, and the practice is the subject of numerous scholarly books and articles. If police who engage in misconduct are willing to flat out lie in court under oath, can it be doubted that they would fabricate facts in their own reports, which are prepared at the station house and are not under oath?

These are some of the reasons why, typically, confidence generally cannot be placed in a police report giving an officer's account of an encounter with a citizen who asserts the officer acted improperly. But what about Crowley's report specifically?

Crowley Clears Himself

Nothing in his own report suggests that Sgt. Crowley did anything wrong, or that he was anything other than calm, patient, and reasonable in dealing with an excited Gates. Everything in that report indicates that it was Gates alone who misbehaved. In his police report, that is, Crowley clears himself of doing anything wrong in accosting and arresting Gates.

It goes without saying that in their reports police officers do not report on their own misconduct. In the thousands of cases of proven police misconduct there are hardly any where the offending officer wrote a report truthfully reporting what actually happened. There was nothing in the reports filed by the officers who beat Rodney King to a pulp (eleven skull fractures, broken cheek bone, fractured eye socket, broken ankle, missing teeth, kidney damage, external burns, and permanent brain damage) intimating that they had done anything wrong.

If Crowley did mistreat Gates, therefore, it is unsurprising that the report fails to indicate this. If Crowley misbehaved, it is to be expected that any report on the incident prepared by Gates would absolve himself and cast all blame for what happened on Gates. And this is exactly what the report does.

Crowley's report, in which he exonerates himself of any wrongdoing, may be true—if in fact he did not misbehave (which seems unlikely). But by itself the report is not reliable evidence that Crowley acted properly in accosting and arresting Gates.

Indications Crowley's Police Report is Unreliable

Quite apart from the fact that it self-servingly exculpates its author of misconduct, are there indications that Crowley's report is slanted or false? Yes, indeed, there are; and I will mention a few.

To begin, the report conflicts with the statements of a disinterested witness.

In his report, in an effort to defuse the race issue, Crowley says that, before he went to the front door of the house at 17 Ware Street, he talked with Ms. Whalen and that "[s]he went on to tell me that she observed what appeared to be two black males with backpacks on the porch of 17 Ware Street." This statement by Crowley is almost certainly a fabrication, for it will be recalled that in her 911 call Whalen, when asked the race of the break-in suspects, told the dispatcher that she was not really sure but that one of the men "looked kind of Hispanic". Why would Whalen tell the dispatcher one thing and then a few minutes later tell Crowley something else?

More importantly, within days of the arrest Whalen talked to news reporters at a press conference and firmly denied telling Crowley what Crowley claims she told him. At the conference she said that at no time in her very short conversation with Crowley were the words "black men" or "backpacks" used. The AP story of the press conference states in part: "The arresting officer, Sgt. James Crowley, has said his information on the race of the suspects came during a brief encounter with Whalen outside Gates' house; she [Whalen] contradicted that Wednesday, saying she made no such description."

In regard to Whalen we have a swearing contest between a citizen who is neutral and impartial and a police officer with a vested interest in his conflicting version of the truth, and there is no reason to think that it is the citizen who is recounting a false version of events.

Other indications that Crowley's police report is unreliable:

- Overall the report is suspiciously defensive. “That report,” James Hannaham comments, “doesn’t read as the details of an incident; it reads to me as someone trying to justify their actions and the charges they brought.” A report that focuses more on vindicating the officer’s actions than accurately relating events is an untrustworthy source of information concerning the interactions between Crowley and Gates.

- The report hardly ever quotes Crowley himself, whose statements are described in favorable, conclusory terms. The report does not, for example, tell us exactly Crowley said when he asked (or demanded) that Gates come out of his own home. Instead it blandly asserts: “I asked if he would step out on the porch and speak with me.” Why doesn’t the report tell us precisely what Crowley, the man who uttered the words and wrote the report, said? On the other hand, Gates’ words are frequently set forth purportedly verbatim, and almost always show Gates in a bad light.

- The report fails to state how it came to be that Crowley entered Gates’ home or ended up in his kitchen. The report says that Gates opened the front door. But even if this is true, and if it is also true that Crowley entered with consent, the question remains: was the “consent” the result of being ordered to open the door or otherwise involuntary, or was the consent voluntary? The Fourth Amendment bars consent searches unless the consent is voluntary.

- In his report Crowley claims: “ I was quite surprised and confused with the behavior [Gates] exhibited toward me.” This statement, designed to make Crowley look good and Gates bad, is likely false. Crowley has been trained to be understanding when dealing with people who are upset, and he is a veteran police officer of many years who undoubtedly has encountered numerous irate citizens who verbally abuse him. He certainly must be used to dealing with citizens who for one reason or another are angry with him. Why would an experienced police sergeant listening to Gates’ protestations (made shortly before and after Crowley knew that Gates was in his own home and that there had been

no break-in) react like a naif and be “surprised” or “confused”? “Police need to be able to put up with people yelling at them,” criminology professor Lorie Fridell says. Why wouldn’t, in the words of Ray Hanania, a veteran police officer such as Crowley “be professional enough to recognize that circumstances sometimes justify a citizen’s outrage and anger as an expression of their free speech”?

- At no point does Crowley’s report state that he had determined the break-in report was false and that Gates lived there. The report fails to show that once Gates proved by photo ID that he lived there, Crowley said or did what a responsible police officer would do in dealing with an indignant citizen who is in his own home and innocent of any wrongdoing: apologize for the error, and promptly leave. In the words of Lowry Heussler: “Perhaps Crowley could commit the following sentences to memory: ‘I’m sorry for disturbing you,’ and ‘I’m glad you are all right.’”

- The report shows on its face that even after Gates had produced his photo ID, Crowley acted as though he had a right to remain on the premises, which he did not.

Dissecting Crowley’s Story

Many aspects of Crowley’s version of events are either doubtful or suspicious.

It is, for example, certain that early in the encounter Gates told Crowley that he was a Harvard professor and that this was his home. Yet Crowley’s report never says so. Why?

In his report Crowley says that while in the house he radioed headquarters to tell them that he “was in the residence with someone who appeared to be a resident but very uncooperative.” (The transcript of that call has Crowley saying: “I’m up with a gentleman who says he

resides here (background voice) but uncooperative. But uh, keep the cars coming.”) Why is Crowley escalating the situation? He acknowledges that probably it is Gates’ home. Why is he not now leaving? Why is he calling for backup? What does he mean by “appeared to be a resident”? Had not Gates told him it was his own house? Had not Crowley seen Gates’ Harvard ID or Gates’ driver’s license (which listed his address)? And what Crowley does mean when he says that “I was led to believe that Gates was lawfully in the residence”? Was there any doubt? Why all the verbal weaseling?

In his report Crowley says: “I asked Gates to provide me with photo identification so that I could verify that he resided at Ware Street and radio my findings to [headquarters].” But what reason did he have for doubting that Gates lived there? And why did he need to radio any “findings”? If he determined that Gates lived there, all he had to do was apologize and leave; he didn’t need to radio anyone—and certainly he didn’t have to do any radioing while remaining in Gates’ house. All he needed to do was look at the ID he had asked for, and if it showed Gates was who he said he was, then the investigation was at an end, and the officer was legally and morally obligated to promptly exit the premises, preferably after apologizing to an innocent American citizen lawfully in his own home for any inconvenience that may have occurred. I think it possible that one reason Crowley radioed was to do a warrant check on Gates in the hope that there was an outstanding arrest warrant for Gates. Meanwhile he acted as if Gates’ home was a police radio communications center.

Crowley’s report says that Gates “did supply me a Harvard University identification card. Upon learning that Gates was affiliated with Harvard University, I radioed and requested the presence of Harvard University Police.” Once Gates had provided the photo ID, why did Crowley escalate things by radioing a request for the presence of the Harvard police? What need was there to do this? Why was the act of providing on request satisfactory identification suddenly grounds for summoning more police? Why did Crowley not promptly apologize for any

misunderstanding and leave?

Crowley's report says: "With the Harvard University identification in hand, I radioed my findings to [headquarters]." But why? What need was there to radio anybody once he knew Gates was "affiliated" with Harvard? Why not return the ID, apologize, get out, and do the radioing somewhere else or later? I suspect the purpose of the call might have been to prolong his stay in the premises and to do a warrant check (if one had not already been performed).

In his report Crowley says: "My reason for wanting to leave the residence was that Gates was yelling very loud and the acoustics of the kitchen and foyer were making it difficult for me to transmit pertinent information to [headquarters] or other responding units." Why didn't Crowley state that the reason for leaving was the fact that it was now evident that there had been no break-in and that Gates lived there? Why is he talking as if he had a right to stay in the house?

In his report Crowley claims that Gates, in addition to being "tumultuous" while on the front porch, previously had been "tumultuous" inside the house. If that is so, why did back-up officer exit the residence and go outside? And why did the numerous back-up officers in front of the residence remain there rather than go inside? Doesn't it seem likely that, if Gates was being tumultuous inside the house, the numerous policemen out front would have entered the residence to protect Crowley?

In his report Crowley claims that Gates' behavior on his front porch "served no legitimate purpose and caused citizens passing by this location to stop and take notice while appearing surprised and alarmed." The "no legitimate purpose" term is, to begin, another example of Crowley's use of conclusory legal terminology in his report. Citizens who think they are being mistreated by police might disagree with Crowley about whether energetically protesting perceived misconduct has no legitimate purpose. And how could Crowley possibly know that

the reason the bystanders were astonished was Gates' yelling? Numerous police cars had parked outside Gates' house and numerous policemen were assembled out front. Maybe it was this spectacle that amazed the seven or more bystanders. Or maybe it was the highhanded way Crowley and the other officers might have been treating Gates that caused the bystanders to act as they did. Did the police at the scene get the names and statements of the bystanders so they could confirm Crowley's version of the facts?

Figueroa's Police Report

In addition to Crowley, one other Cambridge policeman present when Gates was arrested filed a report of the incident. This was officer Carlos Figueroa, whose three-paragraph report may be summarized as follows:

1. Figueroa went to 17 Ware Street in response to the radio broadcast about a possible break-in. "When I arrived, I stepped into the residence and Sgt. Crowley had already entered and was speaking to a black male." (This means that least two police officers entered Gates' home. Nothing indicates that Figueroa entered with Gates's consent or even his knowledge.)
2. "As I stepped in, I heard Sgt. Crowley ask for the gentleman's information [to] which he stated 'NO I WILL NOT!'" Gates "was shouting out to the Sgt. that the Sgt. was a racist and yelled that 'THIS IS WHAT HAPPENS TO BLACK MEN IN AMERICA!' As the Sgt. was trying to calm the gentleman, the gentleman shouted "You don't know who you are messing with!"
3. Figueroa then went outside and talked to Ms. Whalen. "As I returned to the residence, a group of onlookers were now on the scene. The Sgt., along with the gentleman, were now on the porch of Ware St. And again he was shouting now to the onlookers (about seven), 'THIS IS WHAT HAPPENS TO BLACK PEOPLE IN AMERICA!' The gentleman refused to listen as to why the Cambridge Police were there.

While on the porch, the gentleman refused to be cooperative and continued shouting that the Sgt. is [a] racist.”

Because solidarity with and loyalty to fellow officers is an important part of the police culture, it was to be expected that another policeman would file a report corroborating Crowley’s version of the facts (although Figueroa’s report sometimes factually contradicts Crowley’s report).

I also note the following about officer Figueroa’s report.

First, like Crowley’s report, it fails to relate facts demonstrating that Gates violated the disorderly conduct statute. Second, it depicts Gates making criticisms of Crowley which are protected by the First Amendment. Third, Figueroa says that he left Crowley and Gates together in the house and went outside. This surely means that he did not think that Gates was a threat or was committing a crime. Figueroa was a back-up officer, and back-ups never leave a fellow officer who might be in danger. Fourth, the Figueroa report says that Gates while on the porch yelled to the bystanders, whereas Crowley’s report says Gates’ yells were directed at Crowley.

Was Gates Guilty?

The crime of disorderly conduct is a minor misdemeanor in Massachusetts. It is punishable by a \$150.00 fine but no jail time. Prof. Gates was detained, manacled, searched, taken from his home, processed as a criminal suspect and jail prisoner, and held in a police station for four hours based on Sgt. Crowley’s charge that Gates had committed this offense while standing on his own front porch. Was the professor guilty?

No!

The Massachusetts disorderly conduct statute broadly criminalizes all “disorderly persons,” but to discourage abusive enforcement of the statute the courts have severely limited its reach. The Massachusetts Supreme Court has restricted the crime of disorderly conduct to cases where a person, “with purpose to cause public inconvenience, annoyance, or

alarm, or recklessly creating a risk thereof . . . engages in fighting or threatening, or in violent or tumultuous behavior.” The crime of disorderly conduct, that court said, “aims at activities which intentionally tend to disturb the public tranquillity, or alarm or provoke others.” The federal district court in Massachusetts has held that “neither a provocative nor a foul mouth transgresses the statute,” and that “one may be arrested for tumultuous behavior only when the conduct . . . disturbs through acts other than speech.” Both courts agree that the disorderly conduct statute does not cover activities involving a lawful exercise of a First Amendment right.

Sgt. Crowley erroneously thinks that the disorderly conduct statute punishes a person who loudly and insultingly criticizes and denounces a police officer on duty, and even if this happens inside a home or on a front porch of a home. This is contrary to the view of the courts. Shouting at and verbally abusing an officer is not an act of disorderly conduct. “Police work is by definition dangerous work,” writes Robert Schlesinger. “Those who do it deserve our respect, but that is a moral obligation, not a legal one; violation of it is punishable by derision or disappointment, not handcuffs or jail time.”

In prosecutions for disorderly conduct in Massachusetts, the standard jury instructions provide that a person tried for the offense cannot be found guilty unless the state proves beyond a reasonable doubt all three of these elements of the offense:

- (1) The defendant engaged in fighting or threatening, or engaged in violent or tumultuous behavior, or created a hazardous or physically offensive condition by an act that served no legitimate purpose.
- (2) The defendant’s actions were reasonably likely to affect the public.
- (3) The defendant intended to cause public inconvenience, annoyance or alarm, or recklessly created a risk of public inconvenience, annoyance or alarm.

Accepting every fact Crowley alleges in his police report, Gates was not guilty of the crime of disorderly conduct. It is not criminal to call a

police officer a racist. “Police officers are not empowered to arrest people who call them racist,” J. Ackerman notes. “That’s an opinion, political speech, and a right under the Constitution. . . . You can legally say anything in any manner to a police officer that you can say to anybody else. Police in fact operate under legal constraints which do not affect the general public.” Nor is it a crime to yell at a policeman, to refuse to listen to him, or even to revile him.. “The law is aimed not at mere irascibility but rather at unruly behavior likely to set off wider unrest,” Steve Parker has written. “True freedom,” Robyn Blummer writes, “is the right to question authority boisterously and even offensively, and yet be left alone.”

Gates had a First Amendment right to verbally excoriate Crowley, and the disorderly conduct statute cannot be construed to penalize political speech in the form of scorching verbal criticism of a policeman. As Steve Parker notes: “[P]olitical speech is excluded from the statute because of the First Amendment. Alleging racial bias, as Gates was doing, and protesting arrest both represent core political speech.” “Being rude, unfair, or disrespectful should not be illegal,” Joshua Claybourn notes, “and that’s essentially the effect of most disorderly conduct laws.”

In truth, we don’t want on the force any policeman who makes arrests to punish insolence or insults, or who arrests because he has lost his temper or suffered a loss of face. “[I]f a cop can’t take an insult without retaliating, he’s in the wrong job,” writes Lowry Heussler. “When a person is given a badge and a gun, we better be sure he’s got a firm grasp of his temper.” In the words of Robyn Blummer, we so not want to employ police who “will resort to their trump cards of handcuffs and state authority when being affronted.” “We are a country founded on Jeffersonian ideals, and people don’t like government in their lives,” says George Kirkham. “[Police] need to be aware of that.”

There is nothing in the police report, except the use of loaded, conclusory words, e.g., “tumultuous,” indicating that Gates engaged in acts amounting to disorderly conduct. Even if Gates said and did everything

Crowley accuses him of in the report. Even if Gates was rude and abrasive. Even if Gates yelled. Even if Gates accused Crowley of being racist. Even if Gates said something about Crowley's mother. Even if Gates was "uncooperative". Even if there were numerous citizens and police gathered outside the house at 17 Ware Street when Gates was arrested.

In short, Crowley's police report fails to allege any facts indicating that Gates' behavior was "tumultuous" in a legal sense, that Gates' actions inside his own house or on his front porch were reasonably likely to affect the public, or that he intended to cause public inconvenience, annoyance or alarm, or was reckless as to the risk of public inconvenience, annoyance or alarm.

Gates was legally and factually innocent and could not lawfully have been convicted of the crime for which Crowley arrested him.

Was Gates' Arrest Legal?

Even if Gates was not guilty, this does not mean that his arrest was necessarily illegal. Innocent persons are not immune from arrest as long as the arrest complies with the Fourth Amendment. Under the Fourth Amendment, Gates' arrest would be legal, even though Gates was innocent, if at the time of the arrest officer Crowley had probable cause to believe that Gates had committed the crime of disorderly conduct. Probable cause exists when the arresting officer is aware of facts and circumstances which would induce a reasonable person to believe that the person to be arrested has committed a crime.

Here, even assuming Crowley's police report to be factually accurate, no reasonable person would have believed Gates to be guilty of disorderly conduct. If he truly thought Gates was guilty Crowley was unreasonable. Sgt. Crowley seized Prof. Gates in violation of the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures. Crowley violated the Bill of Rights.

The Chump Arrest

In addition to subjecting an innocent person to an arrest that violated the Fourth Amendment, in seizing Prof. Gates Sgt. Crowley also made a “chump arrest,” i.e., an arrest motivated by improper reasons, such as harassment or intimidation, an arrest effected as punishment for giving the arresting officer a hard time, or an arrest based on false charges made to insulate the officer from liability for misconduct and place the arrestee on the defensive.

Few criminal statutes are more abused by police than disorderly conduct laws. A claim of disorderly conduct is commonly used to punish “contempt of cop,” and, as Joshua Claybourn notes, disorderly conduct often “become[s] a euphemism for whatever a particular police officer doesn’t like.”

Arresting Gates for disorderly conduct committed on his own porch was, under the circumstances, stupid, as President Obama has stated. But the arrest was also part of a larger pattern of police misbehavior. What happened to Gates is what happens to many people all the time; it is an example of a case where, as Kenneth Culp Davis wrote in *Police Discretion* (1975), his study of American police practices, “[t]he arresting officer knows he has no probable cause and has no intent to appear in court; he is using arrest as a sanction.”

As Davis notes: “Arrest for disorderly conduct usually is . . . synonymous with imposing punishment—that of being detained, having to go to the station, having to put up bail or to stay in jail, and having to appear in court or forfeit the bail money. Most arrests for disorderly conduct involve an abuse of power by the arresting officer . . . An officer . . . may use arrest as a sanction whenever his emotions impel him, even though he knows he has no evidence that any court would accept as tending to prove disorderly conduct Arrest for disorderly conduct is a principal weapon in the deliberate harassment of individuals . . .”

Sound familiar?

Ending Swearing Contests Through Technology

The technology is available to avoid the pitfalls of the swearing contest and the evils of police perjury. All we need to do is equip police with electronic devices that automatically record or transmit what is said when police communicate with suspects or witnesses or with each other. Then we will have scientific, irrefutable proof of who said what and how they said it. If officer Crowley had been wearing such a device we would know the truth about his encounter with Gates. What was the tone of the voice of each man? Did Gates say, “Officer, can I help you?” Did Gates verbally consent or refuse to consent to the officer’s entry? Did Gates while on the phone really say “Get me the chief”? Did Gates tell Crowley that he was not someone to mess with and that Crowley had not heard the last of this? Did Gates say something about Crowley’s mother? (Or, as James Hannaham puts it, is it really true that the editor of *The Norton Anthology of African American Literature* “suddenly switche[d] codes and beg[an] to talk like George Jefferson”?)

On the other hand, what exactly did Crowley say when he first accosted Gates? Did Crowley refuse to provide his name and badge number to Gates? Did Crowley really refuse to call Harvard’s chief of police, despite Gates’ request that he do so? Did Crowley ever acknowledge to Gates that a mistake had been made and that it was time to leave? Did Crowley request Gates to step outside and then promptly place him under arrest? Did Crowley twice “warn” Gates before arresting him? Did Crowley thank Gates for stepping onto the porch and then immediately arrest him?

If officer Crowley had been using an audio recording device when he talked with Ms. Whalen we would also know for sure whether she said anything about seeing black males with backpacks or whether, as seems likely, Crowley made that up in his report. And if officer Figueroa had been equipped with such a device, we would know what he and Whalen

said when they met and whether Figueroa's police report accurately recounts events.

Gatesgate

The arrest of Henry Louis Gates, Jr., was scandalous.

Gates, it appears, was not at fault, although understandably he was no doubt overexcited.

Defenders of Crowley believe Gates was the cause of his own arrest, and agree with something Crowley said to the press: "The professor could have resolved the issue by quieting down and/or going back inside the house." This clever attempt to blame the victim has been witheringly answered by Robert Schlesinger: "True. But the police officer could also have resolved the issue by rolling his eyes, wishing the cranky old professor a nice day, getting in his care, and going off in search of real crime. And as the person with greater power—in this case, the power to arrest and incarcerate—Crowley had more responsibility to defuse the situation."

America is deeply in trouble when it is saddled with law enforcement personnel such as Sgt. James P. Crowley and with a law enforcement establishment which rushes to take Crowley's side. They make the sinister claim that Crowley only did what police are trained to do at the academy. They outrageously maintain that the manner in which Prof. Gates was treated was acceptable—that it was standard, professional, and in accordance with police protocol. The entire world can see that they are champions of chump arrests, apologists for petty tyrants, and defenders of the indefensible. If their grip on power is not broken, our unwritten national anthem will be "America the Beautiful Police State".

Note: Sgt. Crowley and officer Figueroa's arrest reports, together with the transcripts of Ms. Whalen's 911 call and other police radio communications relating to the arrest of Prof. Gates, can be accessed on the Internet.