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Criminal Procedure and the Racial Profiling Issue for Professor Gates and Sergeant Crowley

L. Darnell Weeden

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Criminal Procedure and the Racial Profiling Issue for Professor Gates and Sergeant Crowley

L. Darnell Weeden*

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In 2008 at Mississippi College Weeden joined Juan Williams, Senior Correspondent for National Public Radio and others in paying national tribute to Justice Marshall. The C-SPAN network broadcasted the Mississippi College Law Review Symposium in March of 2008 and subsequently broadcasted Weeden's presentation as a separate segment on its *Law And The Courts Program*. Weeden currently teaches Constitutional Law, Torts and First Amendment. He is in demand as a speaker. Professor Weeden has presented a paper or served as a panelist at several law schools including the University of Virginia, George Washington, Notre Dame, St John's, Tulane, University of Nevada, University of South Carolina, American University Marquette, University of New Mexico and the University of Arkansas at Little Rock, Mississippi College School of Law, Boston University, Brigham Young University, Florida International University, the University of Puerto Rico Law School and in Barbados, West Indies.

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Introduction

In 1999, President Clinton called racial profiling "morally indefensible."¹ Ten years later, President Obama said it is a problem that "stills haunts us" as an American society.² After President Obama commented on the incident between Sergeant James Crowley and Professor Henry Louis Professor Gates, a discussion regarding racial profiling in America invoked national attention.³ Although President Obama did not specifically use the term "racial profiling," his remarks were generally understood as alluding to racial profiling because of his reference to the fact

1. Steven A. Holmes, *Clinton Orders Investigation on Possible Racial Profiling*, N.Y. TIMES, June 10, 1999, at A2, available at <http://www.nytimes.com/1999/06/10/us/clinton-orders-investigation-on-possible-racial-profiling.html> ("Declaring racial profiling 'morally indefensible,' President Clinton today ordered Federal law-enforcement agencies to compile data on the race and ethnicity of people they question, search or arrest to determine whether suspects are stopped because of the color of their skin.").

2. See Krissah Thompson, *Obama Addresses Race and Louis Gates Incident*, WASH. POST, July 23, 2009, at A4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/22/AR2009072203800.html> ("President Obama said Wednesday night that race still haunts America, even as he noted 'the incredible progress that has been made.'").

3. See Helene Cooper, *Obama Criticizes Arrest of Harvard Professor*, N.Y. TIMES, July 23, 2009, at A20, available at <http://www.nytimes.com/2009/07/23/us/politics/23gates.html> ("There's a long history in this country of African-Americans being stopped disproportionately by the police,' Mr. Obama said.") "It's a sign of how race remains a factor in this society." *Id.* When speaking of the incident involving Professor Gates, President Obama initially said:

No. 1, any of us would have been pretty angry; No. 2, that the Cambridge police acted stupidly in arresting somebody when there was already proof that they were in their own home; and No. 3, what I think we know separate and apart from this incident is there is a long history in this country of African-Americans and Latinos being stopped by police disproportionately. That's just a fact. *Id.*

that minorities were disproportionately stopped when compared to whites.⁴ Statistics show that within the criminal justice system, the disproportionate rate at which minorities are arrested and prosecuted plays a pivotal role in making racial profiling an issue.⁵ A variety of studies reveals that members of racial minority groups, in particular Blacks and Hispanics, could be overexposed to harmful action from beginning to end in the American criminal justice system.⁶ One commentator concluded that President Obama all but blamed the police department for racial profiling in the Professor Gates and Sergeant Crowley eruption;⁷ however, President Obama's statements implicitly suggest that Hispanics and African Americans are quite familiar with the act of racial profiling by law enforcement officers.⁸ President Obama is also on record as suggesting that both Professor Gates and Sergeant Crowley may have "overreacted."⁹

I. Police Investigate Apparent Break-In at Professor Gates' Home

On July 16, 2009, Lucia Whalen, a white woman, placed a call to the police reporting that two men appeared to be breaking into a house in her neighborhood.¹⁰ Cambridge police officers were dispatched to the scene to

4. See *id.* and accompanying text (discussing President Obama's remarks about the racial incident involving Professor Gates).

5. See David Gillborn, *Risk-Free Racism: Whiteness and So-Called "Free Speech,"* 44 WAKE FOREST L. REV. 535, 537-39 (2009) (discussing the disproportionate arrests and prosecutions of minorities, particularly African Americans, in both the United States and the United Kingdom).

6. See *id.* at 539 ("[T]he [United States] government has also acknowledged that 'various studies indicate that members of minorities (especially Blacks and Hispanics) may be disproportionately subject to adverse treatment throughout the criminal justice process.'" (citing Amnesty Int'l, *Racism and the Administration of Justice*, AI Index AFR 40/020/2001, July 23, 2001)).

7. See Cooper, *supra* note 3, at A20 ("President Obama bluntly accused the police of acting 'stupidly' in arresting the Harvard scholar Henry Louis Gates Jr. last week after an officer had established that Mr. Gates had not broken into his own home in Cambridge, Mass.").

8. See *id.* ("[President Obama] added that African-Americans and Hispanics in the United States have long been familiar with racial profiling by law enforcement.").

9. See Michael A. Fletcher & Michael D. Shear, *Obama Voices Regret to Policeman: He Moves to Dampen Racial Controversy*, WASH. POST, June 25, 2009, at A1, available at <http://www.washingtonpost.com/wp-yn/content/article/2009/07/24/AR2009072400451.html> ("The president said he continues to think the arrest was an 'overreaction' by the officer, but he said Gates 'probably overreacted as well.'").

10. See Robert Z. Nemeth, *A Moment Not Teachable*, WORCESTER TELEGRAM & GAZETTE (MA), Aug. 9, 2009, at A12 (stating that "Lucia Whalen, a concerned

investigate the possible break-in.¹¹ During the investigation Sergeant James Crowley approached the door of Professor Gates' home and asked him to step outside after informing Professor Gates, a black male, that he was at the residence to investigate a crime.¹² In the police report filed by Sergeant Crowley, he stated that once he arrived at the home, he asked Professor Gates to step out on the porch and speak to him, to which Professor Gates replied, "No I will not."¹³ According to the police report, Professor Gates demanded to know who Sergeant Crowley was and why he was on his property.¹⁴ While Sergeant Crowley explained to Professor Gates that he was there to "investigat[e] a report of a break in,"¹⁵ Professor Gates opened the door and accused Officer Sergeant Crowley of being there because he was a "[B]lack man in America."¹⁶

After Sergeant Crowley entered into Professor Gates' residence, he requested identification from Professor Gates to assist him in his investigation of the alleged break-in.¹⁷ Sergeant Crowley stated that he was very surprised and confused by the attitude Professor Gates exhibited towards him.¹⁸ Apparently, because of Sergeant Crowley's surprise regarding Professor Gates attitude towards him, Sergeant Crowley asked

citizen . . . alerted police of a possible break-in").

11. See Sally Kalson, *Looking to Impart a Lesson; Obama, Professor, Officer Get Together for 'Teachable Moment,'* PITTSBURGH POST-GAZETTE, June 30, 2009, at A1 (stating that "Sgt. James Crowley and several other Cambridge police officers arrived [at Dr. Gates' house] and began to question Dr. Gates").

12. See JAMES CROWLEY, CAMBRIDGE POLICE DEP'T., INCIDENT REPORT #9005127 (July 16, 2009), available at <http://www.thesmokinggun.com/file/henry-louis-gates-jr-police-report?page=0> (last visited Jan. 22, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice) (stating Crowley said, "I could see an older black male standing in the foyer . . . [so I identified myself as] Sgt. Crowley from the Cambridge Police . . . [and told him that I was] 'investigating a report of a break in progress' at the residence").

13. See *id.* ("As I [Crowley] stood in plain view of this man, later identified as Gates, I asked if he would step out onto the porch and speak with me. He replied 'no I will not.'").

14. See *id.* (stating that Professor Gates "demanded to know who [Sergeant Crowley] was").

15. *Id.*

16. See *id.* (describing that while Crowley explained that his business for being at Gates' residence was to investigate a possible break-in, "Gates opened the front door and exclaimed 'why, because I'm a black man in America?'").

17. See *id.* (reporting that Crowley said, "I asked Gates to provide me with photo identification so that I could verify that he resided at Ware Street and so that I could radio my findings to [the police department]").

18. See *id.* (explaining that Crowley declared, "I was quite surprised and confused with the behavior he exhibited toward me").

that Professor Gates produce a form of identification so that he could confirm that he resided there and radio it in to the police department in preparation for his departure from Professor Gates' home.¹⁹ Professor Gates initially refused to provide identification but then offered up his Harvard identification card.²⁰ The moment Sergeant Crowley verified that Professor Gates was indeed lawfully in his home, there was neither probable cause nor a reasonable suspicion that Professor Gates was the individual suspected of breaking and entering into his residence.²¹ One would reasonably assume that the minute Sergeant Crowley dismissed his suspicion regarding Professor Gates and criminal activity, the investigatory communication between the two men would come to an uneventful end.²² After Sergeant Crowley dismissed his suspicion regarding the break-in, he may have remained at Professor Gates' house because Professor Gates demanded that he identify himself.²³ Sergeant Crowley stated in his police report that Professor Gates accused him of being a racist police officer.²⁴ Sergeant Crowley believed he had probable cause to arrest Professor Gates for disorderly conduct because he was offended by Professor Gates' loud and offensive speech.²⁵ The disorderly conduct charges were properly dismissed even if Professor Gates engaged in disrespectful speech.²⁶ The disorderly conduct charge against Professor Gates would later be dismissed, but the incident sparked a national debate about racial profiling.²⁷

19. See CROWLEY, *supra* notes 12–17 and accompanying text (describing how Crowley asked Gates for identification).

20. See *id.* (stating that "Gates initially refused [to provide identification,] demanding that [Crowley] show him identification but then did supply . . . a Harvard University identification card").

21. See *infra* notes 95–96 and accompanying text (stating that Crowley's duty to investigate ended after Professor Gates provided identification because appropriate identification removed any reasonable suspicion that Gates was a possible criminal intruder).

22. See *infra* notes 63–81 and accompanying text (stating the limitations of reasonable suspicion and that once the suspicion is confirmed or dispelled, the investigation terminates).

23. See *id.* (stating Gates demanded Crowley's name three times and Crowley told him, but when Gates demanded his name a fourth time, Crowley "told Gates that I would speak with him outside").

24. See *id.* ("As I [Crowley] descended the stairs [of Gates's residence] to the sidewalk, Gates continued to yell at me, accusing me of racial bias and continued to tell me I had not heard the last of him.").

25. See *id.* (describing that Gates exhibited a "tumultuous manner," had repeatedly accused Crowley of being a racist police officer, and had been warned twice by Crowley to calm down because he was becoming disorderly before Crowley arrested Gates).

26. See Kalson, *supra* note 11, at A1 ("Sgt. Crowley arrested Dr. Gates for disorderly conduct, but prosecutors quickly dropped the charges.").

27. See, e.g., Kalson, *supra* note 11, at A1 (discussing whether "the incident merely

In Part II, I explain the concept of racial profiling and the right not to be targeted by the police because of one's race.²⁸ In Part III, I explain how the initial questioning of Professor Gates at his home was permitted under the Fourth Amendment because a reasonable suspicion of criminal activity was present under the circumstances.²⁹ In Part IV, I discuss why the disorderly conduct charge against Professor Gates was properly dismissed because speaking to a police officer in a hostile voice is protected by the First Amendment.³⁰ Part V of this Article reveals that a police officer filing a false police report under a Massachusetts's law regarding the race of a potential African-American suspect is not a crime unless the statement was false regarding racial profiling as a material matter.³¹ Part VI of the Article provides a summary of the lesson we can learn from the issues discussed in this Article.³²

II. *The Concept of Racial Profiling Involves Race Conscious Targeting*

Racial profiling is by definition race conscious targeting.³³ Racial profiling is an intentional discriminatory routine.³⁴ African Americans are the chief targets in the racial profiling system.³⁵ One commentator asserts

hardened people's preconceptions [about racial profiling,] or has it shown them something they didn't realize about how the real world operates").

28. *See infra* notes 33–62 and accompanying text (discussing the discrimination of racial profiling, race conscious targeting, and Fourth Amendment rights).

29. *See infra* notes 63–112 and accompanying text (describing that Gates' behavior allowed Crowley to question Gates because there was a reasonable suspicion of criminal activity on the premises and citing cases to support this).

30. *See infra* notes 113–134 and accompanying text (citing cases supporting First Amendment rights of free speech in the context of the disorderly conduct charge).

31. *See infra* notes 135–186 and accompanying text (discussing Massachusetts law about the subject of racial profiling and how it would apply to Crowley's report).

32. *See infra* Part V (suggesting how to counter racial profiling: "In order to close the racial divide on the issue of racial profiling, it is necessary to provide sensitive training to all Americans").

33. *See* Allison A. Hendrix, *Reinforcing Batson Defining the Peculiar: Racial Profiling as an Impermissible Ground for Peremptory Challenge*, 44 No. 5 CRIM. L. BULL. 691, 695 (2008) ("Racial profiling is defined as 'the law enforcement practice of using race, national origin, or ethnicity as a salient basis for suspicion of criminal activity.'" (citing BLACK'S LAW DICTIONARY 1286 (8th ed. 2004))).

34. *See id.* at 695–96 (discussing the routineness of law enforcement officers investigating on the basis of race alone).

35. *See id.* at 695 ("African-Americans remain the primary victims of racial profiling." (citing Floyd D. Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 722

that usually racial profiling may be described as thinking of a person as a suspect because of a stereotypical perception that people identified with that individual's racial classification are expected to perform the kind of crime under examination.³⁶ The expression "racial profiling" as a general matter does not apply to an examination of a specific crime once an injured party or bystander has recognized the race of the alleged criminal and law enforcement officers use race as a factor while making determinations regarding which suspicious persons to target for interrogation.³⁷ Racial profiling has proven to be an unsuccessful tool because statistics fail to show a relevant relationship involving race and crime.³⁸ Unfortunately, racial profiling is a function of our popular culture as well as general stereotypes regarding race.³⁹ As a result, cultural stereotypes involving racial profiling are complicated issues for the law to remedy.⁴⁰ The arrest of Harvard University Professor Henry Louis Gates, Jr. motivated many people to openly discuss the enduring, ugly truth presented by the practice of racial profiling.⁴¹ There is a growing consensus that racial profiling

(2004)).

36. See Michael T. Kirkpatrick & Margaret B. Kwoka, *Title VI Disparate Impact Claims Would Not Harm National Security—A Response to Paul Taylor*, 46 HARV. J. ON LEGIS. 503, 522–23 (2009) ("Most commonly, racial profiling refers to treating an individual differently based upon the belief that members of that person's racial or ethnic group are more likely to commit the type of crime being investigated." (citing Kevin R. Johnson, *Racial Profiling After September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67, 79 (2004)).

37. See *id.* at 523 ("The term racial profiling is not typically used to describe an investigation of a particular crime where a victim or witness has identified the race of the perpetrator, and the police consider race in decisions about which suspects to question or otherwise investigate." (citing DAVID COLE, *ENEMY ALIENS* 49 (New Press 2003)).

38. See *id.* at 524–25 ("The most commonly studied racial profiling context is the practice of pretextual traffic stops, where the true reason for the stop is not the minor traffic violation, but that the driver is black." (citing Deborah Ramirez et al., *Defining Racial Profiling in a Post-September 11 World*, 40 AM. CRIM. L. REV. 1195, 1211 (2003)). "This practice exists despite the fact that 'no data demonstrates [sic] either a general or a circumstantial correlation between race and crime.'" *Id.*

39. See Neil Gotanda, *Computer Games, Racial Pleasure, and Discursive Racial Spaces*, 72 ALB. L. REV. 929, 935 (2009) ("Based upon the target person's body and cultural configuration (dress, style, language), the profiler selects a racial profile from available popular culture and 'common sense' racial understandings." (citing Neil Gotanda, *New Directions in Asian American Jurisprudence*, 16 ASIAN AM. L.J. (forthcoming Summer 2009)).

40. See *id.* ("The controversies surrounding racial profiling in law enforcement reinforce the idea that cultural factors are not easily modified by such traditional avenues as statutory reforms or judicial decisions.").

41. See M.K.B. Darmer, *Teaching Whren to White Kids*, 15 MICH. J. RACE & L. 109, 110 (2009) (stating the arrest of Professor Gates "has revived conversations regarding

violates the Fourteenth Amendment's equal protection principle in theory,⁴² but in fact, it is virtually impossible to prove racial profiling as a constitutional violation because of the Supreme Court's discriminatory intent requirement.⁴³ If the Equal Protection Clause is the sole remedy for racial profiling by the police, the Supreme Court has granted African-American criminal defendants a very challenging equal protection right it knows is very difficult to enforce.⁴⁴

"Racial profiling" is also defined as actions by police officers or other government officials in enforcing laws based on racial stereotyping, rather than the "reasonable suspicion" or "probable cause" standard.⁴⁵ Probable cause is present when an officer acting as a reasonable person has enough facts to think that a crime occurred or is taking place.⁴⁶ On the other hand,

race-consciousness" and "also called attention to the continuing reality of racial profiling").

42. See Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1048 (2010) ("Racial profiling . . . runs counter to the Fourteenth Amendment's guarantee of equal protection of the law.").

43. See *id.* at 1049 ("The Court held [in *Washington v. Davis*] that discriminatory intent must also be proved. Because it poses a formidable barrier to proving Equal Protection claims, the discriminatory intent requirement has been the subject of sustained scholarly criticism." (citing *Washington v. Davis*, 426 U.S. 229, 235–36, 248 (1976); Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991); Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164–65 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319–21 (1987); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 808–09, 877–78 (2004); Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133 (2010)).

44. See *id.* at 1063 ("In holding that the Equal Protection Clause was the exclusive remedy for a race-based pretextual stop based on probable cause for a violation of the traffic laws, *Whren v. United States* failed to persuasively justify that conclusion.") "Moreover, it left criminal defendants . . . with a toothless equal protection remedy that, more often than not, will leave them with an unenforceable right." *Id.*

45. See DARIN D. FREDRICKSON & RAYMOND P. SILJANDER, RACIAL PROFILING: ELIMINATING THE CONFUSION BETWEEN RACIAL AND CRIMINAL PROFILING AND CLARIFYING WHAT CONSTITUTES UNFAIR DISCRIMINATION AND PERSECUTION 15 (2002) ("Racial profiling is a term that is generally understood to mean enforcement action on the part of police officers that is motivated more by racial bias than by any reasonable suspicion or probable cause that may exist under the circumstances.").

46. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2639 (2009) ("Probable cause exists where the facts and circumstances within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed," and that evidence bearing on that offense will be found in the place to be searched." (quoting *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949))).

reasonable suspicion is satisfied when there is a chance of finding evidence of wrongdoing supported by clear and articulable facts.⁴⁷ The Constitution was designed to afford all Americans the right to be free from unreasonable searches and seizures under the Fourth Amendment.⁴⁸ A Fourth Amendment seizure occurs when a law enforcement officer or his agent "terminates or restrains one's freedom of movement *through means intentionally applied*" in order to display his authority.⁴⁹ African Americans contend their constitutional rights against unreasonable seizures or searches are not respected in the criminal justice process.⁵⁰

Race is often a key fact in the law enforcement assessment of whether to investigate African Americans for criminal activity.⁵¹ The Constitution makes it illegal for the police to investigate a person because of race.⁵² Nevertheless, public officials eager to demonstrate support for law and order often unfairly target African Americans because of their race for criminalization and prison.⁵³ Racial profiling is the systematic, unreasonable targeting of African Americans as engaging in suspicious criminal behavior.⁵⁴ Professor Weatherspoon has written an excellent

47. *See id.* ("[W]e have attempted to flesh out the knowledge component [known as 'reasonable suspicion'] by looking to the degree to which known facts imply prohibited conduct, the specificity of the information received, and the reliability of its source.") "At the end of the day, however, we have realized that these factors cannot rigidly control, and we have come back to saying that the standards are 'fluid concepts that take their substantive content from the particular contexts' in which they are being assessed." *Id.* (citations omitted).

48. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

49. *Brendlin v. California*, 551 U.S. 249, 254 (2007) (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989)).

50. *See* Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721, 722 (2004) ("African-Americans feel that their constitutional rights have been marginalized by the very systems in place to protect their rights.").

51. *See id.* at 723 ("Too often, race is the determinative factor used by law enforcement officers to justify a stop and search of African-Americans."). "Even though the Constitution prohibits such conduct by law enforcement agencies, these practices have become the norm, not the exception." *Id.*

52. *See id.* (stating that the Constitution prohibits law enforcement officers from using race as a determinative factor to justify a stop and search of African Americans).

53. *See id.* at 723–24 ("[I]n their zeal to enforce public laws, governmental officials have selected African-Americans and other minorities solely on the basis of their race to stop, arrest, charge, prosecute, and incarcerate." (citing PATRICK A. LANGAN ET AL., U.S. DEPARTMENT OF JUSTICE, CONTACTS BETWEEN POLICE AND THE PUBLIC (Feb. 2001))).

54. *See id.* at 725 ("Unfortunately, racial profiling of African-Americans appears to be

article that focuses on how to reduce and ultimately eradicate official racial profiling.⁵⁵ Professor Weatherspoon argues that only a forceful condemnation of race profiling by public officials will bring a timely end to the tradition of race profiling of African Americans.⁵⁶

Professor Gates' statement, labeling Sergeant Crowley as a racist cop without any substantial objective evidence, might be explained by his subjective Black experience.⁵⁷ In my view, Professor Gates' subjective Black experience initially suggested to him that he was targeted for an unwelcomed police treatment at his home primarily because of his race.⁵⁸ The Black experience, as well as relevant history, probably contributes to the inability of some African Americans to separate the past from the present when interacting with white law enforcement officers because some white police officers bring a Jim Crow attitude with them whenever they interact with any black person for any reason.⁵⁹

President Obama suggested that Cambridge police officer, Officer Sergeant Crowley, may have "acted stupidly" by arresting Professor Gates after it was determined that Professor Gates had not committed a crime, even if his entrance to his home was under rather suspicious circumstances.⁶⁰ In order for an officer to conduct a reasonable search or

ingrained in the minds of many law enforcement officers and has become a part of their standard operating procedures.").

55. *See id.* (suggesting "[a] holistic approach to remedying racial profiling has to be developed to address . . . conduct by law enforcement officials").

56. *See id.* (advocating a holistic, "frontal attack [on eradicating racial profiling of African Americans] must occur at all levels of government, the judiciary, by private citizens, and various community and civil rights organizations").

57. *See generally* Hendrix, *supra* note 33, at 696 ("[I]ncidents of racial profiling have a long-lasting impact on their victims.") (citing AMNESTY INTERNATIONAL, THREAT AND HUMILIATION: RACIAL PROFILING, DOMESTIC SECURITY, AND HUMAN RIGHTS IN THE UNITED STATES 21 (2004)). "African-Americans have reported feelings of depression, helplessness, and humiliation. As a result of being subject to racial profiling, African-Americans have also reported a diminished trust in law enforcement and a reluctance to seek the assistance of law enforcement." *Id.*

58. *See infra* notes 98–101 and accompanying text (discussing possible reasons for Gates' reaction as well as the errors on the part of Crowley).

59. *See generally* Weatherspoon, *supra* note 50, at 724 ("[F]or African-Americans, [equal protection] rights are merely a mirage of what white Americans receive and take for granted . . ."). "Too often, race is the determinative factor used by law enforcement officers to justify a stop and search of African-Americans." *Id.*

60. *See* Cooper, *supra* note 3, at A20 (acknowledging that President Obama initially said "that the Cambridge police acted stupidly in arresting somebody when there was already proof that they were in their own home"); *see also* Peter Baker & Helen Cooper, *A Presidential Pitfall: Speaking One's Mind*, N.Y. TIMES, July 27, 2009, at A3, available at http://www.nytimes.com/2009/07/27/us/politics/27memo.html?_r=1&ref=helene_cooper

seizure of an individual, he must satisfy the requirements established in the Fourth Amendment.⁶¹ The Fourth Amendment guarantees people freedom in their persons and houses from an unreasonable search or seizure, but it does not prohibit an officer from conducting a reasonable investigation of possible criminal activity.⁶²

III. *The Initial Questioning of Professor Gates is Permitted Under the Fourth Amendment Because Reasonable Suspicion Exists*

In *Terry v. Ohio*, the Supreme Court gave police the authority to conduct an investigatory stop to briefly seize or detain a person when there is a reasonable suspicion "that criminal activity . . . [is] afoot."⁶³ An investigatory stop occurs when an officer detains an individual for a limited time to dispel his or her suspicion of criminal activity.⁶⁴ "The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures."⁶⁵ In order to decide whether an investigative detention is unreasonable, courts should be guided by common sense and ordinary human experience.⁶⁶ The Supreme Court in *United States v. Sharpe*⁶⁷ and in

(last visited Jan. 22, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice) (stating that President Obama "declared that the police in Cambridge, Mass., had 'acted stupidly' in arresting a prominent black scholar at his own home").

61. See *supra* note 49 and accompanying text (discussing *Brendlin v. California* and its definition of the Fourth Amendment search and seizure requirements).

62. See *Manzanares v. Higdon*, 575 F.3d 1135, 1145 (10th Cir. 2009) (describing that one exception to Fourth Amendment protection is probable cause "based on the totality of the circumstances, and requires reasonably trustworthy information that would lead a reasonable officer to believe that the person about to be seized has committed or is about to commit a crime" (quoting *Cortez v. McCauley*, 478 F.3d 1108, 1116 (10th Cir. 2007))).

63. See *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that "a police officer [who] observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous . . . [may] conduct a carefully limited search").

64. See *United States v. Sokolow*, 490 U.S. 1, 7 (1989) ("In *Terry v. Ohio*, 392 U.S. 1, 30 (1968), we held that the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause.").

65. *United States v. Sharpe*, 470 U.S. 675, 682 (1985).

66. See *id.* at 685 (balancing the rights of the individual under investigation with the law enforcement interest in effectively achieving the purposes of a stop).

67. See *id.* at 675, 688 (holding that a twenty minute investigatory stop is not unconstitutional if law enforcement officers act diligently to achieve the purpose of the stop).

*Terry v. Ohio*⁶⁸ articulated a twofold inquiry for judging the reasonableness of an investigative stop.⁶⁹ Under this inquiry, a court will consider "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."⁷⁰

If officers are justified in making an investigative stop—to detain and ask a person questions in the first place, and subsequently work to dispel or confirm their suspicion of criminal activity, which should be the only reason why they instituted the stop—then the stop will typically be considered reasonable.⁷¹ Thus, the investigative stop will not be considered unconstitutional.⁷² A brief investigatory stop by a police officer does not require probable cause.⁷³ When a police officer is making a custodial arrest, the officer needs probable cause to believe that a crime has occurred or is about to take place. Sergeant Crowley did not need probable cause to approach Professor Gates at his house because Sergeant Crowley's brief questioning of Professor Gates was permissible.⁷⁴ Sergeant Crowley possessed reasonable suspicion of criminal activity at Professor Gates home.⁷⁵ Reasonable suspicion is satisfied when there is "specific and articulable" evidence of criminal activity.⁷⁶ The criminal activity giving rise to the investigatory stop may have previously occurred or is one that has not occurred but is

68. *See Terry*, 392 U.S. at 8 (stating that the Court should evaluate whether the officer acted reasonably under the circumstances in determining the legality of the investigative stop).

69. *See Sharpe*, 470 U.S. at 682 (referring to the "dual inquiry for evaluating the reasonableness of an investigative stop").

70. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

71. *See United States v. Sharpe*, 470 U.S. 675, 682 (1985) (acknowledging that a search is presumed to be constitutional if it is justifiable at its inception and reasonable in its scope).

72. *See id.* at 686 (holding that an investigative stop satisfying the two-pronged analysis will be considered constitutional).

73. *See Terry*, 392 U.S. at 10 (distinguishing between a "stop" and an "arrest"; the latter requires probable cause, whereas the former does not).

74. *See CROWLEY*, *supra* note 12 (summarizing the series of events leading to Sergeant Crowley's reasonable belief that a crime was being committed and that a preliminary investigation was necessary).

75. *See id.* (describing Professor Gates' behavior as suspicious, especially in light of Mrs. Whalen's concerned telephone call).

76. *See Terry v. Ohio*, 392 U.S. 1, 21 (1968) ("In justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.").

likely to occur.⁷⁷ In forming their suspicion, courts have allowed officers to draw from their personal knowledge or cumulative information made available to them through a reliable third party.⁷⁸ The Seventh Circuit in *United States v. Watson* held that informants could give rise to reasonable suspicion so long as the information revealed had some indication of reliability.⁷⁹

During the duration of the investigative stop, police officers are limited to "reasonable inquiries aimed at confirming or dispelling the suspicion" of criminal activity.⁸⁰ Officers must have a reasonable suspicion that the individual is engaging or has engaged in criminal activity as a prerequisite to conducting the investigative stop.⁸¹

Mrs. Whalen's telephone call provided the officers with sufficient evidence to establish a reasonable suspicion that criminal activity may have occurred or could occur.⁸² The officers had a reasonable suspicion to conduct an investigatory questioning of Professor Gates regarding alleged criminal activity.⁸³ The relevant facts pertaining to the Professor Gates-Sergeant Crowley situation are: 1) Ms. Whalen made a call to the Cambridge police describing a possible break-in at Professor Gates place of residence; 2) Sergeant Crowley along with his fellow officers were dispatched to Professor Gates' home; 3) Sergeant Crowley arrived at Professor Gates' residence and through the front door observed "an older black male;" 4) Professor Gates initially refused to step out on the porch to speak to Sergeant Crowley, but after Sergeant Crowley identified himself as a police officer, Professor Gates opened his front door; 5) Sergeant Crowley asked Professor Gates to show him some form of identification to quickly dispel his suspicion that Professor Gates was the "possible intruder"; and 6) Professor Gates initially refused but eventually submitted to Sergeant

77. *See* *United States v. Hughes*, 517 F.3d 1013, 1016 (8th Cir. 2008) (stating that, under precedent, an investigatory stop is legal if "an officer has reasonable suspicion that a crime has previously been committed by an individual").

78. *See id.* (allowing law enforcement officers to rely on their own experience in the field to form a suspicion that a crime is being or has been committed).

79. *See* *United States v. Watson*, 558 F.3d 702, 705 (7th Cir. 2009) (holding that tips can provide the basis for an investigatory stop in certain circumstances).

80. *Hughes*, 517 F.3d at 1016.

81. *See id.* ("Reasonable suspicion must be supported by 'specific and articulable facts.'" (quoting *Terry*, 392 U.S. at 21)).

82. *See* discussion *supra* Part II (applying the *Hughes* and *Terry* framework to the facts surrounding Prof. Gates' arrest).

83. *See id.* (arguing that the phone call, combined with Professor Gates' behavior, gave the officers a reasonable suspicion that Gates was involved in criminal activity).

Crowley's request for identification by giving his Harvard identification card to Sergeant Crowley inside Professor Gates' home.⁸⁴

When Mrs. Whalen made the call informing the dispatcher of a possible break-in at the residence, she gave the officers "concrete and articulable" facts that formed the basis of their reasonable suspicion.⁸⁵ Armed with reasonable suspicion, the officers were well within the scope of their duties under the Fourth Amendment to investigate the risk of criminal activity at Professor Gates' residence.⁸⁶ Not every questioning of a resident at his home invokes Fourth Amendment protection.⁸⁷ Only an unreasonable seizure of a person invokes Fourth Amendment protections.⁸⁸ Courts have held that a reasonable detention occurs in the commission of an investigatory stop when the defendant's submission to the officer's show of authority results in a brief interference with their freedom of movement but not amounting to a full custodial arrest.⁸⁹ Because show of authority by a police officer when interacting with an individual can occur with or without the use of physical force before a custodial arrest, courts must consider the circumstances surrounding the submission by an individual to the investigating officer.⁹⁰

When Sergeant Crowley arrived at Professor Gates' home and initially asked Professor Gates to step outside, Professor Gates' refusal may have given Sergeant Crowley, under the circumstances, enough reasonable suspicion necessary to continue conducting investigatory questioning of Professor Gates.⁹¹ The mere fact that Sergeant Crowley asked Professor

84. See CROWLEY, *supra* note 12 (summarizing the events leading up to Professor Gates' arrest).

85. *Id.*

86. See *Terry v. Ohio*, 329 U.S. 1, 10 (1968) ("[P]olice should be allowed to 'stop' a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity.").

87. See *United States v. Sharpe*, 470 U.S. 675, 682 (1985) ("The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures.").

88. See *id.* (differentiating between general searches and seizures and unreasonable searches and seizures; only the latter triggers Fourth Amendment protection).

89. See *California v. Hodari D.*, 499 U.S. 621, 629 (1991) (holding that the suspect was not detained until he was physically tackled because the suspect did not comply with the officer's initial showing of authority).

90. See *id.* at 626 (presenting a range of hypothetical situations to demonstrate that the court should consider the circumstances of each case in determining whether a suspect has submitted to law enforcement officers).

91. See CROWLEY, *supra* note 12 (describing the events leading up to Professor Gates' arrest).

Gates to open the door alone is insufficient to establish an arrest because Sergeant Crowley had not "restrained the liberty of a citizen" enough to constitute a seizure.⁹² If Professor Gates, as a reasonable person, were free to end his encounter with Sergeant Crowley, the communicative encounter would not constitute an unreasonable seizure.⁹³ The investigative stop would start the moment Professor Gates submitted to Sergeant Crowley's "show of authority" by opening the door to his house because a reasonable person under the circumstances "would not feel free to terminate the encounter."⁹⁴

Professor Gates may have opened his door to Sergeant Crowley because a reasonable person in Professor Gates' position may have believed he was not free to end the visit until after Sergeant Crowley entered Professor Gates home to dismiss his suspicion of criminal activity on the part of Professor Gates.⁹⁵ Sergeant Crowley's duty to investigate the situation ended after Professor Gates provided him with his Harvard identification because appropriate identification should have removed any reasonable suspicion that Professor Gates was a "possible criminal intruder" in his own home.⁹⁶

The initial arrival and investigatory questioning of Professor Gates to determine whether he was the possible criminal intruder that Mrs. Whalen reported to the dispatcher was a reasonable use of Sergeant Crowley's policing power, because Sergeant Crowley possessed reasonable evidence that a burglary had occurred or was likely to occur at Professor Gates' residence by unknown suspects.⁹⁷ The fact that Sergeant Crowley came to Professor Gates' home because he had reasonable suspicion of criminal activity taking place challenges the argument that Professor Gates was initially targeted because he was black. Racial profiling occurs when an officer violates a person's Fourth Amendment rights against unreasonable searches or seizures when he does not possess a reasonable suspicion stemming from "concrete and coherent" evidence and instead uses race as a

92. *Reid v. Georgia*, 448 U.S. 438, 440 (1980).

93. *See United States v. Jones*, 562 F.3d 768, 772 (6th Cir. 2009) (indicating that a search becomes a seizure when a reasonable person believes that he is not free to end the encounter).

94. *Id.* at 774.

95. *See CROWLEY*, *supra* note 12 (noting that Professor Gates opened the front door to speak with law enforcement officers).

96. *Id.*

97. *See id.* (revealing Sergeant Crowley's reasonable belief that a burglary had occurred or was in progress at the Gates' home based on Mrs. Whalen's observations).

factor while targeting a person for investigative purposes.⁹⁸ When racial stereotyping is the predominant factor in the officer's encounter with the target, racial profiling occurs.⁹⁹ Because the Cambridge police were responding to a phone call indicating reasonable suspicion of criminal activity from Mrs. Whalen without any reference to the suspect being African American, it can be argued that the initial arrival to Professor Gates' home may not have involved racial profiling. In Professor Gates' narrative, police initially arrived at his house to investigate possible criminal conduct.¹⁰⁰ The Cambridge police were dispatched to Professor Gates' home after Mrs. Whalen made a call to 911 to report a break-in.¹⁰¹ Throughout Mrs. Whalen's conversation with the 911 dispatcher, she tried to avoid making race a factor in her description of possible criminal intruders; however, she ultimately described the intruders as possibly Hispanic after being probed by the 911 dispatcher.¹⁰² Once Sergeant Crowley arrived at Professor Gates' home as an officer of the law, he was acting within the scope of his job to investigate the possibility of criminal activity inside the house because he received information creating a reasonable suspicion that criminal activity was taking place inside of Professor Gates' home.¹⁰³

The decision by Sergeant Crowley to arrest Professor Gates for disorderly conduct is not reasonably linked to the suspicion of criminal activity that initially made Professor Gates a reasonable Fourth Amendment target of the investigation.¹⁰⁴ It can be argued that both Sergeant Crowley

98. See FREDRICKSON & SILJANDER, *supra* note 45, at 46 ("[A] stop that is made without reasonable suspicion or probable cause, and therefore is without legal basis, is a violation of the Fourth Amendment.").

99. See *id.* at 15 ("Racial profiling is a term that is generally understood to mean enforcement action on the part of police officers that is motivated more by racial bias than by any reasonable suspicion or probable cause that may exist under the circumstances.").

100. See Nemeth, *supra* note 10, at 1 ("The brouhaha erupted when Cambridge Police Sgt. James Crowley investigated a potential burglary at the home of Harvard professor Henry Louis Gates Jr.").

101. See *id.* (identifying Mrs. Whalen as the concerned neighbor who notified the police of a potential robbery at the Gates' home).

102. See Frank Rich, *Small Beer, Big Hangover*, N.Y. TIMES, Aug. 2, 2009, at A8, available at <http://www.nytimes.com/2009/08/02/opinion/02rich.html> (last visited Jan. 25, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice) (discussing the lack of racial identification in Mrs. Whalen's report to the police).

103. See CROWLEY, *supra* note 12 (demonstrating that Sgt. Crowley formed a reasonable suspicion that a crime had been committed or was in commission at the Gates' home after Mrs. Whalen described a man attempting to break into the house).

104. See *id.* (demonstrating that Sgt. Crowley arrested Professor Gates for disorderly conduct that occurred during their confrontation, not for actions connected to the suspected

and Professor Gates "acted unreasonably" or "overreacted."¹⁰⁵ Professor Gates and Sergeant Crowley may have allowed default stereotyping to cloud their respective judgments. Default stereotyping occurs when the negative preconceived notions that an individual brings to the table when interacting with an individual from a specific racial or ethnic group is a predominant factor in analyzing a given situation.

Professor Gates, a distinguished African American Scholar at Harvard, one of the country's most respected universities, may have engaged in default stereotyping speech by challenging the authority of Officer Sergeant Crowley to investigate a crime by immediately assuming that he was being targeted for criminal activity only because he was "a black man in America," who happened to live in a predominately white neighborhood in Cambridge.¹⁰⁶ On the other hand, Sergeant Crowley may have engaged in default stereotyping speech under the circumstances by stating in error that Mrs. Whalen referred to an African-American male, as the suspected criminal intruder attempting to unlawfully enter into Professor Gates' residence, in his police report.¹⁰⁷ Who knows what actually prompted Sergeant Crowley to make false statements in his police report by indicating that Mrs. Whalen had identified the "suspected criminal" as black?¹⁰⁸ It is possible that Sergeant Crowley was trying to avoid a later charge that Professor Gates was targeted because of his race by falsely and unreasonably stating in his police report that Mrs. Whalen had identified the suspects as black in her 911 call.¹⁰⁹

robbery).

105. See Fletcher & Shear, *supra* note 9, at A1 (quoting President Obama, who described both individuals as acting unreasonably).

106. Krissah Thompson, *Scholar Says Arrest Will Lead Him to Explore Race in Criminal Justice*, WASH. POST, July 22, 2009, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/21/AR2009072101771.html> (last visited Jan. 26, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

107. See *id.* (quoting Professor Gates as stating, "if [Mrs. Whalen] saw someone tomorrow that looked like they were breaking in, I would want her to call 911). Professor Gates continued:

I would want the police to come. What I would not want is to be presumed guilty. That's what the deal was. It didn't matter how I was dressed. It didn't matter how I talked. It didn't matter how I comported myself. That man was convinced that I was guilty. *Id.*

108. See Rich, *supra* note 102, at A8 (acknowledging that there is no way of knowing whether race played a role in Sergeant Crowley's decision to arrest Professor Gates).

109. See *id.* ("In his police report, Sgt. James Crowley portrayed Whalen as a racial profiler by saying she had told him that the two men at Gates' door were black.").

When Professor Gates and Sergeant Crowley return to their regular activities after their meeting with President Obama, one commentator considers whether the nation will learn anything from the incident.¹¹⁰ President Obama correctly observed that the dispute between Professor Gates and Sergeant Crowley provided Americans with a "teaching moment."¹¹¹ The lesson from this is that presumptions based on default racial stereotypes by either an African American or a professional white police officer are harmful to race relations in America. While making a 911 call, Mrs. Whalen as a solid citizen believed she could help fight crime without engaging in either race profiling or default stereotyping.¹¹²

IV. The Disorderly Conduct Charges Against Professor Gates Were Dismissed Because Hostile Speech is Protected

Sergeant Crowley may have acted unwisely in the minutes after he responded to a possible break-in by converting his investigation into an unconstitutional disorderly conduct arrest because he was insulted by Professor Gates' offensive speech.¹¹³ The First Amendment Free Speech Clause protects any offensive speech Professor Gates may have directed at Sergeant Crowley during their conversation.¹¹⁴

The Courts have long been concerned with communications between American citizens and police officers. In *City of Houston v. Hill*,¹¹⁵ the Supreme Court warned officers of the law that "the First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."¹¹⁶ The Court in *City of Houston* deemed it an unconstitutional act to arrest someone for merely verbally

110. See Kalson, *supra* note 11, at A1 (considering the potential lessons to be learned on both sides of the incident following a meeting with President Obama).

111. Fletcher & Shear, *supra* note 9, at A1 (quoting Obama as referring to the incident as a "teachable moment").

112. See Rich, *supra* note 102, at A8 (noting that Mrs. Whalen's 911 call did not refer to race).

113. See Cooper, *supra* note 3, at A20 (noting that President Obama disapproved of Sergeant Crowley's decision to arrest Prof. Gates after it was clear that he was in his own home).

114. See U.S. CONST. amend. I (stating that Congress shall make no law "abridging the freedom of speech").

115. See *City of Houston v. Hill*, 482 U.S. 451, 472 (1987) (holding that the First Amendment protects expressive disorderly speech).

116. *Id.* at 461.

opposing and/or interrupting a police officer in furtherance of his duties.¹¹⁷ Courts have recognized the freedom of citizens when communicating with government officials to speak their mind, ask questions, criticize and express their opinion, which is a substantial right granted to every citizen through the First Amendment.¹¹⁸ The inventory of unprotected speech involves incitements to violence, libel, obscenity, fighting words and commercial advertising.¹¹⁹ The first move in analyzing every First Amendment problem is to examine the checklist of "unprotected" categories of speech to find out whether any category includes the communication in question.¹²⁰

In the present case, between Sergeant Crowley and Professor Gates, it is undisputed that words were exchanged between the two men at Professor Gates' residence.¹²¹ The specific words that were exchanged may not ever be known, but according to Sergeant Crowley's police report, Professor Gates was arrested because of the "tumultuous behavior Professor Gates exhibited in and out of his residence."¹²² Sergeant Crowley believed it was necessary to arrest and charge Professor Gates with disorderly conduct, but the charge was later dismissed because there was not enough probable cause.¹²³ If the tumultuous behavior or disorderly conduct charge was in reference to an alleged verbal outburst by Professor Gates when he accused Sergeant Crowley of being a racist cop, it was necessary and proper for public officials in Cambridge to subsequently drop the charges against Professor Gates. As a general rule, the First Amendment protects your right

117. *See id.* (holding that the Constitution protects mere verbal opposition to actions of law enforcement officials).

118. *See id.* ("[A] certain amount of expressive disorder not only is inevitable in a society committed to individual freedom, but must itself be protected if that freedom would survive.").

119. *See generally* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992); *see also* Keith Werhan, *The Liberalization of Freedom of Speech on a Conservative Court*, 80 IOWA L. REV. 51, 53-66 (1994) (placing First Amendment decisions in context to assess the Court's evolving views on free speech).

120. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1501 (1975) (arguing that the threshold question in addressing free speech issues is whether the expression fits into a protected category of expression).

121. *See* CROWLEY, *supra* note 12 (documenting the conversation between Sergeant Crowley and Professor Gates).

122. *Id.*

123. *See id.* (revealing Sergeant Crowley's state of mind when he decided to arrest Professor Gates and that he believed Professor Gates' behavior was creating a disturbance).

to call a police officer a racist cop.¹²⁴ In my view, offensive speech directed to a police officer is high-risk speech that is likely to lead to your unlawful arrest or other harm. Although Professor Gates yelled and called Sergeant Crowley a racist cop, his offensive speech does not fall within any of the four exceptions to the First Amendment's protection for free speech.

One who unwisely directs offensive speech against armed police officers is protected under the First Amendment, unless his speech is "directed at inciting or producing imminent lawless actions and is likely to produce such actions."¹²⁵ In plain words, accusing a police officer of being a racist cop while on the front porch of one's residence is not likely to fall within the Supreme Court's definition of unprotected speech. Since the Supreme Court has recognized the use of the expletive "fuck the draft" while wearing a jacket in the Los Angeles Court House to protest war is protected speech under the First Amendment, it is probably permissible under the First Amendment to call a police officer a racist at your home as an act of either historical protest or clear and present anger without danger is protected offensive expression.¹²⁶ Professor Daniel A. Farber has appropriately described *Cohen v. California* as an important case that stated unambiguously that offensiveness was not sufficient to categorize speech as fighting words.¹²⁷ In order to qualify as fighting words, the speech should be directed at the listener and reasonably expected to arouse a violent response.¹²⁸ Federal courts have condemned the using of "disorderly conduct" charges as a way to abridge an individual's freedom of speech.¹²⁹ Disorderly conduct charges are proper only when an individual uses such speech to incite immediate lawless action and the speech is likely to

124. See *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) (protecting an individual's right to use disorderly speech during an arrest or investigation).

125. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

126. See *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that the government may not criminalize the use or display of offensive language).

127. See Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 921 n.19 (2009) (noting that mere offensiveness is not sufficient to raise an expression to the level of fighting words).

128. See *id.*

129. See *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (stating that the constitutional guarantee of freedom of speech forbids states to punish language not within "narrowly limited classes of speech"). In *Hess*, appellant argued that Indiana's disorderly conduct statute was unconstitutionally vague. *Id.* at 105. The court found that Hess's use of an expletive was neither directed at the arresting officer nor directed towards inciting or producing imminent lawless action. *Id.* at 108. The State could therefore not punish Hess's words on the grounds that they had a "tendency to lead to violence." *Id.* at 109.

produce such action.¹³⁰ Prosecution for actions amounting to offensive speech without more is prohibited by the free speech clause of the First Amendment.¹³¹ An arrest for simply using offensive words is unlawful, unless, the speech is "shown likely to produce a clear and present danger of a serious substantive evil that rises *far* above public inconvenience, annoyance or unrest."¹³² Since the conversation between Sergeant Crowley and citizen Professor Gates does not amount to the type of substantive evil that escapes First Amendment scrutiny, Professor Gates had the First Amendment right to call Sergeant Crowley a racist cop just before his foreseeable unlawful arrest by Sergeant Crowley.¹³³ My Black experience informs me that if a black male calls a white police officer a racist cop in a face-to-face confrontation the officer will quickly find a legitimate or pre-textual reason to arrest his black accuser that has a plausible justification.¹³⁴

V. A False Police Report Under Massachusetts Law is Not a Crime Unless it Contains a Material Matter

In arresting a highly respected African-American historian who teaches at Harvard, Sergeant Crowley may have realized for the first time, while preparing his police report, that he had "waded into the politically charged swamp of race in America"¹³⁵ and that his interaction with Professor Gates is only politically correct if Mrs. Whalen described the potential criminal intruders at Professor Gates' home as black.¹³⁶ On

130. *See id.* at 108–09 (citing the standard established in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

131. *See id.* (noting that the State can only limit an individual's speech if it incites immediate lawless action and is likely to produce the action).

132. *See Terminello v. Chicago*, 337 U.S. 1, 4 (1949) (discussing the exceptions to the First Amendment protection of freedom of speech).

133. *See Hess*, 414 U.S. at 108–09 (finding that use of an expletive did not have a tendency to incite violence and therefore, the State could not punish the words); *see also* CROWLEY, *supra* note 12 (stating that the action leading to an arrest was merely the accusation that the investigating officer was a racist).

134. *See* discussion *supra* Part II (discussing the subjective Black experience).

135. Editorial, *The Crass Politics of Race*, DALLAS MORNING NEWS, Jan. 12, 2010, at A10, available at <http://www.dallasnews.com/opinion/editorials/20100111-Editorial-The-crass-politics-of-6915.ece> (discussing the use of race in American politics) (last visited Mar. 27, 2011) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

136. *See* discussion *supra* Part III (discussing that the caller actually identified the intruders as possibly being Hispanic, but that the police report states the caller identified the intruders as two black men).

Thursday, July 16, 2009, Professor Gates of Cambridge was arrested at Ware Street for demonstrating loud public behavior.¹³⁷ The loud public behavior was directed at a Sergeant Crowley who was at Ware Street to investigate the reasonable suspicion of criminal activity.¹³⁸ Sergeant Crowley heard a police broadcast of a break-in, in progress at the Ware Street address, Professor Gates' home.¹³⁹ Sergeant Crowley said, "Due to my proximity, I responded."¹⁴⁰ After Sergeant Crowley arrived at the Ware Street address he radioed Ms. Whalen, the white female caller, and asked her to meet him at the front door of the residence.¹⁴¹ While Whalen was standing on the sidewalk in front of Professor Gates' residence, she informed Sergeant Crowley that she was the person who made the call.¹⁴² According to Sergeant Crowley, while standing on the sidewalk, "Whalen told me that she saw two black males on the porch of Ware Street, and one of them was trying to force entry into the home."¹⁴³

It should not come as a surprise if Sergeant Crowley took his clue from Professor Gates in trying to utilize the race card to his advantage in describing their interaction in his police report.¹⁴⁴ Sergeant Crowley's police report strongly suggests Professor Gates expressly invoked the race card before Sergeant Crowley.¹⁴⁵ After Sergeant Crowley asked Professor Gates to step out on the porch and speak with him, Professor Gates said, "No I will not."¹⁴⁶ Professor Gates then demanded to know the identity of Sergeant Crowley.¹⁴⁷ Sergeant Crowley told Professor Gates that he was Sergeant Crowley from the Cambridge Police and that he was investigating a report of a break-in, in progress at the residence.¹⁴⁸ While he was making this statement, Professor Gates opened his front door and asked whether he

137. CROWLEY, *supra* note 12.

138. *Id.*

139. *Id.*

140. *Id.*

141. CROWLEY, *supra* note 12.

142. *Id.*

143. *Id.*

144. *See id.* (describing how Professor Gates asked the officer if he was being investigated because he was black).

145. *See id.* (describing how Professor Gates told a person on the other end of the telephone that he was "dealing with a racist police officer").

146. CROWLEY, *supra* note 12.

147. *Id.*

148. *Id.*

was being investigated because he was "a black man in America."¹⁴⁹ By accusing the police officer of possessing a criminal suspicion simply because he was a black man in America, Professor Gates was issuing Sergeant an open invitation to play the race card game.¹⁵⁰ Professor Gates perceived that he might have a tactical advantage based on the intersection of race and class because of his professional status as a Harvard professor.¹⁵¹ One can only make an educated guess as to why Professor Gates used the race card so quickly in this rather routine investigation of apparent suspicious criminal activity.¹⁵² Professor Gates may have utilized the race card in a routine fashion when interacting with Sergeant Crowley because his understanding of the history of American race relations reveals that he might have a politically correct advantage by accusing Sergeant Crowley of acting like a racist.¹⁵³ "Race remains the third rail of American politics because politicians wield it as a blunt weapon for convenient political advantage."¹⁵⁴ America deserves better than the same old heated race card games from Professor Gates and Sergeant Crowley, as well as its two major political parties.¹⁵⁵ Unfortunately, "the race and 'greater sin' cards are being played by Republicans and Democrats."¹⁵⁶ In the situation involving Professor Gates and Sergeant Crowley, President Obama became a diplomat to control the race card damage created by the controversy.¹⁵⁷

After Professor Gates opened his door, Sergeant Crowley then asked Professor Gates if there was someone else in the residence.¹⁵⁸ Professor Gates yelled and told Sergeant Crowley that it was none of his business who was in the residence and accused Sergeant Crowley of being a racist

149. *Id.*

150. *See id.* (stating that Professor Gates was the first party to invoke the issue of race verbally).

151. *See* Thompson, *supra* note 2, at A4 (discussing Professor Gates' background as a scholar in the history of racism).

152. *See* CROWLEY, *supra* note 12 (stating that Gates brought up race almost immediately upon answering the door).

153. *See* Thompson, *supra* note 2, at A4 (providing an account of Gates discussing his in-depth knowledge of the history of racism).

154. Editorial, *The Crass Politics Of Race*, *supra* note 135, at A10.

155. *See id.* (discussing how the Democratic and Republican Parties utilize the issue of race).

156. *Id.*

157. *See* Kalson, *supra* note 11, at A1 (stating that President Obama prepared to bring the parties together for discussion after the incident).

158. CROWLEY, *supra* note 12.

police officer.¹⁵⁹ After Professor Gates invoked the race card continuously throughout his encounter with Sergeant Crowley, one can better understand why Sergeant Crowley felt compelled to retaliate with his own perceived race card advantage by stating in his police report that he was not just looking for any criminals but a black criminal, which would give him a perceived race card advantage.¹⁶⁰ An allegation by Sergeant Crowley's police report that witness Whalen told him the suspected criminal intruders were black, if false, could have legal implications for Sergeant Crowley if a charge is filed against him alleging that he filed a false police report under Massachusetts law.¹⁶¹

On April 16, 1985, Edwin W. Driscoll reported a stolen car.¹⁶² On May 10, 1985, the defendant located Driscoll's car and prepared an incident report.¹⁶³ An incident report is a form used by the Boston police department to make a written record of any incident involving a police officer.¹⁶⁴ The officer is asked to describe the nature of the incident in the report.¹⁶⁵ However, when a police officer provides information in the incident report, he should not provide false information.¹⁶⁶ The Commonwealth said the incident report was false because it wrongly suggested that proper authorization was given to tow the car.¹⁶⁷ Boston police Captain Mary Evans's testimony strongly suggested a reasonable police officer in the position of the defendant police officer should know that information in the report was not correct and false.¹⁶⁸

The Massachusetts Court concluded that Evans' testimony did not prove beyond a reasonable doubt that the defendant recognized that his report was

159. *Id.*

160. *See* discussion *supra* Part III (discussing how Sergeant Crowley falsely related in the police report that the suspected intruders were black).

161. *See* *Commonwealth v. Kelley*, 626 N.E.2d 12, 12–13 (Mass. App. Ct. 1994) (stating that an officer or employee of the Commonwealth can be subject to punishment for filing a false police report under Massachusetts General Laws ch. 268, § 6A).

162. *Id.* at 747.

163. *Id.*

164. *Id.*

165. *See id.* (stating that inquiry number four of the incident report requires the "type of incident" being reported).

166. *See id.* at 747–48 (discussing that Massachusetts General Laws ch. 268, § 6A forbids an officer from providing false information in a police report).

167. *See id.* at 749 (stating the Commonwealth's position that by stating that the officer towed the car which he had "recovered," there was a suggestion that authorization had taken place).

168. *See id.* (discussing the testimony of Captain Mary Evans and her usage of the term "recovered").

false on a material fact.¹⁶⁹ The Commonwealth made the case that the declaration was material since the "effect of the report was to cover up a crime committed by Roslindale Motors in towing the car without authorization and to allow the company to bill the motor vehicle's owner for its services."¹⁷⁰ Under these circumstances, the Massachusetts Court of Appeals concluded the evidence does not allow a reasonable inference that the defendant knew his statement was false regarding a material matter.¹⁷¹

The Massachusetts Constitution provides for the equality of all of its inhabitants by declaring racial discrimination illegal.¹⁷² Under Massachusetts's law, race profiling is defined as "the practice of detaining [or stopping] a suspect based on a broad set of criteria which casts suspicion on an entire class of people without any individualized suspicion of the particular person being stopped."¹⁷³ Under the Massachusetts Constitution everyone is protected against unreasonable searches and seizures.¹⁷⁴ An alleged false statement regarding the race of the suspect, as reported in the police incident report prepared by Sergeant Crowley, is a plausible material fact and should expose him to a criminal investigation under the rationale of *Commonwealth v. Kelley*.¹⁷⁵ If there is any evidence that the incident report was employed with the goal of implementing unauthorized racial profiling, then Sergeant Crowley's false statement regarding race in the incident report is false on a material matter.¹⁷⁶ From a hypothetical perspective, even if Sergeant Crowley

169. *See id.* (stating that there was insufficient evidence to show that the defendant knew his statement was false in a material matter).

170. *Id.* at 750.

171. *See id.* (discussing the lack of evidence showing that the defendant knew his statement was materially false). The Court continued:

Because the evidence does not provide sufficient basis for a finding beyond a reasonable doubt that the defendant knew his statement was false and that he knew it to be false in a material matter, his motion for a required finding of not guilty should have been allowed. Accordingly, the judgment of conviction is reversed, the finding is set aside, and the case is remanded to the Superior Court for entry of a judgment of acquittal. *Id.*

172. *See* MASS. GEN. LAWS ANN. CONST. pt. 1, art. 1 (West 2010) (stating that no one shall be denied equality under the law on the basis of race).

173. *Commonwealth v. Lora*, 886 N.E.2d 688, n.1 (Mass. 2008).

174. *See id.* MASS. GEN. LAWS ANN. CONST. pt. 1, art. 14 (West 2010) (stating that every person has a right to be secure from all unreasonable searches and seizures).

175. *See Commonwealth v. Kelley*, 626 N.E.2d 12, 15 (Mass. App. Ct. 1994) (holding that there was not sufficient evidence that the police officer knew using the word "recovered" in the police report was false in a material matter).

176. *See id.* (stating that there needs to be evidence to provide a sufficient basis for a finding beyond a reasonable doubt that a defendant knew his statement was false).

engaged in race profiling under the circumstances involving Professor Gates, the Massachusetts Court of Appeals is likely to conclude that the evidence does not allow a reasonable inference that Sergeant Crowley knew his statement was false regarding a material matter.¹⁷⁷ If Sergeant Crowley possessed a reasonable suspicion of criminal activity¹⁷⁸ by Professor Gates during his initial encounter with Professor Gates, one could argue that he did not engage in race profiling. Furthermore, any misrepresentation regarding Mrs. Whalen providing the racial identity of a potential suspect in the incident report is not likely to be considered as a material fact on the issue of race profiling.¹⁷⁹ In a civil rights action filed by white students against Dartmouth College alleging their suspension was racially motivated,¹⁸⁰ the federal court of appeals held, "merely juxtaposing the fact of one's race with an instance of discrimination is insufficient to state a claim"¹⁸¹ of racial discrimination. Similarly, simply juxtaposing race with an alleged false statement regarding the racial identity of a suspect in a police incident report by Sergeant Crowley may be considered as insufficient to prove that Sergeant Crowley committed a crime by making a false statement regarding a material fact in order to cover up the illegal act of racial profiling.¹⁸²

Raymond Scott sued defendants after his arrest for disorderly conduct on a theory of racial profiling after the credit card company was wrongly informed that that plaintiff was suspected of engaging in stolen credit card use.¹⁸³ Assuming that race was the dominant factor in why Scott was a target at the Plaza shopping mall, he faces an uphill battle in proving that the race profiling was illegal¹⁸⁴ because the discriminatory intent proof requirement benefits the

177. *See id.* at 751 (finding that there needs to be enough evidence to prove beyond a reasonable doubt that the police officer knew his statement was false).

178. *See Terry v. Ohio*, 392 U.S. 1, 37 (1968) (noting that while the police officer did not have probable cause to arrest, he had reasonable suspicion to stop, accost the defendant, and question him).

179. *See Kelley*, 626 N.E.2d 12 at 15 (stating that an officer must know that a statement was false as to a material fact).

180. *See Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 15 (1st Cir. 1989) (describing the complaint as stating that the President refused to meet with white students but met with an opposing group of black students).

181. *See id.* at 19 (stating that a "fact-specific allegation of a causal link between defendants' conduct and plaintiffs' race" is necessary for a count to stand).

182. *See Commonwealth v. Kelley*, 626 N.E.2d 12, 15 (Mass. App. Ct. 1994) (establishing the need for strong evidence of an officer's knowledge of a false material fact).

183. *See Scott v. Macy's East, Inc.*, No. Civ.A.01-10323-NG, 2002 WL 31439745, at *1-2 (D. Mass. Oct. 31, 2002) (stating that mall officials identified the defendant as a stolen credit card suspect because of his behavior in a department store).

184. *See id.* at *7 (stating that the law requires a measure of proof and the claimant bears the

defendant regardless of the race of the alleged victim.¹⁸⁵ In a complaint alleging that Sergeant Crowley falsely stated that Mrs. Whalen identified the suspects as black, Professor Gates nevertheless faces an uphill battle because of the heavy burden of proof generally placed on individuals alleging selective law enforcement based on racial profiling.¹⁸⁶

VI. Conclusion

The arrest of Professor Gates by Sergeant Crowley teaches us that racial profiling in the criminal justice system remains a hot button issue.¹⁸⁷ African Americans are the primary targets of racial profiling in America.¹⁸⁸ Because of their race profiling experience, it should not be surprising that African Americans are more likely to accept a charge of racial profiling from a black Harvard professor than many of their white friends.¹⁸⁹ On the other hand, most white Americans who have not experienced racial profiling are more likely to accept a white police sergeant's allegation that he arrested the Harvard professor because he engaged in disorderly conduct and not because of his race.

The lesson from the narrative involving Professor Gates and Sergeant Crowley may be that on the issue of race profiling, many blacks and many whites probably identify with a different worldview.¹⁹⁰ In order to close the racial divide on the issue of racial profiling, it is necessary to provide sensitive training to all Americans. The racial profiling sensitive training should include a joint presentation from the perspective of the traditional victims of race targeting and police officers charged with enforcing our

burden of proof).

185. See *id.* at *6-7 (stating that the claimant bears the burden of production and proof and the defaults favor the defendant).

186. See Melissa Whitney, *The Statistical Evidence of Racial Profiling in Traffic Stops and Searches: Rethinking the Use of Statistics to Prove Discriminatory Intent*, 49 B.C. L. REV. 263, 282-83 (2008) (discussing the difficulties in meeting the burden of proof in both equal protection claims due to the unavailability of data in specific circumstances).

187. See discussion *supra* Part II (discussing racial profiling in general); see also Kalson, *supra* note 11, at A1 (discussing the importance for President Obama to address racial profiling in this specific instance).

188. See Hendrix, *supra* note 33, at 3 (stating that African Americans have been the primary targets of racial profiling).

189. See discussion *supra* Part II (discussing racial profiling and how African Americans have been the primary targets).

190. See discussion *supra* Part II (discussing the "subjective Black experience" as a result of the history of racial profiling and racism in general).

laws fairly and impartially. This joint race sensitive training could be conducted before churches, religious groups, community organizations, civic organizations, and business groups. The incident involving Professor Gates and Sergeant Crowley shows that every person living in America should be given an opportunity to receive sensitivity training as a proactive measure to help us all learn how to get along. Finally, race profiling sensitive training should be offered to all people living in America so that we may learn how to avoid the default stereotyping of people from other racial or ethnic groups. Default stereotyping occurs when the negative preconceived notions that an individual brings to the table when interacting with an individual from a specific racial or ethnic group is a predominant factor in analyzing a given situation. Default stereotyping is dangerous because it can cloud our judgment and lead to racial profiling.