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FORENSIC FORUM

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When Subjects Play the "Race Card"

Preface: "Forensic Forum" is the first of many future columns that I intend to write providing my forensic analysis on certain "high profile" law enforcement incidents and issues presented in the national media. As the law enforcement community realizes all too well, rarely does the media or the "celebrity TV CSI and cop show" watching community understand police practices. These same communities also have little to no appreciation of the dangers and daily stressors of police work. My intended audience for "Forensic Forum" is the media, law enforcement and "Joe Citizen." I hope you all get something out of this column, and that you will pass it on to others so that can learn more about the difficult job of policing.

During the past two weeks everyone in America and the international community who has a television or a radio has learned something interesting about police practices, racial relations and the power of politics as a result of a police contact between the Cambridge police and a black man. It seems that nearly everyone, from politicians, to renowned community activists, to media "talking head" pundits and police administrators, have opined on the contact between Cambridge police officers and Harvard University Professor Gates. Even President Obama stepped into the fray without any knowledge of the fact pattern of this incident to initially opine that the police officers involved "acted stupidly." President Obama has presented this incident to the American people as a "teachable moment." As a professional who has studied the actual police reports in this incident, I would like to offer my considered opinions. The Cambridge Incident is indeed a "teachable moment." But what have we as Americans learned? Let the lesson begin...

Lesson #1 – "All we want are the facts, ma'am." - Know the facts before you opine on anything.

To quote Sergeant Joe Friday of the old TV series *Dragnet*, "All we want are the facts, ma'am."

There is a significant difference between the standards of "truth" and "proof" used by "investigative journalists" and forensic experts. Credible forensic experts must follow the legal guideline of "preponderance of evidence" whenever we render findings or opinions in written reports or when testifying before the "Trier of Fact" (jury). Journalists have no such legal mandate and therefore often play fast and loose with their "facts", which are often no more

than mere speculation. "Preponderance of evidence" may be defined as "more likely to have occurred than not, based upon facts, evidence and a totality of circumstances."

The lack of knowledge and mere speculation by uninformed journalists and biased "community activists" does nothing to enhance our potential for learning anything important about police practices or the state of racial relations in this country. If anything, such comments perpetuate stereotypical prejudices and fuel racial divisiveness.

Lesson #2 - Criminal Profiling vs. Racial Profiling

"Racial profiling" occurs when police officers base their involuntary encounters with citizens solely upon the color of their skin. This is not only unethical and against department policies but also a violation of the citizen's 4th and 14th Amendment rights to be free from unreasonable searches and seizures.

"Criminal profiling" occurs when officers responding to a call for service, or when involved in self-initiated patrol activity, utilize the legal standards of "reasonable suspicion" or "probable cause" to effect a detention or arrest of a person. In such cases, race is only a pertinent factor if it directly relates to a suspect's description.

In the immediate case of "Gates vs. The Cambridge Police", or "Professor Gates vs. Sergeant Crowley", Cambridge police officers were responding to a call for service initiated by a "Reporting Person (RP)," neighbor Lucia Whalen, who reported to a police 9-1-1 dispatcher that two men, one of whom "might be" Hispanic, were possibly breaking into a home. While the 9-1-1 call transcripts do not indicate that the men were black, Ms. Whalen did indicate to the dispatcher that she was not sure of the actual race of one man and did not note the race of the other. We are not yet privy to any audio or written transcript of what the police dispatcher may have told the responding officers with respect to the suspicious subjects' race. However, Sergeant Crowley has reported that when he contacted Ms. Whalen upon his arrival, she told him that she had observed "what appeared to be two black males with backpacks on the front porch,... and that her suspicions were aroused when she observed one of the men wedging his shoulder into the door as if he were trying to force entry."

What is of import in this case is the basic information with which Ms. Whalen was able to provide the dispatcher and Sergeant Crowley: (1) It appeared that two men whom the neighbor did not recognize appeared to have forced entry into a home by applying brute force upon the front door; (2) the men were black and wearing backpacks; and (3) there appeared to be a suitcase near the front of the home. What is implied and may have been asked of Ms. Whalen was whether she recognized either of the men as residents of that home. This begs the question, "If the neighbor (RP) had recognized Mr. Gates or the other man forcing entry into the Gates home, why then would she have even called the police?" People found by police to be breaking into their own homes who are not recognized by their own neighbors as residents is a rare occurrence for police officers.

At the moment of contact between Sergeant Crowley, his partner Officer Carlos Figueroa and Professor Gates, the officers were involved in the investigation of suspicious circumstances; specifically a burglary or a home invasion in-progress.

Statistics consistently inform us that approximately 25% of all officers in the U.S. are killed and injured responding to and investigating “suspicious circumstances” calls each year. Among the most serious high-risk calls for peace officers are possible burglaries and home invasions in-progress. The majority of these crimes take place during the day time and in relatively nice neighborhoods because that’s where money and expensive property are found.

Officers investigating possible burglaries and home invasions in-progress are almost always at a tactical disadvantage. Suspects (many of whom are armed) can see police arrive, and can plan their ambush from positions of cover and concealment. As has happened on two occasions this past month, at least three police officers have been killed in the U.S. under these circumstances. Home invasions are by their very nature particularly violent and often deadly. To emphasize my point, recall the recent killing of two well known parents of fourteen disabled children in front of their children last month in Beulah, Florida by a team of armed home invaders.

In this case, due to the sparse information received from neighbor Ms. Whalen, Sergeant Crowley and Officer Figueroa had only moments to plan for their contact with any subjects inside the residence. At this point, they had to be concerned with their officer safety, making contact with any potentially armed occupants within the residence, assessing the possibility that residents were being held against their will by armed home invaders, and conducting a protective sweep for any armed suspects inside the home.

Multi-tasking under the stresses of officer safety and the uncertainty of the reported suspicious circumstances is no easy matter, when one considers that Sergeant Crowley had to conduct his initial assessment from a position at the front door of the home where he was totally exposed. Under such taxing circumstances, a police officer’s primary concern is of their immediate safety, the safety of their partner(s) and the safety of innocent residents who might be held as hostages. The reasonable officer confronted with such difficult circumstances is not concerned about the race of the person they are contacting unless race is pertinent to a suspect description. In this case it would appear that while the racial description of the suspicious subjects being black may have been a pertinent investigative clue, the observed and described behavior of the subjects in possibly forcing entry into the home was more important to Sergeant Crowley.

Being inquisitive during any initial investigation of the circumstances is both the prerogative and responsibility of the responding officers. This is not “racial profiling”; it is “criminal profiling” which is a critical component of good police work.

Lesson #3 – There is a big difference between being “book smart” and being “street smart.” Never be uncooperative and belligerent with police during an investigation when time is compressed and safety is an issue.

To explain to those who are not familiar with police practices and the legal standards of proof that provide guidelines for police behavior during investigations; allow me to explain the legal concept of “Reasonable Suspicion.”

"Reasonable suspicion" is defined as "specific and articulable facts or circumstances made apparent to an officer which leads the officer to believe that: (1) something out of the ordinary; (2) suspicious; or (3) criminal in nature is occurring; and that (4) there is some relationship between that activity and the person(s) the officer is contacting. Reasonable suspicion provides the officer with legal justification to: (1) stop and detain the subject(s), and; (2) possibly search them for weapons.

While a detained subject is not under arrest, they are not free to leave and must obey all reasonable investigative inquiries made by the investigating officer. Failure to obey an officer's reasonable investigative directions or orders constitutes an arrestable crime of "delaying, obstructing, or resisting a peace officer during the lawful performance of their duty."

The goal of any detention is to investigate reports, circumstances and apparent facts to determine: (1) whether any crime is or has occurred, and (2) if sufficient probable cause exists to transition from a detention to a physical arrest and additional evidentiary protocols.

Officers are trained to seek out information and evidence that is both exculpatory and incriminating during their initial investigation. In effect, they are continually evaluating their contact with the subject(s) and gauging the subject's responses to reasonable and legitimate investigative inquiries and directions. The officer(s) are continually asking themselves, "What if anything is wrong with this picture?" In other words, while being presented with information such as statements and visual and audible evidence that include a subjects' demeanor, officer(s) are evaluating a "totality of the circumstances" that may mitigate or aggravate their perceptions of that subject's veracity or innocence.

In the immediate case, it is reported that upon reaching the front door of the residence, Sergeant Crowley observed a black male, later identified as Professor Gates, to be standing in the foyer of the home. Sergeant Crowley, who was attired in full police uniform, first asked Professor Gates to step out onto the porch to speak with him. This is a standard officer and citizen safety protocol conducted in order to: (1) remove the person from any position of concealment in order to assess them for weapons; (2) remove an innocent citizen resident whom might be a potential hostage away from the hostage taker(s); (3) prevent the subject from accessing any actual or potential weapons from within the home; and (4) assess the responses of the subject contacted for cues of deception or veracity.

Sergeant Crowley reports that when he asked Professor Gates to step outside, Gates responded tersely, "No, I will not!" and demanded to know who Sergeant Crowley was. The sergeant reports that in response, he identified himself to Gates several times and explained to the professor that he was investigating a report of a burglary in-progress at the residence.

Officer Figueroa reports that when Sergeant Crowley asked for Professor Gate's identification (to confirm Gates lived in the home), Gates yelled, "No I will not!" Sergeant Crowley and Officer Figueroa both report that Gates continued shouting at the sergeant, "Why? Because I am a black man in America!"

Sergeant Crowley and Officer Figueroa jointly report that when the sergeant attempted to calm Professor Gates down and inquired as to whether there was anyone else in the home, Gates yelled at Sergeant Crowley, "You don't know who you are messing with!" Sergeant

Crowley further reports that Gates yelled at him that it was "none of (the officers') business whether there was anyone else in the home" and called him "a racist police officer."

Sergeant Crowley reports that while Professor Gates was acting uncooperatively and yelling at him, Gates also picked up a cordless phone, dialed an unknown number and began yelling into the phone, "Get the chief! I am dealing with a racist police officer in my home!" It was apparently at this point that Sergeant Crowley called for additional police to assist him with an uncooperative subject who might be a resident.

It would appear that, up to this point, Sergeant Crowley and Officer Figueroa displayed remarkable restraint in response to the apparent tirade and increasingly suspicious, if not criminal behavior, of Professor Gates. In evaluating the circumstances to this point, one should keep in mind the the officer(s) is asking himself, "What's wrong with this picture?"

If you are not involved in law enforcement, here is a "reasonable officer's" forensic evaluation. We have two officers who have responded to a possible burglary or home invasion in-progress called in by a neighbor who does not recognize the two black men with backpacks who she witnessed to forcibly enter a residence.

We have one subject matching the description of one of the men who, when contacted by a uniformed officer, refuses to come out of the home, refuses to identify himself and refuses to answer pertinent, direct and reasonable investigative inquiries; even after the officer has repeatedly identified himself and has explained the nature of the investigation.

Rather than greeting the officers and calmly explaining to them that he is a resident who had to force entry into his home because his door was jammed, or he was locked out; this unidentified subject now yells at the officer, calls him a racist police officer and reacts in overly aggressive and intimidating manner.

At this point, the officers' information of suspicious and possibly criminal activity associated with this subject are enhanced, if not confirmed. Neither investigating officer has been able to assess this now "suspicious" subject to determine whether or not he is armed; the second suspicious subject is nowhere to be seen and both officers are in the open and exposed. The contact is rapidly evolving; neither officer has physical control over the now "detained" subject who is dynamic, animated and enraged; and back-up officers have not yet arrived on scene. Are any of you now beginning to ask yourself, "What's wrong with this picture?" I know I am; and obviously so were Sergeant Crowley and Officer Figueroa.

After initially refusing to show Sergeant Crowley his identification, Professor Gates reluctantly provided his Harvard University faculty identification card to Sergeant Crowley. (Producing a Harvard ID without a residence address rather than a drivers license was a "Look at me, I'm important" power play on Gates' part because he did not produce his drivers license to officers until he had been booked later that afternoon.)

Once Sergeant Crowley had Gates' Harvard faculty identification card, he was able to contact and have Harvard University Police respond to confirm who Gates was and that he resided in a university owned residence. Once Sergeant Crowley's initial suspicions of possible criminal activity had been assuaged, he then attempted to clear from the call by leaving

Gates' property. Apparently Gates felt that it was now his opportunity to prosecute an engagement with Sergeant Crowley in the "Court of Public Opinion" outside of his residence.

As Sergeant Crowley was leaving the Gates property, the professor followed him outside and repeatedly screamed at the sergeant to again provide him with his name and badge number. The professor then publically accused Sergeant Crowley of being a racist police officer, and threatened the sergeant in the presence of a gathering crowd of citizens and officers by screaming, "You don't know who you're messing with! You haven't seen the last of me!"

Sergeant Crowley reports, and several other witnessing officers apparently confirm, that in response to Professor Gates' loud, threatening and belligerent public display, the sergeant next produced a set of handcuffs and verbally warned Professor Gates that he was becoming disorderly. Sergeant Crowley then repeatedly directed Gates to calm down and go back into his home, or face arrest. When Gates ignored Sergeant Crowley's lawful orders and continued his tumultuous behavior outside, the sergeant placed him under arrest for disorderly conduct.

What lesson is to be learned here? You can have a fancy degree and title that indicates that you are "book smart;" but that does not necessarily equate to being "street smart." Of all people that one might expect to have a modicum of common sense and racial tolerance, it would be a Harvard professor with a Ph.D. who teaches African-American studies and race relations. Further, never act deviant or uncooperative with police when they have indicated to you there is a safety issue and time is compressed. Provide direct answers to the officers' legitimate questions to recincile their suspicions. After the issue is resolved, then approach the police with your concerns in a calm and respectful manner.

Gates' self-serving comment that he is "afraid of police because (he) is black" just does not work for me because it simply does not make any sense. If you as a black man were really scared of the police and did not want them at your home, you would simply cooperate with them to resolve their issues and they would quickly be on their way. Sergeant Leon Lashley (who is black) and Officer Carlos Figueroa were with Sergeant Crowley at the time, so it is difficult to make the "white racist cops harrassing a black man in America" argument. But that did not stop the Professor from playing the "race card" immediately upon being contacted by police.

Lesson #4 – Being a racist and racism is a state of mind

What was Professor Gates affected by that caused him to act so erratically and irrationally? How about "racism?" Yes, in my opinion, the good professor of African- American studies is by social and psychological definitions a "racist." Speaking forensically, Professor Gates has already provided us with plenty of communicative and behavioral cues of his racist mindset.

One thing that I learned many years ago as a detective who investigated real racists who had committed horrible hate crimes, is that one is not born with prejudice or to be a racist. These character and behavioral traits are learned and inculcated by parents, relatives and close associates. Fledgling and overt racists are empowered by groups, organizations, schools

or churches that they belong to that teach a racist or separatist ideology. These entities act to solidify a prejudice mentality.

The basic psychological profile of a "racist" may include, but not be limited to the following components: (1) the person's life and professional career has evolved towards and is myoptically centered around the singular component of one's race; (2) the person views all societal contacts and interpersonal relationships in terms of their race, before they consider any other components, rationale or mitigations for others' behavior towards them or others of their race; and (3) the person's consistent behavior suggests a myoptic and obsessive paranoia that those not of his race are "transgressing" upon him solely because of his race.

Race was not a factor in this case until Professor Gates made it one. That is because his singular mindset is "racism." While it is laudible to be proud of one's racial heritage and one's academic accomplishments in enhancing opportunities for those within your culture who you believe are socially disadvantaged; it is absolutely unacceptable to cling to a racist mentality that blinds you and infuses the naive and impressionable students and citizens you effect with prejudice and racist diatribe.

Sergeant Crowley, is a decorated police supervisor who is universally respected by his local law enforcement community. He was hand picked by a former Cambridge Police Commissioner who is black, to teach police - race relations and racial profiling for the past five years at the Lowell Police Academy.

Current Police Academy Director Thomas Flemming says he has the highest respect for Sergeant Crowley and calls the officer a role model for all police officers. Are we being asked to believe that a supervisor unanimously supported by his Police Commissioner and a racially diverse department of officers, experienced an acute onset of "racism" in this singular incident?

Lesson #5 – Sergeant Crowley's arrest of Professor Gates would ultimately be seen by a court as lawful and without negligence or deliberate indifference

In tactical communications classes, officers are trained to let the subject have the last word, because (officers) have the last act.

Officers are trained in laws of arrest and legal update classes that if a subject they are contacting, whether detained or not, demonstrates elements of any crime in the presence of the officer – that officer may take that person into custody for that crime. In the immediate case, Professor Gates' actions fulfilled the elements of the crime of "disorderly conduct" (Massachusetts) or "disturbing the peace" in California. Albeit, the arrest for this misdemeanor crime is discretionary on the part of the officer, but that fact does not create any unlawful action on the part of Sergeant Crowley.

That the City Prosecutor decided not to prosecute Professor Gates in no way makes Sergeant Crowley's arrest of the professor unlawful. Furthermore, in my professional opinion based upon the totality of the reports and evidence I have reviewed to date, the actions of the arresting officers and the Cambridge Police Department demonstrate no negligence whatsoever, let alone a level of egregious, gross negligence, malice or "deliberate indifference" required in a civil court to provide foundation for any civil suit that Professor

Gates might subsequently file in federal or state courts against the arresting officers and the City of Cambridge.

In actuality, it would appear that Professor Gates received special treatment by the City Prosecutor who dropped the disorderly conduct charges. It is doubtful that such preferential treatment would have been afforded to a non-black person under similar circumstances.

Lesson #6 – The “Race Card” gets played every day. Protect yourself against it.

Officers are validly admonished to avoid inappropriate “racial profiling” based upon the past and historic wrongful actions of law enforcement upon the minority community. However, it is also appropriate to warn today’s officers that there are many “Professor Gates’” out there who are waiting for their opportunity to play the “race card” against the unprepared officer.

Two rules I teach in police practices classes are, (1) *“You cannot seek to control others, unless you are first in control (emotionally) of yourself, and (2) “Always have a studied response, rather than an emotional reaction to resistance.”*

If you the peace officer are acting appropriately during your subject contacts and enforcement stops and you are suddenly and aggressively engaged by someone displaying inappropriate racially-oriented behavior, you should be asking yourself, “What’s wrong with this picture?”

If the subject’s response appears to be unreasonable, acute and suspicious, your next response should be: (1) a studied evaluation of the subject(s) for officer safety; (2) heightened situational awareness in the event of an attempt at officer distraction; (3) awareness of your own potential for a heightened emotional, rather than a studied response to their resistance; and (4) an immediate memorialization of the incident by use of recording devices to preserve evidence and to protect yourself against allegations of racial discrimination. Always be prepared for the unexpected!

In summary, Sergeant Crowley did nothing wrong and was both ethically and legally correct in the actions he took when he detained and subsequently arrested Professor Gates. Sergeant Crowley and Officer Figueroa responded to a possible crime in-progress that could have easily cost one or both of these officers their lives under different circumstances. Knowing the potential for extreme danger was present, Sergeant Crowley without hesitation exposed himself and climbed the front steps of that home to contact persons inside no doubt mindful that if armed suspects were indeed inside the residence and he was ambushed, he might never see his family again.

To those of you who disagree with my opinion, I would ask you this simple rhetorical question: If Professor Gates’ home was really being burglarized or home invaded and Professor Gates was being held hostage at gunpoint, and the professor’s life or property were saved by the officers’ legal intervention, would you still define Sergeant Crowley as a “racist police officer” who was “acting stupidly;” or would you call him a hero?

That’s just my opinion. What’s yours?

Be safe out there!

About the author

Dr. Ron Martinelli is a forensic criminologist specializing in police practices and 4th, 8th and 14th Amendment litigation. He is a former police officer, detective, police academy director, and Division Dean of Criminal Justice. Dr. Martinelli is an adjunct professor of forensic science, a Federal/State Courts certified police practices expert, and a Certified Litigation Specialist in Police and Corrections Practices, who is Board Certified in Forensic Traumatology. He can be reached at: Code3Law@martinelliandassoc.com

