Government Should Stay Out of Southie Bar Dispute

By Harvey A. Silverglate

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Boston has been beset by another one of its periodic ethnic and racial controversies, and the sides have lined up to battle over the question of whether Tom English's Cottage, a South Boston bar, did or did not intend a racist message when it installed a display featuring stuffed monkeys and jungle foliage around the time of Black History Month.

Citizens who know and do not know English and the bar have taken different sides. Various neighborhood organizations have weighed in, along with some politicians, both African-American and white. This is as it should be. Those who conclude - after giving English a fair opportunity to explain - that the bar meant to insult the city's African-American citizens are free not only to criticize and boycott the place but to seek to persuade others to join them. Those who believe English's explanation - that the decorations were simply a seasonal theme in keeping with many years of such decorations - can support the business, even if they have to cross a picket line to get in. The freedom to publicize such situations and to exert moral and economic pressure against bigots, just like the freedom to support those whom one views as having been wrongly accused of bigotry, is as American as apple pie.

However, there is yet another piece of the great American apple pie in this picture: the First Amendment. Two groups have weighed into the controversy that by law, should have maintained silence - the Massachusetts Commission Against Discrimination and the Boston Licensing Board.

The MCAD launched its investigation under the claimed authority of the city's public accommodations law. This is the law that prevents certain businesses, such as restaurants and hotels, from discriminating against any patron who is willing to pay for services and to abide by the establishment's reasonable rules (such as dress and decorum) on the basis of such factors as race, religion, and sex.

In seeking to justify his ordering an investigation, the MCAD chairman, Charles E. Walker Jr., was quoted as saying, "This kind of conduct is deeply offensive to all decent Americans, as well as being illegal." And in an extraordinary assertion of governmental authority to punish racist expression by a business, an MCAD spokeswoman, JeLeisa Jones, said that if the display is found to have been intended as

racist, sanctions the MCAD imposed might range from fines to required "sensitivity training" for employees.

The Licensing Board entered the picture with its assertion of an even more coercive power over this business: the authority to revoke the liquor license without which no bar can operate. A board hearing is set for Tuesday.

What has been conspicuously absent from discussion is that the First Amendment, which protects citizens and businesses from governmental interference with free speech and expression and which almost certainly would render any action taken by either of these governmental agencies invalid. In fact, the mere holding of hearings likely would be deemed by a court to be unlawful.

Boston has very little institutional memory. A couple of decades ago a national restaurant chain named Sambo's tried to open a restaurant in Massachusetts. Attorney General Francis X. Bellotti commenced legal action to prevent the chain from using the Sambo's name in Massachusetts on the theory that the name, being offensive to black citizens, was an indirect way of discriminating against African-Americans and hence of keeping them out of the restaurant, just as if the restaurant had a formal no-blacks-allowed policy.

The legal case never got resolved here because the chain went bankrupt, but the issue was litigated in other parts of the country. In 1982, a federal judge in Ohio prohibited authorities from revoking signage permits until the restaurant name was changed.

"It would be selling our birthright for a mess of pottage to hold that because language is offensive and distasteful even to a majority of the public, a legislative body may forbid its use," the judge said. He added that if the restaurant's name were sufficiently offensive to enough citizens, "its use will be counterproductive" because those offended would not patronize the place and could persuade others to do likewise.

Nor have these city agencies recalled even more recent history, when the Supreme Court in 1995 unanimously reversed the MCAD's attempt to use the city's public accommodation ordinance to force the private sponsors of the St. Patrick's Day parade to open ranks to an organized gay Irish group that sought to march under its own banner.

There is an appropriate battle to be fought over the question of whether the bar intended to insult African-Americans, a considerable segment of the population, and whether members of other races will join their fellow citizens in exerting pressure on the bar.

However, official governmental agencies must keep hands off. The specter of fines, license revocations, or mandatory sensitivity training in order to forcibly change bar employees' attitudes is as un-American as racial bigotry.