

The Gates Case and North Carolina Law

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Categories : [Crimes and Elements](#), [Uncategorized](#)

Tagged as : [disorderly conduct](#), [gates](#)

Date : July 28, 2009

I am reluctant to dip my toes into the waters of controversy swirling around the arrest of Harvard Professor Henry Louis Gates, but it provides a useful framework for discussing North Carolina's disorderly conduct laws, so I'm going to do so anyway.

First, let me provide the disclaimer that I'm not taking sides. The best thing I've read about this controversy is [this AP article](#), arguing that Professor Gates and Sergeant James Crowley, the arresting officer, had a very understandable misunderstanding. And the happiest thing I've read about the situation is [this piece](#), suggesting that Gates and Crowley may both be willing to bury the hatchet. Folks who want to do further reading about the facts might be interested in [the police report](#) and in a lengthy [New York Times article](#) on the case.

I'll assume, for the purposes of this post, that the facts relevant to the arrest -- which don't directly include the facts about Crowley's treatment of Gates -- are as follows: Sergeant Crowley went to Professor Gates's home in response to a call about a possible break-in. The two didn't exactly hit it off, but after some conversation, Crowley realized that Gates was the homeowner. Crowley prepared to leave. Gates, who is black, felt that Crowley had treated him differently than he would have treated a similarly-situated white person. As Crowley left the home, Gates loudly accused Crowley of being a racist police officer, and offered to "speak with [Crowley's] mama outside." Gates followed Crowley out of the house, and, as passers-by stopped and looked, made additional loud accusations of racism and told Crowley that Crowley had "not heard the last of" Gates. Believing that the onlookers were "surprised and alarmed" by Gates's behavior, Crowley told Gates that he was "becoming disorderly." Gates continued to voice his displeasure with Crowley, and Crowley arrested him for disorderly conduct.

The charges against Gates have since been dismissed. [This short analysis of Massachusetts law](#) suggests that was the proper course under state law, but I don't have any special expertise in Massachusetts law, so I don't have an opinion about that.

I do have a tentative opinion about whether the charges could be sustained under North Carolina law. The starting point is G.S. 14-288.4, our disorderly conduct statute. It encompasses a variety of behavior, including disturbing discipline on any public school bus and interfering with the orderly administration of any funeral (!). But as relevant to the Gates case, it makes it a crime to cause a "public disturbance" by "[m]ak[ing] or us[ing] any utterance, gesture, display or abusive language which is intended and plainly likely to provoke violent retaliation."

The first prong of the statute asks whether Gates's conduct amounted to a "public disturbance." Under G.S. 14-288.1(8), a public disturbance is "any annoying, disturbing, or alarming act . . . exceeding the bounds of social toleration normal for the time and place in question" and occurring in a public place. The definition of "public place" specifically includes "highways" and "any neighborhood." Although Gates was on his own property, he was outside and pedestrians on the street could see and hear him, so he was probably in a "public place." Whether his conduct exceeded the bounds of social toleration is a pretty subjective question -- and one that's hard to answer without knowing more about the volume, tone, and exact content of Gates's remarks -- but it's at least possible that a fact-finder would say that it did. So a disorderly conduct charge against Gates probably wouldn't be subject to dismissal on the grounds that there was no public disturbance.

The second, and more difficult, question is whether Gates's remonstrations were "plainly likely to provoke violent retaliation." One issue that sometimes arises is whether abusive language directed at law enforcement officers is measured by the same standard as similar language directed at civilians. In other words, assuming that law enforcement officers are, by virtue of their training, less likely to retaliate violently when insulted, does that mean that language sufficient to constitute disorderly conduct when directed at a civilian would be insufficient when directed at an officer? Different states may answer that question differently, but in North Carolina, the answer is no. In *State v. Cunningham*, 34 N.C. App. 72 (1977), the court held that while an "officer . . . would be expected to show restraint when confronted with abusive language and [so] as a practical matter the likelihood of violent retaliation may have been slight," the defendant was properly convicted because "the jury could reasonably interpret the defendant's utterances as fighting words likely to provoke the average person to retaliation."

Measured against the "average person" standard, it's possible that Gates's remarks rose to the level of disorderly conduct under North Carolina law. We don't have much case law in this area, but consider *State v. Tucker*, 2004 WL 943775 (N.C. Ct. App. May 4, 2004) (unpublished), where a disorderly conduct conviction was upheld against a mother who loudly confronted the principal at her daughter's school and, among other things, called her a "fat a-- b----." Is that clearly worse than being called a racist cop? Or consider *State v. Raley*, 2002 WL 31894939 (N.C. Ct. App. Dec. 31, 2002) (unpublished), where a disorderly conduct conviction was upheld against a man who, among other things, said "f--- you" several times to a store clerk, and when asked by police to calm down, responded "f--- that s---, I can say what I want." Again, more facts would be helpful, but one can make a pretty plausible argument that Gates's behavior towards Crowley was on par with the behavior at issue in *Raley*.

The bottom line is that if the Gates case had happened in North Carolina, a disorderly conduct charge might well be sustainable. It isn't a slam dunk, obviously, and the fact that the charge might pass legal muster doesn't mean that charging Gates would be the right thing to do.