Race and Sentencing

The Ontario Court of Appeal has faced a barrage of hostile media commentary for its recent decision in *R. v. Borde* (decided February 10, 2003) that trial judges can in appropriate cases take into account systemic and background factors when sentencing African Canadian offenders. This criticism is unfortunate because it is based on a misunderstanding of Canadian law with regard to equality and sentencing.

First, it is important to understand what the Ontario Court of Appeal said. The court indicated that the principles in s. 718.2(e) of the *Criminal Code* and the Supreme Court's decision in *R. v. Gladue*, [1999] 1 S.C.R. 688, could be applied to black offenders. These principles speak of the need for restraint in the use of imprisonment for all offenders, with particular attention to be paid to Aboriginal offenders. They are designed to remedy Canada's high rate of incarceration and the dramatic over-representation of Aboriginal people in Canada's prisons.

Rosenberg J.A. stated that the above principles "are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence and the values of the community from which the offender comes" (*R. v. Borde*, at para. 32). No across-the-board race discount in sentencing is contemplated.

The court held that an offender's personal circumstances (the 18-year-old Borde never knew his father, had been abandoned by his mother, grew up in and out of foster homes and has drinking, school and employment problems) can be considered in light of the conditions of his or her community. A court can also consider how the justice system may discriminate against the offender. One of the many reasons why Borde was in trouble was his bail conditions, which had banished him from Regent Park in Toronto where his spouse and child live.

Finally, the Court of Appeal indicated that evidence of systemic racism and overrepresentation of African Canadian offenders in Ontario's jails could not have made a difference in this case given the seriousness of Borde's violent offences with a loaded handgun, which discharged during
The Court of Appeal reduced his sentence because of his youth, and a subsequent decision applying *Borde* took a holistic approach that considered the background, gender and family responsibilities of two African Canadian single mothers who acted as drug couriers. The judge in that case also considered the costs and immigration consequences of imprisonment and the overrepresentation of black women imprisoned for drug offences (*R. v. Hamilton*, February 20, 2003, Ont. S.C.J., Hill J.).

The principles of sentencing in Canada are broad and flexible enough to make the background and systemic factors that explain why the offender is before the court relevant. It is unfortunate that the media simplifies these principles of sentencing under the provocative banner of race-based sentencing.

More principled objections made by the media were that the decisions undermined equality and individual responsibility. The operative model of equality is that each offender should be treated the same. Canadian law, however, has recognized since the mid-1980s that treating people who face different challenges in the same fashion will compound pre-existing disadvantage and not advance substantive equality. Even a more formal vision of parity found in s. 718.2(b) of the *Criminal Code* is qualified by the notion that only similar offenders who commit similar offences in similar circumstances should be treated the same.

Others have argued that there is an inconsistency between recent concerns about racial profiling and these decisions. But there is a difference between using race as a crude proxy for criminality and heightened police investigation, and considering mitigating background and systemic factors related to race in sentencing.

The argument that the decisions undermine principles of individual responsibility misunderstands Canadian sentencing law. Every day offenders in this country are sentenced in the name of such instrumental goals as deterrence of crime despite much evidence that sentence severity does not deter crime. The instrumental goal of limiting Aboriginal or African Canadian or other forms of overrepresentation in our prisons is a worthy one for sentencing judges to try to achieve. We do not want to become more like the United States, where gross overincarceration of African Americans has unhealthy effects on individual communities and the broader society.

Even on the desert side of the equation, Canada has never mechanically sentenced offenders on the basis of offence seriousness. Our understanding of moral responsibility is richer than the simple question of whether the offender committed the crime with the appropriate level of fault. We should be concerned more with achieving restraint in the use of imprisonment than with ensuring logical consistency in the distribution of punishment.

The media's reactions to these cases are not a trivial matter. Media hostility to s. 718.2(e) and *Gladue* was an important factor in the initial decision to exclude such a section from the new *Youth Criminal Justice Act*. This glaring omission was only remedied at the last minute and s. 38(2)(d) still has not been appropriately highlighted in the run up to the new Act coming into force. All those in the criminal justice system have a duty to read and apply *Gladue* and *Borde* in good faith. Do not believe everything you read in the newspapers about these important cases. K.R.