

A photograph of three doors set into a grey wall. The two doors on the left are grey, and the door on the right is red. The floor is a light-colored, reflective material. The lighting is dramatic, with strong highlights and shadows.

Selling 'Alternatives to Prison' to Judicial Consumers: **Why the Market Logic Fails**

Cyrus Tata, University of Strathclyde, proposes that market-based thinking embeds prison as the default sentence.

How should prison sentencing in relatively less serious cases be reduced? Generations of reform-minded government officials, probation managers, academics and practitioners have tried to reduce the use of prison in relatively less serious cases. Yet these efforts to sell community penalties have not resulted in the desired radical reduction in the use of imprisonment. Indeed, as a society we seem to be using prison more than ever - even for those whose offending in itself does not demand it.

Judicial sentencers, we are told, *would* use these 'alternatives' *if only* they could be *persuaded* to have 'confidence' in them. The solution? Pre-Sentence Reports 'provide an invaluable mechanism via which influence can be exerted over sentencing' (Taylor, Clarke and McArt 2014: 53). By 'selling' community penalties more effectively, judicial sentencers will choose to 'buy' them in the case they are about to sentence and as a concept more generally.

So instead of an open debate about penal reform and sentencing policy, 'alternatives' to prison have to be 'sold' convincingly to individual judicial sentencers on a case-by-case basis. Yet, while PSRs (and their various precursors) are important in various ways to sentencing, this strategy of 'selling alternatives' to judicial 'consumers' has failed to achieve radical change (Tata 2018). Surprisingly, many still cling to the claim that the impact of reports can be seen in the rate of 'agreement' between the sentencing suggestions in reports and the sentence passed. This is muddled thinking. As Carter and Wilkins (1967: 508) pointed out some 50 years ago: 'Probation officers write their reports and make recommendations *anticipating* the recommendation the court desires to receive'.

Propelling this logic, which holds the cultural trope of the singular sovereign judicial sentencer's choice as paramount, is a consumerist

logic of the market. So it is that so much practice and policy effort goes into trying to discover what the judicial consumer 'really wants'. What do judges look for? How can reports be more appealing to judicial sentencers? How can reports satisfy their key consumers to persuade them to buy the proposed product?

Instead, I propose that we step back from the dominant metaphors of selling and buying sentencing options. What assumptions inhere in this market-based logic? I suggest that this market-based strategy is bound to fail. The seller-buyer logic which inheres in consumerism necessitates a failure to satisfy the consumer. In his penetrating analysis of the consumer society, Bauman (2007: 46-7) explains that consumer needs and wants *must* remain, at most, only partly fulfilled:

"the desire remains ungratified, more importantly as long as the client is not completely satisfied Consumer society thrives as long as it manages to render the non-satisfaction of its members (and, so in its own terms, their unhappiness) perpetual."

Let us consider three examples which are central to 'selling alternatives' to prison.

1. Realism, credibility and the consumer

A key criticism frequently levelled against PSRs and their earlier guises is that they often lack 'credibility' and are 'unrealistic'. If, for instance, the suggested proposed sentence is in the eyes of the sentencers 'unrealistic' then the credibility of the whole report is undermined: "It diminishes the validity and the value of the report, if you're getting such an unrealistic suggestion" (Judge, Tata *et al.* 2008).

However, the ability to apprehend what a 'realistic' sentence would be is undermined both by a lack of transparent sentencing information in similar cases and, second, by an awareness of inter-judge sentencing disparity: what may be realistic to one judge may not be to another.

2. Relevance

In the consumption of reports, there is a paradox. Judicial consumers often complain, sometimes almost simultaneously, about reports being 'long-winded' *and also* about abbreviated reports being too brief with 'too many ticky boxes' (Tata 2018). Indeed, this apparent contradiction in consumer demand is played out in the restless oscillation over time between a preference for full, as opposed to abbreviated, reports (for example, Standard *versus* Fast delivery PSRs).

How can we make sense of this apparent contradiction in consumer demand: wanting yet not wanting 'comprehensive' information about the individual? The answer lies partly in the consumer cynicism which perpetual product re-branding generates.

3. Novelty and Perpetual Re-branding

Why are community penalties the subject of incessant re-branding? The perpetual search for new community penalty 'products' and ways of selling them (PSRs) so as to persuade the consumer to buy them is inherent in consumerism.

Bauman explains:

"New needs need new commodities; new commodities need new needs and desires; the advent of consumerism augurs the era of 'inbuilt obsolescence' of goods offered on the market and signals a spectacular rise in the waste-disposal industry."
(Bauman 2007: 31)

Governments tend to respond to judicial-consumer complaints about the quality of PSRs by marshalling the bureaucratic values of standardisation and speed. Yet, this can also result in consumer disappointment. Report-writing templates, now being heavily used in England and Wales (Robinson 2017, 2018), may quickly come to be seen as copy and paste, tick boxes products, engendering consumer cynicism. Product novelty is also sought in 'new alternatives' to custody, which weary judicial consumers may understandably dismiss as another over-hyped passing fad.

Selling Alternatives' embeds prison as the default

Conceiving of the judge as the metaphorical sovereign consumer in a quasi-market-place *appears* to empower the judge: the customer is always right; the customer is king. The job of the seller is to *persuade* the consumer to buy her/his goods, while the consumer can simply buy elsewhere: notably prison. This consumerist conceptualisation takes for granted and embeds the idea that the judicial sentencer is minded towards prison as the obvious default if nothing else can prove itself.

Making prison 'the last resort' may sound progressive, but it simply solidifies it as the backstop if nothing else seems good enough. It cements the supposition that unless, and until 'alternatives' can be sold as credible, prison is the only realistic option. If nothing else is sold convincingly to the sentencer, then it will be prison. Unlike 'alternatives', prison never has to prove itself to the sentencer. Prison is always assured. It does not have to be sold or marketed. It is the backstop, the default, which is always ready, dependable and available to the judge, reassuring in its familiarity.

Positioning the judge as the consumer solidifies the idea, the trope, of him/her as *the exclusive sovereign individual chooser*: the decision belongs to the judge alone. Thus, the seller must meet the expectations of the consumer - not to do so risks being perceived as naïve or unrealistic. Challenging expectations and assumptions can be bad for business.

An Alternative to 'Selling Alternatives to Prison'

Rather than framing reports in sentencing in market terms of producer/seller and consumer, we could conceive of sentencing as a (multi-disciplinary) partnership with the judge as head of the team, a relationship explicitly based on mutual professional respect, while, nonetheless, accepting that the judge takes the final decision. However, to mainstream this idea would require openly discussing the trope that sentencing belongs *solely and exclusively* to individual, sovereign judicial consumers operating in a penal market-place.

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