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**EVIDENCE, EMOTION AND CRIMINAL JUSTICE: THE
LIMITS TO EVIDENCE-BASED POLICY**

ARIE FREIBERG¹ AND W.G (Kit) CARSON²

ABSTRACT

While ‘evidence-based’ or ‘rationalist’ approaches to criminal policy may appeal to technocrats or bureaucrats, they often fail to compete successfully with the affective approaches to law and order policies which resonate with the public and which appear to meet deep-seated psychological needs. They also fail to recognise that ‘policy’ and ‘politics’ are related concepts and that debates about criminal justice are played out in broader arenas than the academy, the bureau or the agency.

To be successful penal reform must take account of the emotions people feel in the face of wrongdoing. Further, successful reform must take into account changes in public ‘mood’ or emotions over time and be sensitive to different political and social cultures. This paper argues that criminal justice policies are more likely to be adopted if, in addition to the gathering and presentation of evidence, they recognise and deal with the roles of emotions, symbols, faith, belief and religion in the criminal justice system.

It also argues that evidence alone is unlikely to be the major determinant of policy outcomes and that the creation and successful implementation of policy also requires extensive engagement and consultation with interested and affected parties.

INTRODUCTION: THE BRIEF GENEALOGY OF A POLICY MANTRA

In April 2008, the Australian Prime Minister, Kevin Rudd, addressed the heads of agencies and members of the senior executive of the Commonwealth Public Service, setting out as one of his goals a ‘robust, evidence-based policy making process’ that would lead to government by reason rather than ideology, ‘by facts rather than fads’. At the heart of a reformist government, the Prime Minister stated, lay ‘policy innovation and evidence-based policy making’ (Rudd 2008).

¹ Dean, Faculty of Law, Monash University.

² Honorary Professorial Research Fellow, The University of Melbourne. Parts of this paper are drawn from Carson 2003. The full version of the original paper can be found at <http://www.ssps.unimelb.edu.au/> Our thanks are due to Don Weatherburn, Pat O’Malley, Monica Pfeffer and Graeme Hodge for comments on earlier versions of this paper.

In making this commitment, the Prime Minister was joining a long list of politicians and other policy-makers who had shared similar aspirations before him. For evidence-based policy (EBP), at least as an ideal to be striven for, is by no means new. In one form or another EBP is as old as the 'state' itself (Davies, Nutley and Smith 2000:161; Wyatt 2002). Davies, Nutley and Smith chart its history from Bacon's 17th century vision of the New Atlantis where 'policy is informed by knowledge, truth, reason and facts' (Davies, Nutley and Smith 2000:25) to the Tony Blair vision of policy founded on the mantra that 'what matters is what works'. In between, albeit briefly, they traverse the great evidence-supported reforms of the 19th century, like the 1834 Poor Law, the subsequent pioneering influence of a pantheon of social analysts such as the Booths, Rowntree and the Webbs, and the Keynesian inspired plethora of reports and evidence-based argument lasting from the end of the Second World War up to its substantial demise at the hands of Margaret Thatcher's 'conviction politics'.

In the United States, experiments in education during the Progressive Era and the so-called 'golden age' of evaluation between the mid-1960s and the 1980s saw public policy initiatives made subject to systematic evaluation (Oakley 2000) culminating in the growth of the Cochrane (established 1993) and Campbell (established 1999) Collaborations.

Evidence-based policy and its limits

'Evidence-based policy' has been described as an approach that 'helps people make well informed decisions about policies, programs and projects by putting the best available evidence from research at the heart of policy development and implementation' (Davies 2004:3; Davies 1999). The modern evidence-based project has drawn most prominently upon developments in medical research that came under the rubric of 'evidence-based practice', which has been defined as

an approach which tries to specify the way in which professionals or other decision-makers should make decisions by identifying such evidence that there may be for a practice, and rating it according to how scientifically sound it may be. Its goal is to eliminate unsound or excessively risky practices in favour of those that have better outcomes' (http://en.wikipedia.org/wiki/Evidence-based_practice).

'Evidence' is not the same as 'facts' or 'data'. 'In a legal context 'evidence' refers to information provided to establish a fact or point in question (Shorter Oxford English Dictionary). More broadly, it can be any 'information selected from the available stock and introduced at a specific point in the argument in order to persuade a particular audience of the truth or falsity of a statement' (Majone 1989:10). In this paper we argue that while evidence is an important element in the policy making process, it is only one part of the process of persuasion and one which is rarely determinative of policy outcomes.

In the first part of this paper we examine the nature of 'evidence' in EBP, the ostensible linear/rational models of scientific policy-making and their limits - particularly the wide range of non-evidential factors that influence policy. We suggest that the development of evidence-based policy should not be seen just as a process, however complex and messy, of the inexorable onward march of unqualified rationality in the formulation of public policy but as one step in the evolution of a

reflective, recursive and multi-factorial policy development and implementation model.

In the second part of the paper, we argue that in particular *affective* or *emotional* arguments have a legitimate, if not a vital role in public policy discourse. Indeed, it is our contention that failure to appreciate the role of emotion can partly explain why so many official and academic reports lie unimplemented in the metaphorical bottom drawer of government. We then discuss a number of models of the relationship between policy and evidence and argue, finally, that in addition to both evidence and emotion, the creation and successful implementation of policy also requires extensive engagement and dialogue with interested parties. An understanding of the process of evidence gathering, presentation and explanation - the procedural aspects of reform and policy – may be, we argue, as important as the substance of those policies.

A TWENTIETH CENTURY RESURGENCE

The modern incarnation of evidence-based policy received a huge boost from the election in 1997 of the Blair government in the United Kingdom. That government produced a series of official reports (Cabinet Office 1999a; Cabinet Office 1999b, Cabinet Office 2000; Cabinet Office 2001) which, together with ministerial exhortations to social scientists (Blunkett, 2000) and sectoral developments of institutes and other evidence-based innovations in public health, education, children, social care and criminal justice gave new impetus to the EBP enterprise (Wyatt 2002; Clarence 2002:8; Nutley, Davies and Walter 2003). What was different about the Blairite project was not its innovation but its scale and its professed willingness to engage academia in the policy making process (Clarence 2002:1; Nutley and Homel 2006:7; Davies et al 2000; Wyatt 2002; Young et al 2002).

The resurgence of interest in the philosophy of EBP in the last decades of the twentieth century has been attributed to a number of factors. At the broadest level, it can be seen as part of the modernist project, the product of the Enlightenment which seeks to ‘change and improve the world through the application of reason’ (Sanderson 2002:61; Freiberg 2001). Governments are eager for information, particularly comparative information, and can now obtain it relatively quickly from a wide range of sources (Mulgan 2003). The modern index of relevance, the Google search, produces nearly 180,000 hits on the phrase ‘evidence-based policy’.

In contrast, Solesbury, in his seminal if provocatively entitled paper *The Ascendancy of Evidence*, cautions against interpreting the current popularity of evidence-based policy as ‘the long awaited triumph of social science’, preferring instead to locate developments, at least in the United Kingdom, within what he sees as a shift in the nature of politics, a retreat from ideology, the dissolution of class-based party politics and the empowerment of consumers (Solesbury 2003:96). While this is possibly the most quoted, though by no means least contentious, view on what underpins the current penchant for evidence-based policy, it is not the only one. Others include:

- EBP, far from being ‘post-ideological’, ‘supports particular beliefs and values compatible with dominant cultural paradigms that define how people and society function’ (Packwood 2000:267).
- EBP reflects the ideology of Third Way politics and ‘a belief in a particular approach to the governance of change’ (Oliver and McDavid 2002:183; Martin and Sanderson 1999; David 2002:213).

- Evidence-based rationality is related to the legitimation problems of governments, which are ‘seeking to present evidence of performance for legitimacy’ (Bhatta 2002:98; Newman 2002:351).
- EBP is the product of the ‘risk society’, where a skeptical public paradoxically questions the role of science and expertise at the same time as demanding that governments base their decisions on rigorous evidence. In such an environment the *management* of evidence is as important as the evidence itself (Campbell 2003:89; Leicester 1999:6).
- EBP is a result of the managerialism that came to pervade the public sector during the 1980s and 1990s that has bequeathed a focus on program evaluation, performance indicator systems and audit regimes (Davies et al. 2000:19; Freiberg 2005).
- EBP ‘has become fashionable in the current climate of public expenditure pressures in the UK and beyond’ reflecting the dark hand of economism (Oliver and McDaid 2002:183).

Whatever the contributory factors, and it should be emphasized that no-one claims the candidates outlined above to be either exhaustive or mutually exclusive, there is no doubt that the phenomenon of evidence-based policy has, at least in theory, well and truly arrived. Evidence-based policy and practice has spawned dozens of specialist journals. Evidence-based centres or institutes, usually attached to universities, have also flourished during this period. In the United Kingdom, the best-known centre is the Economic and Social Research Council Centre for Evidence Based Policy and Practice at King’s College London [<http://www.kcl.ac.uk/schools/sspp/interdisciplinary/evidence>] (accessed 14 November 2008) while the Research Unit for Research Utilisation, established at the University of St Andrews (<http://www.ruru.ac.uk/>) is a highly productive, broad-based organization based in that university’s business school.

In the United States the Coalition for Evidence-based Policy, provides an Evidence-Based Policy Help Desk to the Office of Management and Budget and Federal Agencies (<http://www.evidencebasedpolicy.org/0>). High levels of interest in EBP are also to be found across a wide range of other countries, including Denmark, Norway and Canada, although Australia and New Zealand have been singled out as the ‘post-colonial societies’ particularly in tune with (or post-colonial thrall to?) the British debate on EBP (David 2002:213).

Evidence-Based Policy in Criminology

The positivist, empirically-oriented, strands of criminology have always employed the scientific method in their attempt to understand criminal behaviour and the operations of the various arms of the criminal justice system. The more self-conscious approaches to EBP in criminology can probably be traced to the development of an evaluation literature, particularly the meta-analysis evaluation studies of correctional effectiveness, the best known of which was Martinson’s famous ‘what works’ article in 1974 (more popularly known as ‘nothing works’) (Martinson 1974; Nutley & Davies 1999:48). These, and subsequent, studies culminating in Sherman et al’s influential 1997 report *Preventing Crime: What Works, What Doesn’t, What’s Promising* (1997) developed a body of work heavily influenced by the evidence-based paradigm. The advent of the Campbell Collaboration in 1999/2000 found an enthusiastic following among certain influential sectors of the criminological

community, and together with the legacy of Sherman's work this has established a solid tradition dedicated to the advancement of EBP in criminological and criminal justice circles.

In 1998 Sherman coined the term 'evidence-based policing' (Sherman 1998) to describe the research-policy link in relation to law enforcement whereby intelligence-led or evidence-led practices have created 'a new culture of measurement, analysis and evaluation' (Mitchell 2007:81). The theory of evidence-based policy has, however, been most developed in the field of crime prevention where the cycle of experimentation/evaluation/improvement has been most widely used and well-resourced (Sherman et al 2002; Carson 2003; Australian Institute of Criminology 2006; Sutton et al 2008). The United Kingdom Crime Reduction Program, for example, was a three year, £400 million project aimed at reducing crime, distinguished by the fact that there was a commitment to 'turning research-based evidence into mainstream practice' (Nutley and Homel 2006:6). It was also based on commitment to the evaluation of programs and the integration research/evaluation/policy.

The evidence-based research/policy nexus in Australia is also apparent in those areas of criminology that draw from the medical model. Research into drug policy where various treatment modalities, as well as broader policies such as harm minimization, are evaluated, refer extensively to EBP theory (Hughes 2007; McBride et al 2007; Moore et al 2007; Johnston et al 2006) as does that in relation to firearms policy (McPehdran and Baker 2008).

Though Australia lacks a unit in the style of those in the United Kingdom dedicated to evidence-based policy research, the New South Wales Bureau of Crime Statistics and Research (BOCSAR), established in 1969 is an organization which is philosophically committed to linking evidence to policy. In contrast to centres in the other countries which are usually located within universities, BOCSAR is an agency within the New South Wales Attorney-General's Department. Its director of the past twenty years, Dr Don Weatherburn, is a strong and articulate proponent of EBP (Weatherburn 2004; Weatherburn 2005).

WHAT IS EVIDENCE?

By any measure it is probably true that there is no more contentious set of issues in the entire field of evidence-based policy than the troubled questions of what should constitute evidence for this purpose and how it should be assembled. Governments use a wide variety of information, and have done so for years: statistical, scientific, economic, opinion polls, focus groups, public opinion, practitioner and professional views and others (Mulgan 2003). However, 'information' is not the same as 'evidence' which is information for a specific purpose that may or may not be considered relevant.

Oakley (2000:26) sets out what she sees as the fairly stereotypical antinomies characterising two broadly defined positions in this regard. Ranged on one side are the well-known canons of logical positivism, natural science, quantitative methods, functionalism and rationalism, while on the other stand familiar terms like naturalism, interpretivism, qualitative methods, subjectivism, ethnography, analytic induction and constructivism.

For social (and other) scientists, the medically derived 'gold standard' emphasizes experimentation, randomised control trials (RCT) and systematic review,

institutionalised in forms such as the Cochrane Collaboration. In the health care field there is a so-called 'hierarchy of evidence' (Boaz et al 2003:6).³

- Systematic review and meta-analyses
- Well designed randomized controlled trials
- Well designed trials without randomisation, e.g. single-group pre-post, cohort, time series or matched case-controlled studies
- Well designed non-experimental studies from more than one centre
- Opinion of respected authorities, based on clinical evidence, descriptive studies or reports of expert committees

On top of this foundation rises the edifice of 'systematic review', which has become a standard part of the evaluation repertoire and a crucial link in the posited feedback loop whereby previously accumulated knowledge informs present policy formulation. Results from previous studies are combined according to standardised protocols which distinguish this kind of review from others such as literature reviews, scoping studies, briefing papers etc

Underpinning this model is the admittedly idealised image of successful interventions, carried out under experimental conditions, as closely controlled as possible, and scrupulously evaluated, leading to the cumulative development of reliable evidence for subsequent policy purposes. At the base of this edifice, notionally lies the individual intervention and its hopefully positive outcome, evaluated in terms of a 'successionist logic' that infers causation from the repeated succession of one event by another. All other things being held as equal as possible, the *program* causes the effect. It, the program, 'works' and can therefore be reliably put up for replication elsewhere. Magic bullets can be loaded, if not fired.

EBP AND THE RATIONALITY MODEL

At its most naïve an ostensible linear model of scientific policy-making is created within which the relationship between evidence and policy is characterized by rationality. This approach might be contrasted with policy based on precedent, folklore, intuition, the personal experience of a Minister, faith, prayer, astrology, opinion, prejudice, ideology, politics or many other factors that may be considered as lacking a scientific or logical foundation (Mulgan 2003:1). Here, however, the experts are either 'on top', science driving progress, or they are 'on tap', providing the evidence to assist in solving already identified problems (Young et al, 2002). This 'simple and unproblematic model' of rational evidence based policy has evidence being created or amassed by experts and then drawn on as necessary by policy makers and practitioners (Nutley et al 2003:10). In this formulation, the challenge is to identify and remove the factors that get in the way of the smooth operation of this rational relationship (Newman 2002:348) and to root out the 'enemies' of evidence-based policy (Leicester 1999).

As even the most cursory foray into history would reveal however, such 'enemies' abound and, indeed, if the preponderant views of experts in the general field are taken into account, they appear to do so in such profusion as to cast doubt upon the portrayal of the relationship as primarily rational in the first place. Whether referring

³ Source: Canadian Task Force on the Periodic Health Examination (1979).

to the identification of issues as matters of policy concern, to the methods selected for purposes of collecting evidence about them, or to the subsequent use to which such evidence is put, the balance of expert opinion suggests that rarely, if ever, does policy develop in a straightforward, rational way from an evidence base. Thus, there is ample comment to support the further assertion of Nutley et al that the simple and unproblematic model outlined above is neither an accurate description nor an effective prescription since ‘the relationships between research, knowledge, policy and practice are always likely to remain loose, shifting and contingent’(Nutley et al 2003:10).

Although the linear/rational model of scientific policy making is rarely stated in the naïve form offered above, it is surprising that its ghost so frequently haunts the corridors of parliaments, bureaucracies and academe. ‘What matters is what works’ almost invites the drawing of such an unproblematic line, at least on paper, while public servants across the western world will be all too familiar with the often truly naïve demand from Treasuries for evidence as the sine qua non with which to back proposed initiatives. Nor are academics immune from straying close to a naïve, rational connection between evidence and policy as the goal, as the following statements indicate:

We hope that this book has made progress towards the evidence-based ideal, where conclusions about crime prevention effectiveness based on the highest quality science are used by policymakers as the basis of local, state and national policies on preventing crime (Sherman et al 2002:405).

If we want to see the crime rise move into permanent decline, then we need to use the techniques of scientists – social, physical and computer scientists. Science is essentially about *data, logic, evidence and rationality*. It is about formulating hypotheses and testing them in real world situations. It results in *bodies of knowledge*, which can guide policy and practice (Laycock 2001:5 emphases in original).

There are three main reasons why the linear/rational model is inadequate to describe the policy process. First, there is simply too much evidence of constraints around the operation of rationality in practice for us to accept its theoretical integrity save as a kind of unattainable and maybe even undesirable ideal. Second, and even more important, the assumptions underlying the notion of rational decision-making, namely that ‘decisions are purposive choices made by informed, disinterested, and calculating actors working with a clear set of individual or organizational goals’, are questionable (Hawkins 1992:21). We know that there are limits on decision-makers’ knowledge and abilities, that people or institutions rarely have clear or simple sets of purposes, that choices are often collective rather than individual and that decisions may be as much symbolic as they are instrumental (Hawkins 1992:25-6). As Bohme, drawing on the work of Habermas (1966) on rationalism and technocracy, observes: ‘we should keep in mind that rationality is relative as it is highly related to values, interests, knowledge and power’, thus accounting for the highly contested history of the debate over the nature and role of evidence in policy-making (Bohme 2003:100). Third, we argue that factors other than reason or evidence may be just as, or maybe even more significant, persuasive or compelling in the hotly contested market place of public policy and that policy studies must be expanded to include an understanding of the role of such factors.

Non-evidential factors that influence policy

Policy is multi-determined. The terms ‘evidence-informed’ (Packwood 2002:270), ‘evidence-influenced’ and ‘evidence-aware’ are considered more accurate descriptions of the policy process by most commentators than ‘evidence-based’. Among the many other factors influencing policy are:

Economic and financial factors: resources are limited and in many cases, the decision for policy makers is not just ‘what works’ but ‘how much does it cost and can we afford it?’. Many modern evaluations of programs also include cost-benefit analyses as well as addressing effectiveness issues (Leicester 1999; Packwood 2002: 270; Oliver and McDaid 2002:18; Davies 2004:5)

Time: tactical versus strategic factors: decision-makers often operate in conditions of uncertainty and must make their decisions within strict time constraints possibly relating to budget cycles, electoral cycles or institutional requirements (Mulgan 2003:5; Packwood 2002:270). Waiting for conclusive evidence to be gathered, considered, debated and evaluated may not be a realistic option for those who need to deal with problems within a real-world governmental, rather than an ideal world scientific, time frame. As Pawson notes: ‘The policy cycle revolves quicker than the research cycle, with the result that ‘real time’ evaluations often have little influence on policy making’ (Pawson 2002:157)

Experience, expertise, judgment: where evidence is equivocal, imperfect or non-existent the tacit knowledge of decision-makers may often be crucial (Davies 2004:5).

Lack of a research-oriented culture: in some organizations, or parts of organizations, there may not be a culture which understands the nature of research and its role in policy development (Nutley and Davies 1999:51). For some professions, such as law, empirical evidence about effectiveness is little known or understood and is often viewed with skepticism.

Habit, tradition and bureaucratic logic: many decision-making bodies prefer to consistent rather than correct, adhering to policies that may once have been valid and evidence based. Even if the evidence changes, it may be more administratively convenient to keep to what is known than to what may be uncertain (Leicester 1999:5; Davies 2004:5).

Politics: of all the external factors which may impact on the evidence/policy relationship, politics is probably one of the most dominant and all-embracing influences, encompassing as it does many of the other considerations. After reviewing the literature surrounding evidence-based policy and practice in public services, Davies et. al. conclude that ‘the frequency with which political imperatives appear to dominate evidence is a consistent theme’ (2000:360; see also Innes 2003:102; Walker, quoted in Nutley et al 2000:3).

Cynical policy analysts use the phrase ‘policy-based evidence’ to refer to those situations where evidence is used in a political context to further political ends. This may involve using or commissioning research that supports a policy that has already been determined in order to provide legitimacy to that policy (Coory 2004; Bryson and Mowbray 2005). Former Australian Foreign Minister, Alexander Downer, has recently been quoted, for example, as saying in respect of quarantine laws: ‘I just want you all to know that all Australian quarantine

decisions are science-based.....it's called political science' (Arup 2008:3). In such cases, it is argued, the policy direction may determine what will be considered as relevant evidence.

For politicians, evidence may simply be used as ammunition for political debate and internecine disputation (Pawson and Tilley 1997:12) while for others, flimsy evidence may be enough. In the United Kingdom, for example, unsubstantiated assertions about the relationship between prison numbers and crime rates were all that was necessary to support a strongly held political commitment to the view that 'prison works'. Home Secretary Michael Howard's statement in 1993 to that effect was a sufficient ground to found the government's prison construction policy (<http://www.prnewswire.co.uk/cgi/news/release?id=33411>; see also Nutley and Davies 1999:51).

Because evidence is only one resource in decision-making and because policies may have multiple purposes, decision-makers in a democratic system have the right to reject or ignore evidence if there are other more pressing or politically convincing reasons to act in a particular way. Thus even if there is evidence that increasing police numbers on the streets may not reduce crime, a decision may be made to do so if it a more visible police presence serves to build public confidence in the police (and government) (Mulgan 2003:5). In some circumstances decisions appear to be made in the face of reasonably strong scientific evidence contrary to the policy direction adopted by the government. In the field of drug policy, the Howard government's 'tough on drugs' policy rejected evidence-supported policies such as heroin trials, needle and syringe exchange programmes, supervised injecting facilities and similar programs, citing instead the lack of public support for such programs (though the evidence for this was weak (Hughes 2007; Maher and Salmon 2007).

And because, in bureaucracies, decisions tend to be made by committees rather than individuals, a policy may not be based on evidence but rather on what will garner sufficient support around the table (Leicester 1999). The policy agreed upon may not be what is the best, but what is possible (Leicester 1999).

Bounded rationality: if the existence of evidence is promoted as assisting the development of policy, paradoxically, too much evidence may become counter-productive. The question of how evidence, once assembled, can best be brought to bear on policy and practice, is a difficult one (Innes 2003:103). The reality of the evidence/policy relationship is that decision-making operates within the confines of 'bounded rationality' a concept that holds that perfectly rational decisions are not possible both because decision-makers are influenced by emotion and other factors and because there are limits on their ability to receive, store and analyse data (Simon 1957). Young et al argue that 'information may be complicating and inconvenient, obscuring the clarity of choices most easily made under conditions of relative ignorance... The core beliefs of policy makers are unaffected by information, as policy change is driven by external factors, not by ideas and analysis' (2002:218). Indeed, Keynes' somewhat cynical view that 'there is nothing a government hates more than to be well-informed; for it makes the process of arriving at decisions much more complicated and difficult' has been oft-quoted (Solesbury 2001:7).

Theory, values and ideology: policy-making operates in a moral and theoretical universe and evidence may be unrelated to, or be unlikely to change values. As Laub has observed (Laub 2004:18):

... most policy issues are moral question that cannot be answered by theory or for that matter by research... the idea that scholarly knowledge and this knowledge alone should determine policy outcomes is naïve

A belief in the rightness of capital punishment may be quite independent of an understanding of its effectiveness in deterring crime. Davies has argued that indeed, 'evidence-based policy can itself be seen as political ideology, representing the case for empirical demonstration alongside more theoretical approaches to political discourse and action' (Davies 2004:5). Evidence is also related to theory, in that it is adjectival rather than substantive: it is used to support or advance an argument or theory: it means nothing by itself.

REASON, EMOTION AND EVIDENCE

In the field of policy studies, the role of emotion or affect in the shaping of governmental decisions must be taken into account (Welch 1997:55). Debates over abortion, the Iraq war, gun control, affirmative action, in vitro fertilization, surrogate parenting and the like suggest that in relation to numerous issues, of which crime and justice are just a few, evidence may be a necessary, but not sufficient condition for the successful adoption or implementation of policy, and that, in relation to some controversies evidence may even play only an insignificant part (Welch 1997:55-6).

In contrast to the extensive and diverse literature on evidence, reason and policy making (Andrews 2006; Griggs 2006) the literature on emotions and policy is less developed. Lasswell's pioneering work in the 1930s argued that politics was the process by which the irrational bases of society are brought out into the open (cited in Gusfield 1986:182). This model of politics, termed psychological expressivism, sees the political process as an arena into which 'irrational' impulses are projected (Gusfield 1986:177). In Australia, Little's work on the public emotions (Little 1999) contended that in order to understand 'who we are and what we can do', it is necessary to understand the role of emotion (Little 1999:16).

In the legal field, 'law and emotion' has emerged as a distinct field as recently as the last two decades (Maroney 2006) and a literature on regulation and emotion is emerging which argues broadly that regulators must understand how regulation involves the 'generation, expression, and management of emotions' (Lange 2002).

Emotion and reason

The concept of 'emotion' describes a range of cognitive and physiological processes that involve appraisals of situations, changes in bodily sensations, the display of expressive gestures and a cultural label associated with specific constellations of these elements. (Lange 2002:198). It is associated with concepts of 'feeling', 'affect' and 'sentiment'. Emotions include, anger, fear, excitement, joy, anguish, disgust, contempt, shame, guilt, love and others. Whatever they are, emotions are not 'objective, disinterested, dispassionate, impartial, impersonal, detached, or unconnected' and form part of a person's character and identity (Welch 1997:58, 60). It is neither possible nor desirable to draw rigid distinctions between emotion and reason, though the two concepts do not necessarily occupy the same terrain (Welch 1997:58; Harris and Shultz 1993:1786; Sunstein 2005:67; De Sousa 1987). They are

different and related aspects of the self and cognate, complementary elements in decision-making.

Law and emotion

Law, crime and justice are deeply emotional areas (Karstedt 2002:300). Traditionally lawyers are wary of emotions, which are most commonly associated with a lack of control and antithetical to reason and rationality (Lange 2002:199). However, the law is cognizant of emotions (Bandes 1999). As Karstedt writes (2002:300):

Emotions pervade penal law and the criminal justice system. Offenders, victims and witnesses bring their emotions to the courtroom, criminal courts deal with crimes of passion, and their decisions can occasion public outrage and anger, or feelings of vengeance among victims.

Law represents, encapsulates and expresses ideas and emotions such as ‘fairness’ and ‘justice’ (Harris and Shultz 1993:1777). Its very institutions, police, courts and corrections, are designed to control and channel emotions such as anger and vengeance, not to eliminate or ignore them: it ‘stands at the fulcrum of deeply consequential, deeply emotional, never-ending struggles’ (Harris and Shultz 1993:1779).

Sometimes courtroom evidence is withheld from the jury because of its purported prejudicial effects on jurors’ reasoning processes. Loss of self-control due to provocation has long been considered as mitigating an offence or sentence (Maroney 2006; cf Stewart and Freiberg 2008). Victim impact statements recognize both the physical and emotional harm caused by crime. The emotion of disgust underlies many of our legal prohibitions (Nussbaum 2004) and that of shame provides the foundation of Braithwaite’s highly influential theory of re-integrative shaming which is an important component of restorative justice (Braithwaite 1989).

Over recent years a change has occurred from the formal, rational, administrative and routinised forms of law which came to be termed ‘technocratic justice’ to more emotional, non-rational, expressive modes (Laster and O’Malley 1996; Freiberg 2001; Karstedt 2002). These have occurred in two areas: the emotionalization of public discourse about crime and justice, often referred to as ‘penal populism’ and the development of sanctions and interventions that are designed around emotions, such as sexual psychopath laws, naming and shaming laws, public displays of stigmatizing garments by offenders and others (Karstedt 2002:310-311). Laws such as ‘Megan’s Law’ in California, which require sex offenders to be registered and their whereabouts notified to the public, were driven by public outrage, not by their effectiveness. Subsequent equivocal evaluations of their effectiveness in reducing sex offences have not led to their attenuation or repeal (Pawson 2003:475).

‘Populist punitiveness’, a term coined by Bottoms in 1995 and also referred to as ‘penal populism’ (Pratt 2006) refers to the ability of politicians to engage the emotions in debates about crime and punishment. As Karstedt observes (2002:308):

Crime policies are explicitly based on the expression of collective emotions of fear and anger about crime. Politicians compete with each other in addressing the ‘emotional’ needs of the public, and in turn mirror these emotions back to the audience and the electorate. National and even global audiences become highly emotionalized ‘moral spectators’ in the spectacles of distant suffering of victims and perpetrators.

Appeals to rationality or evidence in these circumstances are unlikely to provide effective responses to such outbreaks of public feeling. In our view, it is unrealistic and unwise to attempt to ignore, banish or eliminate emotions from the policy process. Rather, it is necessary to recognize that emotions 'are part of thought, not its antithesis' (Harris and Shultz 1993:1774). Strong emotions influence thought and action and an acknowledgment of their effects serves to enrich and deepen the discourse rather than demean or distort it (Harris and Shultz 1993:1774). Nussbaum argues that emotions are cognitive in their structure and are essential to the processes of deliberation (cited in Harris and Shultz 1993:1780). Whereas for Plato, passion is the problem for which reason is the answer (cited in Gottweis 2006:239) Nussbaum draws on the Aristotelian view that emotions are important because they are the motive for action. According to Nussbaum, Aristotle saw emotions as

more reliable in deliberation than detached intellectual judgments, since emotions embody some of our most deeply rooted views about what has importance, views that could easily be lost from sight during sophisticated intellectual reasoning (cited in Harris and Shultz 1993:1774).

Under this conception, an emotional response can be intelligent, logical and open to persuasion. In the face of injustice, anger may be an appropriate and logical response (Gottweis 2006:239). And not all emotions are 'bad' or irrational. Compassion, forgiveness and shame can serve important public purposes. The growth of restorative justice theories and practices can provide a counter-weight to the vengeance-based law and order policies that tend to dominate political discourse. As Karstedt observes (2002:308):

One of the most important conclusions from contemporary emotion theory is that penal law and legal procedures are not built on 'basic emotions', but are part of the emotion process. They establish an institutional context and regulatory processes for a diversity of emotional components

Evidence, risk and emotion

Decisions often require an assessment of risk and the most effective means of dealing with it. The assessment of risk is not a neutral, value free or affectless process nor is the decision whether or not to take that risk. Kahan has argued that emotions play a critical role in apprehending personal and social danger and that these perceptions of risk embody the individual's personal and cultural evaluations of the meaning of the risk and whether it should be tolerated or abated (Kahan 2008:743-744; see also Slovic 2005).

Sunstein refers to an 'affect heuristic' in relation to certain risks (Sunstein 2005:87), namely that when people have a strong negative feeling about a product or process, they will think more about the outcome than the probability of the event occurring. When they have a positive feeling toward the product or process, they will tend to ignore the probabilities. Emotional responses most often tend to be triggered by low probability but seriously adverse outcome events such as terrorist attacks, plane hijackings or crashes, shark attacks, sexual predators, genetic modification of food, global warming, AIDS, mad cow disease and the like. Alarmist accounts, whether spread by the media or by word of mouth, trigger fear and fear can be contagious and lead to catastrophic results. The current global financial crisis has seen runs on banks and other financial institutions which have threatened the stability of the world's financial infrastructure. Hatfield et al have termed this phenomenon 'emotional

contagion' (Hatfield et al 1994; Sunstein 2005:95, 101) and it is similar to that of 'moral panics'.

Fear can provoke or engender acceptance of inappropriate policy responses: invasions of countries as a result of terrorist attacks in the face of evidence that those countries were not associated with such attacks; working with children checks in response to sexual assaults by strangers in the face of evidence that most such assaults are committed by people already known to the victim or their families. In South Korea, in 2008, mass demonstrations took place to oppose the sale of beef from the United States because of fear of mad cow disease when the evidence was overwhelming that the risk was infinitesimal.

Governmental responses to public panics based on intense emotional reactions to low probably risks are unlikely to be solely evidence-based. As Leicester notes (Leicester 1999:6):

... the political management of risk is even more important than the evidence itself.

Though a technocratic response would be to ignore public concern, the political response will weigh up both the evidence and the electoral consequences and seek a (usually short term) accommodation to allay the fear rather than to abate the harm.

In other circumstances, governments may, in fact, want to heighten fear where harm is being ignored, for example in relation to cigarette smoking, reckless driving, skin cancer and the like (Sunstein 2005:124). The Australian government's terrorism campaign some years ago, which urged citizens to be 'alert but not alarmed', is a fine example of the thin line between cognition and emotion.

Understanding and embracing emotion

If it is accepted that policy decisions are influenced by both feelings and reasoned thought processes, and that emotion and cognition are closely related, what are the implications for policy makers?

- If EBP is to be effective it must identify the nature of the affective, symbolic and non-instrumental concerns that influence policy (Tyler and Boeckmann 1997:260; Sutton 1997:13). Studies of public opinion in relation to the severity of sentences (Gaubatz 1995) and 'tough on crime' measures such as three strikes legislation (Tyler and Boeckmann 1997) found that public punitiveness, although ostensibly instrumental in expression (the desire to reduce crime), was largely non-instrumental, and that people's policy positions were symbolic and non-instrumental in character: expressions of fear and of social disintegration. Punishment had less to do with crime rates and more about a re-assertion of social values (Freiberg 2001). Viewed from this standpoint, evidence about the effectiveness of imprisonment or three-strikes legislation (or more likely about its ineffectiveness or even its cost) is unlikely to lead to policy changes unless the underlying causes of the public's emotional discomfort are addressed.
- Policy implies action: action to put policy into practice. Often, evidence, information or knowledge alone is insufficient to motivate action, whereas emotion can be a powerful driver (Welch 1997:67). Majone (1989:146) refers to the 'rationalist fallacy' of believing that ideas and theories alone are sufficient to shape events and argues that policy-making is a process that

involves the art of persuasion, that is, the use of evidence to make a particular case or support a particular theory. In his view EBP over-emphasises knowledge and under-emphasises the normative, political, administrative and institutional and organizational context in which decisions are made (Majone 1989:15, Chapter 6; see also Sanderson 2002:68). Gottweis takes this argument further when he suggests that emotions are a legitimate part of the repertoire of rhetoric and that the language of passions can co-exist with an argumentative and ethical discourse (Gottweis 2006:237). Indeed emotion is often embedded in political discourses relating to issues such as abortion, stem cells, in vitro fertilization and the like. The framework of debate can be determined by emotional legitimacy. Thus victims of crime may speak with authority about crime, Christopher Reeve could speak about stem cell research and parents or putative parents can speak about abortion (Gottweis 2006:237) whereas ‘experts’, who may not have had first hand experience of an event, may be given little credibility.

- Good affective arguments can energize and galvanize effective policy, provided that the ‘ends being served are connected to the grounds for the emotion’ (Welch 1997:78). In other words, there should be a link, preferably supported by evidence, of the policy intervention and the outcome sought.
- ‘Emotions can serve as warning signals that certain judgments or decisions need to be scrutinized carefully’ (Welch 1997:68). Emotional responses may prefigure inchoate intellectual or rational responses which may be articulated at a later time. Sometimes one may feel that an argument or a solution is wrong without being able to identify the reasons: the emotional response may delay a decision until an acceptable solution is found (Welch 1997:77).
- Emotions, their role and influence on policy are observable phenomena which can be studied by quantitative and qualitative methods (Lange 2002). These studies can then provide the material upon which an evidence-based approach to policy can be developed in relation to the role of emotion on policy development and implementation.
- Emotion must be factored into rational choice models. Even economics, that most dismal of sciences, has realized that emotions can affect public and private choices, that they, and their influence can be understood, predicted, anticipated, accounted for and, if necessary, corrected (Maroney 2006).
- The emotional motivations of policy makers themselves must be examined in order to understand how they are influenced by the evidence and what drives them to act upon the information provided to them. For both the public at large, and policy makers

normative affective factors shape to a significant extent the information that is gathered, the ways it is processed, the inferences that are drawn, the options that are being considered, and the options that are finally chosen. That is, to a significant extent, cognition, inference, and judgment - hence, decision-making - are not logical-empirical endeavors but are governed by normative-affective (non-cognitive) factors ...(Welch 1997:66-7; see also Etzioni 1998:94).

EVIDENCE-BASED POLICY, DEMOCRACY AND DIALOGUE.

Models of policy and evidence

As we have already indicated, the impression overwhelmingly conveyed by the literature is that a model predicated upon a straightforward linear relationship of rationality is not adequate to the task of making sense of the place that evidence and knowledge more generally can or even should play in the formation of policy. Following Weiss (1979), Ken Young and his co-workers at the United Kingdom Centre for Evidence Based Policy and Practice have reproduced a five-fold typology of the relationship between policy and knowledge that canvasses several alternatives (2002):

The knowledge-driven model in which research leads policy. This model contains an element of scientific inevitability, with the expert ‘on top’ and, in extreme form, the abdication of political choice in favour of science. It is also referred to as the naïve rational approach.

The problem-solving model in which research follows policy, and policy issues shape research priorities. Experts are ‘on tap’ rather than ‘on top’ and specific pieces of research (evidence-gathering) are used to assist policy formulation and implementation.

The interactive model where research is one of many factors in a much more complex and subtle set of relationships between decision-making and research. Research and policy are mutually influential, with agendas in both contexts shaped in ‘policy communities’. Boundaries between academic work and public service are blurred, and it is difficult to discern who influences whom. Think-tanks sometimes provide archetypal examples.

The political/tactical model is one that sees policy as the outcome of a political process which also drives the research agenda in a politically instrumental fashion. Research is used selectively to support particular policy positions, or to achieve some other tactical purpose such as delay. At the margin, this model carries the risk of social science being politicized.

The enlightenment model has research affecting the way in which issues are framed. Rather than research serving policy agendas in direct fashion, the benefits are indirect. Research and evidence deriving therefrom do not address the decision problem itself, but the context within which that decision will be taken. They provide a frame for thinking about it and seek to illuminate the landscape for the decision-makers.

It is not necessary to adjudicate between competing models of the policy/evidence relationship. In all probability, and as with all ideal-types, none of them occurs in pure form. It should be reiterated, however, that the weight of evidence apparently provides relatively little support for the dominance of the first two, more rationally oriented models in practice (Davies et al 2000:29). But these typologies and their attendant descriptions, however brief, do nonetheless alert us to a number of important considerations to be borne in mind when looking at the nature of the relationship within the criminal justice system. These may be summarised as follows:

- We should not expect the prevailing relationship between evidence and policy in that field to be straightforward and naively representable as a

linear one of unqualified rational connection, in either direction, between evidence and policy. We should expect it instead to be, ‘messy, uncertain, unstable and essentially political [in its] realities’ (Young et al 2002:218).

- This does not mean that we should be recommending surrender in the face of incomprehensible and indecipherable complexity. Belief in the role of ideas suggests that we should, above all, confront this issue and address the question of what *we* believe the nature of the evidence-policy relationship should, for our purposes (if not ideally) be. This will be a difficult issue for politicians, bureaucrats (state and local) and academics, alike, to face. It would involve an inclusive process whereby we collaboratively go beyond a literature that appears to observe and comment upon the infinite intricacies of inter-connection, to a position where we agree upon the broad contours of what we would like an evidence/policy relationship to be.
- Such a venture does not entail downgrading or even dismissing the potential role of evidence in the formulation of criminal justice policy. It *does* however mean that we should acknowledge other factors with a bearing on policy, not as inconvenient intrusions into an impossibly idealised relationship between science and policy, but as integral features of the policy formation process, with their own rationalities and consequent constraints upon policy development.
- Crucial among these must be the rationalities of politics, which postulate value-choices and the parameters of the politically possible (eg. commitment to social justice, recognition of cost/benefit analysis implications and the limitations imposed by public sentiment). The integrity of the political should be reasserted, not to be privileged above other rationalities, such as the social scientific, but neither to be downgraded to the role of inconvenient and intrusive *realpolitik*.
- We must confront the fundamental question posed almost *en passant* in the above discussion – *evidence for what and for whose purposes?* Is our preferred purpose to influence decision-making in an instrumental fashion, to be ‘on tap’ (presumably we have long abandoned unrealistic and probably undesirable aspirations to be ‘on top’), to shape the frames for decision- making, or to inform the broader community debate about policy.

Of the models outlined above, neither the knowledge-driven nor the problem-solving ones easily accommodate these factors which are, almost by definition, ‘extraneous’ to the rational, linear connection between evidence and policy running in one direction or the other. The interactive and political models can indeed *take account* of emotion and affect, but they do so in terms of inconvenient, if inevitable, intrusions into other agendas. We would argue that only the enlightenment model, suitably expanded, can embrace these intrinsic features of the evidence/policy domain in a constructively positive fashion. This is because this model would involve researchers and collectors of evidence in becoming, not so much the drivers of a comprehensive, problem-solving, scientific enterprise, but as contributors to an informed discourse, one in which ‘policy research can be more effective as an instrument of the democratic process than of the decision-making process’ (Shulock 1999; Young et al 2002:218). In so doing, it has more in common with the ‘discursive policy-making

practices' currently being canvassed in health sciences (Fafard 2008) and with the views of David Adams who discards 'the ontology of the creed of expertise' for a return to the 'much older stream of thinking (that) casts the role of the administrator and the policy analyst as a craftsperson who navigated values and facts and meanings and interests' (2004:40).

Emotion and policy

Our suggested model of public policy does not require us to abandon evidence for intuition or reason for emotion. We have attempted to draw a distinction between the 'evidence' element in evidence-based policy and the policy component. While the evidence base for policy, to the extent that it is empirical or quantitative must be scientifically rigorous, the application or translation of that evidence into practice, particularly in relation to the criminal justice system, must be informed by broader considerations such as emotions.

Emotion-based (Welch 1997), or emotion-influenced, or emotion-aware public policy requires policy makers to take into account phenomena such as trust, credibility, virtue, feelings and passions (Gottweis 2006:237). If our premise that emotion plays an important part in law, crime and justice, and that emotion and reason are related is accepted, the task then is to identify the appropriate role of emotion in the public policy discourse.

Though emotional arguments are frequently regarded as weaker, albeit often more consequential, than reasoned debate and are criticized as possibly leading to poor decisions because they cloud or affect reason, they are a force that must be understood and made manifest (Welch 1997:56). Suppressing the affective dimensions of policy arguments may result in their resurfacing in other forms 'unacknowledged, unexamined and perhaps unchallenged'. The challenge for the policy process is to ensure that emotional arguments contribute to, rather than undermine the discourse, that they be appropriate and disciplined (Welch 1997:57). Welch suggests that a 'feeling-based discourse' can make a positive contribution to policy debates but only if it identifies appropriate ethical or moral choices, or illuminates the reasons for action. In contrast, affective argument can be abused when it is used to suppress legitimate dialogue or de-legitimizes opposing points of view (Welch 1997:79 citing Walton 1992).

For Welch (1997:85) the task of good public policy making:

...is not to reason what is good for others but to envision imaginatively, from diverse standpoints, the present reality and the desirable future. Thus, we need a model of the human that is social and affective, that is embedded in an embodied life world - as real people's lives are. Policy discourse that strives to be objective, technical, and scientific, that radically separates policy makers from the social world, obscures the subjectivity of the choices we make. The problem with an approach to policy decision making that is overly theoretical is that it loses touch with the life world of the persons whose lives it is intended to enhance (footnotes omitted).

... Emotional appeal cannot be the sum total of policy analysis and argumentation. We can, however, recognize affective considerations as a legitimate, acceptable ingredient in discussions of public policy.

This approach recognizes the importance of process, engagement and dialogue and the essential role that persuasion and advocacy play in translating evidence into

action. Neither ‘rationalistic nor post-rationalistic approaches to policy studies’ have done this sufficiently (Gottweis 2006:237).

CONCLUSION

Our vision of the enlightenment model emphasises the importance of creating informed discourse on a broader democratic front, one where the vision is of an ‘evidence-based society in which debate is reasoned and takes account of (contested) evidence which is available to the many, not the few’ (Young et al 2002:219). It also firmly pushes evidence into the broader arena of affect. It posits a *centrifugal* process of evidence diffusion rather than a narrower *centripetal* process of instrumental evidence collection, albeit with condign consultation, for purposes of policy formulation. Evidence circulates back into the policy-making process through a communicative, discursive or dialogic approach that seeks to democratise knowledge and its use, to inject values and emotions deliberately into the decision-making process, and to avoid the de-politicisation and managerialisation of knowledge production and its utilization (Parsons 2002:56). In Sanjay Reddy’s words this would involve rejection of scientific pretensions to sole authority and the ‘insertion at the very centre of the scientific enterprise of a more accessible and democratic discourse (1996:248).

Procedural justice research has repeatedly found that involving people in the process leading up to a decision, and treating them with trust, fairness and respect will mean that they will be more likely to comply with the decision made, even if they do not agree with it (Murphy and Tyler 2008). Recent research on procedural justice also shows that emotional reactions to the engagement or decision-making processes, such as anger or happiness, can influence subsequent compliance behaviour (Murphy and Tyler 2008).

Adoption of such a model would also echo a developing body of thought in criminology and in broader social theory that acknowledges a new acceptance of epistemological modesty with regard to the dominant role of ‘scientific’ or ‘expert’ as opposed to ‘lay’ or ‘local’ knowledge. As authors like Wynne (1996), Carson (2004), Shearing (2005) and O’Malley (2006) have pointed out, an iterative and complementary, as opposed to a dichotomised and uncompromisingly antagonistic, relationship between these different knowledge discourses is absolutely essential to the formulation of useful *public* knowledge. Not that one should be privileged above the other. As O’Malley (2004) puts it within the context of risk theory, crime prevention and what he calls the *democratisation of risk*:

“This does not involve some equivalent to Stalinist science, in which expertise is turned on its head by ideology, or where the results of analysis are problematised by dogma or a romantic privileging of the local and the lay. Rather, the question concerns the nature of that which is to be achieved by risk techniques in the name of security. It concerns dialogue over what will work, a dialogue that allows challenges to risk-based expertise and its assumptions about what this term involves, and whether the abstract knowledges are adequate to the setting.” (2004:336).

Adoption of the enlightenment model of evidence-based policy would also entail a new commitment to openness on the part of organisations designed to maximise the impact of evidence on policy-making. Most obviously, perhaps, they would have to be open in the sense that they should be permeable to the input and participation of

other parties in a more active and collaborative role than is connoted by traditional concepts of consultation, contracting out or expert advice. Interest groups and advocates become an integral part of an informed process of public debate over data and evidence. Practitioners, users and other stakeholders (who are not without their own emotional and value positions) become part of an iterative process within which their knowledge, needs and perspectives, while not granted unqualified primacy or privilege, are nonetheless integrated into the identification of problems, the analysis of evidence and the formulation of relevant policies. Academic researchers are accepted into the domain of the public service analyst, and crucially vice-versa, as part of a process whereby both are kept mutually cognisant of the other's debates and contentious issues.

Finally and most importantly, we suggest that recognition of emotion and affect within a reasoned and open dialogic process of policy formulation would not only generate a better model of evidence-based policy but also a greater likelihood of such policies achieving their expressed objectives.

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