

What is the Most Useful Standard of Proof in Criminal Law?

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Introduction

'What is the most useful standard of proof in criminal law?' This is a question regarding philosophy of evidence and will have five main focuses. Firstly I will discuss what is meant by this question. Secondly I will consider what the standard of proof currently is whilst looking at its benefits. The third focus will involve what constitutes 'beyond reasonable doubt' in the context of forensic evidence. Fourthly I will look at Dewey and what he can contribute to the discussion. And finally I will consider the possible strengths of an alternative; a variable standard.

To begin with I will explain precisely what is meant by this question, what is the most useful standard of proof in criminal law? By useful I wish to assess the benefits of the current fixed standard of proof in comparison to the alternative which is to have a variable standard of proof. It is important to note that I am regarding the standard of proof which is most useful to be the one which is most accurate. So the method which convicts the greatest proportion of those who are guilty and the lowest proportion of the innocent. No system can be perfect, but the system which comes closest I will argue is the most useful. So a standard of proof is the level of persuasion required in court to be able to reach a judicial verdict. For the purposes of this question I will solely focus on the English standard for criminal cases. This is for the benefit of coherence and rigour in addressing the question.

Why is the question important? Currently in the UK, although officially there is a fixed standard of proof, there are instances where judges and juries appear to have adopted a variable approach in reaching a verdict. The reason I feel this is an important question is that this is addressing a somewhat grey area in English law where it seems necessary for a clear stance to be taken regarding this issue. We want a system which has the highest accuracy in convicting the guilty and acquitting the innocent. Therefore the question of the most useful standard of proof when faced with a potentially more useful alternative to the current standard is an important one.

To begin with it must be explained what the current standard of proof in English law is. The standard of proof is the level of persuasion required in order to reach a guilty verdict in a case. In English law there are two fixed standards of proof, one for civil cases and one for criminal cases. In criminal cases there must always be proof 'beyond reasonable doubt' in order to pass a guilty verdict. If a judge and jury are not sufficiently convinced by the prosecution that the accused is guilty to this level, they are acquitted.

What are the Benefits of a Fixed Standard?

It is necessary for there to be consistency in judicial decision making. This is surely crucial for all systems of law? Without consistency the problem of fairness arises, and there is a detrimental impact to the respect people have for the law which in turn harms the law in a vicious cycle resulting in unrest and upheaval. The law ought to be fair. This seems quite an uncontroversial statement. There ought to be at least some expectation

of what will be the consequences of our actions. Such universal understanding and appreciation for consequences is built up through consistency of verdicts for crimes of similar natures achieved through a fixed standard. So long as the outcomes of trials appear fitting and are consistent then respect for the law will grow. With respect for the law more people are likely to obey it resulting in a more just and well-functioning society; this is an end many people would deem desirable. Therefore a critical benefit of having a fixed standard of proof is that there is consistency in decision-making. Consistency is a central to the requirements of a respected system of law.

A type of evidence often which is regularly sufficient in proving a case 'beyond reasonable doubt' is that of DNA. DNA evidence is internationally recognised as being the closest we can often get to conclusive evidence. There are cases where DNA evidence alone has proved sufficient in gaining convictions. This is due to its low error rate and the elevated significance it holds in the courtroom.

An example of a case where DNA evidence alone was sufficient for reaching a guilty verdict is as follows. In 1991 a young woman, Miss M, was grabbed from behind and raped.¹ After the assault she went to the police but beyond being able to say he was a clean-shaven Caucasian man in his early twenties with a local accent there was no more description she could give. She underwent a physical examination which included a vaginal swab. Forensic analysis revealed traces of semen from which a DNA profile was able to be developed. However when compared to the Metropolitan police's database there were no matches. Two years later a Dennis Adams was arrested in connection with another sexual offence. The police took a blood sample and developed a DNA profile. Forensic investigators ran it through their system and it matched the evidence recovered during Miss M's rape. As a result Adams was charged with her rape. According to the case's judicial summary the matching DNA profiles was the only substantial evidence against him. His conviction came despite Miss M's claim that he did not look like her assailant; him being 37, not his early twenties, and Adams' girlfriend acting as an alibi for him that night. This was the first time in the UK that 'witness' evidence was outweighed by 'scientific evidence'.

The use of DNA evidence in criminal proceedings fulfils the criteria described by Peirce as being necessary for attaining a belief. DNA evidence is a way of settling an enquiry without relying on the contrasting views of others. After all, witness evidence and alibis can be fallible. However in the case of Miss M it did require more than just a DNA profile match to prove Adams guilty. The evidence given by Miss M in the immediate aftermath of her assault had to be able to tally with the forensic evidence at least in part. The forensic evidence is used in conjunction with the context of the case to test the persuasiveness of the case. Such as had it been an eighty year old Asian man then the discrepancy of age and appearance would have been too great to ignore. Thus context must be in line with common sense. This is an example of the usefulness of a fixed standard of proof where we know that accurate DNA evidence, in criminal proceedings, is sufficient in persuading 'beyond reasonable doubt'. As a result it gives the law consistency.

What Constitutes 'Beyond Reasonable Doubt'?

To get to the heart of the question it is important that we consider what constitutes

¹ Lynch, M. *Et al.* (2008) *Truth Machine: The Contentious History of DNA Fingerprinting*. The University of Chicago Press: London, pp. 193–199

'beyond reasonable doubt'. I wish to discuss this in keeping with the theme of the essay so far by focusing on forensic evidence, and in particular DNA evidence. There are various different qualities of evidence in forensics and how they are considered in a courtroom can alter with every forensic science revelation. Sometimes this gives more credence to certain types of forensics; on other occasions it casts doubt onto particular methods. All this time the required standard of proof, 'beyond reasonable doubt', has remained constant. The ways in which different forensic evidence is interpreted is significant for the question concerning the standard of proof because they are inherently linked. For each case there are going to be varying qualities of evidence. This is to a greater degree than ever before with constant scientific advances. It is how we interpret the varying degrees of accuracy of forensic methods which will be a critical factor in considering what the best approach to the criminal standard of proof is. The most useful standard of proof is that which is most suited to coping with scientific advances.

Even the most highly regarded forensic evidence can fail to persuade a jury 'beyond reasonable doubt'. For example, fingerprint evidence often being regarded as infallible due to the probability of having two people having matching prints being minute. However there is rarely such a thing as a perfect print. More often than not they are found to be either smeared or partial. This increases the error rate and means that, although it can contribute to a case's persuasiveness, fingerprints are not usually used as evidence in isolation. This is contrary to DNA evidence. This perceived high value is misplaced and its implications potentially damaging. There are cases where people have been included as a suspect entirely based upon incorrect fingerprint evidence.² There is also the possibility that finger prints have been planted at the scenes of a crime in an attempt to incriminate an innocent party. The possibility of a false attribution to an individual is significant enough that it must be accounted for in weighing up the evidence's persuasive value. This is why the context of a case is crucial in conjunction with the fingerprint evidence in creating a case which could persuade a jury 'beyond reasonable doubt'. In isolation the fingerprint evidence is insufficient. It is an example of how a method can be theoretically full-proof but in reality less assuring. Without a near-perfect print and an explanation of how it got there the persuasive nature of this science alone is inadequate in legal practice.

On the other hand DNA evidence in isolation is deemed sufficient as 'proof beyond reasonable doubt'. DNA analysis is considered to be "the gold standard in forensic analysis, because it has taken new technology and demonstrated that it is robust and reliable by analysing samples with tried and tested, statistical methods which are mathematically proven methods."³ The rigorous statistical approach makes DNA evidence one of the least likely methods in forensic science to result in the false attribution to an individual; that is why it is 'the golden standard'. The main difference between fingerprint and DNA evidence is the subjective nature of its interpretation. The reliability of forensic evidence may depend on how subjective the interpretation of it is. The less conjecture surrounding the interpretations of a piece of evidence the higher the quality of evidence is considered to be; and in turn the greater its persuasiveness.

The primary source of conjecture affecting all types of forensic evidence is the method of

² Aitken, C.G.G. (1995) *Statistics and the Evaluation of Evidence for Forensic Scientists*. John Wiley & Sons: Chichester, p. 106

³*Ibid.* p.110

collection and the 'continuity of evidence'.⁴ These are the "procedures for collecting, transporting and handling legally significant material"⁵ and as a result "deliver and certify evidential products".⁶ The main method of attacking DNA analysis is to question how samples were collected and handled prior to lab work. It is a search for 'pre-analytical errors'. The significance of this is summed up by the judge in the Oteri *et al.* trial: "Unless the history of the sample from seizure to analysis is carefully authenticated, the validity of the analysis is irrelevant."⁷ The reliance upon pre-analytical procedure demonstrates how regardless of the precision of the forensic scientists in attaining results, these results can still be undermined. The pre-analytical procedure is inherently linked to the issue of quality of evidence. With the quality of evidence varying in every case being able to implement a variable standard seems more possible today than ever before.

The problem of 'continuity of evidence' became particularly apparent during the trial of OJ Simpson (1994–95). Despite overwhelming evidence suggesting OJ Simpson was guilty of murder the defence successfully attacked the expert witness' DNA evidence. They demonstrated that unless there is proper procedure in the attainment of the DNA's findings, the analysis' results are useless. In the Simpson murder case the jury acquitted him because they agreed with Simpson's lawyers 'junk in, junk out' argument.⁸ This was a result of mistakes made at the 'lower' end of the 'chain of custody' by ground level police. Wet blood specimens were left in a hot vehicle for several hours prior to analysis. The defence attacked this and in particular focussed on the lack of control on evidentiary import of the laboratory's analysis. As a result this raised doubts over the forensic analyst's expert evidence. Therefore however precise the analysis was, the accuracy could not be assured. When cross-examined the police who'd collected the samples admitted to lacking the necessary scientific credentials and knowledge of how to treat DNA samples. The defence held that their actions "degraded, or otherwise ruined, the scientific (and legal) value of the evidence".⁹ The jury ruled that "the DNA matches had doubtful significance due to incompetent, and possibly fraudulent, police handling of evidential items prior to their analysis".¹⁰ The defence effectively undermined the probative value of the DNA evidence demonstrating that the science alone is insufficient. The degree of doubt surrounding the basis of the prosecution's argument was deemed too great by the jury; this resulted in Simpson being acquitted due to the allegations not being proved 'beyond reasonable doubt'. The Simpson trial was a clear demonstration of how the high precision in the science of DNA profiling alone can be undermined if it is not backed up by careful collection and transportation of samples.

The best standard of proof must account for the differences in quality of evidence, particularly in times where there is evidence which is conflicting. The current, fixed standard of 'beyond reasonable doubt' works by being consistent but possibly rules too hard a line. If the evidence is of a low quality then it is reasonable to discount it as being

⁴'Continuity of evidence' is a UK term; it is more commonly referred to as the 'chain of custody' in the USA.

⁵ Lynch, M. [et al.]. (2008). *Truth Machine: The Contentious History of DNA Fingerprinting*. The University of Chicago Press: London, p. 114

⁶ *Ibid*, p. 114

⁷ *Ibid*, p. 115

⁸ *Ibid*, p. 119

⁹ *Ibid*, p. 118

¹⁰ *Ibid*, p. 119

insufficient. However proponents of a variable standard of proof in law may argue that it the variable standard is better suited to account for the differing qualities of evidence. Instead of demanding a set level of proof, one form of the variable standard could judge each case according to the evidence available and set the required standard accordingly. For example a variable standard of proof could vary according to the crime; setting a higher standard for some with the knowledge that a greater certainty can be met. Judge LB Sand has proposed that for cases where there is a risk of the death penalty the required standard of proof should be raised to 'beyond all possible doubt' due to the severity of the punishment.¹¹ To meet such a standard the quality of evidence would have to be of the highest degree. Judge Sand's reasoning is that too high a proportion of innocent people are being put to death as the standard 'beyond reasonable doubt' has too much room for error. He is asserting that the standard of proof required should be in accordance to the severity of a guilty verdict's implications. The quality of evidence required to prove these standards would also vary. Forensic evidence is proving to be more and more versatile, making more complex standards of proof feasible. Thus for cases where punishments are severe, a variable approach could raise the standard to 'beyond all possible doubt'.

Pragmatism and the Standard of Proof

Although no pragmatists have written directly about what is the best standard of proof in law I believe that Dewey offers a new perspective concerning the judicial decision-making process. By looking at Dewey's arguments about responsibility he takes the unusual stance that for misdeeds we need only consider whether a man might act differently next time. His position of not looking at experience retrospectively brings to question the purpose of the judicial system and offers a new direction to look at the standard of proof from. Dewey is treating the purpose of law to be that of a deterrent, not as a system for dishing out punishment. Dewey's view on responsibility means that, in cases of murder for example, "to judge his responsibility for a murder done, we ask only if he is able to desist in the future from this kind of responsiveness".¹² In practice this entirely changes the purpose of a trial by focusing on potential responsiveness, rather than considering crimes retrospectively. Within this there is an assumption that the crime was committed so a standard of proof will still be necessary in order to then judge a person's responsibility. Responsibility for Dewey being if man x was placed in the same situation again, how would he respond? It is ultimately this situation which must be judged. Dewey's position seems quite problematic and impractical. How can we judge how someone will act when placed in the same scenario again? Therefore we must look at the reasons and motivations behind his peculiar outlook on crimes.

The basis of Dewey's assertion that crimes should be judged according to their likeliness of being committed again results from his position on contingency. By contingency Dewey is referring to how in decision making situations, if one choice is made, one chain of events will occur, but if an alternative choice is made then there will be alternative consequences.¹³ For choice to make a difference the future must be open to different

¹¹ Judge Sand and Rose, D. (2003) *Proof Beyond All Possible Doubt: Is there a need for a higher burden of proof when the sentence may be death?*
<http://www.capitalpunishmentincontext.org/files/resources/innocence/heightenedburdenofproof.pdf>
[Accessed: 29/12/2012]

¹² Dewey, J. (1924) Logical Method and Law. *The Philosophical Review*, Vol. 33, No. 6., p. 135

¹³ *Ibid*, p. 137

potentialities.

So why does Dewey argue there is contingency in nature? He is aiming to demonstrate that worldly events are sufficiently contingent, and as a result they give human choices an opportunity to be effective in determining the future. He described the contingency in the world as making it indeterminate'.¹⁴ By this he is referring to the "singularities, ambiguities, uncertain possibilities, [and] processes going on to consequences as yet indeterminate".¹⁵ Dewey argues that to combat the indeterminacy in the world humanity developed culture to bring in some stability and certainty. Part of man's cultural development has been the implementation of a system of law. Law, and by extension the standard of proof, is part of how man's responded to what is 'unstable, precarious, and thereby perilous features of the environment'.¹⁶ Dewey is placing a great deal of emphasis on combating the world's instability, noting it as a 'perilous feature'. A central feature of law is the acknowledgement of 'unsophisticated' evidence and experience. I will argue that Dewey's view of the world demonstrates that he would have supported having a variable standard of proof.

There are various reasons to support Dewey's claim that there is contingency in the world however I will only focus on the one I considered the most persuasive. For Dewey the ultimate evidence for the presence of contingency in the world is found in the 'ignorance, doubt and uncertainty which characterises thinking'.¹⁷ It is our fear of uncertainty in the future that has led to the integrating of social institutions in society in an attempt to bring about some measure of control and security. An example of such a social institution is our system of law. Dewey would argue that it was created in recognition of the contingency in the world in an attempt to bring about a degree of social order. However it seems Dewey is making an unjustified assumption which is problematic for his position. He is asserting that through reflecting upon the way we make decisions in the world we can see that it contains contingency. After all this is what makes Dewey's view so peculiar by maintaining that contingency is in the world rather than man's will. However seeing contingency as a part of man's decision making about the world does not entail that contingency is necessarily a trait of the world. Therefore I am unconvinced by Dewey's argument for contingency being a part of the world, and not a part of our wills.

This has great implications on Dewey's claim that for misdemeanours one need only to consider the accused's responsibility in terms of responsiveness. If the assertion that contingency is not a trait of man's will but a trait of the world fails, then so too does the claim that only the responsiveness is relevant in judging a person's responsibility in a case. A more generous interpretation of John Dewey is suggested by Richard Dewey. He suggests that John Dewey is "calling to attention the fact that thinking would be pointless unless it resulted in choices which effect the development of future situations".¹⁸ This is a milder claim than before and is far less controversial. For the purpose of the question, 'what is the most useful standard of proof in criminal law?' Dewey's emphasis on consequences does supports one particular formulation of the variable standard of proof; a standard which accounts for the implications of a guilty verdict for a

¹⁴ *Ibid*, p. 121

¹⁵ Dewey, J. (1924) Logical Method and Law. *The Philosophical Review*, Vol. 33, No. 6, p. 121

¹⁶ *Ibid*, p. 121

¹⁷ *Ibid*, p. 141

¹⁸*Ibid*, p. 141

professional. Due to the further reaching implications for professionals who are found to be guilty of a crime, a variable standard can help to protect them. For example the consequences for a lawyer found guilty of shoplifting are further reaching than for a shopkeeper because their profession is particularly reliant on their integrity. The effects of the besmirchment of character is greater, and the loss of that professional has a more serious effect on society than shopkeepers due to the smaller proportion of qualified individuals. Therefore there is a case for ensuring criminal proceedings for professions convict the lowest proportion of innocent people by demanding a greater degree of certainty. Thus there is an argument for looking at the implications of a guilty verdict before setting the standard of proof. Dewey's call for making choices which have a focus on future implications would support a variable standard for professionals, rather than a fixed standard of proof.

An openness to a more experimental approach to law can also be found within Dewey's paper 'Logical Method and Law'.¹⁹ In the paper he suggests that the "infiltration into law of a more experimental and flexible logic is a social as well as an intellectual need"²⁰. His motivation for this comes from recognition that rules which are "hardened into absolute and fixed antecedent premises"²¹ can become "harmful and socially obstructive".²² Thus in order to have social advancement there is a requirement for getting over the 'chief obstacle'²³ which is "the sanctification of ready-made antecedent principles as methods of thinking".²⁴ This is particularly relevant in considering the implications of changing to a variable standard of proof which has been fixed for centuries. In order for our rules to not become socially obstructive they must adapt. Due to advances in the expectations and results in empirical evidence in criminal cases it may be time to re-evaluate the criminal standard of proof. This could be to account for the greater degrees of certainty we can now be reached in cases in comparison to what was expected when the standard was initially set. Although Dewey is not precisely saying that a variable standard of proof should be implemented, it seems that he would be in favour of its possibility so to keep the law in accordance with social advances.

Is a Variable Standard of Proof Advantageous?

There are various ways which a variable standard of proof could be set up. One conception was outlined by Judge Holroyd who claimed that "the greater the crime the stronger the standard of proof required for the purpose of conviction". So this is setting the standard of proof according to the crime's severity; it is a context dependent standard. It is possible to justify this by arguing that the consequences for the accused rise in direct correlation to the severity of the alleged crime. Thus, one might argue, that we ought to have a greater degree of certainty out of respect of the potential implications the verdict will have on someone's life. Such a line of thinking was seen in the case of *Briginshaw vs Briginshaw* where the judge stated that "the seriousness of an allegation made" and "the gravity of the consequences flowing from a particular finding are

¹⁹ Dewey, J. (1924) Logical Method and Law. *The Philosophical Review*, Vol. 33, No. 6

²⁰ *Ibid*

²¹ *Ibid*

²² *Ibid*

²³ *Ibid*

²⁴ *Ibid*

considerations which must affect the answer to the question [of] whether the issue has been proved". This does appear to make sense, after all shouldn't the degree of certainty required to charge someone of murder be greater than of someone who's shop-lifted?

This focus on the implications of a being found guilty in order to set the standard of proof fits with Dewey's way of thinking. He calls for people to take account that the choices we make effect the development of future situations.²⁵ Looking ahead towards the consequences of crime for individuals is one of the main motivations behind a variable standard of proof of this nature. This is why Judge Sand has made calls for the death penalty to require proof 'beyond all possible doubt'.²⁶ There is also the argument for a variable standard of proof to give more protection to those with professional careers. This too is motivated through an assessment of the size of the consequences.

A second conception of a variable standard of proof is based upon the probability of certain crimes being committed. For example vandalism occurs far more often than bank robberies making it a more likely crime. On this reasoning the standard of proof required for vandalism should be adjusted according to the crime's likeliness. It does seem reasonable that for something which is inherently more unlikely that it should require a greater degree of proof to be believable. For example the claim 'I saw a dog in the park' seems more likely than the claim 'I saw a wild lion in Essex'. The latter many people would argue would require a greater deal of evidence to convince them due to its inherent unlikelihood. Interestingly there does seem to be a link between the likely occurrence of a crime and it's severity but in its application to setting a standard of proof this is merely coincidental. The flexibility offered here could be the most effective way of convicting the maximum number of guilty, while acquitting the greatest number of innocent people. Although no standard of proof, fixed or variable, can be perfect. The ability to adapt between cases has the potential to increase the accuracy of and be a benefit to the judicial system by focusing on the possible consequences first.

The flexibility of the variable standard of proof is not without its problems. First, there is an argument that a judge ought to care equally about all crimes. By lowering the required level of proof for less serious offences it may be feared that carelessness would ensue. Although proponents of a context driven variable standard may respond that this fear is groundless.

The idea of having a standard of proof that is tied to 'clearly extra-epistemic considerations'²⁷ has been described as objectionable. A standard of proof which is based upon a broader social benefit does appear unjust. Although there is a greater damage to society and to the individual if, for example, a lawyer is found guilty of a crime. The likelihood of a conviction should not be dependent upon external factors unconnected to the defendant's blameworthiness. This makes the chance of a conviction more fortuitous and the system unjust. A fixed standard of proof comes closer to keeping the system fair by putting everyone on the same level, avoiding the pitfalls of the variable

²⁵ Dewey, R.E. (1977) *The Philosophy of John Dewey: A Critical exposition of his method, metaphysics and theory of knowledge*. Martinus Nijhoff: The Hague, p. 141

²⁶ Judge Sand and Rose, D. (2003) *Proof Beyond All Possible Doubt: Is there a need for a higher burden of proof when the sentence may be death?*
<http://www.capitalpunishmentincontext.org/files/resources/innocence/heightenedburdenofproof.pdf>
[Accessed: 29/12/2012]

²⁷ Ho, H.L. (2008) *A Philosophy of Evidence Law: Justice in the Search for Truth*. Oxford University Press: Oxford, p. 173-214

standard.

Judging according to the premise that because a crime is commonly committed it should require less proof to be charged for it is also unjust. It is guilty of marginalising less severe crimes. It risks there being a predisposition to assuming someone did or did not commit a crime based upon their profile. This is bordering on discrimination. A variable standard of proof could also act in conflict to changes in crime rate as it would assume one base level and attempt to judge according to that likeliness. This is to an extent committing the gambler's fallacy. The gambler's fallacy put simply being if you flip nine heads in a row you are not more likely to flip a tails next, it is still a 50:50. Although there are cases which may be similar in nature they are not necessarily connected. Therefore to apply a variable standard of proof based on past case experience is a mistake. The occurrences of crimes vary continually so ironically the variable standard of proof based on this would be too static while a fixed standard of proof would be able to maintain consistent judgments over time.

It would also be a mistake to apply a variable standard according to the likelihood of crimes because it is confusing standard of proof with quality of evidence. Although the two are connected, for crimes which are particularly unlikely instead of raising the standard of proof there is actually just a demand for a higher quality of evidence. In the example of the Casey Anthony murder trial, the unlikely nature of the crime meant that it should not necessarily require a higher standard of proof but rather a higher quality of evidence to convince a jury 'beyond reasonable doubt'. The phrase 'beyond reasonable doubt' therefore can offer a degree of variety in the amount of evidence required to meet it. Thus, the fixed standard of proof is less rigid than initially seen and can meet the varying demands in criminal law.

Conclusion

In the beginning I outlined the most useful standard of proof in criminal law being that which has the most accurate conviction rate, i.e. that which successfully convicts the highest proportion of those guilty to acquitting the lowest proportion of the innocent. The two types of standard of proof discussed within this paper are the fixed standard which is currently used, and a variable standard in the conjunction with the example of forensic evidence. The advancement of scientific, and in particular DNA analysis, means that there is the potential to prove cases to higher levels of certainty than would have been considered in fixing the standard of proof as 'beyond reasonable doubt'. This gives reason for reconsidering whether it is still the most useful standard of proof. Some of the conceptions of a variable standard of proof do seem inviting. For example, adjusting the standard of proof according to the seriousness of the crime, or the severity of the implications both have their merits. The role of context in such standards when considering cases involving forensic analysis is particularly important. If the standard of proof were to vary according to the nature of the crime, based upon the expectation of forensic evidence being able to give proof to a higher standard, considerations must be made surrounding such evidence. As demonstrated in discussing the importance on 'continuity of evidence' the pressures on proof of 'pre-analytical' procedure are extremely high. It seems that the raising of the criminal standard for certain crimes based on the expectation of being able to meet that level of proof is to ask too much. There will always be a degree of doubt from the method of collection to potential mistakes during analysis that Judge Sand's call for raising the standard for cases involving the death penalty would lead to many guilty individuals walking free. The focus on context of each case which is at the heart of the variable standard is too subjective. Be it questions of who

decides which crimes are more severe than others in setting the standard of proof, to concerns about a decline in care taken over crimes considered to be 'less serious', or the impact a guilty verdict would have on society. There are too many problems with a variable standard because it is so context driven, unlike a fixed standard of proof. The issue of placing too great an emphasis on context is why it seems to me Dewey's attitude in decision-making is unhelpful when extended into reaching judicial decisions. I agree with Dewey that in many situations there is indeterminacy which is looking at experience in a responsive manner rather than retrospectively is useful. However the purpose of trials is to ascertain an individual's responsibility in past actions so there must be a requirement to look at cases retrospectively.

The critical feature of a system of law I discussed at the beginning of my essay was consistency in decisions. Although the greatest accuracy is most useful, the judicial decisions made must be consistent for them to be respected and adhered to. Therefore the most useful standard will also be one which is able to maintain the greatest level of order. I believe the fixed standard of proof achieves this better than the variable standard. The variable standard's reliance on context leaves the opportunity for inconsistencies and decisions appearing to be unfair. The fixed standard of proof is able to avoid these problems, therefore making it the most useful standard of proof in criminal law.

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