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RODRIGO GHIRINGHELLI DE AZEVEDO

Organização de

PAULO VINÍCIUS SPORLEDER DE SOUZA

FABIO D'ÁVILA

NEREU GIACOMOLLI

IS “PROOF BEYOND A REASONABLE DOUBT” A SELF-EVIDENT CONCEPT? Considering the US and the Italian legal cultures towards the understanding of the standard of persuasion in criminal cases

Federico Picinali
Università degli Studi di Trento.

*“So prove it.
That the probation bear no hinge nor loop
To hang a doubt on.”*
Othello to Iago, in Shakespeare, *Othello*, Act III.

Resumo

O objetivo deste trabalho é mostrar que o critério da “prova além da dúvida razoável”, considerado o alicerce que protege os valores em jogo tanto no processo criminal dos EUA como no da Itália, não é uma questão de compreensão original das pessoas, ou seja, um conceito “autoevidente”, mas precisa de um conhecimento considerável para ser compreendido e ser válido.

Palavras-chave: prova; dúvida razoável; autoevidente; processo criminal italiano.

Abstract

The aim of this paper is to show that the standard of “proof beyond a reasonable doubt”, considered to be the bedrock which protects the values at stake both in the US and in the Italian criminal process, is not a matter of the people’s original understanding, that is, a “self-evident” concept, but needs a considerable insight in order to be understood and to be enforced.

Keywords: proof; reasonable doubt; self-evident; Italian criminal process.

1 PRELIMINARY REMARKS

The aim of this paper is to show that the standard¹ of “proof beyond a reasonable doubt”, considered to be the bedrock which protects the values at stake both in the US and in the Italian criminal process², is not a matter of the people’s original understanding, that is, a “self-evident” concept, but needs a considerable insight in order to be understood and to be enforced.

The issue’s relevance is bound to the long-lasting dispute which involved US scholars and Courts on whether the “reasonable doubt standard” ought to be defined by jury instructions or not. A more recent reason (closer to the writer) that underlines the issue’s relevance is the introduction of the “reasonable doubt standard” in the Italian Criminal Procedure Code, namely at the article 533³. This article does not define the

standard but just states it: it is therefore necessary to wonder if further explanations are needed to warrant a correct application.

In order to accomplish the task, the paper focuses on both the Italian and the US internal and external legal cultures⁴ on the subject, but first, some preliminary remarks are needed.

The US and the Italian criminal systems are notably different. Besides the differences in substantial criminal law, those in criminal procedure are pronounced. For instance, while in the US the jury is in charge of the fact-finding process and does not have to explain its verdict, in Italy the fact finder is a professional judge who is compelled to give reasons whose review can, potentially, bring to the reversal of the decision. According to these main differences it is possible to argue that the same standard of persuasion might be given a different regime of application in the two systems⁵. The present paper doesn't deal with this last issue, but it does rest on the premise that the concept itself of "proof beyond a reasonable doubt" has the same significance in the two systems.

Nonetheless, the above differences reveal the different influence that the external legal culture on the subject studied has in the two criminal systems. In the United States lay people participate to the administration of justice through the institution of the jury. The ideas and values of lay people affect directly the application of the standard of persuasion. On the one hand the study of the external legal culture is relevant to understand how the "reasonable doubt rule" operates, or, generally speaking, to detect "what law's own processes do not allow it to see about the way it operates"⁶. On the other hand it is impossible to clearly distinguish between internal and external legal culture on the issue at stake.

In the Italian criminal system the above considerations are sound only if referred to the few cases which are within the jurisdiction of the *corte d'assise*, that only tries the most heinous crimes⁷. The *corte d'assise* is constituted by six laymen and by two judges who are expected to have a much greater influence on the laymen's ideas and values than the jury instruction have in the US criminal. Apart from the mild influence that external legal culture might have in the application of the standard of persuasion in this particular cases, in all the other cases, as noted above, the trier of fact is a professional judge, and thus it is necessary to focus more on the internal legal culture in order to reflect upon the administration of justice. This study will be concisely and partially performed in the second part of the paper.

For both the Italian and the US criminal systems an insight into the external legal culture might reveal how the everyday language and reasoning lay hold of legal terms and transform them according to the field in which they are used. Such an insight may answer, from a specific perspective and for a specific subject, to the "analytic question" put by David Nelken in his essay *Law as Communication: Constituting the Field: "can we communicate with law"?*⁸

Ultimately, it comes to light that the direct participation of ordinary people in the criminal process (which involves the influential entry of extra-legal elements) and the export of legal terms to different fields make it hard to detect the boundaries of what is usually called "legal culture". Thus, it might be more appropriate to talk of "culture seen from a legal perspective" instead of talking of "legal culture"⁹. Notwithstanding that, in the paper this latter expression will be preferred because of its simplicity and its descriptive features.

2 A QUICK OVERVIEW ON THE CONCEPT'S ORIGINS

The origin of the "reasonable doubt standard" must be searched in the common law tradition and, especially, in its cultural background. In particular, it is important to start focusing on the evolution of the jury system.

A crucial step in the history of the institution of the jury is described clearly by Theodore Waldman: "At first (...) the jury consisted of men who lived in the vicinity of the defendant, who, if possible, knew him and the events concerning the question at issue, and who, by discussing one another these points of information, came to a verdict. The members of the jury were in effect often both witnesses – usually even investigators – and judges of the facts. Between the sixteenth and the nineteenth centuries the role of the jury changed so that it became solely judge of the facts without any prior knowledges of the case which was to be heard"¹⁰.

Jointly with other important factors¹¹, this fundamental change in the figure and the role of the jurors, that started to take place already in the late Middle Ages¹², triggered the development of precise evidence laws which imposed that evidences had to be introduced in the trial according to determined procedures. Particularly eloquent are the following words by Williams Holdsworth: "The change in the character of the jury (...) had an effect on the law of evidence as profound as it had on the law of pleading. Now that the verdict was based not upon their own knowledge – i.e. the jurors' knowledge –, but on the evidence produced to them in the court, some law about this evidence became necessary"¹³. This important shift resulted in making the evidence uniform from a procedural perspective and thus in the introduction of a modern and uniform concept of standard of persuasion that could not be nullified by the jurors' own direct senses, investigations and feelings. Due to this change, the judge started to instruct the jury on the standard of persuasion.

In the very first stage of the transformation described above, the standard of persuasion that more frequently appears in the judge's instruction is the so called "satisfied conscience test". According to this test the jurors had to sentence the defendant only if convinced in their own conscience of his guilt. This standard was conceived as a standard of "absolute certainty" because the jurors had to acquit the defendant whenever they had any doubt (reasonable or not) about his guilt¹⁴. In the late seventeenth century, however, when the change in the jury institution was accomplished, the standard of persuasion in the criminal trial was about to be modified because of some important evolution in the philosophical and religious thinkings of that time.

Theodore Waldman calls attention to the conflict between Protestants and Catholics, during and after the Reformation, which "concerned the criteria of religious faith, especially with regard to the proper interpretation of the scripture and in whom the authority for this interpretation was vested. The more general question as to what standards may be set up by which any dispute could be settled or any configuration of symbols interpreted was also raised. From attempts to answer these questions a protestant tradition developed which stressed probable rather than absolute certainty concerning articles of religious faith"¹⁵. So, while the Catholic Church proposed a standard of absolute certainty and claimed to be, through its dogmas, the only source of this certainty, the Protestants proposed a standard of probable certainty, the "reasonable doubt standard". "Coincidental with their development of a theory of probable certainty as an answer to the absolute certainty theory held by some of their Catholic opponents, they also focused their attack upon the sceptics who cast doubt upon the possibility of reaching any degree of certainty in the search for knowledge of religious and scientific truths"¹⁶.

Among these protestant philosophers were the founders and early members of the Royal Society of London John Wilkins, Robert Boyle and Joseph Glanvill. Particularly interesting is John Wilkins' *Of the Principles and Duties of Natural Religion*¹⁷. In this work the Author first discusses the several kinds and degrees of evidence or assent and secondly he distinguishes the three types of possible knowledge or certainty those kinds of evidence can provide. Knowledge (or certainty) is defined as "that kind of assent which doth arise from such plain and clear evidence as doth not admit of any *reasonable cause of doubting...*" (italics added)¹⁸. The three types of possible knowledge (or certainty) are the following: "*Physical certainty* is evidence of

sense immediately perceived and is the highest certainty of which humans are capable. *Mathematical certainty* refers to mathematical things or 'such simple abstracted beings' whose nature lie open and are obvious to the understanding. (...) *Moral certainty* which is part of the legal doctrine of reasonable doubt, unlike the first two kinds of certainty, rests for Wilkins upon mixed evidence – i.e. evidence based on both senses and understanding – rather than simple evidence – based either on senses or on understanding¹⁹ (italics added). Differently from simple evidence, mixed evidence, according to Wilkins, cannot necessitate a man's assent, "yet may they be so plain, that every man whose judgment is free from prejudice will consent unto them. And though there be non natural necessity, that such things must be so, and that they cannot possibly be otherwise, without implying a contradiction; yet may they be so certain as not to admit *any reasonable doubt* concerning them" (italics added)²⁰. The "reasonable doubt standard" is thus shown as the most trusted standard of persuasion in matters different from scientific and mathematical ones, that is, in matters generally regarding human affairs.

Once arisen in the philosophical literature, the "reasonable doubt standard" was gradually brought in the legal one. The links between the philosophical theories previously mentioned and the evidence law are clearly visible in the works of Baron Geoffrey Gilbert (who explicitly referred to Wilkins)²¹ and Thomas Starkie²² who were both eminent scholars.

Thanks to the influence of philosophical doctrine, "reason" made its definitive entry into the criminal process. With the Reformation "reason" becomes the instrument for the emancipation of the philosophical and scientific understanding from the catholic predominance.

The juror, who still swears to God, nonetheless is not required anymore to apply the unrealistic standard of absolute certainty which faded in the subjective "satisfied conscience test" and in the irrational belief that God would express his incontrovertible truth through the jury. Moreover, the juror is no more a witness of the facts that are tried and loses his investigative prerogatives. He has to assess the evidences introduced in the trial with specific procedures in order to "rebuild" a fact that is beyond his experience. However, the evidence cannot be gauged using the parameters of physical or mathematical knowledge. The fact-finding process can only aim to the standards of physical and mathematical certainty, but, in order to reach the closest point to those standards, it must rest on reason as a binding tool to gauge the evidence.

Thus, the "reasonable doubt standard" is the highest standard that the criminal process can hanker. The quest for higher standards would just be a delusion.

3 THE DEFINITIVE AFFIRMATION OF THE "REASONABLE DOUBT STANDARD" IN THE US AND IN THE ITALIAN CRIMINAL SYSTEMS

After having just recalled the origins of the "reasonable doubt standard", it is necessary to quickly point out the way in which the standard has been enacted in the United States and in Italy.

The "reasonable doubt standard" was first mentioned in a common law criminal case during the Boston Massacre Trials in 1770²³. After these trials the standard has been used many times by state and federal courts, till the famous case *Commonwealth v. Webster* in 1851²⁴. In this case the Supreme Court of the United States analyzed the nature and the meaning of the "reasonable doubt standard" with the following well-known words by Chief Justice Shaw which became the parameter for the judge's instructions on the standard: "What is reasonable doubt? It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of jurors in that condition that they cannot say they feel an abiding conviction, to an absolute certainty, of the truth of the charge (...) but the evidence must establish the truth of the fact to a reasonable and moral certainty: a certainty that convinces and

directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it.”.

The statement of the constitutional valiance of the “reasonable doubt standard” was pronounced only in 1970 with the paramount decision of the Supreme Court *In re Winship*²⁵: the standard is imposed by the due process clause of the Fifth and Fourteenth Amendments and, in particular, by the presumption (which actually is an assumption²⁶) of innocence. It does rest on the strong belief that it is much worse convicting an innocent man than letting a guilty man free. With the following decisions *Jackson v. Virginia*²⁷ and *Victor v. Nebraska*²⁸, the Supreme Court stated that the Constitution requires the judge to instruct the jury on the “reasonable doubt standard”. Notwithstanding that the Court did not compel the judge to define the standard, declaring that the mere mention of it was sufficient.

This permissive tendency produced a variety of orientations among the state and the federal courts of appeal that were asked to check the accuracy of the judge’s instructions. At the same time the Supreme Court’s decisions split up even the legal doctrine. This paper does not intend to show abundantly the various argument that have been and still are endorsed to sustain or deny the necessity of an instruction defining the “reasonable doubt standard”. For such an enquiry much more accurate and complete works can be considered²⁹.

Among the courts of appeal it is possible to detect three main orientations. Some courts require the definition of the standard³⁰; some courts are against the definition³¹; some courts leave the decision to the judge’s discretion³². The different orientations of the doctrine basically rest on the court’s decisions, on empirical studies and tests (that will be assessed later) and on some linguistic considerations.

Trying to simplify and summarize the dispute it is possible to identify two main theories.

On the one hand there are those (either courts or scholars) who claim that the standard must not be defined, because jurors have an “original understanding” of its meaning. An instruction that leaves the term undefined “is simple and as a rule to guide the jury is as intelligible to them generally as any which could be stated”³³. Moreover: the definition is said to prevent the jury to express the “collective wisdom” while determining the meaning and the weight of the standard; the definition is said to introduce new concepts that might be less clear than the one defined and might need an ulterior definition; the definition is said to be practically impossible; the failure to provide the definition, even upon request of the defendant or the jury, never rises to the level of constitutional error.

On the other hand there are those (either courts or scholars) who claim that the standard must be defined because the due process clause, contained in the Fifth and in the Fourteenth Amendment of the Constitution, requires the standard of persuasion to be applied rationally and because a rational application can be warranted only through the instructions defining reasonable doubt. Moreover: the term is capable of definition; the definition of the standard must be qualitative and not quantitative because only the former definition helps the jurors’ comprehension, allowing them to compare the decision of the case with the decision-making processes of their own lives; the failure to provide the definition upon request by the defendant or the jury, rises to the level of constitutional error; such an error can never be subject to “harmless error review”³⁴ because “it is not possible to determine whether it had an effect on the outcome of the trial”³⁵ and “the likelihood that such an error would normally influence the outcome of the trial is so great as to render it ‘inherently prejudicial’”³⁶; such an error, therefore, is always reversible (i.e. it always imposes the reversal of the court of appeal).

The time has come to write about the enactment of the “reasonable doubt standard” in Italy.

In 2006 the highly discussed law n. 46 introduced in the Italian Criminal Procedure Code at the article 533, the standard of “proof beyond a reasonable doubt” (*prova “al di là di ogni ragionevole dubbio”*). The legal provision does not define the standard but just states it.

Even before this time, in Italy, the standard at issue had been applied in important decisions by the Corte di Cassazione³⁷ and some scholars had strongly argued that the standard was already part of the Italian criminal system and, in particular, was imposed by the Italian Constitution³⁸. Federico Stella, in his awesome lifelong study on the subject, had explicitly referred to the US legal experience as a guidance.

According to that, is it possible to argue that the explicit enactment of the "reasonable doubt standard" didn't actually bring any change in the Italian criminal system? Some decisions of the Corte di Cassazione follow this argument, stating that the standard at stake was already applied and, moreover, that it was deductible from legal principles in force and from other articles of the Criminal Procedure Code, such as articles 192, 530, par. 2, 546, let. "e" and 606, let. "e"³⁹. This might be true, and the paper does not want to deepen the point. Nonetheless, the introduction of the "reasonable doubt standard" brought about the flourishing of decisions and of defense attorney's speech and judicial documents in which the standard is recalled and applied in different ways.

Since the legal provision does not define the standard but just states it, and since the standard is given different interpretation by judges and lawyers, it is not senseless to wonder if the dispute that took (and is still taking) place in the United States might offer a hint for a careful consideration of the need for a deepening of the standard's meaning. In the Italian criminal system case, of course, such a deepening won't bring to a defining instruction but simply to an understanding of the standard as accurate as possible and, moreover, to a more uniform and righteous application.

4 THE EXTERNAL LEGAL CULTURE ON THE "REASONABLE DOUBT STANDARD"

The core of the present paper is an insight into the external legal culture with regards to the "reasonable doubt standard". Though US and Italian materials will be presented together, it has already been clarified which is the different significance that such an insight can have in the US and in the Italian criminal systems. If in the perspective of the former system, this insight might reveal something about the way the "reasonable doubt standard" is applied; if in the perspective of the latter system, this insight might mainly (but not exclusively) reveal something about the phenomenon of the "everyday use" of the concept of "reasonable doubt standard" by lay people.

First, the paper will focus on some empirical studies that reveal the ideas and attitudes of mock jurors and lay people towards the standard. All of these studies were carried out in the United States. Secondly, the paper will focus on the movies in which the "reasonable doubt standard" is involved. Finally, the attention will be directed to the articles and books in which the standard at issue is mentioned.

Even if the documents and the materials are numerous, the paper will assess only the ones which are more intriguing for the insight's purposes and which stimulate some speculations. The others will just be cited.

As long as the legal "minimal significance" of the "reasonable doubt standard" will be assessed only at the end of the paper, all the criticism that will be made to the ideas and attitudes of laymen towards it, will be probably better understood later... hoping that won't mean demanding too much faith from the reader!

4.1 Empirical Studies

There is a considerable number of studies which show the lack of a widespread understanding of the significance of the "reasonable doubt standard".

The first study⁴⁰ taken into account involved some jurors from Wyoming after they had served out their duty. Wyoming uses an instruction which doesn't define the standard⁴¹. Jurors were asked many questions. In particular they were asked if they agreed in principle that when the prosecution has introduced enough

evidence to show that the defendant *may have committed the crime*, the latter has the burden to prove herself innocent. The 30,5% of the jurors was "very sure" or "pretty sure" that the statement was correct. That means that, even though instructions on the presumption of innocence were given, the third of the jurors deemed the standard of persuasion satisfied whenever the prosecution has only satisfied the standard of production⁴², a much lower standard than the "reasonable doubt" one.

The second study taken into account was carried out by Irwin Horowitz, a psychology professor, and Laird Kirkpatrick, a law scholar⁴³. They compared mock jurors' reactions to different instructions on the standard of persuasion. Among these instructions there was one which defined the "reasonable doubt standard" and one which didn't define it⁴⁴. After the jurors had seen a trial, shown with slides and videotapes, the scholars created five panels of eight jurors each. Every panel was given a different instruction on the standard of persuasion that the prosecution had to satisfy and was asked to quantify it with a percentage before deliberating⁴⁵. The result was daunting. The panel that was given an instruction with the definition suggested the threshold of 68,25%; the panel that was given an instruction without definition suggested the threshold of 52,87%. In both cases the indicated percentage is very low. But it is necessary to underline that there is a considerable gap (almost 16 points) between the thresholds suggested in the two circumstances. That means that the definition could be a suitable device to better the jurors' understanding of the standard.

The third study taken into account involved a group of 606 university students⁴⁶. They were shown a trial simulation and then were split into juries of six students each. A third of the juries was given a "stringent instruction" which defined the "reasonable doubt standard"⁴⁷; a third was given a "lax instruction" which defined the standard⁴⁸; a third was given an instruction without definition. The mock jurors were then questioned on the probabilities of guilt they deemed necessary in order to convict a defendant according to the "reasonable doubt standard". The threshold suggested by the juries who were given the "stringent instruction" was 87%; the one suggested by the juries who were given the "lax instructions" and by those who were not given a defining instruction was 82%. Once more it is manifest that an accurate definition of the "reasonable doubt standard" can play an important role in the concrete respect of the presumption of innocence and in avoiding confusions in the fact-finding process⁴⁹.

The fourth study taken into account involved 116 people selected among prospective jurors who were excluded with the *voir dire* process⁵⁰. These people were divided into two groups. The first group watched a 25 minutes movie that contained instructions for a robbery case taken from the Florida Standard Jury Instruction in Criminal Cases. The second group didn't watch the movie. All the people were given a questionnaire with multiple-choice and true-false questions. Even if the mock jurors who were given the instructions showed a better understanding of certain concepts, nonetheless the results taken altogether were discouraging. Only the 5% of the jurors believed that the defendant does not have to introduce any evidence of her innocence. The 23% believed that when the evidence of guilt and the evidence of innocence are well-balanced the defendant has to be sentenced. A frightful 2% believed that the defendant has the burden of proving his innocence. These results have been assessed by the scholars who lead the study and by other scholars in a subsequent article.⁵¹ In this article they conclude that it is necessary to make more efforts to explain the concepts of "burden of proof" and especially of "reasonable doubt".

The last study involved a sample taken from three groups of people: judges, sociology students and "other citizens"⁵². The people were given a list of crimes and were asked to detect a probability threshold (from 1 to 10) they would apply to each of them in order to convict the defendant. In the answers given by the judges there were not significant differences between the threshold detected for the different crimes. In the other groups' answers there were significant differences (up to two points) between the thresholds: the

crime of murder was given the highest threshold, the crime of petty larceny was given the lowest. To indicate different probability thresholds for the different crimes taken into account means to safeguard the value of liberty every time in a different way, administrating the punishment with a lightness inversely proportional to its length and severity. A criminal system that rests on the principle of legality, equality and liberty cannot accept such a judgment. It is therefore evident the necessity to give jurors a more precise knowledge of the rules they must apply in the fact-finding process.

4.2 Movies

There are several movies that can be assessed for their connection with the theme of the criminal process and of the judgment. Nonetheless, only few of them are interesting in the perspective proposed by this paper: only few of them directly deal with and mention the "reasonable doubt standard" in such a way to offer a chance for speculation. The paper will focus only on these latter group of movies. As a preliminary remark it is necessary to underline that all the movies taken into account deal with the US criminal process⁵³.

First it is interesting to briefly notice that a famous and appreciated film-noir by Fritz Lang was given the title *Beyond a Reasonable Doubt*⁵⁴. Even more interesting is the fact that the title of a Sidney J. Furie's movie, *The Lawyer*⁵⁵, was modified in Italian version, using the words *Al di là di Ogni Ragionevole Dubbio* (i.e. beyond any reasonable doubt). That of course shows a certain familiarity with the concept, probably due to the influence that US movies, series and novels dealing with legal issues had directly on the Italian ones, without the mediation of the US and the Italian legal doctrines. Particularly eloquent on this aspect are the following words by Carlo Zaza: "L'origine anglosassone di questa espressione – proof beyond a reasonable doubt – è nota anche in ambienti diversi da quelli tecnico-giuridici; ove per via mediatica è penetrata nell'immaginario collettivo con le sembianze di una formula sacramentale, associata inizialmente a quell'esperienza processuale e poi, in una trasposizione arbitraria ma diffusa nel comune sentire, al processo in quanto tale. Non stupisce, dunque, che la sua formale introduzione nell'ordinamento – the Italian one – non abbia suscitato particolari reazioni da parte della pubblica opinione"⁵⁶.

Besides these quick comments a considerable chance for speculation is given by an awesome movie directed by Sidney Lumet, *Twelve Angry Men*⁵⁷. Let's report the story accurately.

"The story begins after closing arguments have been presented in a murder case, as the judge is giving his instructions to the jury. According to American law (...), the verdict (whether guilty or not guilty) must be unanimous. The question they are deciding is whether the defendant, a young teenaged boy from the city slum, murdered his father. The jury is further instructed that a guilty verdict will be accompanied by a mandatory death sentence – the electric chair. The jury of twelve move to the jury room, where they begin to become acquainted with each others' personalities and discuss the case.

The plot of the film revolves around their difficulty in reaching a unanimous verdict due, in some cases, to the jurors' prejudices. Juror 8 – Henry Fonda – dissents in the initial voting, stating that the evidence presented is circumstantial and the boy deserves a fair deliberation, upon which he starts questioning the accuracy and reliability of the sole two witnesses to the murder, the fact that the knife used in the murder is not as unique as assumed (he produces an identical one from his pocket) and that the overall circumstances are rather shady.

His most fierce opponents – Jurors 3, 4 and 10 – claim that the boy's alibi is botched, since he does not remember any detail from the movies he watched at the theatre the night of the murder and he has sufficient motivation to kill his father. His lack of memory, however, is excused by panic attack; also, one of the witnesses is accused of wanting attention whilst the other might have 'witnessed' the murder without

her glasses on. As the deliberation goes on, the jurors go on to vote not guilty – in order, Jurors 9, 5, 11, 2, 6, 7, 12, 1, 4, 10 and finally 3. Juror 8 makes up his mind at the very beginning, in a secret vote; after hearing his reasons and listening to the complaints of Jurors 7 and 10, Jurors 5 and 2 change their votes. After Jurors 11 and 6 also decide on ‘not guilty’, 7 becomes tired and also votes ‘not guilty’ just so that the deliberation may end. Juror 12 changes his mind after voting ‘not guilty’. but switches back moments after; the jury Foreman, 1, also votes ‘not guilty’. Juror 10 loses all favor or respect after indulging in a bigoted rant, after which he is told to shut up by Juror 4 – who in turn is convinced that the witness who ‘saw’ the murder may be inaccurate in her account owing to the fact that she may not have been wearing glasses at the time.

Last of all is the adamant Juror 3, who, after a long confrontation with Juror 8, breaks down after glancing at and furiously tearing up a picture of him and his son, whom he hasn’t seen in two years (his angry rage suggesting a probable falling out with the boy). All jurors leave and clear the accused of all charges off-screen. In the epilogue, the friendly Jurors 8 and 9 exchange surnames (all jurors have remained nameless throughout the movie) and the movie ends.”⁵⁸

How does the “reasonable doubt standard” appear in the movie? How is the reasonableness declined?

Henry Fonda, the protagonist, juror number 8, uses many times the expression “possible” while talking about the alternative hypothesis that would call for the acquittal. The whole movie rests on the creation of possible alternative hypothesis and on the assessment of clues supporting such hypothesis: the bad eyesight of a witness; the slowness in walking of another witness that would not be consistent with his deposition; the likelihood that the defendant could have stabbed his father in his chest only moving from the bottom to the top and not the other way around; the likelihood that the defendant could have forgotten, due to an emotional stress, the titles of the movies he claimed to have watched in a movie theatre at the time of the murder, and so on. The reasonable doubt is cast directly on the reliability of the witnesses. These witnesses might be “unaware witnesses”: they might, in good faith, believe that they saw the defendant stabbing his father, but they actually might not have seen it.

The expression “reasonable doubt” is often used by the jurors. In particular, juror number 4 affirms that it casts a reasonable doubt the fact that the female witness, who usually wore glasses and testified that she had seen the defendant committing the crime from a considerable distance, while she was half asleep and in the middle of the night, may not have been wearing the glasses at that precise time. Every juror is put to the test by the arguments of juror number 8 and sees his certainty for the guilt fade out. The jurors in their discussion take into account even issues that the two parties of the trial did not assess: the “reasonable doubt standard” requires the fact-finder to integrate the arguments of the defense especially if it is devolved upon a bad public defender.

The discussion of the panel shows the strength of the dialectic and rhetorical approach to the criminal case. The starting point is juror number 8’s responsibility. He feels that it is compulsory to spend at least some time reasoning before sentencing a boy to death. His proposal is therefore to test the prosecution’s and the defense’s cases. Confident with the defense’s case, Henry Fonda tries to persuade the other jurors, not with sophistries, but with rational argument that are based on the evidence introduced in the trial. In such a dialectic process, the confrontation between *confirmatio* and *reprehensio*⁵⁹ brings to the rebuttal of the weak arguments. If the reason manages to overcome the emotions (see the end of the movie) then the strongest reason will indicate the most likely course of facts.

Notwithstanding the remarkable example of the dialectic reasoning given by the movie, there are certain aspects of the discussion that are not convincing. Juror number 8 correctly reminds the others that the burden

of proving guilt is on the prosecution and that a reasonable doubt is enough to acquit. However, several times he speaks of belief in the innocence of the defendant and at the end he says that all the jurors are convinced of this innocence as if this belief or conviction was necessary for the acquittal. He might be excited by his victory but he definitely commits a mistake. Indeed it is considerably different to have a reasonable doubt on the guilt or to be convinced of the innocence. Many jurors do not seem to get the difference and seem to do even worse. Some of them, at the beginning, consider the defendant guilty because the defense did not prove anything. They therefore misunderstand the allotment of the burden of persuasion, that is the fact that the burden is on the prosecution. Others seem to wait till the time in which they believe in the defendant's innocence before voting for his innocence. They therefore misunderstand the standard of persuasion of reasonable doubt, that is the fact that a reasonable doubt on the guilt is sufficient to acquit.

Another problematic aspect is the following. As noted above, at the very beginning Henry Fonda says that before sentencing somebody to death it is necessary to gauge accurately the evidence. Even though this might not be his intention, it seems that such a reasoning might allow a quicker and more approximate judgment in case of less heinous crimes. That conclusion, as noted in the previous paragraph, is completely mistaken, because it is the result of an arbitrary and inconsistent interpretation of the values of liberty and equality. The "reasonable doubt standard", however, does not allow any gradation depending on the gravity of the crime.

Finally, it is interesting to notice that, before the jury moves to the jury room, the judge gives sketchy instructions and does not define the "reasonable doubt standard".

4.3 Books and Articles

There are several books and articles which, despite of the fact that they are not products of legal doctrine, do mention and reflect upon the "reasonable doubt standard" in such ways that are interesting in the perspective of this paper. Even this time the paper will just focus on some of them but, differently from the previous paragraph, the attention will be now put especially on Italian materials due to the greater quantity gathered and to their more suitable quality for the purposes of the insight.

First, it must be noticed that the expression "reasonable doubt" occurs in many articles. For example: an article dealing with a real murder case⁶⁰; an article dealing with the chances that the Italian movie industry regain its good reputation⁶¹; an article dealing with the hypothetical responsibilities of the Pope Benedetto the 16th in glossing over the cases of pedophilia within the Catholic Church⁶²; an article dealing with the chances that UFOs exist⁶³; an article judging the quality of a recent Italian novel⁶⁴. The "reasonable doubt standard" has therefore been applied to various subjects, most of them pretty far from the criminal process. This is of course the sign that a concept that grew up in the criminal system has been exported to other fields maintaining its function of fixing a satisfactory standard of persuasion.

Regarding to the books, it is important to notice that a legal thriller was given the title *Reasonable Doubt*⁶⁵ and that the title of a harmony book (*Best Kept Secrets*⁶⁶) was modified in the Italian version, using the words *Un Ragionevole Dubbio* (i.e. a reasonable doubt). It has already been noticed, in the previous paragraph, that the use of this expression in the Italian version attests a certain familiarity with it. Moreover, since the latter novel does not deal strictly with legal issues, this usage attests also the tendency to export the concept to fields other than the legal one.

The paper will now focus on three books that stimulate some intriguing considerations.

The first book has recently been written by Sean B. Carroll, a professor of genetics. Its title is *The Making of the Fittest. DNA and the Ultimate Forensic Record of Evolution*⁶⁷. The title of the Italian version is *Al di là di ogni ragionevole dubbio* (i.e. beyond any reasonable doubt).

The book wants to demonstrate that the study of the DNA of different biological species can prove beyond a reasonable doubt that the theory of evolution is the basis of bio-diversity. It is extremely interesting the following ironic remark made in the preface. In the courtrooms – says the Author – the DNA test is deemed sufficient to prove beyond a reasonable doubt the defendant's culpability or innocence (with a correct assessment of all the circumstances). The organization Innocence Project, that provides defense attorneys *pro bono* for the appeals based on the DNA test, refers that in the last thirty years more than a hundred and fifty people who had been sentenced were set free, according to the results of the test. Apparently all the US citizens agree with this use of the DNA test. Notwithstanding this faith in the studies on the DNA, about the half of the US citizens still doubt on or deny the theory of biological evolution whose consistency and soundness can be proved exactly with the same means. Is it a greater risk to accept a false scientific theory or to sentence innocent people to death? Should we require a higher standard of persuasion for a scientific matter? Moreover, are we really sure that we can require it? What for?

The Author uses the above ironic remark to point out that the real reasons that impede a widespread agreement on the evolution theory are political and religious rather than scientific. It is interesting the fact that the "reasonable doubt standard", originally thought as a remedy to the impossibility of a higher standard in human affairs as opposed to scientific and especially mathematical ones, is now used as a mean to persuade on a scientific theory. The Author seems to use approximately the following reasoning. If the "reasonable doubt standard" can justify someone's conviction and if someone's life or liberty is much more important than the agreement on a scientific theory, why can't we just believe in such a theory if it can be proved beyond a reasonable doubt? Such a reasoning highlights both that, as contemporary philosophy has shown⁶⁸, even science can't afford the standard of absolute certainty and that the satisfaction of the "reasonable doubt standard" can be considered the goal even for a scientist.

The second book is *Il ragionevole dubbio* (i.e. the reasonable doubt) by Roberto Giacobbo⁶⁹. The Author interviews many scientists, especially medical doctors, on the subject of the existence of life after death. Through these interviews he aims to find reasons that might support the hypothesis that there exists a life after our heart has stopped beating and so, to convince those who think that such a subject can't be matter of dispute. It is useful to quote some parts of the preface. "Se persone comuni come me o come molti che stanno leggendo questo libro sono intimamente convinte che non tutto finisce con la morte, la loro convinzione ha valore solo per i diretti interessati, per quanto ragionata essa sia (...). Insomma, anche se ognuno di noi ha un dubbio, si tratta di un dubbio non legato a esperienze specifiche, a conoscenze scientifiche, a studi dedicati. Ma se lo stesso dubbio comincia a ronzare nella testa del responsabile medico di una sala di rianimazione o nella testa di uno scienziato, allora questo non è più il dubbio dell'uomo della strada (...). Il dubbio dell'uomo della strada, insomma, se espresso dall'uomo di scienza, diventa il 'ragionevole dubbio'⁷⁰.

Three very interesting considerations can be based on this passage. Firstly, it shows a very strong faith in science and in its ability to warrant certainty and therefore guidance to the common people. Such a faith is nowadays highly criticized⁷¹. Secondly, it rests on the idea that the mere fact that a doubt is cast by a scientist makes the doubt reasonable. Such a reliance on the scientist would have considerable consequences on the assessment of the expert witness's statements in the criminal process and would of course put the fact-finder in trouble in case of contrast between expertises. Thirdly and consequently, if the mere fact that a scientist has a doubt makes the doubt reasonable, there is a juxtaposition of the simple hypothesis and the reasonable doubt. The reasonable doubt is no more conceived as a doubt that must rest on reason, but it turns into an hypothetical explanation coming from a peculiar source.

The third book is a legal thriller by Gianrico Carofiglio, who, besides being a well known novelist, has also been a public prosecutor. It could therefore be questioned whether this legal thriller represents the internal or the external legal culture. The book was translated in English. Its title is *Ragionevoli dubbi*⁷².

In the final address by counsel, impliedly centered on the "reasonable doubt standard", the fictitious defense attorney Guido Guerrieri, the protagonist of the novel, makes a wonderful job. He starts saying that the only way to know the past is to create stories that match with the clues and the facts. The more a story is likely, the more we are justified to believe it. But – Guerrieri says – in a criminal process the final decision can't be taken resting on a story that is simply more probable than the others; in the criminal process the prosecutor's story must be the only one that can be reasonably accepted. Till this point there is nothing to object. Differently, in the following part of the speech there are two sentences pronounced by Guerrieri which are troublesome and highly disputable. First he says: "Ogniqualevolta sia possibile costruire una pluralità di storie capaci di inglobare tutti gli indizi in un quadro di coerenza narrativa, bisogna arrendersi al fatto che la prova è dubbia"⁷³. Secondly he says: "Alla difesa basta proporre una spiegazione possibile"⁷⁴. Some critical questions arise. Is it true that a "reasonable doubt" is simply a "possible doubt"? Is something merely possible also reasonable? Would there ever be a conviction if the standard in the criminal process was the "possible doubt standard"?

5 THE INTERNAL LEGAL CULTURE ON THE "REASONABLE DOUBT STANDARD"

This paper, as above anticipated, does not have the purpose to assess pervasively the internal legal culture on the subject. Complete and insightful works on this aspect has already been recalled⁷⁵. The intention here is just to present a single example for each internal legal culture taken into account, namely the US one and the Italian one. In both the examples the meaning of the "reasonable doubt standard" is misinterpreted. They might be considered as isolated cases, but unfortunately that is not the case, as the everyday experience and the works of the law scholars testify.

Referring to the US internal legal culture, a jury instruction given in the criminal case *People v. Feldman* is particularly eloquent: the reasonable doubt – the instruction says – "is not a doubt based upon sympathy or a whim or prejudice or bias or a caprice, or a sentimentality, or upon a reluctance of a weak-kneed, timid, jellyfish of a juror who is seeking to avoid the performance of a disagreeable duty, namely, to convict another human being of the commission of a serious crime"⁷⁶. The problem with this instruction is that it conveys a really confused meaning of the "reasonable doubt standard" if it does convey a meaning at all. While using the technique of telling the jurors which doubts are not reasonable, moreover detecting a set of examples which stress only on the emotional aspects of judging, the instruction does not say anything about what a reasonable doubt is and, indeed, shows a lack of understanding.

Referring to the Italian internal legal culture it has already been noticed (paragraph 2) that the Corte di Cassazione welcomed the introduction of the "reasonable doubt standard" in the Criminal Procedure Code by stating that such an introduction did not bring any change in the system and that it had more a descriptive function than a substantial one. Nonetheless, as noted above, something new did happen. Especially lawyers and judges focused quite a lot on the standard of persuasion and adopted meanings of it that are not always consistent and sound. A decision by the Tribunale of Reggio Calabria⁷⁷ is an example of such meanings. In this decision the judge acquits the defendant who was charged for attempting to blackmail a defense attorney. In the longest part of the decision the judge lists the evidence introduced by the prosecution. It seems to be very strong and conclusive. Notwithstanding that, the decision ends up with a sentence that makes short work of the prosecution's case: "Tuttavia – the judge writes – la possibilità sia pur remota ed il dubbio ragionevole

(...) esiste e non può ignorarsi". The decision rests on a parallelism between "reasonable doubt" and "remote possibility". Is this a sound definition of the meaning of the "reasonable doubt standard"?

6 MENTAL MODELS AND VERBS OF PROPOSITIONAL ATTITUDE: SOME FINAL ARGUMENTS AGAINST THE "ORIGINAL UNDERSTANDING THEORY"

Lawrence Solan in an insightful article⁷⁸ makes some compelling considerations that show the imprecision of the expression "reasonable doubt standard" and therefore suggest its on-depth examination and its definition. These considerations can hardly be placed according to the dichotomy internal/external legal culture, because they concern generally the way a human being relates with choices and the way language and reasoning reciprocally influence themselves. Nonetheless, the following thoughts, as it will clearly appear, are better addressed to a layman than to a lawyer or a judge, whose legal experience and knowledge are supposed to preserve more the justness of their reasoning.

First Solan explains how our way of reasoning is shaped by our mental models and how this fact can affect the application of the standard at stake. It is useful to quote his words. "Pretend that you are participating in a study – writes the author – in which the experimenter shows you a set of pictures, and you have to label each of them either as a rabbit or a fish. You have no other choices. In addition to showing real rabbits and real fish, the experimenter shows you something that looks a little like a rabbit, but is clearly not a rabbit. Nonetheless, it certainly looks more like a rabbit than a fish. Given the experimental choices, you will no doubt call this a rabbit because it is closer to being a rabbit than a fish. In everyday life, we make this sorts of choices all the time. If, for example, the red traffic lights in a town you are driving through are a slightly different shade from the ones that you are used to seeing, you will generalize the off-red signals to the red ones that you know so well, and stop your car. Our ability to fit new situations into categories characterized by prototypical situations is not only commonplace but a human strength. It is what allows us to apply our knowledge of the world to unfamiliar problems. Now let's alter our experiment by adding one new instruction. In addition to telling you that you will be asked to call each of the pictures either a rabbit or a fish, you are told that if you have any reasonable doubt about the picture being a rabbit, then you should call it a fish. Now when you are shown the same picture – the picture of the fictional animal that resembles a rabbit but isn't a rabbit – you become uncomfortable. You have in front of you something that looks a lot like a rabbit, but have been told to call it a fish. The problem has two solutions. The first is to call it a fish. This is harmless enough in our thought experiment. But if your answer really mattered, as it does if you are voting as a member of a jury, you might gradually convince yourself to disregard those features of the picture that made you think it was not a rabbit. Over time, you may become willing enough to call it a rabbit, which certainly seems closer to reality than calling it a fish. After all, you come to the experiment not only with a model of a rabbit, but also with a model of a fish. The temptation to call it a rabbit is increased by the unattractiveness of calling it a fish"⁷⁹.

Judges and jurors have mental models of what guilt and innocence mean, referred to specific crimes. Such mental models are framed by prior experiences and knowledges. If the prosecution does not satisfy the "reasonable doubt standard", but it does introduce evidence that highlights those aspects of guilt about a specific crime that match, at least partially, with the mental models of the fact-finder, there is a high risk that, without providing an explanation of the "reasonable doubt standard" and more generally of the "presumption of innocence", the fact-finder (especially a non-professional one) might lower the standard. That might happen because he is well aware that each one of his possible decisions has a critical consequence on an important interest that the system seeks to protect (liberty vs. security) and therefore, in such a critical situation, he is lead to trust his mental models as the best means to acknowledge the evidence, as the only reliable help.

Secondly, it is interesting to observe that the verb “to doubt” is what linguists and philosophers⁸⁰ call a “verb of propositional attitude”. Such verbs describe the speaker’s attitude toward a proposition. Let’s imagine this conversation: “Do you think tomorrow it will snow on the Monte Bianco? – an alpinist asks his climbing partner – I doubt it – the partner replies”. The latter is expressing his opinion on or attitude towards the former’s question. Many other verbs belong to this category: “to think”, “to believe”, “to know” etc.

Philosophers of language explained verbs of propositional attitude through “possible world” semantics. Whenever somebody expresses an opinion on a given clause he does it by creating a mental model of a “possible world”. This mental model can contain or not those conditions that allow to view the clause as true. Depending on the presence or absence of those conditions, the person will express his faith or doubt on the truth of the sentence. For example, the above alpinist might say: “If it wasn’t raining I would be on the top of the Monte Bianco”. His climbing partner would reply “I believe it” or “I doubt it” depending on the fact that he has a mental model of “possible world” in which, absent the snowfall, his friend can reach the summit.

In the criminal process the fact-finder behaves the same way when he has to gauge his attitude towards the existence of a reasonable doubt. Firstly, the prosecutor must provide a mental model of “possible world” that supports his case. Secondly, he has to frame this model so that the fact-finder, while expressing his propositional attitude cannot believe in alternative reasonable models. This two tasks are strictly bound but they are not the same thing. In a weak case the prosecution might be unable to accomplish the second task and so, even if the defendant did not introduce evidence of a reasonable doubt on his guilt, he should be acquitted anyway, according to the presumption (assumption) of innocence. Nonetheless, the expression “proof beyond a reasonable doubt” tends to call the fact-finder’s attention to the second task and especially to a specific aspect of it (the existence of possible alternatives), almost bypassing the first one; which brings to the result that, while gauging possible alternatives, the fact-finder unconsciously moves the burden of persuasion from the prosecution to the defense. Instead of assessing the job of the prosecution, the fact-finder considers decisive the introduction of evidence of a reasonable doubt from the defense.

Instead of assessing the “proof”, the fact-finder assesses the “doubt” straight. That happens because only the “doubt” is directly qualified, while the “proof” is qualified indirectly (i.e. through the qualification of the “doubt”). The expression “proof beyond a reasonable doubt” conveys the idea that, to satisfy the standard of persuasion, it is sufficient the absence of reasonable doubts provided by the defence, regardless the fact that the prosecution case is strong or weak.

Finally it is interesting to point out that “ a subtle change in the language of the reasonable doubt instructions in the middle of the nineteenth century further supports the point that people understand proof beyond a reasonable doubt as imposing a burden on defendants”⁸¹. Federal courts, in the beginning of the nineteenth century used the following expressions to mention the standard of persuasion: “proof beyond *all* reasonable doubt”; “proof beyond *any* reasonable doubt”; “proof beyond reasonable doubt”. The current expression “proof beyond *a* reasonable doubt” was pretty rare at that time and did not became the norm until the second half of the nineteenth century.

The term “doubt”, when used as a noun, refers either to the state of doubting or to the evidence that causes that state.

Differently from the last expression, the former ones use the term “doubt” as a mass noun. “Mass nouns, like *water*, generally occur only in the singular, and do not take the article *a*; rather they take *some*”⁸². In this sense “doubt” refers to the state of doubting.

The last expression uses the term “doubt” as a count noun, that “occur freely in the plural and take *a* in the singular and *some* in the plural”⁸³. Thus, the term “doubt” refers to the facts that cause the state of doubting:

“its focus, therefore, is even more on evidence the defendant has raised to create doubt in the juror’s mind rather than the strength of the government’s evidence”⁸⁴. Such consideration might be suitable even for the Italian expression “prova al di là di ogni ragionevole dubbio”. In fact, the term “ogni” means “every” and it is used with count nouns.

7 CONCLUSION

The paper might have seemed to be more a *divertissement* than a “scientific” work. Nonetheless, it attempted to show two things: first, the current confusion regarding the meaning and the application of the “reasonable doubt standard”; secondly, the use of such standard in matters that are different from the legal ones, that is the export of the concept to other fields.

Regarding the latter task it might be possible to conclude that the “reasonable doubt case” shows how lay people, especially if stimulated by medias, perceive certain legal concepts as useful and tend to use and shape them according to their purposes. Common people, therefore, in a certain sense seem to “speak with law”. There is a widespread idea that the “reasonable doubt standard” is a highly satisfactory standard for the decisions in human affairs. Of course, such an idea lacks some elements of the legal concept that would be necessary for a righteous application of it in the criminal process context.

This last point leads to some conclusive considerations regarding the first task mentioned.

The paper attempted to show that in both the external and the internal legal culture (that was only rapidly viewed) the “reasonable doubt standard” is not conceived and applied in a uniform way. In paragraph 1 it has been noted how, due to the differences between the US and the Italian criminal systems, the external legal culture affects the application of the “reasonable doubt standard” differently in each of them. Moreover, it has been noted that the means to provide a more righteous application of the standard are partially different in the two systems. Notwithstanding that, after all the considerations proposed in the paper, it is possible to trace a “minimal significance” of the “reasonable doubt standard” that would rest on some fundamental values shared by both the criminal systems. Such very general, but binding contents might establish the starting point for further more specific insights especially into the Italian system which lacks the background experience of the US one on the issue at stake. Moreover such contents might be at least a rudimental mean to check the correctness of the applications of the standard.

First. The “reasonable doubt standard” must be applied as a “rule”. It expresses, enforces and, most of all, completes⁸⁵ the presumption of innocence which reflects the trade-off between the values of liberty and security, that is, between the risk of convicting an innocent man and the risk of letting free a guilty man⁸⁶. Once such trade-off is conclusively qualified through the standard, the latter must be applied as a “rule”, that is, in a rigid manner. Which means that its significance (i.e. the petrification of the above trade-off) must not change according to the evidence introduced, the gravity of the crime or its statistical frequency (see paragraphs 4.1, 4.2).

Second. The “reasonable doubt rule”, which includes the placement of the burden of proof and the setting of the standard of persuasion, is the expression of a fundamental principle of both the US and the Italian Constitutions: the presumption (assumption) of innocence⁸⁷. Such a principle compels the burden of proof to be placed on the prosecution and the standard of persuasion to be the highest standard that can be satisfied in matters regarding human affairs⁸⁸ (see paragraphs 4.1, 4.2, 6).

Third. The “reasonable doubt standard” requires moral certainty, conceived, according to its original significance, as practical and rational certainty. Certainty is practical as long as it allows to make a decision in matters regarding human affairs, as the choice between guilt or innocence in a criminal process. Certainty

is rational when it can be communicated to other people and justified so that it creates consent among a wide range of people living in the community. Rhetoric and dialectic are the best means to reach such practical and rational certainty⁸⁹ (see paragraphs 2, 4.2, 6).

Fourth (consequently). The “reasonable doubt” is not just a “possible” or, even worse, a “fantastic” doubt. It must be a doubt based on reason, that is, a doubt whose consistence can be communicated and whose soundness creates consent among a wide range of people living in the community⁹⁰. A doubt is not reasonable just because of the supposed reasonableness of the doubt’s source (see paragraphs 4.3, 5).

Fifth. The “reasonable doubt standard” requires the complete and accurate assessment of all the evidence introduced into the process. The decision, therefore, must absolutely adhere to that evidence and must not ignore any part of it (see paragraph 4.2).

As a conclusion nothing would sound better than the intriguing words of George Fletcher: “It is not the task of culture to legitimate argument. It is the task of argument to legitimate – or to delegitimize – culture”⁹¹.

NOTES

¹ It is important to remark that the “reasonable doubt standard” is a part of the so called “reasonable doubt rule” which includes both the standard of persuasion and the burden of proof. While the standard determines the degree of certainty that must be reached in order to convict, the burden determines the party that has to satisfy the standard. The paper basically focuses on the standard of persuasion, but certain allusions to the rule as a whole will be necessarily made.

² The term “process” is here preferred to the term “trial” because of the allusion of the latter one to the US specific experience.

³ The article, as modified by the Law n. 46/2006 begins as follows: “Il giudice pronuncia sentenza di condanna se l'imputato risulta colpevole del reato contestatogli al di là di ogni ragionevole dubbio”.

⁴ “Legal culture – using Lawrence Friedman’s words – (...) refers to ideas, values, expectations and attitudes towards law and legal institutions, which some public or some part of the public holds”. See L. M. FRIEDMAN, *The Concept of Legal Culture. A Reply*, in D. NELKEN (edited by), *Comparing Legal Cultures*, Dartmouth, Brookfield, 1997, p. 35. Legal culture is further divided into internal and external legal culture depending on whether the people taken into account are “those members of society who perform specialized legal tasks” (L. M. FRIEDMAN, *The Legal System: A Social Science Perspective*, Russell Sage Foundation, New York, 1975, p. 233) or lay citizens.

⁵ On this aspect see: G. CANZIO, *L'oltre il ragionevole dubbio come regola probatoria e di giudizio nel processo penale*, in Riv. It. Dir. e Proc. Pen., 2004, p. 303; D'ALESSANDRO, *L'oltre il ragionevole dubbio nella revisione del processo*, in Riv. It. Dir. e Proc. Pen., 2004, p. 682; F. M. IACOVIELLO, *Lo standard probatorio dell'al di là di ogni ragionevole dubbio e il suo controllo in Cassazione*, in Cass. Pen., 2006, IV, p. 3869 ss.

⁶ David Nelken uses these words to describe what social sciences approaches to law, as well as law and language approaches, can reveal. See D. NELKEN, *Law as Communication: Constituting the Field*, in D. NELKEN (edited by), *Law as Communication*, Dartmouth, Brookfield, 1996.

⁷ See art. 5 of the Italian Criminal Procedure Code.

⁸ See NELKEN, *Law as Communication*, cited, p. 15.

⁹ For a criticism to the concept of “legal culture” see R. COTTERRELL, *The Concept of Legal Culture*, in D. NELKEN (edited by), *Comparing Legal Cultures*, cited.

¹⁰ T. WALDMAN, *Origins of the Legal Doctrine of Reasonable Doubt*, 20 Journal of the History of Ideas 229, 1959, p. 309.

¹¹ On this regard see P. TILLERS, *Intellectual History, Probability, and the Law of Evidence*, 91 Michigan Law Review 1465, 1993, p. 1471. John Langbein believes that “the central event in the formation of the modern law of evidence was the rapid development of adversary criminal procedure”. See J. H. LANGBEIN, *Historical Foundations of the Law of Evidence: A View from the Ryder's Sources*, 96 Columbia Law Review 1168, 1996, p. 1172.

¹² On this regard see J. H. LANGBEIN, *The Origins of Public Prosecution at Common Law*, 17 American Journal of Legal History 313, 1973, pp. 314, 315 and LANGBEIN, *Historical Foundations*, cited, pp. 1170, 1171. The Author writes: “Thayer noticed that a separation of witnesses and jurors could be found even in the early thirteenth century in cases disputing the genuineness of deeds, and a similar distinction seems to have been taken in some felony trials of the fourteenth and fifteenth centuries. Probably in the later fifteenth century, certainly by the sixteenth, it had become expectable that jurors would be ignorant of the crimes they denounced and determined” (LANGBEIN, *The Origins of Public Prosecution*, cited, pp. 314, 315).

¹³ W. S. HOLDSWORTH, *A History of English Law*, Goodhart, London, 1956, Vol. IX, p. 126.

¹⁴ See. A. A. MORANO, *A Reexamination of the Development of the Reasonable Doubt rule*, 55 Boston University Law Review 507, 1975.

¹⁵ WALDMAN, *Origins*, cited, p. 300.

¹⁶ Ibidem.

¹⁷ J. WILKINS, *Of the Principle and Duties of Natural Religion*, London, 1699, cited in WALDMAN, *Origins*, cited.

¹⁸ Id., cited, p. 5.

¹⁹ WALDMAN, *Origins*, cited, pp. 302-303.

²⁰ J. WILKINS, *Of the Principle*, cited, pp. 7-8.

- ²¹ G. GILBERT, *The Law of Evidence*, London, 1756, cited in WALDMAN, *Origins*, cited.
- ²² T. STARKIE, *A Practical Treatise of the Law of Evidence*, Philadelphia, 1824, cited in WALDMAN, *Origins*, cited.
- ²³ Massachusetts Supreme Court, *Rex v. Preston*, October 24-30, 1770 and *Rex v. Wemms*, November 27 – December 5, 1770. For a comprehensive description of these trials see MORANO, *A Reexamination*, cited, p. 508 ss.
- ²⁴ 5 Cush. 295, 1851.
- ²⁵ 397 U.S. 358, 1970.
- ²⁶ On this regard see H. A. ASHFORD, D. M. RISINGER, *Presumptions, Assumptions and the Due Process in Criminal Cases: a Theoretical Overview*, 79 *Yale Law Journal* 165, 1969-1970, p. 173.
- ²⁷ 443 U.S. 307, 1979.
- ²⁸ 114 S. Ct. 1239, 1994.
- ²⁹ See: Note, *Reasonable Doubt: an Argument Against Definition*, 108 *Harvard Law Review* 1955, 1960; H. A. DIAMOND, *Reasonable Doubt: to Define or not to Define*, 90 *Columbia Law Review* 1716, 1990; J. L. BAIN, *A Proposed Definition of Reasonable Doubt and the Demise of the Circumstantial Evidence Charge Following Hankins v. State*, 15 *St. Mary Law Journal* 353, 1983-1984; L. M. SOLAN, *Convicting the Innocent Beyond a Reasonable Doubt: some Lessons about Jury Instructions from the Sheppard Case*, 49 *Cleveland State Law Review* 465, 2001.
- ³⁰ To this first group belong the courts of appeal of Florida, Indiana, North Carolina, Idaho, Maryland, New Jersey, Pennsylvania, Washington and the federal courts of the District of Columbia Circuit. For specific decisions by these courts see DIAMOND, *Reasonable Doubt*, cited, p. 1718.
- ³¹ To this second group belong the courts of appeal of Texas, Wyoming, Illinois and Mississippi and the federal courts of the fourth, fifth and seventh circuit. For specific decisions by these courts see DIAMOND, *Reasonable Doubt*, cited, p. 1719-1720.
- ³² To this last group belong the courts of appeal of Alaska, Louisiana, Arizona, Montana, Nebraska, Connecticut and the federal courts of the first and the second circuit. For specific decisions by these courts see DIAMOND, *Reasonable Doubt*, cited, p. 1720-1721.
- ³³ See *Hopt v. Utah*, 120 U.S. 430, 1887.
- ³⁴ A constitutional error can be deemed harmless by the court of appeal if it is “unimportant and insignificant”, that is “if it was harmless beyond a reasonable doubt”, so that it did not influence the outcome of the case. See *Chapman v. California*, 386 U.S. 18, 1967 and *Rose v. Clark*, 478 U.S. 570, 1986.
- ³⁵ DIAMOND, *Reasonable Doubt*, cited, p. 1734.
- ³⁶ *Id.*, p. 1734.
- ³⁷ See for example: Sentenza n. 30328/2002; Sentenza n. 25678/2004; Sentenza n. 33748/2005.
- ³⁸ On this specific aspect see F. STELLA, *Giustizia e Modernità. La protezione dell'innocente e la tutela delle vittime*, Giuffrè, Milano, 2001. According to Stella the articles 2, 25, 2nd paragraph and 27, 3rd paragraph of the Italian Constitution require that the defendant is convicted only if proved guilty beyond a reasonable doubt. For an in-depth examination on the “reasonable doubt standard” in the Italian system see also: CANZIO, *L'oltre il ragionevole dubbio*, cited; CANZIO, *Prova scientifica, ragionamento probatorio e libero convincimento del giudice nel processo penale*, in *Dir. Pen. e Proc.*, 2003, p. 1193 ss.; F. D'ALESSANDRO, *La certezza del nesso causale: la lezione “antica” di Carrara e la lezione “moderna” della Corte di cassazione sull' “oltre ragionevole dubbio”*, in *Riv. It. Dir. e Proc. Pen.*, Giuffrè, Milano, 2002, p. 737; F. D'ALESSANDRO, *L'oltre ogni ragionevole dubbio nella valutazione della prova indiziaria*, in *Cass. Pen.*, Giuffrè, Milano, 2005, vol. XLV, p. 284; D'ALESSANDRO, *L'oltre ogni ragionevole dubbio*, cited; M. PISANI, *Riflessioni sul tema del ragionevole dubbio*, *Riv. It. Dir. e Proc. Pen.*, 2007, p. 1243; C. PIERGALLINI, *La regola dell'oltre il ragionevole dubbio al banco di prova di un ordinamento di civil law*, in *Riv. It. Dir. e Proc. Pen.*, 2007; C. ZAZA, *Il ragionevole dubbio nella logica della prova penale*, Giuffrè, Milano, 2008; F. CENTONZE, *La Corte d'Assise di fronte al “ragionevole dubbio”*, in *Riv. It. Dir. e Proc. Pen.*, Giuffrè, Milano, 2003, p. 673 ss.; D. C. SCHITTAR, *Al di là del ragionevole dubbio e oltre. Un tentativo di chiarezza sui principi*, Giuffrè, Milano, 2008.
- ³⁹ In particular, the Corte di Cassazione stated that the new article 533 of the Criminal Procedure Code: “non ha introdotto un diverso e più rigoroso criterio di valutazione della prova rispetto a quello precedentemente adottato dal giudice, ma ha semplicemente formalizzato un principio già acquisito dalla giurisprudenza” (see Sentenza n. 20371/2006); “ha un carattere meramente descrittivo, più che sostanziale, dato che anche in precedenza, il ‘ragionevole dubbio’ sulla colpevolezza dell'imputato ne comportava il proscioglimento a norma dell'art 530, secondo comma, cod. proc. pen.” (see Sentenza n. 19575/2006).
- ⁴⁰ See B. SAXTON, *How Well Do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 *Land and Water Law Review* 59, 1998.
- ⁴¹ Here is the instruction n. 1.03 of the Wyoming Pattern Criminal Law Instructions: “In order to convict the defendant of the crime charged, every material and necessary element to constitute such crime must be proved beyond a reasonable doubt and if the jury has a reasonable doubt on any necessary element, it is your duty to give the benefit of such doubt to the defendant and acquit him”.
- ⁴² The “standard of production” is that standard that must be satisfied in order to compel the judge to instruct the jury on a specific legal issue that concerns the case at stake. It can be considered as the function of the standard of persuasion of a reasonable jury. In fact the judge would instruct the jury on a specific legal issue only if he could reasonably foresee that the specific fact tied to that issue may be proved beyond a reasonable doubt to the jury. See J. T. MCNAUGHTON, *Burden of Production of Evidence: a Function of a Burden of Persuasion*, 68 *Harvard Law Review* 1328, 1954-1955.
- ⁴³ I. A. HOROWITZ, L. C. KIRKPATRIK, *A Concept in Search of a Definition: The effects of Reasonable Doubt Instructions on Certainty of Guilt Standards and Jury Verdicts*, 20 *Journal of Law and Human Behavior* 655, 1996.
- ⁴⁴ The other instructions were on distinct standards of persuasion or used expressions other than “reasonable doubt”.
- ⁴⁵ The use of mathematics and, in particular, of probabilities in order to define the standard of persuasion is highly discouraged by the writer. Indeed here it has just a descriptive usefulness and not a constitutional meaning. On this point see L. H. TRIBE, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 *Harvard Law Review* 1329, 1970-1972.
- ⁴⁶ See N. L. KERR, *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 *Journal of Personality and Social Psychology* 282, 1976.

- ⁴⁷ The "stringent instruction" said: "That is, before you can return a verdict of guilty you must be sure and certain that the defendant is guilty (...). If you feel that the facts of this case are compatible with any other theory besides the one in which the defendant is guilty, then you have a reasonable doubt about his guilt and must find him not guilty". See KERR, *Guilt Beyond a Reasonable Doubt*, cited, p. 286.
- ⁴⁸ The "lax instruction" said: "A reasonable doubt about the defendant's guilt must be a substantial one, a fair one, one based on reason, and one for which reasons can be given. In summary you need not be absolutely sure that the defendant is guilty to find him guilty". See KERR, *Guilt Beyond a Reasonable Doubt*, cited, p. 286.
- ⁴⁹ The reason why the percentages suggested by mock jurors in this study are notably different from the percentages suggested in the study previously presented can be found in an ulterior study that shows how students have a much stronger restraint in sentencing. See R. J. SIMON, L. MAHAN, *Quantifying Burdens of Proof, A View from the Bench and the Classroom*, 5 Law and Sociology Review 319, 1970-1971.
- ⁵⁰ See D. U. STRAWN, R. W. BUCHANAN, *Jury Confusion: a Threat to Justice*, 59 Judicature 478, 1975-1976.
- ⁵¹ D. U. STRAWN, R. W. BUCHANAN, P. K. TAYLOR, A. PRYOR, *Reaching a Verdict, Step by Step*, 60 Judicature 383, 1977.
- ⁵² See R. J. SIMON, L. MAHAN, *Quantifying Burdens*, cited.
- ⁵³ Among the many movies that won't be here assessed and that deal with the US' criminal process see: *Anatomy of a Murder*, 1959, by Otto Preminger; *To Kill a Mockingbird*, 1962, by Robert Mulligan; *Midnight in the Garden of Good and Evil*, 1997, by Clint Eastwood; *Runaway Jury*, 2003, by Gary Fleder. Definitely more accurate are the following documentaries by Jean-Xavier de Lestrade: *Murder on a Sunday Morning*, 2003; *The Staircase*, 2004.
- ⁵⁴ *Beyond a Reasonable Doubt*, 1956, by Fritz Lang. The following plot is taken from the website www.imdb.com: "The owner of an important newspaper Austin Spencer (Sidney Blackmer) opposes to the capital punishment and particularly to the prosecutor Roy Thompson (Philip Bourneuf), who has just succeeded in a trial based on circumstantial evidences. When a dancer is strangled and the police have no suspect, Austin convinces his future son-in-law, the prominent writer Tom Garrett (Dana Andrews), to plant circumstantial evidences to self-incriminate, while he would hold pictures, receipts and other evidences of his innocence until the very last moment. Later Austin would begin a campaign in his newspaper disclosing the possibility of sending an innocent to the electric chair. They decide to hide the truth from Austin's daughter Susan (Joan Fontaine) since she could not support the situation under stress. When the jury withdraws from the court in the end of the trial to give the sentence, Austin takes the evidences that prove the innocence of Tom from his safe, but has a car accident and dies. Tom is sentenced to death penalty and tries to convince Susan of his innocence as his last hope".
- ⁵⁵ *The Lawyer*, 1968, by Sidney J. Furie. The following plot is taken from the website www.fandango.com: "Barry Newman stars as Tony Petrocelli, a maverick Midwestern attorney. Petrocelli is hired to defend a wealthy doctor (Robert Colbert), accused of murdering his wife. In the tradition of Sam Sheppard, the truculent doctor insists that the killing was committed by a mystery intruder who knocked him unconscious. Thanks to the doctor's healthy extramarital life, the case receives a surfeit of negative press coverage. Since he's already been tried by the public, it comes as little surprise to the doctor that he's found guilty. But during the appeal process, Petrocelli manages to locate a witness who opens the possibility that the murderer was the husband of the doctor's mistress". To know more about the Sheppard Case from the perspective of the standard of persuasion see L.M. SOLAN, *Convicting the Innocent Beyond a Reasonable Doubt: some Lessons about the Jury Instructions from the Sheppard Case*, 49 Cleveland State Law Review 465, 2001.
- ⁵⁶ ZAZA, *Il ragionevole dubbio*, cited, p. XV.
- ⁵⁷ *Twelve Angry Men*, 1957, by Sidney Lumet, screenplay by Reginald Rose. Rose wrote several stage adaptations of the story that were performed worldwide. A recent remake of this movie is *12*, 2007, by Nikita Mikhalkov.
- ⁵⁸ The plot is taken from the website www.en.wikipedia.org.
- ⁵⁹ For an insightful study of the relationships between dialectic, rhetoric, proof and process see: A. GIULIANI, *Il concetto di prova*, Giuffrè, Milano, 1971; GIULIANI, *Teoria dell'argomentazione*, voce, in Enc. dir., Giuffrè, Milano, 1975, vol. XXV; GIULIANI, *Prova*, voce, in Enc. dir., Giuffrè, Milano, 1988, vol. XXXVII; A. GIULIANI, *Prova e convincimento: profili logici e storici*, in *La prova penale*, Atti del Corso di formazione ed aggiornamento professionale per i magistrati, Quaderni del Consiglio Superiore della Magistratura, 1997, n.98; B. PASTORE, *Giudizio, prova, ragion pratica, Un approccio ermeneutico*, Giuffrè, Milano, 1996.
- ⁶⁰ This well-known case has been followed by the Italian medias for several years. To read the article see the following webpage http://www.lastampa.it/_web/cmstp/tmlPRubriche/editoriali/gEditoriali.asp?ID_blog=25&ID_articolo=4556&ID_sezione=&sezione=.
- ⁶¹ See the webpage <http://www.undicom.it/network/arca/repository/articles/venice61/02092004/cinemaita/view>.
- ⁶² See the webpage <http://www.mentecritica.net/ratzinger-ha-occultato-casi-di-pedofilia-per-ora-solo-un-ra-gionevole-dubbio-non-una-certezza/border-zone/mstatus/525/>.
- ⁶³ See the webpage <http://www.cifas.net/ricerche/credere%20non%20credere.html>.
- ⁶⁴ See the webpage http://www.perceber.com/archives/dicono_di_perceber/index.html.
- ⁶⁵ See P. FRIEDMAN, *Ragionevole Dubbio*, Sonzogno, Milano, 1994 (original title: *Reasonable Doubt*).
- ⁶⁶ See S. BROWN, *Un Ragionevole Dubbio*, Mondadori, Milano, 1989 (original title: *Best Kept Secrets*).
- ⁶⁷ SEAN B. CARROLL, *The Making of the Fittest. DNA and the Ultimate Forensic Record of Evolution*, Baror International, Armonk, New York, 2006. The Italian version is *Al di là di ogni ragionevole dubbio. La teoria dell'evoluzione alla prova dell'esperienza*, Codice edizioni, Bologna, 2008.
- ⁶⁸ On this subject see M. C. AMORETTI, M. MARSONET (edited by) *Conoscenza e verità*, Giuffrè, Milano, 2007.
- ⁶⁹ R. GIACOBBO, *Il ragionevole dubbio*, Giunti, Firenze, 2008.
- ⁷⁰ Id., cited, pp. 9, 10.
- ⁷¹ See, among the others, AMORETTI, MARSONET (edited by) *Conoscenza e verità*, cited.
- ⁷² G. CAROFIGLIO, *Ragionevoli dubbi*, Sellerio editore, Palermo, 2006. The english version is *Reasonable Doubts*, Bitter Lemon Press, London, 2007. The following plot is taken from the website www.monstersandcritics.com: "Set in Italy, defence counsel Guido Guerrieri is dealing with the appeal of Fabio Paolicelli, who has been sentenced to sixteen years for drug smuggling. Paolicelli had initially confessed to the crime and to make matters worse, had been a neo-Fascist thug. Having changed his testimony, Paolicelli is seeking his freedom. Guerrieri is reluctant to take on the case, but is

eventually persuaded by Paolicelli's half-Japanese wife - with whom he eventually has an affair. The story centers on Guerrieri's attempts to prove Paolicelli's innocence in court. It offers lots of insights into the Italian legal system reflecting the author's background as an anti-Mafia prosecutor in Southern Italy".

⁷³ *Id.*, p. 283. The italics present in the original text have been removed.

⁷⁴ *Id.*, p. 284.

⁷⁵ In addition see, in particular: S. E. SUNDBY, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 *Hastings Law Journal* 457, 1988-1989; L. B. SCHWARTZ, "Innocence". *A dialogue with Professor Sundby*, 41 *Hastings Law Journal* 153, 1989-1990; C. R. NESSON, *Reasonable Doubt and Permissive Inferences: the Value of Complexity*, 92 *Harvard Law Review* 1187, 1979; R. J. ALLEN, *Structuring Jury Decisionmaking in Criminal Cases: a Unified Constitutional Approach to Evidentiary Devices*, 94 *Harvard Law Review* 2, 321, 1980; R. J. ALLEN, L. A. DE GRAZIA, *The Constitutional Requirement of Proof Beyond a Reasonable Doubt in Criminal Cases: a Comment upon Incipient Chaos in the Lower Courts*, 20 *American Law Review* 1, 1982; ASHFORD, RISINGER, *Presumptions, Assumptions and the Due Process in Criminal Cases: a Theoretical Overview*, cited; S. SALTZBURG, *Burdens of Persuasion in Criminal Cases: Harmonizing the Views of the Justices*, 20 *American Criminal Law Review* 343, 1983; C. E. PALIERO, *Il "ragionevole dubbio" diventa criterio*, in *Il Sole 24-Ore*, Guida al Diritto, 2006, n.10, p. 73.

⁷⁶ See *People v. Feldman*, 71 N. E. 2d 433, New York, 1947.

⁷⁷ See Tribunale of Reggio Calabria, n.140/2007, February 1st, 2007.

⁷⁸ SOLAN, *Refocusing the Burden of Proof*, cited.

⁷⁹ *Id.*, pp. 138,139.

⁸⁰ See, in particular, S. KRIPKE, *Naming and Necessity*, Harvard University Press, Cambridge Mass., 1980. See also the other works cited in SOLAN, *Refocusing the Burden of Proof*, cited, p. 133.

⁸¹ *Id.*, p. 136.

⁸² *Id.*, pp. 136, 137.

⁸³ *Ibidem*.

⁸⁴ *Ibidem*.

⁸⁵ By establishing a degree of persuasion necessary for conviction.

⁸⁶ On this trade-off see the fundamental decision *In re Winship*. In particular, it is important to remind the concurring opinion of justice Harlan: "If (...) the standard of proof for a criminal trial were a preponderance of the evidence rather than a proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of wrong outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each. When one makes such an assessment, the reason for different standards of proof in civil as opposed to criminal litigation becomes apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an wrong verdict in the defendant's favor than of there to be an wrong verdict in the plaintiff's favor (...). In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty (...). In this contest I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that is far worse to convict an innocent man than to let a guilty man go free" (*In re Winship*, 397 U.S. 358 (1970), pp. 371-372).

⁸⁷ See the Fifth and Fourteenth Amendments of the US Constitution and art. 27, paragraph 2, of the Italian Constitution.

⁸⁸ See WALDMAN, *Origins*, cited.

⁸⁹ On this aspect see: A. GIULIANI, *Il concetto di prova*, cited; GIULIANI, *Teoria dell'argomentazione*, cited; GIULIANI, *Prova*, cited; B. PASTORE, *Giudizio, prova, ragion pratica*, cited.

⁹⁰ See the instruction at section 1096 of the California Penal Code. It contains the two fundamental detected elements of the adherence to the evidence and of the exclusion of fantastic and possible doubts.

⁹¹ G. FLETCHER, *The Right and the Reasonable*, 98 *Harvard Law Review* 949, 1985, p. 15.