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SHIFT IN REASONABLE DOUBT JEOPARDIZES PRESUMPTION OF INNOCENCE

FAYETTEVILLE, Ark- Most Americans learned everything they know about courtroom law from Perry Mason and Jack McCoy, including the cornerstones of the American judicial system - "presumption of innocence" and "beyond a reasonable doubt." But University of Arkansas law professor Steve Sheppard knows that the concept of reasonable doubt is changing, and that change may do away with the presumption of innocence.

"In practice, reasonable doubt doesn't work the way we think it does," explained Sheppard. "It has come to mean articulable doubt, a standard that has been directly attacked by federal and state judges on the grounds that it reverses the presumption of innocence."

Although recognized by lawyers and judges, there have been few attempts to address the problem in judicial opinions. To provoke study of this dramatic change, Sheppard wrote the first article to address this issue. "The Metamorphoses of Reasonable Doubt: How Changes in the Burden of Proof Have Weakened the Presumption of Innocence" appears in the current issue of the Notre Dame Law Review.

Central to the issue is the instruction that a judge gives to jurors. This instruction, in effect, tells jurors how independent they can be in exercising their judgement, what they may and may not consider as evidence and the legal basis for their verdict.

"Throughout history, the fundamental purpose of the instruction was to constrain the juror, to prevent the juror from acting with excessive independence," Sheppard explained. "But the legal consequences of the instruction have changed. Over time the burden upon the juror who would acquit has grown, and so the evidence necessary for the state to convict has lessened."

A legal historian, Sheppard examines how these instructions and the concepts they embody have changed over time. Through the 19th century, reasonable doubt was taken to include an element of moral certainty. This assumed that jurors brought with them personal observations, experience and an understanding of the nature of things and applied reason and thought to evaluating the evidence.

Over time, that concept has changed. In instructing juries, reasonableness no longer means good judgment or "based on reason." Rather, it is taken to mean articulable doubt - a doubt for which a specific reason can be given. This means that a generic doubt - "the prosecutor's case just didn't convince me" - is not acceptable; the juror must be able to point to a specific deficiency in the prosecutor's case or a specific proposition in the defense.

Sheppard cites as an example of this instruction one upheld by the Second Circuit Court of Appeals. This instruction defined reasonable doubt as "doubt for which you can give a reason if called upon to do so by a fellow juror in the jury room."

"One of the difficulties of the requirement of articulability is that it hinders the juror who has a doubt based on the belief that the totality of the evidence is insufficient," said Sheppard. "Yet, this is precisely the circumstance in which the rhetoric of the law, particularly the presumption of innocence and the state's burden of proof, require acquittal."

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Sheppard points out that this standard is subject to infinite reduction. If a juror says that a specific witness is not credible, for example, he might be asked to articulate why the witness was not credible. It also creates a potential barrier to acquittal for less educated or skillful jurors.

"A juror who lacks the rhetorical skill to communicate reasons for a doubt is then, as a matter of law, barred from acting on that doubt," he added.

Although this concept of reasonable doubt has become widespread, many judges and legal experts are becoming uncomfortable with its impact on other aspects, particularly the burden of proof and the presumption of innocence. As Sheppard points out, prosecutors, who often provide written suggestions for jury instructions, have a vested interest in seeking to diminish the burden of proof on the state.

The American judicial system is based on the presumption of innocence - a person is innocent until proven guilty. That places the burden of proving the person is guilty upon the state. But changes in the standard of reasonable doubt mean that the juror must presume that the prosecutor is correct unless the juror can articulate a reason for doubting a specific point in the state's case.

"The state no longer has to prove its case, the defense does," Sheppard explained. "The courts have moved the jurors' goal from a vote for the state if the state can convince them of a fact to a vote for the state unless the defense can convince them of a certain type of doubt."

This creates a tremendous imbalance, taking away the presumption of innocence and replacing it with a presumption of guilt. A juror who votes to convict only needs to say, "I think he is guilty," and does not need to give a reason. But a juror who votes to acquit must articulate precisely why he doubts the state's case.

While this may have devastating consequences for a defendant, it also has repercussions for the jurors. Sheppard points out that this instruction on reasonable doubt limits the discretion of the jurors, which might be "fundamentally immoral" because it gives the jurors responsibility for an act without giving them discretion to act.

"The juror has been given a task that demands only one power, the discretion to reach an independent judgment. A limitation on the judgment the juror may apply to the evidence presented in the trial is a limit on discretion," explained Sheppard. "There is no question that the limit of juror independence is an immoral burden placed by state officials on the citizen-juror."

The moral issue arises because, as Sheppard says, "the juror is blamed for the law's errors." He points out that a judge can set aside a jury verdict only if it is so outrageous that no reasonable jury could actually have reached that verdict.

"The jury is a scapegoat for the law. The juror immunizes the police, judge and lawyers from mistakes prior to trial and mistakes made after the trial," said Sheppard. "An actual error, the wrongful conviction of an innocent, is simply the fault of the jury."

Currently, instructions to juries on reasonable doubt not only limit the independence of jurors, but they may add confusion about the appropriate method of judging the evidence. Although this has been directly attacked by federal and state judges on the grounds that it reverses the presumption of innocence, no attempt has been made to quantify the effects of reasonable doubt instruction on actual juries.

"The idea that a layman is better suited for the job of assessing guilt than is a specialist is ancient and significant in the culture," Sheppard explained. "That the independence of a citizen in this role might be limited by the specialists, and that the specialist might have a discreet thumb on the balance in that limitation, does not fit well with the cultural role of the jury."