

TURNER:: Hello and welcome back to Wisconsin Law and Action, a podcast where we discuss new and forthcoming scholarship with University of Wisconsin Law School professors. I'm your host Kris Turner, and my guest today is distinguished professor Michele LaVigne. Thank you for joining me, professor LaVigne.

PROF. LAVIGNE:: Thanks for having me.

TURNER:: Oh, absolutely, anytime. Today professor LaVigne will be talking with me about her new article Under the Hood: Brendan Dassey, Language Impairments and Judicial Ignorance, which she coauthored with Dr. Sally Miles, a Madison based speech pathologist. Okay. So let's begin with some background. Could you tell me a little bit about Making a Murderer, what it is? And Brendan Dassey's role in it?

PROF. LAVIGNE:: Sure. And it couldn't be more timely since we're sitting here the day after Brendan Dassey's lawyers have filed a petition for clemency with governor Evers. So back in 2005 Teresa Halbach was killed. And Steven Avery was charged, ultimately about six months later, his nephew, his 16 year old nephew, Brendan Dassey, was charged. He was convicted based primarily on his confession. When Making a Murderer came out, everybody got to see what that confession looked like. And what you saw was an impaired kid being cajoled, harassed, harangued, and coerced into confessing in a way that was honestly nothing short of disgraceful. In a cynical mood you could say this kid would have confessed to killing Abraham Lincoln. It was really something to see. And the show is also about Steven Avery. People really are mixed on Steven Avery. Do they think that he was framed? Do they not? But people were almost unanimous that what happened to Brendan Dassey was a disgrace and he is still in prison right now.

TURNER:: And so the petition that's going in front of governor Evers, what are they trying to do with that?

PROF. LAVIGNE:: They've asked either that his sentence be commuted because Brendan was given a life sentence with first eligibility for parole, I think at 45 years, when he's almost 60. Or for a pardon. Sally Miles and I are both deeply honored that there's a lot of discussion of our scholarship and our article actually in that petition.

TURNER:: That's great, yeah. Because this article takes a deep, deep dive into what just went wrong and what was really, I'm going to stick with wrong as my adjective here.

PROF. LAVIGNE:: Yes.

TURNER:: About the techniques used to interrogate Brendan Dassey. So I think we know this, but I'm going to ask you anyway, what inspired you to write this particular article?

PROF. LAVIGNE:: Well, you actually have to back up about 10 years. I had started doing some work on language impairments. I found out almost by accident that a huge percentage, yeah, really a substantial percentage of people coming through the criminal and juvenile justice systems have impaired or underdeveloped language skills. And not surprisingly it affects them in everything from the way bail is set, to the way they deal with their lawyers, to the way that they're sentenced. At the same time, the legal system actually doesn't know very much about these. So I started doing some research on this. I wrote a couple articles about it.

PROF. LAVIGNE:: Along comes Making a Murderer and I watched it. I specifically watched episode four where they show Brendan being interrogated. And like everybody else, I was pretty shocked at what I saw. But I thought it would be really interesting to have a speech language perspective on it. So I contacted Sally Miles who has a PhD in speech language pathology. And I said, "Would you take a look at this?" And she's the kind of person who wouldn't in a million years had been watching Making a Murderer. Well, she was beyond shocked, the next thing she knew, she had watched it all. She'd gone online and found the interviews. And she really was horrified at what she saw. She saw a clearly impaired kid.

PROF. LAVIGNE:: And as a PhD level clinical speech language pathologist, she knew what she was looking at. She saw someone who struggled with processing. Someone who was struggling with understanding, someone who was struggling with expression being buffaloed by two cops who frankly never stopped talking and more frightening to her was that he was in there by himself. Based on that, we started talking, she said, "We could do a discourse analysis. We could analyze what was said in there." And she had access to a language transcription company that uses software that was actually developed here. It's based in Madison. It was developed by somebody from our communication sciences and disorders department here at the University of Wisconsin.

TURNER:: Great.

PROF. LAVIGNE:: And we had it done, the numbers came back and they were shocking. And the next thing you know, here we are.

TURNER:: Yeah. And the numbers, I agree is what really jump out at you in this article to see the data that is underlying, just how this interview went and how this interrogation technique really works. So when you were writing this, what was most surprising to you about the data or about the writing process itself? What are your conclusions?

PROF. LAVIGNE:: Well, you start with this was a true collaboration. Sally really wasn't familiar with the legal system. And so we had to share our perspectives back and forth. So for example, I would talk to her about what the police were doing. And I kept using the term Reid Technique, which is a common and controversial interrogation technique used primarily in the United States. Actually, most other

countries don't use it because it's considered unreliable and inherently coercive. And she kept saying, "You keep calling this a technique, this can't be a technique." That interviewing in her world is actually highly regulated by rules. That it involves constant training, retraining, observation, and it's as much of a science as it is a so-called art. There really our rules for doing this, especially for interviewing kids and super especially for dealing with kids who have an impairment like Brendan has. And so she kept saying, "You're calling it a technique. This can't be a technique." I said, "No. It's a technique." And she said, "No. It's not a technique." So we went back and forth that it was a technique.

TURNER:: Right. It's challenging because technique in one world does not equal what technique means in another world.

PROF. LAVIGNE:: Yeah, right. That's right. She thought this was sheer madness that this such a thing was allowed. So that was surprising. The other thing is it was actually quite easy to find out how impaired Brendan was. It was in the court record. There hadn't been much said about it. They kept saying he has an intellectual impairment, but you never really knew much about it. But there sitting in the record were his special ed records. And specifically there was a speech language assessment which was actually part of his special ed program. And you could see that this kid was in the bottom of the bottom of the bottom. He could function in a fashion, but his ability to deal verbally is severely, severely compromised. And there it was sitting right there in the court record.

TURNER:: Right. It's all right there. They're not hiding the ball here, it's just out there.

PROF. LAVIGNE:: No. Yeah. Except nobody knew what that ball was.

TURNER:: Yeah. So you're sitting there and it's almost like a black box, we have this piece of evidence, but what does that mean? Doesn't matter, we're going to interrogate this person Brendan like it's just our regular technique of the day.

PROF. LAVIGNE:: And I don't know what the police knew. They maintained that they could tell he was fine. And some of the things they said were so odd. On post-conviction, the police were asked, "Did they recognize that he had limitations?" "No. He seemed fine. He was in regular classes. And he takes driver's ed." Driver's ed? So he can be fine in interrogation. It was crazy.

TURNER:: So before we get even deeper into this article, I want to take one step back and talk about your background a little bit.

PROF. LAVIGNE:: Okay.

TURNER:: You were talking about how you're discussing with Dr. Miles how things work in the criminal procedure world. Can you give us a little bit more background on you and what makes you so qualified to discuss that with Dr. Miles?

PROF. LAVIGNE:: Well, I grew up as a public defender, before I came to the law school, I was a public defender. And I represented, I don't know how many thousands of people. I came over to the law school and continued work representing individuals who are incarcerated in the Wisconsin state prison system. I'm now in charge of the public defender project. You don't have to scratch the surface much to see that in the end, I'm a public defender.

TURNER:: Right, right. It boils to the top as you're listening too. I was lucky enough to be in professor LaVigne's class and it was not easy. It was easy to identify the public defender that dwells within professor LaVigne.

PROF. LAVIGNE:: Yeah, yeah. No, it doesn't hide.

TURNER:: And that's okay. I think that's a positive thing in this case especially. So what do you think distinguishes this article? What will make this article stand out when you're talking about Making a Murderer and Brendan Dassey in particular. Because there's a lot of stuff that talks about this already. So what makes this much more special?

PROF. LAVIGNE:: Well, this isn't an attempted, it succeeds because of Sally's amazing work in quantifying and describing in detail exactly what his disability is. It isn't a generic term, he's got intellectual limitations or intellectual impairments, cognitive impairments. No, we know exactly what they are. We know how deep they are, we know how they operate. And it also quantifies exactly what the police did. You can look at it and say, "Boy, it seems like that's crazy. It seems like they're forcing him to talk. It seems like they're doing most of the talking." Oh no, now we have the numbers. We have the numbers. So in a three hour interview they asked him over 1500 questions. It came out to like six to seven questions a minute. For a kid who's got a severe verbal disability, you might as well hit him over the head with a hammer six to seven times a minute.

TURNER:: I don't want to be asked that many questions by anyone, especially over such a short period of time.

PROF. LAVIGNE:: No you don't. No you don't. And here it is high stakes. And it was just rapid fire. Sometimes you'd get three, four, five questions coming in at a time and it's like, "Well, what do you want him to answer? What are you asking him?"

TURNER:: This especially seems like you said, quantify. That to me seems like the most distinctive thing in this article because a lot of law scholarship, it's qualitative and you're saying, this is what the cases are saying, here are the doctrines. Now we have more quantification here.

PROF. LAVIGNE:: Right. Really for the first time you can see it. If you look at the article, you'll see graphs and you'll see, here's the number of times Brendan spoke. Sally broke down the kinds of questions that were asked. Because in interviewing protocols there's very strict rules about the kind of questions that you're supposed to ask.

They of course did it completely backwards and filled this interview with every kind of question you're not supposed to ask. But there it is. It's in there. There's the numbers, you can see it, you can look at it and you can now get away from an impressionistic sense, now to a quantitative sense of, "Oh yeah, this was bad."

TURNER:: Is there, let's say you have someone that just says, "Give me the very brief version of this article." Is there one part of the article you say here is where you should go to really see the most either outrageous or most effective parts of what your argument is?

PROF. LAVIGNE:: Can I look at this for a minute?

TURNER:: Sure.

PROF. LAVIGNE:: Let me look at the article because of course I think the whole thing needs to be read.

TURNER:: Right.

PROF. LAVIGNE:: And people need to be outraged but I certainly, there's a couple parts in here people need to see the graphics that describe the level of Brendan's disorder. And I think even people who aren't familiar with language disorders will get a quick idea. If you look at the bell curve, he's way down at the point, just about at the point at which the curve disappears down below the basic line. But then if you look at part seven, the interview assessment and analysis, even without knowing the rules for a good interview, if you look through there where you can see Sally taking example after example after example of multiple questions in one, of leading question after leading question after leading question, multiple choice questions, of her visually comparing best practice and what happened here, you can't miss it. You can't miss it.

TURNER:: When you see it this way, visually it seems very explicit what was going on.

PROF. LAVIGNE:: Right. And that's one of the reasons I like it so much because it goes away from the descriptive and impressionistic to, "Here it is. You can't get around it."

TURNER:: Facts are facts here. These are the numbers.

PROF. LAVIGNE:: And numbers are numbers.

TURNER:: Exactly, yeah. That was what I got out of this too, was like, "This is it. You can't argue around this. Here are the numbers."

PROF. LAVIGNE:: No.

TURNER:: This is what is happening. You had mentioned the Reid Technique earlier in your answer. Can you go into a little bit more detail about what the Reid Technique is and how police apply it?

PROF. LAVIGNE:: Sure. First of all, the term technique in this context is a complete misnomer. In the professional world, a technique is actually scientifically validated, tested, adjusted, anybody who does it is observed, is tested. They're constantly retested, retrained. None of that happens here. This so-called technique is based upon the folk wisdom that the police are able to decide whether or not a suspect is telling the truth, and they do that by supposedly behavioral observation. Well, cops are no better at telling whether somebody is telling the truth than you, than me, than the guy in the street. But it starts with that.

PROF. LAVIGNE:: Once they determine that somebody is telling a lie, that they are not truthful. In other words they decide whether they're guilty, they then come onto the hardcore technique, which is we confront you with your quote unquote evidence of guilt even if we're making it up. As police sit around and talk about our superior knowledge, we already know you did it. We know you did it. If you look at the interview with Brendan, I don't know how many times they said, "Oh, we already know you're guilty. We know. We already know all about it." They are trained to talk over the defendant, over the suspect. They are trained to interrupt. They don't give them a chance to tell their story. They basically just harangue and harass telling them it's useless to try to deny because we already know.

PROF. LAVIGNE:: And then they try to show them how much better it will go and then they start to minimize. There's a number of different psychological, if that's the term you want to use, techniques they use to convince somebody to go along. The most damaging thing about the Reid technique is the number of times that it's implicated in false confessions. People confess to things they didn't do in response to the Reid Technique. It is not accepted in any other country. Canada doesn't use it. The UK doesn't use it. It is widely regarded as so deeply flawed, so inherently coercive that most countries are just saying, "We don't use it. We simply don't use it." That is not true in the United States.

TURNER:: This is very much not underlying at all, but I'm going to pull it up anyway. So what happens with this technique with someone that has an impairment like Brendan Dassey?

PROF. LAVIGNE:: He's a sitting duck. This kid, I'll just talk about him. But there's a whole lot of people like him. That's one of the things we know from the research is that there's a whole lot of Brendan's out there. He never stood a chance. These people, they pretended to be his friend. They actually went so far as to say, "We're not police officers here. We're like your father." They talked about how much they cared about him. They went on and on and on and they just pummeled him with words. And the reviewing court said, "Well, they didn't yell at him. They didn't threaten him." They didn't have to. It wasn't necessary. They

weaponized their language and at the end, sure he said whatever they wanted him. He wanted it over. And to show the extent to which he didn't get it when it was over. He says, "Well, can I go back to school now? Because I have a paper due and it's sixth period." Supposedly this kid has just confessed to rape and murder. And he's saying, "So yeah, I got a paper due."

TURNER:: Yeah. That seems to me that if you know that you're confessing to something like that, you're not worried about a paper that is due that day.

PROF. LAVIGNE:: No, no. And then later, then he tries to recant. And he says to his mom, "They got to my head." And it is tragic. It's tragic that this was allowed.

TURNER:: And that speaks to another aspect here that you discuss a little bit in your paper about how Brendan Dassey's in there by himself. And there's no one there.

PROF. LAVIGNE:: Right. And the police say they talked to his, they asked his mother. His mother didn't understand this. And if you go to another country like England, he would never have been allowed to be in there by himself. In Canada, he wouldn't have been allowed to be in there by himself. It could not have happened. And he was 16, and he was a young impaired 16. Forget madness, this is cruelty.

TURNER:: It seems that this technique, can you talk a little bit about why this technique is not used in the UK or in Canada versus in the US?

PROF. LAVIGNE:: Right. They have discovered that it is coercive and that it gets you unreliable statements. Like I said, this kid would have confessed to killing Abraham Lincoln. And that's not to say they don't interrogate in the UK, and that they don't interrogate in Canada. But they want to use methods that are the most likely to get reliable voluntarily given sustainable confessions, if indeed a confession is to be made. They want to know what happened.

TURNER:: Yeah. I think I would want my police to find out what happened, for sure, yeah.

PROF. LAVIGNE:: Exactly, exactly. And so they have a mechanism in the UK called the Peace Method where they actually follow some of the rules of interviewing. Sit back, allow this person to talk, allow them to talk, allow them to talk. Sometimes when someone talks after a while, they dig their own grave. But we want to find out what they know. We don't let the police decide what happened and then have them go after it in a tank, which is essentially what happens here.

TURNER:: So this was released earlier this year in spring.

PROF. LAVIGNE:: Yes.

TURNER:: I believe, right?

PROF. LAVIGNE:: Right.

TURNER:: So what kind of reaction have you gotten so far and what kind of reaction do you hope to get going forward?

PROF. LAVIGNE:: The reaction so far has been very, very positive. No doubt, because it's about Brendan Dassey. We show up on Facebook, we show up on Twitter. I want people anywhere and everywhere to read it. Do I hope it helps Brendan Dassey? Absolutely. But there's a bigger issue in that I would really like this information to start going out to judges, to lawyers, to the police. Let's start to incorporate this. As lawyers, we use language, that's all we've got. We don't take blood, we don't have a hammer, we don't have nails. We know almost nothing about it. We know very little about how language operates. We have almost no information or knowledge about how language is developed. And we certainly don't know what it means when a person fails to develop language. And that's what you had here.

TURNER:: Right. And that leads to the miscarriage of justice that you're [crosstalk 00:20:59]-

PROF. LAVIGNE:: Oh, it drives right to it.

TURNER:: Yes.

PROF. LAVIGNE:: Right. It was funny the way this article came about, Sally and I had done the research. We'd talked about it, I'd done some presentations about it. To be honest, we'd be moaning going, "Oh, we're going to have to write this thing." A little over a year ago, I got an email from the editor of the Miscarriages of Justice edition of Albany Law Review, "Did we have anything? And would we be interested in submitting it?" We said yes. It gave us a time limit. And the thing got written surprisingly quickly because the data was in and because we had actually talked this thing to death, we knew what it meant.

TURNER:: It's just a matter of putting word to paper here.

PROF. LAVIGNE:: Yes, we just had to sit down and do it. And so I tell the story of how on Christmas day I sat in my pajamas with my coffee, and my little dog down at my feet and I said, "I'm getting this sucker done." And it was in by the end of the year.

TURNER:: Wow. That is an amazingly quick turnaround for this article like this. I'm amazed. I didn't know that ahead of time of this interview. I'm even more impressed now.

PROF. LAVIGNE:: Yeah, I know. Understand like we had the data, we had the graphs because I had used them when I was doing presentations. And we really had talk, talk, talk, talk, talked about what this meant. And we talked about how would this look,

how would this look? But if I think about it, we were first contacted by Albany in July. And by the end of December it was out. We did have one thing we added later on, we added a little bit of a discussion of a particular aspect, but over and out, done.

TURNER:: And obviously you had the passion that was right [crosstalk 00:22:44] too. You talked it through, you had the data, you had everything. And you both had the passion to get this thing published out there.

PROF. LAVIGNE:: Yes, yes. And the other thing is Sally and I are radically different people in so many respects. But if you look at this article, other than what's being discussed in a particular place, you'd have a hard time knowing who wrote what. Our writing, our styles, we were perfect collaborators.

TURNER:: Yeah. Sometimes you read an article that's coauthored by two, three, four people. And you're like, "All right, that is where that person ended, and that person began."

PROF. LAVIGNE:: Yes, yes.

TURNER:: That is not the case here.

PROF. LAVIGNE:: No, no. We were pretty proud of that. And I'm going to be honest, I still read through it and go, "This is good."

TURNER:: That's a good feeling. Because sometimes you get your stuff published and you're like, "Oh, I just published"-

PROF. LAVIGNE:: Yeah. What was I thinking with that? What was I thinking with this?

TURNER:: Yeah. And not the case here. You're like peanut butter and jelly, these two writing together.

PROF. LAVIGNE:: Yeah, I think so. I think we were, I think we were.

TURNER:: Good. That's great. So you talked about getting the word out to judges and attorneys and public defenders. Where can people find more about your work in particular?

PROF. LAVIGNE:: Well, if you go to my webpage at law school, then you go to publications, you will see the links to everything I've ever written. So I've got an article about deafness, which is actually how I started working in the whole language issue. And then the first two articles I wrote about language impairments, you can find them on there. The first one from UC Davis is a general discussion of language impairments, where they come from, how they show up in the criminal justice system. The next one is about the effects of a language impairment when a

client is dealing with a lawyer. Because I think that's a place where there will be major impact.

TURNER:: Right.

PROF. LAVIGNE:: And it might be just sane lawyers are really important, but the truth is the quality of communication with a client impacts justice in ways we actually can't begin to measure. And so you can see it starting to narrow down. And then the last thing that will show up will be this one.

TURNER:: Great. And we will link both to that faculty page. And we also link to the Albany Law Review on your publication SSRN, and in the podcast as well.

PROF. LAVIGNE:: Great. Good, good, good, good. And if people have questions, my email's right in there. They can email me and I'm happy to direct them to resources or answer the questions, or do anything I can because most people don't know anymore who Aimee Semple McPherson. But she was an old style evangelist who trumped around the country wearing a white dress and talking in tent revivals. Well, that's kind of who I feel like. I'll go anywhere and everywhere to talk about this because language impairments and the ability to communicate matter so much as we can see with this kid.

TURNER:: All right. Well, I'm glad you took the time to talk with me not in a tent outside-

PROF. LAVIGNE:: No, no.

TURNER:: ... but here in the law school. That was very nice of you to come visit me here the library here.

PROF. LAVIGNE:: Thanks. Thank you. Thanks.

TURNER:: Well, thank you all you listeners out there for joining us on Wisconsin Law and Action. We've been talking with distinguished law professor Michele LaVigne about her article Under the Hood, Brendan Dassey, Language Impairments and Judicial Ignorance. Professor LaVigne's article can be found on her SSRN page. And a link to that SSRN page along with all her other works, to her faculty biography will be available along with this podcast at wilawinaction.law.wisc.edu. You can subscribe to the Wisconsin Law and Action podcast in the Apple podcast store, Stitcher, or Google play. Or find our full archive at you guessed it, wilawinaction.law.wisc.edu. Thank you for listening, and please join us next time as we discuss constitutional law with professor David Schwartz and his new book, The Spirit of the Constitution. Until then, happy researching.