

TURNER:

Hello and welcome back to Wisconsin Law in 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 Professor Cecelia Klingele. Professor Klingele is here today to discuss two articles that were published earlier this year. The first article is from Behavioral Sciences and the Law, titled Making Sense of Risk. The second article is Labeling Violence, and was published in the Marquette Law Review. Both articles examine controversial but increasingly important aspects of our criminal justice system, risk assessment tools and the diverse punishments for violent and nonviolent criminals. Thank you for joining the podcast today, Professor Klingele.

PROF. KLINGELE:

Thanks for having me, Kris.

TURNER:

It's absolutely my pleasure. So before we jump into our discussion of these two most recent articles of yours, let's start as we always do on this podcast by learning more about your background, specifically your research and your scholarly writing interests.

PROF. KLINGELE:

Sure. So I write very broadly in the area of criminal justice. And I would say that my interests are primarily focused on managing human behavior. Deviance in particular. Punishment and sentencing are only one way in which we do that in the world. But they're a way in which I'm very interested in the differences, for example, between the way that we think about deviance in the context of parenting or supervising employees and the way we think about it in the context of punishing people for criminal behavior.

TURNER:

With that, let's get to your first article, starting with Making Sense of Risk. To begin, what are these risk assessment tools and what are they used for in the criminal justice world?

PROF. KLINGELE:

So risk assessment tools, particularly what we call actuarial risk prediction tools really began in the field of insurance and have made their way into all kinds of settings, including doctor's offices and judicial sentencings. So what these tools do is try to rely on large aggregate sets of statistics to predict the likelihood of people's future behavior. Now we can't, of course, say what you will do tomorrow afternoon. You probably don't know yet what you will do tomorrow afternoon with certainty. But what we could do is gather a lot of information about you and compare it to people who share many of those same characteristics that you do. And we might be able to make a prediction about what you might do tomorrow afternoon. It might be accurate. It might be inaccurate. Again, it can never be perfect because we don't know what any one person will do.

PROF. KLINGELE:

That said, often looking at these actuarial tools allows us to be more accurate in our guesses about the risks that people pose of engaging particular behavior. And in the criminal justice system, these tools are now being used in a number of ways from street level diversion by police officers trying to decide

whether or not to make an arrest in a particular situation, to court commissioners deciding whether or not to grant someone release on bond and if so, what bond conditions to impose, and judges and correctional officers imposing sentence and supervising individuals in prisons or in communities.

TURNER:

These are very high stakes situations, obviously where people are being released on parole or being arrested in the first place. I also heard the word inaccurate, accurate guesses in that answer a little bit. So can you tell me how these tools might be misunderstood or misused sometimes in the criminal justice system?

PROF. KLINGELE:

Sure. So I think to begin with, we need to understand the fundamental premise that I already shared with you, which is the idea that our predictions about large groups of people and their tendencies on average are different than a prediction about what a very particular person is likely to do. And the more particular we get, the less accurate we tend to be because there are so many variables involved in human decision-making. It's really essential that people within the criminal justice system, lawyers, judges, correctional, officers, police officers, understand what the tools they are using do and what they don't do. And my experience training people in the field on this topic is that often there are some really fundamental misconceptions that state actors have about the tools they're using. And so I think if we're going to be using them in a way that is helpful and fair, that improves equity rather than undermines it, we need to be doing a better job of helping people understand how these tools are created and what purposes they can validly serve.

TURNER:

It sounds like some of the information they use to gather this risk assessment tools are maybe a little bit invasive, especially in the privacy end of things. Is there any concern toward that end from the criminal justice system?

PROF. KLINGELE:

So different tools collect different information. And many of them try to collect information about people's family backgrounds, their employment history, medical conditions, things of that nature that might be private. But the reality is that most of the statistical predictive power of these tools lies really in two very simple variables, which are the age at which a person was first arrested and that person's criminal history. And although other factors may be helpful in bringing risk levels up or down, those two facts, which are usually matters of public record, are the ones that actually seem to be the most predictive of future engagement in the criminal justice system.

TURNER:

One specific aspect of your article that really jumped out at me was the difference between capture and conduct. It was especially illuminating for me because I felt like I was a teen who at times may have avoided capture and was lucky that it was just the conduct and not the capture. What are some of the underlying factors that differentiate capturing conduct and how that affects risk assessment?

PROF. KLINGELE:

Sure. So this would be one of those fundamental facts that I write about in this article that I think we often overlook and allow ourselves to forget. And it's important not to do that. So in the piece I write about how these instruments purport to tell us the risk that a person will re-engage with the criminal justice system in some way. Some tools predict the risk of rearrest within a certain period of time. Others predict the risks that a person will be re-convicted of a crime or a specific crime in a particular period of time. And still others purport to predict the risk that a person will be punished by the criminal justice system, either as a result of a new conviction or as a result of revocation from some form of community supervision.

PROF. KLINGELE:

But regardless which tool we're using and what it purports to predict, we often shorthand the results of risk assessment tools by saying that they predict the odds that someone will engage in criminal conduct. But in fact, that is not what they do in any way. All three of the examples I gave of different metrics that we might be predicting are metrics that involve the risk of being captured for committing or allegedly committing a crime, not the risk that you will in fact engage in crime, that your conduct will be criminal. Because as you point out, the reality is that the vast majority of criminal conduct goes undetected by the legal system. And even when it is detected, it's not always recorded in a formal way.

PROF. KLINGELE:

So what we're doing isn't predicting whether people will commit crimes or not. After all, one can imagine that the very best criminals are never captured at all. So their actuarial risk would appear to be extraordinarily low, when in fact it might be exceptionally high. And remembering that these tools are telling us about your odds of getting caught rather than your odds of doing something wrong, I think is important for purposes of equity and fairness, that we need to remember that there are people who are more likely to be entangled in the criminal justice system than others. Sometimes that's about their actual underlying conduct, and other times it's about the environments in which they live and the degree to which their behavior is being policed.

TURNER:

So it just rolls perfectly into my next question here about how context matters with all things, especially when it comes to the criminal justice risk assessment. How should legal decision makers assess risk when determining these future outcomes then, taking context into consideration?

PROF. KLINGELE:

So that's a great question. And I think fundamentally we have to stop at every decision point and remind ourselves what legal question any particular actor, a police officer or a prosecutor or a judge, a correctional officer is supposed to be asking. And then ask ourselves whether risk is relevant to that decision. So for example, if I'm making a bond determination for a person who's been arrested, the most important consideration is whether or not that person is likely to appear in court to answer for the charges against him or her. The risk of future offense of any kind, may be a secondary consideration, it may not be a consideration at all. And as a judge, I should be focused on the legally relevant question, "Is this person going to appear?" And then depending on the charges against the person, it might also then become important whether I think the person will pose a risk to the community on release. If I'm making a sentencing decision, then I have to ask myself, "Does risk of future funds matter or not?" It will probably depend on what I am punishing the person for.

PROF. KLINGELE:

If really the purpose of my sentence is simply to hold a person accountable for something that they've done wrong in the past, and I'm not particularly concerned about future behavior then the results of a risk assessment tool are irrelevant to my decision. If in fact the person's behavior is such that I am concerned about future actions, well then a risk tool might be more relevant. But not because it tells me what this person will do in the future. It can't. Instead, it can be useful to check my natural intuition about how risky this person is. Because what we know from study is that very frequently judges and other decision makers tend to over predict someone's risk of re-engagement in the criminal justice system. And in those cases, it can be helpful sometimes to have a more objective tool to sort of check your gut instincts against in order to help you make sure that you're making a decision that is fair and grounded in what we do know about a person, rather than in some form of bias.

TURNER:

It sounds like these risk assessment tools are kind of a double-edged sword in many ways; when used correctly, they are a powerful tool to help check the intuition or for over prediction, but also they could cut the other way as well. So generally, what recommendations do you have for legal practitioners who are using these risk assessment tools?

PROF. KLINGELE:

Well, I wrote this piece, again, because I'd had so many encounters with people in the system who were using these tools on a regular basis and still had some real serious misconceptions about what they did and didn't do or what they were actually telling them. And so I think the first thing that we need to do is make sure people using these tools are properly trained to understand their limitations. And then secondarily, I think it's really important that as we develop these tools and implement them in the field, and that certainly is something that is happening, whether you think it's good or not, we need to create tools that are transparent, and that lawyers, judges, and others who are using them can examine fully in order to identify places where the tools themselves may be feeding bias or driving inequity in ways that are not fair and therefore need to be corrected.

TURNER:

Now let's move on to your second article titled Labeling Violence. Your article starts with a great quote from Judge Doyle, which I just have to read out loud cause it was really wonderful quote. "I think the big points is that there are not two kinds of humans. One, the kind that commits crimes and gets imprisoned, and another the kind that does not commit crimes. I think there is but one kind of human beings, all of whom are a mix of good and bad, all of whom do a mix of good and bad things. Ask for the bad things, comparatively few of them have been labeled criminal. There is an infinite number of ways not declared crimes in which without justification we inflict pain and sorrow upon and exploit one another and destroy the thin envelope of air and water and soil in which we live." Great quote, I need to know, why choose to begin your article with that quote?

PROF. KLINGELE:

So that quote shows up on a poster that hangs in the chambers of my former boss, Judge Barbara Crabb in the Western District of Wisconsin. And she had made the poster, which has several Judge Doyle quotes on it, I think, for one of his judicial anniversaries. And I used to sit, my desk was really close to where that poster hung and I often read it and it really stuck with me. And now I actually have a copy that hangs in my office too from Judge Crabb. And I think it really invites us to reflect on a fundamental

truth, which we actually mentioned earlier, right? Many of us do bad things. And some of those things are criminal and some are not. And much of the time when people commit crime, it goes undetected and unreported and therefore unpunished.

PROF. KLINGELE:

But even when we're not committing crimes, there are all sorts of ways in which every one of us harms other people. Often significantly. And it is very easy when we start classifying behavior as criminal or non-criminal and people as criminals or non-criminals to create this deep dichotomy between us and them, the good guys and the bad guys, the people who commit crime and the people who are upstanding citizens. And I don't think that's right. I think it's wrong. And I think that it invites us to lie to ourselves in ways we find comfortable about our own capacity to do harm. And it allows us both to sometimes over condemn and over punish people who do commit crime and to under identify an under-report and under-check our own damaging behavior, including behavior that manifests in the criminal justice system itself through excessive violence by state actors.

TURNER:

If only the world were so clean as to put people in a good guy bucket and a bad guy bucket and just let it be like that. But unfortunately the world is never going to be that clean. And I think that this article helped explain why these labels are difficult to make things worse in many ways. Are there any patterns across different legal jurisdictions that tell us how or why these labels are applied to certain violent acts while others are not?

PROF. KLINGELE:

Not really. There's a lot of diversity. So one of the things I discuss in this piece is the different ways in which we identify what behavior counts as violent. And it was interesting to me to see, for example, that social psychologists are going to define it a little differently than evolutionary biologists, who will define it differently from folks who work in international human rights. But that the law itself internally has a lot of variation in what behavior particular jurisdictions label violent. In some cases, when we talk about violent crime, we really are talking about the prototypes of violence; interpersonal physical force that hurts individual people, murder and rape and the kind of crime you think of when you hear the word violence as a lay person.

PROF. KLINGELE:

Other times we're including behavior that causes harm, but maybe does it not intentionally. So reckless injury, someone may not be trying to harm another person, but nonetheless, that is the result. In other cases, it's even more attenuated behavior like drunken driving, which may involve, again, no desire to cause harm of any kind, and yet it manifests potentially in serious injury. And in still other cases, we allow people to be labeled as violent criminals for their participation in group activities in which one member of the group may resort to physical violence of which others had no warning or were wholly unaware. And yet all of them, because they are a group participants in some crime, can have liability for the violence of one of their members.

PROF. KLINGELE:

And there's just tremendous variation from one jurisdiction to another in the breadth of that definition of violence, which usually comes up when we're talking about penalty enhancements, that often we punish people who are labeled as violent criminals more harshly, both at the time they are being

punished for the initial crime, and then sometimes down the line too they can be subject to enhancements for later crimes that they may commit.

TURNER:

You note in the article itself and just now in your answer about how important it is when compiling statistics on violence to look beyond just criminal justice statistics. Why is it so important to examine these other areas?

PROF. KLINGELE:

As we mentioned a little bit earlier, often when we talk about crime, we begin to think differently about human behavior than we do in other areas of our lives, where we also are managing human deviants; parenting, being an employer, being a teacher, these are all contexts in which human behavior, including problematic behavior needs to be managed. But often we don't code even behavior that could be considered criminal as a criminal justice problem if it arises in a different context. For example, you could have someone with a serious behavioral health challenge in an emergency room who is acting out. And although everyone needs to manage potentially physically aggressive behavior, it is the exception and not the rule that police will be summoned and a person will be charged and prosecuted for battery in that context.

PROF. KLINGELE:

Instead it will be dealt with as a medical emergency and trained staff will work on deescalating the individual, helping him or her become voluntarily compliant. And again, handling it as a medical challenge rather than a criminal justice challenge in the vast majority of situations. And I think looking at what other disciplines tell us about the prevalence of problematic behavior, especially aggressive behavior can tell us a lot about how commonplace it actually is for people to engage in behavior that when it comes on the radar of police gets called criminal. But often it never comes on the radar of police at all, because again, we're handling it in different ways in different contexts. And I think that that's important for us to know, both because tells us how often human beings actually do engage in this kind of problematic behavior, and also because it suggests that maybe treating violent criminals with that label and imagining that they are very, very different from the rest of humanity is not true.

TURNER:

One of my favorite parts of doing this podcast is I get to look at a whole bunch of different statistics and research that I normally would have missed or not had pulled up to me. And this is one of my favorite questions to ask if anybody on the podcast, is there any one specific statistic or study that jumped out at you as particularly alarming about either under-reported or over-reported violence?

PROF. KLINGELE:

Sure. So there actually is an example. When I was looking around to try to find different ways in which aggressive or violent behavior might be recorded outside of the criminal justice system, I stumbled on a study by AAA that did actually shock me a little bit. It said that 78% of surveyed drivers admitted to driving aggressively. And over half said that they had purposely tailgated another car. 12% had admitted to cutting off other drivers, of course, very dangerous behavior. And 3% of drivers acknowledged to AAA that they had purposely rammed another car. Given how many people drive, 3% of drivers is a staggeringly high number. Again, it just suggests that there are so many ways in which ordinary people are periodically prone to be aggressive, that it's important that we not write off those who've

committed violent crime as somehow being incorrigible or entirely different from people who have not. The category itself has become so expansive that it really encompasses many people engaging in behaviors that are not that abnormal statistically.

TURNER:

Mm-hmm (affirmative) What I'm taking away from the AAA report is that driving may be a cause of violence here for many people or at least cause some sorts of stress. [crosstalk 00:23:14] Yes.

PROF. KLINGELE:

Be careful on the roads, people.

TURNER:

Yes, exactly. Speaking of which, part four of your article focuses on other causes of violence beyond just driving on a highway. It was very fascinating, especially the section discussing unchecked power differentials as a factor that caused violence. Why is this factor commonly less discussed than other ones such as socioeconomic factors or physical factors?

PROF. KLINGELE:

I think we don't identify it for lots of reasons. In part people just may not be aware of the fact that when you allow someone to have great amounts of authority over another person, particularly without external checks and accountability over that power, it tends to induce abuse of power. We don't like to think about that because we'd like to think people who have power over others are more responsible than those in their charge, that they are more trustworthy than those in their charge. But in fact, that is not always true. There is the idea that power corrupts is an awfully an old concept, and although, of course it's not universally true, we have many, many examples of state actors being put in charge of other individuals, when someone's been convicted of a crime, they are in the hands of correctional officers. When they're accused of a crime, police have authority over them. And that doesn't of course mean that all correctional officers and all police officers will abuse that authority. But we do know from studies of those professions, that there are high levels of aggression and violence that we find in some of these studies suggesting that, in fact, that the power differential can be a real problem.

TURNER:

Mm-hmm (affirmative) And then in part five, I felt like this section was written to be purposefully challenging in many ways. In a good way. I like an article that doesn't just mollify me and say, "Okay, here's what can be done." It's discussing how important it is to face how universal violence can be across society in general. Why is this uncomfortable exercise of facing how prevalent violence can be necessary for criminal justice professionals?

PROF. KLINGELE:

I think it's essential that we acknowledge our own power to do harm. And the fact that we are flawed and failed and the systems we create are as well. That we need accountability as much as the people we are punishing. The rhetoric of criminal justice is about holding people accountable for the harms they have caused. And yet the system itself almost never holds itself accountable for the harm that it causes. And often we don't do so because we justify with this narrative that we are better than them, that we are the good guys punishing the bad guys. And that relieves us of moral responsibility to be self-

reflective about the systems we have built and the lack often of accountability mechanisms that exist for ensuring that state actors are using their power, which they need to have in order to have a criminal justice system, to have accountability, we will have to give some people power. But we need to make sure that that power is checked and supervised and constrained. And I don't think we will be able to do that or have the will to do that well unless we first acknowledge all of the ways in which our system itself is often quite violent and quite destructive.

TURNER:

Mm-hmm (affirmative) And one of those ways it could potentially be destructive is how a label when applied to a person that can stick with them for a very long time, particularly violent offender. If someone were to be released from jail, the term violent offender might still be with them afterwards. How could a different view of violence and labeling of violence affect how these people are treated both by the criminal justice system in particular and society at large?

PROF. KLINGELE:

That's a great question. And I think that it is true that often individuals who have been convicted of violent offenses are subject to more, what we call, collateral consequences or long lasting civil restrictions on their employment, sometimes on where they are allowed to live following the completion of their sentence, et cetera than are people who are convicted of nonviolent offenses. Now, sometimes it is necessary to have regulations and restrictions in order to protect the greater public good. At the same time, to the degree that we engage in this mythology around the idea that only some people are violent and that they're different in kind than those of us who are not, and therefore their lives have to be restricted forever in intense ways while the rest of us are just fine, I think the less we were actually protecting public safety. In many ways, when you marginalize people in perpetuity, you make it impossible for them to re-acclimate fully into society.

PROF. KLINGELE:

And I think that while, of course, we need to be appropriately cautious, especially with vulnerable populations, at the same time having a greater sense of our commonality as humans, that we tend at times to be aggressive and at other times not to be allows us to, I think, have a more cautious and more sensible and grounded view of human nature, which is that just because someone has once done something violent, doesn't mean that the person is going to do that forever. And that in fact, we should sensibly allow people opportunities to reintegrate and to show their ability to manage their behavior. In the same ways that those of us who haven't been convicted of crimes do. Often tools like cognitive behavioral therapy and other interventions prove very useful for people in learning how to manage difficult emotions and deal with social situations that might otherwise lead to aggression. And while I don't want to be Pollyanna about it, there certainly are some people who need much more supervision in order to manage their behaviors safely, the vast majority of people, even the vast majority of people who engage in violent crime, are not likely to spend the rest of their lives behaving in an aggressive manner.

TURNER:

And that's where the risk assessment tools come back into play again I'd say a little bit too, where you can maybe start to see if this is a person that is someone that will be interacting with the criminal justice system again in the future potentially.

TURNER:

Well, thank you for a challenging but extremely important discussion of these aspects of the criminal justice system. Are there any final thoughts you'd like to leave our listeners with? What do you hope readers take away from your work?

PROF. KLINGELE:

I hope that they remember that people involved in the criminal justice system are no different from people not involved in the criminal justice system. We all have the capacity to do great good, and great harm, and that it is important to build institutions that recognize those human capacities and respond proportionally to them.

TURNER:

And where can people find more of your work?

PROF. KLINGELE:

SSRN is the best way to find my work. It's available for free download at the Social Science Research Network under my name,

TURNER:

And as always we'll link to Professor Klingele's scholarship on our podcast page. Of course, starting with her SSRN home page. Thank you again for joining us today, Professor Klingele. We've been discussing two of Professor Klingele's most recent articles, Making Sense of Risk, published in the Behavioral Sciences and the Law, and Labeling Violence, published in the Marquette Law Review. Thanks as always for listening to Wisconsin Law in Action. To find a list of Professor Klingele's scholarship budget, as I just mentioned, visit either her SSRN page or the University of Wisconsin Law School's repository. As I mentioned earlier, links to both these resources are posted along with this podcast at wilawinaction.law.wisc.edu. I hope that by now you are subscribed to our Wisconsin Law in Action podcast, but if you aren't, you can find us in the Apple iTunes store, Stitcher, or wherever you get your podcasts. And listen to our full archive at wilawinaction.law.wisc.edu. Thank you for listening and happy research.