

TECH SUPPORT: WIRING TECHNOLOGY LAW CLINICS TO SERVE RACIAL JUSTICE

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This essay explores the intersection between technology law, clinical pedagogy, and racial justice. Drawing from existing literature on clinics, social justice, racial justice, and technology, as well as from interviews and conversations with other technology law clinicians, the essay: 1) explains the racial and social justice dimensions of technology law, 2) argues that clinics focused on technology law should strive to incorporate racial justice into their clinics, and 3) offers suggestions on how to wire technology law clinics for racial justice.

INTRODUCTION

Issues of social and racial justice intersect with technology in a multitude of ways. Many lawyers and law students may not notice this connection without reflection. This essay argues law school clinical programs should strive to train students to connect technology law and racial justice. This essay presents a humble exploration on this topic, a call to action, and an invitation to continued evolution and dialogue at the intersection of technology law, clinical pedagogy, and racial justice.

The essay draws from two sources of information. The piece reviews some of the existing literature on clinics, social justice, racial justice, and technology. In addition, it summarizes and synthesizes my thoughts and those of fellow technology law clinicians, gleaned from individual conversations and interviews, as well as from conversations at a retreat of technology law clinicians that took place in 2023 at Georgetown Law. Researching and drafting this piece has been a deeply valuable reflective practice for me. I hope reading and discussing the essay will be helpful for at least three types of audiences: 1) fellow tech law clinicians who are already committed to racial justice work and will welcome ongoing dialogue on the topic; 2) new and future tech law clinicians who are interested in integrating racial justice into

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their clinics and looking for ideas and suggestions on the topic; and 3) clinicians in other practice areas and law school administrators who seek more information about how technology-oriented law relates to the social justice mission of clinical pedagogy generally and to racial justice specifically.

The essay proceeds in three main parts. The first part explains the racial and social justice dimensions of technology law. Next, the essay argues that clinics focused on technology law (e.g. privacy, surveillance, intellectual property, communications law, artificial intelligence, and so on) should incorporate racial justice into the structure, pedagogy, and work of their clinics. Finally, the essay offers suggestions on how to wire technology law clinics for racial justice.

I. THE RACIAL JUSTICE DIMENSION OF TECHNOLOGY LAW

Throughout history, technology has played an important role in advancing or failing to advance racial equity, as well as directly supporting both the advancement and suppression of justice movements. A great deal has been written on this topic—far more than can reasonably be summarized in the context of this brief essay—but I name a handful of illustrative examples here for readers not familiar with the field.

For some readers, this section of this essay admittedly will be preaching to the choir. This includes the majority of technology law clinicians with whom I have spoken on this topic—most are already thinking about and engaged in racial justice work to a lesser or greater extent. Yet for other readers, the connection between technology law and racial justice may not be obvious.

A. *Technology's Role in Advancing Racial Equity or Aggravating Inequity*

Technological innovation has long played a critical support role in the struggle for racial equity. Without technologies to communicate and organize, many of the events in history that we think of as key moments in the fight for racial justice would not have occurred or would not have had the same impact. For example, in the past decade, ubiquitous camera-equipped smartphones have played an instrumental role in documenting police violence against and killings of Black people and sharing information with the public both about police violence and about the many responsive protests.¹ The role of modern

¹ See Nicol Turner Lee, *Commentary: Where Would Racial Progress in Policing Be Without Camera Phones?*, BROOKINGS INST. (June 5, 2020), <https://www.brookings.edu/articles/where-would-racial-progress-in-policing-be-without-camera-phones/> (“The combination of smart phones, video recording apps, and social media platforms have generated a

communications technology in the current racial justice movement echoes the role played by television decades ago in the Civil Rights Movement. There were only a few thousand television sets in use in the U.S. in 1946, but by 1955, half of all U.S. homes had one,² and by 1957, 80% of homes had one.³ Televisions enabled people all over the country to view pivotal moments such as Martin Luther King, Jr.'s "I Have A Dream" speech in 1963,⁴ as well as to gain insight into some of the injustices that Black people faced, such as police use of violent instruments like attack dogs and beatings to suppress peaceful demonstrations in Birmingham.⁵

And for as long as technology has played a role in racial justice, so too has the law, with its capacity to alter the availability—or lack thereof—of technology. During the Civil Rights Era, as civil rights leaders used television as a tool to support their work, they also leveraged the law to attempt to increase televised coverage of Black people's struggles, perspectives, and interests.⁶ In the late 1950s and 1960s, a group of activists led by the Reverend C. Everett Parker of the United Church of Christ began a sixteen-year legal challenge to the broadcast license of a Jackson, Mississippi television station over its failure to serve the interests and perspectives of Black people and its refusal to fairly cover the Civil Rights Movement.⁷

New technologies, if not carefully and thoughtfully deployed with an intentional orientation toward justice, can also aggravate existing and historical racial inequity. In a previous article about technology and racial equity in the context of policing, I defined and explained five different ways that technology may aggravate existing and historical racial inequity.⁸ First, existing or historical inequity may be embedded into a technology such that when it is used, its use causes the replication and reinforcement of that inequity.⁹ For example, an artificial intelligence or predictive tool may be trained on historical data tainted by past incidences of deep inequity, and when that tool is then

revolution in public empowerment. Rather than having to take the word of African Americans over the police, people can see the violence for themselves and demand justice.”).

² Michell Stevens, *History of Television*, <https://stephens.hosting.nyu.edu/History%20of%20Television%20page.html> (last visited Sept. 11, 2023).

³ See Michael Bowman, *TV, Cell Phones and Social Justice*, 24 RACE, GENDER & CLASS 16, 17 (2017).

⁴ *The 1963 March on Washington*, NAACP: HISTORY EXPLAINED, <https://naacp.org/find-resources/history-explained/1963-march-washington> (last visited Sept. 11, 2023)

⁵ Bowman, *supra* note 3, at 17.

⁶ KAY MILLS, CHANGING CHANNELS: THE CIVIL RIGHTS CASE THAT TRANSFORMED TELEVISION 3–5 (2004).

⁷ *Id.*

⁸ Laura Moy, *A Taxonomy of Police Technology's Racial Inequity Problems*, 2021 U. ILL. L. REV. 139 (2021).

⁹ *Id.* at 154–59.

used to make suggestions or predictions, it replicates the inequitable patterns that were present in its training data.¹⁰

Second, when a relatively non-transparent technology supplants some aspect of human decision-making that is known to be inequitable, it may mask the underlying inequity from outside observers.¹¹ For example, a technology that is used to help screen resumes may be racially biased, but if outsiders view the tool as unlikely to exhibit bias relative to human decisionmakers, its adoption may obscure racial inequity in hiring.¹²

Third, technology can spread racial inequity from one context to another when a tool embeds racial inequity derived from one context, and then is adopted for use in another context.¹³ For example, racial bias in the development process of a third-party vendor could result in development of a biased tool that, when adopted by another party, spreads the developer's bias to the user.¹⁴

Fourth, technology can provide powerful tools to augment the harm of racially unjust parties or activities.¹⁵ For example, consider powerful police surveillance tools such as "cell-site simulators"—fake cell phone towers. When wielded by law enforcement agencies that tend to deploy resources in a racially inequitable way, these tools can exacerbate the inequitable harms caused by racially disparate policing.¹⁶

Finally, technology can compromise existing institutional checks we may have on racial inequity by frustrating the ability of legislative bodies, courts, and the public to effectively understand and exercise oversight over complex technologies.¹⁷

B. Concrete Examples of Technology's Interplay with Racial Justice

To further illustrate the interplay between technology, technology law and policy, and racial justice in concrete terms, I offer a handful of specific examples here.

1. Internet access and affordability.

Reliable high-speed internet access is not available and affordable to everyone and is disproportionately unavailable to communities

¹⁰ See *id.* at 155–57.

¹¹ *Id.* at 159–62.

¹² See *id.* at 187.

¹³ *Id.* at 162–66.

¹⁴ See *id.* at 162–65.

¹⁵ *Id.* at 166–72.

¹⁶ See *id.*

¹⁷ *Id.* at 172–75.

of color.¹⁸ But internet access is increasingly recognized as essential,¹⁹ with some even arguing that it should be regulated as a utility.²⁰ Indeed, internet access is necessary for students to complete their homework and succeed in school,²¹ as well as for workers to be eligible for and do a large number of jobs²²—even more so in the past few years as a result of the Covid-19 pandemic.²³ Health experts have recently argued that internet access is also emerging as a social determinant of health, adding that this “appears to be particularly true for under-resourced racial and ethnic minority communities and aging populations.”²⁴

¹⁸ Olivia Wein & Cheryl Leanza, *Affordable Broadband Service Is a Racial Equity and Public Health Priority During COVID-19*, LEADERSHIP CONF. CIV. & HUM. RTS., June 29, 2020, <https://civilrights.org/blog/affordable-broadband-service-is-a-racial-equity-and-public-health-priority-during-covid-19/> (“According to census data, about 10 percent each of Black and Hispanic Americans and 13 percent of American Indians and Alaska Natives have no internet subscription compared to 6 percent of White households. And not all broadband access is equal: a disproportionate number of Black and Latino households rely on a smartphone (small screen) for their broadband connectivity.”); see Sara Atske & Andrew Perrin, *Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in U.S.*, PEW RESEARCH CTR., July 16, 2021, <https://www.pewresearch.org/short-reads/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s/>.

¹⁹ See generally Human Rights Council Res. 47/16, *The Promotion, Protection and Enjoyment of Human Rights on the Internet*, A/HRC/RES/47/16 (July 13, 2021); see also U.N. Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue*, ¶ 2, U.N. Doc. A/HRC/17/27 (May 16, 2011) (stating that “[t]he Special Rapporteur believes that the Internet is one of the most powerful instruments of the 21st century for increasing transparency in the conduct of the powerful, access to information, and for facilitating active citizen participation in building democratic societies,” and asserting that “facilitating access to the Internet for all individuals, with as little restriction to online content as possible, should be a priority for all States.”); Catherine Howell & Darrell M. West, *Commentary: The Internet as a Human Right*, BROOKINGS INST. (Nov. 7, 2016), <https://www.brookings.edu/blog/techtank/2016/11/07/the-internet-as-a-human-right/>.

²⁰ See, e.g., Susan Crawford, *Why Broadband Should Be a Utility*, BROADBAND COMMUNITIES, Mar.–Apr. 2019, at 50, <https://www.bbcmag.com/law-and-policy/why-broadband-should-be-a-utility>.

²¹ *Get ON the Internet and Do Your Homework!*, U.S. GOV’T. ACCOUNTABILITY OFF.: WATCHBLOG (Aug. 8, 2019), <https://www.gao.gov/blog/2019/08/08/get-on-the-internet-and-do-your-homework>.

²² Joe Supan, *70% of Americans Say: We Can’t Do Our Jobs Without an Internet Connection*, ALLCONNECT (Sept. 15, 2020), <https://www.allconnect.com/blog/70-percent-of-americans-cant-do-their-jobs-without-home-internet-connection> (“Most employed Americans (over 71.5%) say they could not perform their jobs without a home internet connection.”); Aaron Smith, *Lack of Broadband Can Be a Key Obstacle, Especially for Job Seekers*, PEW RESEARCH CTR. (Dec. 28, 2015), <https://www.pewresearch.org/short-reads/2015/12/28/lack-of-broadband-can-be-a-key-obstacle-especially-for-job-seekers/>.

²³ Kim Parker, Juliana Menasce Horowitz, & Rachel Minkin, *How the Coronavirus Outbreak Has – and Hasn’t – Changed the Way Americans Work*, PEW RESEARCH CTR. (Dec. 9, 2020), <https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/>.

²⁴ Tamra Burns Loeb, AJ Adkins-Jackson, & Arleen F. Brown, *No Internet, No Vaccine: How Lack of Internet Access Has Limited Vaccine Availability for Racial and Ethnic*

Thus, to advance racial equity in multiple areas, including education, economic opportunity, and healthcare, it is important to increase the availability of affordable internet access to underserved people and communities.²⁵ Law and policy can help with this, for example, by making resources available to increase internet connectivity,²⁶ by supporting affordable internet access programs,²⁷ and by supporting local efforts to fund and build community broadband networks.²⁸

2. *Tools for racial justice organizing.*

For racial justice to advance, movement participants and leaders must have the tools to share information, to organize and coordinate, and to be able to do so in a way that is both reliable and trustworthy. Movement participants often rely on social media and messaging platforms for a large part of their collective work.²⁹ To ensure that platforms are fully available for this purpose, they must be made truly welcoming and not hostile to participants,³⁰ and platform communications and activities must be protected from surveillance by potentially hostile parties.³¹ Law and policy can help by supporting the existence

Minorities, THE CONVERSATION (Feb. 8, 2021), <https://theconversation.com/no-internet-no-vaccine-how-lack-of-internet-access-has-limited-vaccine-availability-for-racial-and-ethnic-minorities-154063>.

²⁵ See COLOR OF CHANGE, THE BLACK TECH AGENDA: TECH POLICY + RACIAL JUSTICE 10 (2022), https://colorofchange.org/wp-content/uploads/2022/09/22-09_BLACK_TECHAGENDA.pdf (“Giving Black communities broadband access will ensure they can keep pace with economic opportunities, education and communications as they move online.”).

²⁶ *Fact Sheet: Biden-Harris Administration Announces Over \$40 Billion to Connect Everyone in America to Affordable, Reliable, High-Speed Internet*, WHITE HOUSE (June 26, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/26/fact-sheet-biden-harris-administration-announces-over-40-billion-to-connect-everyone-in-america-to-affordable-reliable-high-speed-internet/>.

²⁷ *Homework Gap and Connectivity Divide*, U.S. FED. COMM’NS COMM’N, <https://www.fcc.gov/about-fcc/fcc-initiatives/homework-gap-and-connectivity-divide> (last visited Sept. 11, 2023).

²⁸ See *Our Vision*, INST. FOR LOC. SELF-RELIANCE CMTY. NETWORKS, <https://communitynets.org/content/our-vision> (last visited Sept. 11, 2023).

²⁹ See Bijan Stephen, *Social Media Helps Black Lives Matter Fight the Power*, WIRED, Nov. 2015, <https://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/>.

³⁰ See *id.* (stating that “social media itself has become another arena where black people are abused”).

³¹ See *id.* (discussing the fact that “many leaders of Black Lives Matter have been monitored by federal law enforcement agencies”); MOVEMENT FOR BLACK LIVES & CREATING LAW ENFORCEMENT ACCOUNTABILITY & RESPONSIBILITY CLINIC, STRUGGLE FOR POWER: THE ONGOING PERSECUTION OF BLACK MOVEMENT BY THE U.S. GOVERNMENT 9 (2021), <https://m4bl.org/wp-content/uploads/2021/08/Struggle-For-Power-The-Ongoing-Persecution-of-Black-Movement-by-the-U.S.-Government.pdf> (describing government “interference with organizing and movement building through a range of tactics, including increased social media monitoring, surveillance at protests, interrogations of those per-

of strong encryption and other security measures,³² by creating legal pressure to rein in hostile behavior among platform users such as harassment and doxing,³³ and by reining in law enforcement surveillance of private communications and activities.³⁴

3. Automated eligibility determinations.

Data-driven technologies now help automate advertising and decision-making in areas such as housing, employment, credit, education, and healthcare. The fairness and transparency—or lack thereof—of such technologies will play a major role in determining whether the future will bring more or less racial equity in these and other areas. As many experts have explained, these new tools sometimes are embedded with the very biases they were deployed to help address.³⁵ Law and policy can help, for example, by establishing clarity around the impermissibility of discrimination in automated decision-making,³⁶ by creating a legal framework for proactive antidiscrimination audits of such systems to take place,³⁷ and by ensuring that government regulators and enforcers are equipped with the necessary tools and expertise to exercise proper oversight over

ceived to be leaders or otherwise associated with activism, and the use of informants”).

³² See Amelia Nierenberg, *Signal Downloads Are Way Up Since the Protests Began*, N.Y. TIMES, June 11, 2020, <https://www.nytimes.com/2020/06/11/style/signal-messaging-app-encryption-protests.html> (explaining the role of encrypted messaging tools such as Signal in organizing protests); Brandon E. Patterson, “Black People Need Encryption,” *No Matter What Happens in the Apple-FBI Feud*, MOTHER JONES, Mar. 22, 2016, <https://www.motherjones.com/politics/2016/03/black-lives-matter-apple-fbi-encryption/> (quoting multiple civil rights activists stating that they rely on trusted encrypted communications tools); ENCRYPT Act of 2023, H.R. 5311, 118th Cong. (2023) (a proposed piece of legislation that would establish certain legal protections for encrypted technologies).

³³ To “dox” is “[t]o document or expose (a person’s identity); spec. to search for and publish private or identifying information about (an individual) on the internet, typically with malicious intent.” *Dox*, OXFORD ENG. DICTIONARY, https://www.oed.com/dictionary/dox_v?tab=meaning_and_use. Users of various internet platforms sometimes dox other users for the purpose of punishing or harassing them, and various legislative efforts have aimed to rein in this behavior. See Rob Harrington, *Online Harassment and Doxing on Social Media*, MICH. TECH. L.R. BLOG (Apr. 12, 2022), <https://mttlr.org/2022/04/online-harassment-and-doxing-on-social-media/> (describing anti-doxing legislative efforts).

³⁴ See, e.g., Rachel Levinson-Waldman & Ángel Díaz, *How to Reform Police Monitoring of Social Media*, BROOKINGS INST.: TECHSTREAM (July 9, 2020), <https://www.brookings.edu/articles/how-to-reform-police-monitoring-of-social-media/>.

³⁵ See *Fact Sheet: Biden-?Harris Administration Announces Key Actions to Advance Tech Accountability and Protect the Rights of the American Public*, WHITE HOUSE (Oct. 4, 2022), <https://www.whitehouse.gov/ostp/news-updates/2022/10/04/fact-sheet-biden-harris-administration-announces-key-actions-to-advance-tech-accountability-and-protect-the-rights-of-the-american-public/>.

³⁶ See *AG Racine Introduces Legislation to Stop Discrimination in Automated Decision-Making Tools that Impact Individuals’ Daily Lives*, OFF. ATT’Y GEN. FOR D.C. (Dec. 9, 2021), <https://oag.dc.gov/release/ag-racine-introduces-legislation-stop>.

³⁷ *Id.*

such tools.³⁸

4. *Workplace automation and surveillance.*

Automation and worker surveillance in workplaces are both displacing workers and leading to the deterioration of working conditions across multiple industries.³⁹ These challenges disproportionately impact low-income workers of color.⁴⁰ Law and policy can respond, for example, by giving workers rights with respect to their data, ensuring that employers can be and are held responsible for harms caused by automated systems, establishing guardrails for employers' use of automation and surveillance, protecting workers' organizing rights, and prohibiting discrimination.⁴¹

5. *Automated facial analysis technology.*

Automated facial analysis technology, including facial recognition, is used in a multitude of applications that may be critical for people's lives, such as by police to identify crime suspects and by financial institutions to authenticate users. Research has indicated that this technology often does not perform equally well across demographic groups, a problem that could lead to disproportionate harms for people of color if, for example, it leads to higher rates of misidentification or authentication failure in contexts such as criminal investigations or banking authorizations.⁴² And even if the demographic performance

³⁸ See LAURA MOY & GABRIELLE REJOUIS, DAY ONE PROJECT: ADDRESSING CHALLENGES AT THE INTERSECTION OF CIVIL RIGHTS AND TECHNOLOGY (2020), <https://uploads.dayoneproject.org/2020/12/14123102/Addressing-Challenges-at-the-Intersection-of-Civil-Rights-and-Technology.pdf>.

³⁹ See generally ANNETTE BERNHARDT, LISA KRESGE, & REEM SULEIMAN, DATA AND ALGORITHMS AT WORK: THE CASE FOR WORKER TECHNOLOGY RIGHTS (2021), <https://laborcenter.berkeley.edu/wp-content/uploads/2021/11/Data-and-Algorithms-at-Work.pdf>; Brishen Rogers, *Workplace Data and Workplace Democracy*, 6 GEO. L. TECH. REV. 454 (2022); JESSIE HF HAMMERLING, TECHNOLOGICAL CHANGE IN FIVE INDUSTRIES: THREATS TO JOBS, WAGES, AND WORKING CONDITIONS (2022), <https://laborcenter.berkeley.edu/wp-content/uploads/2022/09/Technological-change-in-five-industries-Threats-to-jobs-wages-and-working-conditions.pdf>.

⁴⁰ BERNHARDT ET AL., *supra* note 39, at 2 (explaining that “workers of color, women, and immigrants can face direct discrimination via systemic biases embedded in these technologies, and are also most likely to work in occupations at the front lines of experimentation with artificial intelligence”); HAMMERLING, *supra* note 39, at 5 (explaining that “women and people of color . . . are overrepresented in the many front-line occupations that are most likely to be changed by technology.”).

⁴¹ BERNHARDT ET AL., *supra* note 39, at 19 (offering “policy principles that can help build a robust regulation regime” for data-driven workplaces).

⁴² See, e.g., Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. MACHINE LEARNING RES. 1, 11 (2018); Inioluwa Deborah Raji & Joy Buolamwini, *Actionable Auditing: Investigating the Impact of Publicly Naming Biased Performance Results of Commercial AI Products*, in AIES: PROC. 2019 AAAI/ACM CONF. ON AI, ETHICS, & SOC. 429 (Jan. 2019), <https://>

gap of facial recognition is eventually eliminated, the adoption of this technology by police may increase the likelihood of police misidentifications and, ultimately, wrongful convictions—a severe harm that will fall disproportionately on heavily policed communities of color.⁴³ Law and policy can help address this problem through legislation or at least department policies that restrict or prohibit particular uses of automated facial analysis technology or that at a minimum establish high standards of quality and oversight for its use.⁴⁴

In these and countless other areas, specialized expertise is needed at the intersection of technology and many areas of law. Technology law clinics can and must assist with that legal work, as well as with training the next generation of lawyers who will do that work.

II. THE RACIAL JUSTICE DIMENSION OF TECHNOLOGY LAW CLINICS

Law school clinics should explore the interplay between technology and racial justice in depth and provide students with the opportunity to reflect and learn about these areas together in a practical environment. There are at least four reasons for technology law clinics to intentionally advance racial justice. I have already discussed the first: technology—and the law that shapes its availability and use—is

www.aies-conference.com/2019/wp-content/uploads/2019/01/AIES-19_paper_223.pdf; CLARE GARVIE, ALVARO M. BEDOYA, & JONATHAN FRANKLE, *THE PERPETUAL LINE-UP: UNREGULATED POLICE FACE RECOGNITION IN AMERICA* (2016), <https://www.perpetuallineup.org/>; Brendan F. Klare, Mark J. Burge, Joshua C. Klontz, Richard W. Vorder Bruegge, & Anil K. Jain, *Face Recognition Performance: Role of Demographic Information*, 7 *IEEE TRANSACTIONS ON INFO. FORENSICS & SEC.* 1789, 1796–97 (2012).

⁴³ Laura Moy, *Facing Injustice: How Face Recognition Technology May Increase the Incidence of Misidentifications and Wrongful Convictions*, 30 *WM. & MARY BILL RTS. J.* 337 (2021).

⁴⁴ *See, e.g.*, GARVIE ET AL., *supra* note 42 at 62–71 (law and policy recommendations for adoption of face recognition technology by police agencies); Moy, *supra* note 43, at 367–72 (law and policy recommendations for police use of face recognition technology, including policies that ought to apply to eyewitness identification procedures to help); Tate Ryan-Mosley, *The Movement to Limit Face Recognition Tech Might Finally Get a Win*, *MIT TECH. REV.*, July 20, 2023, <https://www.technologyreview.com/2023/07/20/1076539/face-recognition-massachusetts-test-police/> (describing various legislative efforts to regulate the use of face recognition technology). In recent years there have been numerous federal legislative proposals to ban or regulate face recognition technology in certain contexts, though none have passed yet. *See, e.g.*, Facial Recognition and Biometric Technology Moratorium Act of 2023, S. 681, H.R. 1404, 118th Cong. (2023) (the most recent version of a largely identical bill that was introduced under the same name in both the 116th and 117th Congresses); FACE IT Act, S. 5334, 117th Cong. (2022); Ethical Use of Facial Recognition Act, S. 5289, 117th Cong. (2022); Facial Recognition Act of 2022, H.R. 9061, 117th Cong. (2022); Facial Recognition Ban on Body Cameras Act, H.R. 8154, 117th Cong. (2022); Facial Recognition Technology Warrant Act of 2019, S. 2878, 116th Cong. (2019); FACE Protection Act of 2019, H.R. 4021, 116th Cong. (2019); Commercial Facial Recognition Privacy Act of 2019, S. 847, 116th Cong. (2019).

inextricably tied to issues of racial justice.⁴⁵ Second, a central goal of legal education in general, and of law school clinics in particular, is to provide law students with justice training.⁴⁶ Third, the tremendous size and power of tech companies underscores the importance of ensuring new lawyers destined to represent those companies have received training on the broader justice implications of those companies' actions.⁴⁷ And finally, it is important for the field of technology law to be inviting for students of color and students interested in racial justice.⁴⁸

A. Law Schools Are Obligated to Provide Students with Bias and Justice Training

Law schools have an obligation to provide students with bias and justice training. This obligation has been affirmed by the American Bar Association, which last year adopted a revised Standard 303(c) for legal education on this very point.⁴⁹ Under the revised standard, law schools must “provide education to law students on bias, cross-cultural competency, and racism.”⁵⁰

The revised ABA standard follows a rich and many decades-old body of literature arguing that law schools—and especially clinics—must train students in justice. Advocates for the clinical education model have been arguing for nearly a century that the classroom does not and cannot provide sufficient training for a student to become a lawyer.⁵¹ In 1969, Chief Justice Warren Burger opined that “[t]he modern law school is not fulfilling its basic duty to provide society with people-oriented counselors and advocates to meet the expanding needs of our changing world.”⁵² That same year, William Pincus, widely recognized as one of the founders of clinical education, and Peter deLancey Swords defined social justice as one of the core educational values of the clinical model. They argued that a student in the clinical environment “needs to learn to recognize what is wrong with

⁴⁵ See discussion *supra* Section I.

⁴⁶ See discussion *infra* Section II.A.

⁴⁷ See discussion *infra* Section II.B.

⁴⁸ See discussion *infra* Section II.C.

⁴⁹ *ABA Standards and Rules of Procedure for Approval of Law Schools (2021-2022)*, A.B.A. SEC. ON LEGAL EDUC. & ADMISSIONS TO THE BAR, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2021-2022/21-22-standards-book-revisions-since-printed.pdf.

⁵⁰ *Id.*

⁵¹ See Judge Jerome Frank, *Why Not a Clinical-Lawyer School?*, 81 U. PA. L. REV. 907 (1933).

⁵² Chief Justice Warren Burger, *Address Before the ABA Convention Prayer Breakfast* (Aug. 10, 1969), quoted in Dominick R. Vetri, *Educating the Lawyer: Clinical Experience as an Integral Part of Legal Education*, 50 OR. L. REV. 51, 59–60 (1970).

the society around [them]—particularly what is wrong with the machinery of justice in which [they are] participating and for which [they have] a special responsibility.”⁵³ In 1980, upon becoming dean-elect of the University of Oregon School of Law, Derrick Bell called for “humanity in legal education,” asserting that “[l]awyers need conscience as well as craft,” and arguing that “law school faculty and administrators cannot be exempted from their most vital obligation, to instill ethical values in students, through coursework and by example.”⁵⁴

Calls for law schools to train students in humanity and values were echoed, amplified, and focused on clinics in the 1980s and 1990s. In 1986, Gary Palm, then-chair of the Association of American Law Schools (AALS) Section on Clinical Legal Education, urged clinics to focus on instructing students on things they would not learn elsewhere, including about poverty, stating that students “should confront the failure of our government to provide equal justice and fair legal procedures for the poor.”⁵⁵ In 1990, a special AALS committee identified, as one of the nine teaching goals present in most clinics, “imparting the obligation for service to indigent clients, information about how to engage in such representation, and knowledge concerning the impact of the legal system on poor people.”⁵⁶ In 1992, Robert Dinerstein, who had chaired the AALS special committee, wrote that “to many people the relationship between clinical programs and the justice mission of American law schools is so clear as to be self-evident. . . . [T]he law clinic may be the *only* place in which concerns about justice are discussed and, at least sometimes, acted upon.”⁵⁷ And a landmark report that same year generated by an American Bar Association task force concluded that training for lawyers in professional responsibility “should encompass the values of the profession,” among them “striving to promote justice, fairness, and morality.”⁵⁸

⁵³ William Pincus & Peter deLancey Swords, *Educational Values in Clinical Experience for Law Students*, COUNCIL ON LEGAL EDUC. PRO. RESP., (New York, N.Y.), Sept. 1969, at 4.

⁵⁴ Derrick A. Bell Jr., *Humanity in Legal Education*, 59 OR. L. REV. 243, 244 (1980).

⁵⁵ Gary H. Palm, *Message from the Chair*, AALS SECTION ON CLINICAL LEGAL EDUCATION NEWSLETTER, Nov. 1986, at 2.

⁵⁶ *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 515 (1992).

⁵⁷ Robert D. Dinerstein, *Clinical Scholarship and the Justice Mission*, 40 CLEV. ST. L. REV. 469, 469 (1992).

⁵⁸ *Legal Education and Professional Development – An Educational Continuum (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap)*, A.B.A. SEC. ON LEGAL EDUC. & ADMISSIONS TO THE BAR, July 1992, at 135–36 (often referred to as the “MacCrate Report” after Robert MacCrate, who chaired the task force) [hereinafter *MacCrate Report*].

B. Technology Law Clinics Cannot Opt Out of the Obligation to Train Students on Bias and Justice

Despite the rich history involving law school clinics and social and racial justice—a context into which technology law clinics were born—technology law clinics typically retain the discretion to decide which cases to accept. As a result, tech law clinicians may find that they do not have to directly address racial justice in their clinics: they can select cases in which neither their client, the decision-making venue, nor any other party will bring up race.

But for all the reasons that legal professionals and scholars have called for law school clinics to play a central role in training law students in social justice, technology law clinics should embrace this call. If law students take any clinical course at all, many, and perhaps a majority, take only one.⁵⁹ And a student's clinical work may be the only part of the law school experience that can directly train them on the values of the profession and on what Jane Aiken refers to as “justice readiness.”⁶⁰ This applies to technology law clinics as well as to any other kind of clinic.

Conversely, technology law clinics should eschew work that is silent on justice, that lacks consideration of non-majority perspectives,⁶¹ or that reinforces the message that the law is or ever can be neutral with respect to justice. In the words of Aiken,

If all I can do in law school is to teach students skills ungrounded in a sense of justice then at best there is no meaning to my work, and at worst, I am contributing to the distress in the world. I am sending more people into the community armed with legal training but without a sense of responsibility for others or for the delivery of justice in our society.⁶²

By embracing racial justice in the context of our clinics, technology law clinicians can help students learn how to pierce the veneer of neutrality that often obscures the justice implications of technology law and to analyze the law through a justice lens. And as discussed in

⁵⁹ Robert Kuehn, *Implementation of the ABA's New Experiential Training Requirement: More Whimper than Bang*, Best Pracs. Legal Educ. Blog (Apr. 28, 2021), <https://bestpracticeslegaled.com/2021/04/28/implementation-of-the-abas-new-experiential-training-requirement-more-whimper-than-bang/> (noting that in 2020, across U.S. law schools, the number of seats available per J.D. student in clinics was only 0.28).

⁶⁰ See generally Jane H. Aiken, *The Clinical Mission of Justice Readiness*, 32 B.C. J.L. & SOC. JUST. 231-246 (2012).

⁶¹ See KIMBERLÉ WILLIAMS CRENSHAW, FORWARD: TOWARD A RACE-CONSCIOUS PEDAGOGY IN LEGAL EDUCATION 2-3 (1988); see also further elaboration on Crenshaw's description and discussion of “perspectivelessness” *infra* notes 72-73 and accompanying text.

⁶² Jane Harris Aiken, *Striving to Teach Justice, Fairness, and Morality*, 4 CLIN. L. REV. 1 (1997).

greater depth below, squarely addressing racial justice in our clinics can also help our students learn many important related professional skills that extend beyond the substantive ability to analyze the law through a justice lens. By encouraging students to be self-critical and honest about their approach to racial justice, we create opportunities for them to develop the important skill of reflection.⁶³ By facilitating discussions of race in our clinical seminar and rounds practices, we teach students to embrace the type of difficult dialogue that will offer the greatest opportunities for professional growth throughout their careers.⁶⁴ And by including students in conversations and deliberations about the role of race and racial justice in areas such as case selection and client counseling, seminar structure, clinic operations, and our broader institutions, we enrich students' understanding of how to apply a justice lens to all aspects of the practice of law.⁶⁵

C. Lawyers Going to Work for Powerful Tech Companies Should Be Trained in the Justice Implications of Their Work

Tech law clinicians must address racial justice in our clinics because many of our students are destined to practice law in the interest of powerful and well-resourced technology companies. In that role, they may have the opportunity to help their employers or clients better understand the racial justice implications of their products and practices. The law student of today may be the in-house counsel of tomorrow, in a position either to support or combat decisions about technology for reasons related to racial justice.

In many ways, tech companies represent the emerging “corridors of power.” Tech sector revenue accounts for about a tenth of the U.S. gross domestic product.⁶⁶ In particular, the “Big Five” tech giants, Alphabet (Google’s parent company), Amazon, Meta, Apple, and Microsoft are tremendously powerful, with a combined annual revenue that in recent years has often topped \$1 trillion, or more than the gross domestic product of Switzerland.⁶⁷ The sheer size of these companies makes it difficult to effectively regulate them. Indeed, when the

⁶³ See discussion *infra* Section III.A.

⁶⁴ See discussion *infra* Section III.B.

⁶⁵ See discussion *infra* Section III.C.

⁶⁶ TINA HIGHFILL & CHRISTOPHER SURFIELD, U.S. DEP’T COM. BUREAU ECON. ANALYSIS, NEW AND REVISED STATISTICS OF THE U.S. DIGITAL ECONOMY, 2005–2020 at 1 (2022), <https://www.bea.gov/system/files/2022-05/New%20and%20Revised%20Statistics%20of%20the%20U.S.%20Digital%20Economy%202005-2020.pdf> (stating that “in 2020, the U.S. digital economy accounted for \$3.31 trillion of gross output, \$2.14 trillion of value added (translating to 10.2 percent of U.S. gross domestic product (GDP)).”).

⁶⁷ GDP (current US\$), WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=true (last visited Sept. 8, 2023) (showing the GDP of Switzerland to be approximately \$807.7 billion).

Federal Trade Commission announced its record-breaking \$5 billion fine of Facebook a few years ago, Facebook's stock price actually rose in response.⁶⁸ Yet tech giants regularly take actions and make decisions about things that have major implications for our lives and futures.⁶⁹

When students in our clinics graduate from law school and end up at tech companies, they will become forces helping to direct the power of their employers, for better or worse, toward greater or lesser justice. If we want our students to become lawyers who can influence the tremendously powerful systems in which they work for good, we must prepare them for that role. They will need the skills not only to evaluate how their employers' actions may affect racial justice but also to lead conversations and advocate for actions and policies that will advance it.

D. The Technology Law Field Should Be Inviting to Students of Color and Students Interested in Racial Justice

Law clinics must address racial justice to help make the technology law field more inviting for people of color and people interested in racial justice.

The technology sector is even more disproportionately white and male than many other fields.⁷⁰ The whiteness of technology is not limited to the private sector; civil society organizations are also disproportionately white. In 2019, Alisa Valentin wrote a blog post about #TechPolicySoWhite (a hashtag inspired by the #OscarsSoWhite hashtag created by April Reign). Valentin recounted:

my experiences in various meetings and events related to digital inclusion, artificial intelligence, content moderation, privacy, and intellectual property. I often think to myself, “#TechPolicySoWhite.” . . . In many of these spaces there is almost always someone from a non-marginalized background who speaks with authority about how a certain policy has or will impact communities of color. At this point, this has become normalized behavior within the Beltway.⁷¹

⁶⁸ Charlotte Jee, *Facebook Is Actually Worth More Thanks to News of the FTC's \$5 Billion Fine*, MIT TECH. REV., July 15, 2019, <https://www.technologyreview.com/2019/07/15/134196/facebook-is-actually-richer-thanks-to-news-of-the-ftcs-5-billion-fine/>; see Siva Vaidhyanathan, *Billion-Dollar Fines Can't Stop Google and Facebook. That's Peanuts for Them*, THE GUARDIAN, July 26, 2019, <https://www.theguardian.com/commentisfree/2019/jul/26/google-facebook-regulation-ftc-settlement>.

⁶⁹ See Lina M. Khan, *Sources of Tech Platform Power*, 2 GEO. L. TECH. REV. 325 (2018).

⁷⁰ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *Diversity in High Tech*, <https://www.eeoc.gov/special-report/diversity-high-tech> (last visited Sept. 8, 2023).

⁷¹ Alisa Valentin, *#TechPolicySoWhite*, PUBLIC KNOWLEDGE BLOG (Feb. 1, 2019), <https://publicknowledge.org/techpolicysowhite/>.

This problem extends to technology law clinics. At several points during a recent retreat of around twenty technology law clinicians from around the country, folks in the room looked around and observed how very white the gathering was.

When we operate clinics as white-dominated spaces without directly acknowledging and addressing issues of race, we risk perpetuating whiteness by fostering environments that are hostile to people of color. Kimberlé Williams Crenshaw explored the law school tendency to promote “perspectivelessness,” in which faculty attempting to teach legal analysis would “discount[] the relevance of any particular perspective in legal analysis and . . . posit[] an analytical stance that has no specific cultural, political, or class characteristics.”⁷² Perspectivelessness is particularly burdensome to students of color, who are often forced to suppress their identities and experiences and “participate in the discussion as though they were . . . colorless legal analysts.”⁷³ Margaret Montoya explained that mimicking the characteristics of the dominant class for the purpose of participating in the classroom or another context “is comparable to being ‘on stage.’ Being ‘on stage’ is frequently experienced as being acutely aware of one’s words, affect, tone of voice, movements and gestures because they seem out of sync with what one is feeling and thinking.”⁷⁴ More recently, Bennett Capers observed that “[n]on-white students, particularly Black and Brown students, often find that they must unrace themselves, and become white.”⁷⁵ When students of color then choose to or must ground a particular argument in their own racial experience, they often then feel put on the spot or dismissed.⁷⁶

Failing to directly address race in the practice of technology law further perpetuates whiteness. When we avoid addressing race in clinic, we fail to equip newly minted lawyers with the skills and habits necessary to confront racial equity in their own future workplaces.⁷⁷ Jean Koh Peters and Susan Bryant warn that as a result of this failure, “[s]tudents who experience race-based microaggressions towards themselves and their clients may have no framework to talk about these acts and how to respond.”⁷⁸

⁷² CRENSHAW, *supra* note 61, at 2.

⁷³ *Id.* at 3.

⁷⁴ Margaret E. Montoya, *Máscaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories with Legal Discourse*, 17 HARV. J. L. & GENDER 185, 196 (1994).

⁷⁵ I. Bennett Capers, *The Law School as a White Space*, 106 MINN. L. REV. 7, 41 (2021).

⁷⁶ CRENSHAW, *supra* note 61, at 3.

⁷⁷ See Jean Koh Peters & Susan Bryant, *Talking About Race*, in TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY 375, 376 (Susan Bryant, Elliott S. Milstein, Ann C. Shalleck, eds., 2014).

⁷⁸ *Id.*

Perpetuating the whiteness of the tech sector generally and of technology law specifically does further harm in at least two ways. First, it reduces the opportunities available to individual students of color who may be deterred by certain career paths they perceive to be surrounded by toxicity or hostility. Second, it reduces the entire field's ability to fully understand and address the racial justice implications of real-world applications of technology law.⁷⁹

III. HOW TO WIRE TECHNOLOGY LAW CLINICS FOR RACIAL JUSTICE: A STARTING POINT

I offer three suggestions for technology law clinicians interested in integrating racial justice into their clinics. These suggestions are largely informed by various helpful conversations with generous colleagues.⁸⁰ I offer these suggestions with humility, as a possible starting point. I invite my fellow technology law clinicians to continue to maintain an open dialogue about different approaches we try, mistakes we make, and what we learn about how to do this well.

First, technology law clinicians should approach racial justice with reflectiveness and a growth mindset. Second, we should establish student expectations regarding racial justice in our clinics and invite and embrace difficult dialogue about race. And finally, we should apply a racial justice lens to client and case selection, client counseling, seminar, clinic operations, and the structure of our institutions.

A. *Approach Racial Justice with Reflectiveness and a Growth Mindset*

Clinical colleagues I spoke with welcomed the discussion and readily offered reflections both on ways they were effectively advancing racial justice through their clinical work, as well as on challenges they struggle with and have not yet figured out how best to approach. All seemed to exhibit a growth mindset and to illustrate that racial

⁷⁹ See Valentin, *supra* note 71 (“[N]o matter how much James Baldwin one has read or how many times they visited the Blacksonian (National Museum of African American History and Culture), if someone is not a person of color, they are likely to lack the experience to find policy solutions that positively impact communities of color.”).

⁸⁰ I conducted interviews with faculty from other technology law clinics in May. In June, I facilitated a discussion session on racial and social justice at a retreat of approximately twenty tech law clinicians, during which participants engaged in small group discussions focusing on the contexts of casework, institutions, and pedagogy, then reported back to the large group. Some of the goals of these interviews and discussions were to hear tech law clinicians' thoughts on why tech law clinics should incorporate racial justice into clinical practice and pedagogy; how they do or could do this; what questions and concerns they have at the intersection of technology law clinics and racial justice; and what support(s) they would like to see from peers, within the broader technology law clinic community, or from their institutions. Notes on file with author.

justice can and should be taught along with an openness to vulnerability, mistakes, and growth. We can and should approach conversations about race honestly, with acknowledgement of our own imperfections and room for growth and with an openness to reflect and learn.

Many of us find it challenging to be fully vulnerable when it comes to race-related discussions. One common barrier for clinicians interested in more fully integrating considerations of racial justice and equity into our clinics is that we feel we lack expertise and/or fear that we will get it wrong. Deborah Epstein documented this several years ago when she reported that in the context of clinical supervision rounds, clinicians “gained insight into their own tendency to avoid focused discussion about issues involving race. Whether conscious or unconscious, this tendency resulted in supervision conversations that started out including race as a factor, but quickly shifted to less politically charged ground.”⁸¹

We must not shy away from inviting explicit and sometimes difficult discussions of race in our clinics out of fear of imperfection; rather, we should remind ourselves and our students that we are works-in-progress.⁸² Learning is a lifelong journey, making mistakes is an unavoidable part of this process, and reflection and growth are an integral part of the clinic experience.

We can start by openly acknowledging to ourselves and our students that we are not perfect. Writing about how to facilitate difficult race discussions, Derald Wing Sue, a professor of psychology and education at Columbia, states that “instructors must be able and willing to acknowledge and accept the fact that they are products of the cultural conditioning in this society, having inherited the biases, fears, and stereotypes of the society.”⁸³

Facilitating and teaching reflectiveness—cultivating what Donald Schön referred to as the “reflective practitioner”—is already a central part of what we do as clinicians.⁸⁴ Indeed, the clinical model is

⁸¹ Deborah Epstein, *Beyond the Classroom: Applying the Stages of Rounds Structure to Analysis of Clinical Supervision*, in *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* 162, 166 (Susan Bryant, Elliott S. Milstein, Ann C. Shalleck, eds., 2014).

⁸² See DOLLY CHUGH, *THE PERSON YOU MEAN TO BE: HOW GOOD PEOPLE FIGHT BIAS* (2018).

⁸³ DERALD WING SUE, *FACILITATING DIFFICULT RACE DISCUSSIONS: FIVE INEFFECTIVE STRATEGIES AND FIVE SUCCESSFUL STRATEGIES* 4, https://www.colorado.edu/center/teaching-learning/sites/default/files/attached-files/facilitating_difficult_race_discussions.pdf.

⁸⁴ See Richard K. Neumann, Jr., *Donald Schön, the Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 *CLIN L. REV.* 401 (2000); DAVID F. CHAVKIN, *CLINICAL LEGAL EDUCATION: A TEXTBOOK FOR LAW SCHOOL CLINICAL PROGRAMS* 9 (2002) (“we hope to help you develop into a practitioner who has a reason for every choice s/he makes and a process for making and implementing those choices that includes critical

founded on the belief that it is important for one to engage in a practice before they feel like they know everything in order to generate opportunities to try various approaches, to make mistakes, and to learn through reflection.⁸⁵

As teachers and scholars with packed schedules, we are not always as generous in carving out the time and space for ourselves to conduct and grow from self-reflection as we are for our students.⁸⁶ But we can best tackle challenging practice and pedagogy issues, such as those at the intersection of racial justice and technology law, with an intentional practice of reflectiveness, which we have an important opportunity to model for our students.⁸⁷ As studied by Schön, most professional work starts in a state of confusion and indeterminacy, and it is through “reflective conversation with the situation” taking place “in the midst of action” that professional problems are solved, and learning and growth happen.⁸⁸

B. Establish Student Expectations and Invite and Embrace Difficult Dialogue

Many technology law clinicians asserted the importance of telling students upfront that clinic would address race explicitly and directly, as well as of establishing ground rules to facilitate difficult dialogue in seminar, casework, and supervision.

Much has already been written both about the value of establishing expectations and ground rules regarding difficult dialogue and about how to do it. Indeed, Jean Koh Peters and Susan Bryant have an entire chapter on the topic of “talking about race” in *TRANSFORMING THE EDUCATION OF LAWYERS*.⁸⁹ I will not recapitulate here that entire chapter, which is full of rich insights and advice, but will say only that Peters and Bryant break conversations about race into “a four-part process: (1) inviting the conversation early, (2) normalizing conversations about race, (3) introducing key critical race theory con-

reflection through every step of your professional career.”).

⁸⁵ Susan Bryant & Elliott Milstein, *Chapter Six – Rounds: Constructing Learning from the Experience of Peers*, in *TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY* 113, 120 (Susan Bryant, Elliott S. Milstein, Ann C. Shalleck, eds., 2014).

⁸⁶ See Epstein, *supra* note 81, at 166 (“We routinely ask our students to make themselves vulnerable; we require them to perform simulated lawyering tasks in front of their colleagues, to request and absorb critique, or to share their reflections on what they might have done differently after a lawyering “performance.” But as teachers, we ourselves are rarely called upon to do the same.”).

⁸⁷ I discuss some of the specific tactics that can be adopted to this end *infra* in Section III.C.

⁸⁸ Neumann, *supra* note 84, at 405–407.

⁸⁹ Peters & Bryant, *supra* note 77, at 377.

cepts, and (4) including updated information about the historical and current role of race in the field.”⁹⁰

Racial equity expert and strategist Glenn Singleton refers to candid dialogue about race as “courageous conversations,” and has written multiple books on the practice of courageous conversation.⁹¹ In 2006, Singleton and Cyndie Hays articulated four guidelines for educators to facilitate courageous conversation: “They must stay engaged, expect to experience discomfort, speak their truth, and expect and accept a lack of closure.”⁹²

Beyond attempting to abide by these general guidelines, many of us find it fruitful to establish more specific rules for students to follow in in-class discussion. A simple online search generates many examples of ground rules for difficult dialogue that clinicians can adapt and add to for their own purposes. In my own clinic, I use discussion ground rules that I initially compiled in this manner and that I modify slightly each semester based on feedback from students and teaching fellows. A few examples of rules on the list:

- The purpose of in-class discussion is to share and understand perspectives, not to win arguments.
- We will trust each other to engage in this conversation in good faith and with respect for one another.
- You are not being evaluated for the correctness of your in-class opinions.
- You are not required to speak during in-class discussion about topics that are emotionally challenging. Please do not feel pressured to speak and do not pressure others to speak.
- Only one person should speak at a time. When someone is speaking, everyone else should focus on listening to them.

One technology law clinician I spoke with asks students to use the Oops!/Ouch! framework in discussions.⁹³ Students are encouraged to communicate when something someone else says harms them (the

⁹⁰ *Id.*

⁹¹ See GLENN E. SINGLETON & CURTIS W. LINTON, *COURAGEOUS CONVERSATIONS ABOUT RACE: A FIELD GUIDE FOR ACHIEVING EQUITY IN SCHOOLS* (2005); GLENN E. SINGLETON, *MORE COURAGEOUS CONVERSATIONS ABOUT RACE* (2012).

⁹² GLENN E. SINGLETON & CYNDIE HAYES, *BEGINNING COURAGEOUS CONVERSATIONS ABOUT RACE* at 19 (2006).

⁹³ There are numerous resources readily available explaining the Oops!/Ouch! framework. See, e.g., JESÚS TREVIÑO, *DIVERSITY AND INCLUSIVENESS IN THE CLASSROOM* 7 (last visited Sept. 11, 2023); Kristina Ruiz-Mesa & Karla M. Hunter, *Best Practices for Facilitating Difficult Dialogues in the Basic Communication Course*, 2 J. COMMUN PEDAGOGY 134, 137–38 (2019); Annaliese Griffin, *Three Words You Need for Your Next Hard Conversation: Oops. Ouch. Whoa.*, MEDIUM (Aug. 10, 2020), <https://forge.medium.com/three-words-you-need-for-your-next-hard-conversation-a3e2090d043d>.

“ouch”). In response, students who have harmed someone else through something that they have said are encouraged to acknowledge the harm that they have done (the “oops”). Under this framework, students have the opportunity to grow their communication and empathy skills and are invited to embrace and learn from missteps.

C. Incorporate a Racial Justice Lens into Cases, Operations, Seminar, and Institutional Structure

On the specific mechanics of addressing racial justice in technology law clinics, colleagues I spoke with described practices falling into five areas of clinic activity: client and case selection; client counseling; seminar; clinic operations; and the broader institution.

Applying a racial justice lens to client and case selection and planning. Many technology law clinicians I spoke with intentionally select clients and cases that have a clear connection to racial justice. One colleague pointed out that the ability to exercise discretion in selecting clients and cases—something many technology law clinics can do—is a privilege that many clinics do not have. As a result, there is a risk that some technology law clinicians could become disconnected from the social justice roots of clinical legal education unless they make an intentional effort to take on cases that, in the words of William Pincus and Peter deLancey Swords, help students “learn to recognize . . . what is wrong with the machinery of justice in which [they are] participating and for which [they have] a special responsibility.”⁹⁴

There are different ways to do this. Technology law clinicians can seek out clients with a racial justice mission. They can build racial equity analysis into the legal, factual, and policy analysis that they conduct on cases. And even when they take on a case with unclear racial justice implications for a client with no particular racial justice mission, they can include questions about racial justice in their client vetting process and language about racial justice counseling in their engagement letters.

Applying a racial justice lens to client counseling. Many technology law clinicians I spoke with also talked about the importance of cultivating students’ racial justice awareness and facility in client interactions, especially those across racial and cultural differences. One colleague opined that technology law clinicians do not talk enough about power dynamics in the context of lawyering their cases.

Technology law clinicians may consider applying and/or assigning helpful pieces on lawyering across differences, such as *People from The Footnotes: The Missing Element in Client-Centered Counseling* by

⁹⁴ Pincus & Swords, *supra* note 53.

Michelle Jacobs,⁹⁵ *The Five Habits: Building Cross-Cultural Competence in Lawyers* by Susan Bryant,⁹⁶ or *Client as Subject: Humanizing the Legal Curriculum* by Eduardo R.C. Capulong.⁹⁷

Applying a racial justice lens to seminar. Technology law clinicians emphasized the importance of using seminar time to help students gain insight into racial justice lawyering in the technology context. Colleagues specifically mentioned holding seminar sessions on—among other things—differences and cross-cultural competency, abolitionism vs. reformism, and racism in the legal profession. One colleague recommended making an effort to weave racial justice into every seminar session in one way or another, stating that even though this may feel like overdoing it, it is important for concepts to be repeated over and over for students to internalize them. This colleague pointed out that racial justice does not have to be the explicit focus of seminar every time but could sometimes merely feature in related readings.

Technology law clinicians also should interrogate assigned reading and resource lists to ensure that seminar materials include the perspectives of people of color and people hailing from other historically marginalized communities. This will sometimes require effort to accomplish—as discussed above, the tech sector is disproportionately white and male, and white male voices often dominate media coverage and public discourse about technology.

Applying a racial justice lens to clinic operations. One colleague stressed the importance of ensuring that clinic faculty, staff, and students do not actively perpetuate harm by their interpersonal interactions. Several colleagues observed that our clinics tend to skew even more disproportionately white than law school clinics in general, and one expressed concern that people who notice this about our clinics may erroneously conclude that the issues addressed by technology law clinics belong only to certain groups or certain types of people. Those I spoke with universally asserted that we can and should do more to ensure technology law clinics are not hostile places for people of color.

Technology law clinicians advocated several approaches to support this goal. Many said that we can make a greater effort to attract and retain staff and faculty of color for our clinics. Technology law

⁹⁵ Michelle Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345 (1997).

⁹⁶ Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLIN. L. REV. 33 (2001).

⁹⁷ Eduardo R.C. Capulong, *Client as Subject: Humanizing the Legal Curriculum*, 24 CLIN. L. REV. 37 (2016).

clinics also should ensure that faculty and staff are trained to recognize and avoid common features of harmful interpersonal interactions, such as microaggressions,⁹⁸ white saviorism,⁹⁹ and racist conceptions of “professionalism.”¹⁰⁰

Applying a racial justice lens to institutional structure. Several colleagues also pointed out that there is also a role for law schools to play at the institutional level to support the racial justice work of technology law clinics. Some law schools offer a cross-clinical critical theory course co-taught by multiple clinical faculty and available only to students enrolled in clinics. Some law schools have training sessions and/or supervision rounds for clinicians to discuss and reflect on their practices and learn from one another. Some law schools intentionally recruit non-tenure-track instructors to direct and staff clinics, in part so that clinical teaching is more accessible to practitioners from diverse backgrounds. Other law schools maintain hard-won unified tenure standards for clinicians, in part so that tenured clinical faculty have the support and security to take risks with their pedagogy and practice.

CONCLUSION

Technology and technology law are inextricably linked to social and racial justice. As clinical legal educators, we have a responsibility to ensure that we are helping our students to understand this link and to develop the legal and professional tools to evaluate and advance justice in the course of their careers. We can fulfill this responsibility by embracing an approach to racial justice with reflectiveness and a growth mindset, by inviting and embracing difficult dialogue about race, and by applying a racial justice lens to client and case selection, client counseling, seminar, clinic operations, and the structure of our institutions. I am grateful to my fellow technology law clinicians for sharing thoughts on this topic with me, and I call on us all to continue to maintain a candid and fruitful dialogue about what we are learning along this journey.

⁹⁸ See Derald Wing Sue, Christina M. Capodilupo, Gina C. Torino, Jennifer M. Bucceri, Aisha M. B. Holder, Kevin L. Nadal, & Marta Esquilin, *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62 AMER. PSYCH. 271 (2007).

⁹⁹ See Janice Gassam Asare, *What Is White Saviorism and How Does It Show Up in Your Workplace?*, FORBES, Sept. 30, 2022, <https://www.forbes.com/sites/janicegassam/2022/09/30/what-is-white-saviorism-and-how-does-it-show-up-in-your-workplace/>.

¹⁰⁰ See Kendra Albert, *Care, Not Respect: Teaching Professionalism* (July 15, 2021), <https://kendraalbert.com/2021/07/15/care-not-respect-teaching-professionalism.html>.