

# Critical Theory: A Transactional Skills Argument

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The politicization of critical race theory distorts the legitimate legal skill-building capacity produced by one of the legal profession's most valuable intellectual contributions to social justice.<sup>1</sup> Due, in part, to this politicization, the public and even some legal professionals misunderstand the value of critical race theory to society and private markets alike.<sup>2</sup> At a time when society is recognizing how systemic racial injustice is, law schools should be

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<sup>1</sup> For this Essay, I use "critical race theory" and "critical legal theory" interchangeably while acknowledging that some scholars view critical race theory as arising out of critical legal studies. See Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 3 COLUM. J. RACE & L. 23, 26 (2013). In this Essay, I use critical race theory to describe an analytical framework that does not accept institutional decision-making as "colorblind" and analyzes "how race and racial hierarchies are constructed and represented in legal culture and society." Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 189 (2013).

<sup>2</sup> See, e.g., Victor Ray, *Trump Calls Critical Race Theory 'Un-American.'* *Let's Review*, WASH. POST (Oct. 2, 2020), <https://www.washingtonpost.com/nation/2020/10/02/critical-race-theory-101/> (discussing President Trump's antipathy towards critical race theory and noting that, "Ironically, Trump's most recent executive order banning racial sensitivity training confirms critical race theory's central point: Racism is embedded in the law."); Lindsey Burke & Mike Gonzalez, *To Tackle Critical Theory in the K-12 Classroom, Start With Colleges of Education*, NAT'L REV. (Oct. 5, 2020), <https://www.nationalreview.com/2020/10/higher-education-critical-theory-attacks-americas-norms-traditions/> (evinced a profound misunderstanding of critical race theory by labelling it "an unremitting attack on all of America's norms and traditions.").

aiming to produce lawyers who can adequately diagnose, address, and reform racial inequity wherever it may occur. The value of diagnosing institutional racism and structural inequity goes beyond public interest law because the effects of racially discriminatory policies and behaviors are evident across the societal spectrum.

It follows that, to present as competent counsel, transactional lawyers, and specifically “startup lawyers,” must be trained to identify structural barriers to the equitable distribution of capital and resources.<sup>3</sup> Identifying and diagnosing structural bias is vital to promoting social justice and achieving racial equity. Furthermore, market participants<sup>4</sup> within the startup ecosystem will expect their attorneys to possess the skills needed to advise firm leaders on eradicating structural bias from their organizations, products, and decisions.<sup>5</sup> Despite the clear social benefits of a legal community empowered to address racial inequity, the discussions of the influence race has on our current cultural, political and legal infrastructures, and the national reckoning with race and injustice in the wake of the murder of George Floyd, some social commentators view critical race theory as an unproductive use of time during lawyers’ formative years.<sup>6</sup> As society seeks to, once again, recognize the influence institutional racism has on nearly every

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<sup>3</sup> While some scholars define “startup lawyers” strictly as strictly those lawyers who represent early-stage technology companies capable of rapid growth, I include those lawyers who participate in the startup ecosystem in any capacity in my definition, including those representing venture capital firms, accelerators, and other ecosystem support organizations. *See generally* John F. Coyle & Joseph M. Green, *Startup Lawyering 2.0*, 95 N.C. L. REV. 1403 (2017).

<sup>4</sup> BRAD FELD & IAN HATHAWAY, *THE STARTUP COMMUNITY WAY: EVOLVING AN ENTREPRENEURIAL ECOSYSTEM* 41–48 (2020) (noting that startup ecosystem participants include entrepreneurs, startups and their employees, business coaches, investors, professional service providers, entrepreneurial support organizations, universities, large corporations, research groups, and municipal governments).

<sup>5</sup> *See* Robert Ambrogi, *Toward Increasing Diversity in Legal Tech*, ABOVE THE L. (Jun. 8, 2020), <https://abovethelaw.com/2020/06/toward-increasing-diversity-in-legal-tech/?rf=1>.

<sup>6</sup> *See, e.g.*, Daniel Subotnik, *What’s Wrong with Critical Race Theory: Reopening the Case for Middle Class Values*, 7 CORNELL J.L. & PUB. POL’Y 681, 756 (1998) (“Spreading a range of unbaked antiblack conspiracy theories, trying to transform social pathologies into new cultural paradigms, and disseminating despair at every turn—actions that are taken for clinical symptoms—[critical race theorists], I am suggesting, are in the way . . .”).

aspect of our lives, those scholars and professionals who argue that critical race theory has no place in legal training and professional development are out of touch with the market's demands of the legal community. In this Essay, I will briefly discuss how subjective decision-making processes based on pattern matching produce racially inequitable outcomes within the startup ecosystem and how critical race theory doctrine and training will enhance the value of the transactional lawyer who finds herself as a counselor to venture capitalists ("VCs") and startup founders in tomorrow's innovation economy.<sup>7</sup>

In the wake of the killings of George Floyd, Breonna Taylor, and Ahmaud Arbery, the venture capitalist community has decided to make a concerted effort to invest in Black founders.<sup>8</sup> To increase investment in Black founders, some VCs have established separate "diversity" funds that specifically fund Black-owned startups.<sup>9</sup> VCs

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<sup>7</sup> Innovation economies, like startup ecosystems, are widely recognized as an economic development strategy driven by entrepreneurship in scientific, technological, and telecommunications fields. See Lynnise E. Pantin, *The Wealth Gap and the Racial Disparities in the Startup Ecosystem*, 62 ST. LOUIS U. L.J. 419, 424 (2018); see also DARRELL WEST, TECHNOLOGY AND THE INNOVATION ECONOMY 1 (2016), [https://www.brookings.edu/wp-content/uploads/2016/06/1019\\_technology\\_innovation\\_west.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/1019_technology_innovation_west.pdf).

<sup>8</sup> In the wake of George Floyd's murder, investors opened their calendars, took to social media to invite Black founders to reach out to them and reviewed pitch decks; however, their efforts were met with skepticism and the outcomes of these efforts are still largely unknown. Natasha Mascarenhas & Jonathan Shieber, *Venture Firms Rush to Find Ways to Support Black Founders and Investors*, TECHCRUNCH (June 2, 2020), <https://techcrunch.com/2020/06/02/diverse-startups-and-investors-matter/>. At least some of this skepticism comes from the lack of diversity in venture capital firms themselves; according to ecosystem support organization, BLCKVC, 80% of venture capital firms do not have a single black investor. Gené Teare, *The Conversation and the Data: A Look at Funding to Black Founders*, CRUNCHBASE NEWS (June 5, 2020), <https://news.crunchbase.com/news/the-conversation-and-the-data-a-look-at-funding-to-black-founders/>.

<sup>9</sup> See, e.g., Delane Parnell, *The SB Opportunity Fund Is a \$100 Million Venture Fund Dedicated to Supporting and Building a Community of Outstanding Black, Latinx and Native American Founders*, SOFTBANK (Oct. 29, 2020), <https://theopportunityfund.com/>; *Meet the Recipients: Black Founder's Fund*, GOOGLE FOR STARTUPS <https://startup.google.com/blackfoundersfund/> (last visited May 7, 2021) (highlighting that Google's "Black Founders Fund" is a \$5 million fund providing non-dilutive cash awards to Black led startups that participate in Google programs); *Introducing the Talent x Opportunity Fund*,

have, additionally, hired more fund managers from underrepresented backgrounds and designed accelerator programs dedicated to helping Black founders develop and showcase their startups.<sup>10</sup> The stated goals of these programs and efforts are to reverse the inequitable distributions of capital.<sup>11</sup> Lawmakers and advocates, however, distrust venture capital's capacity and willingness to self-regulate. These lawmakers would prefer if venture capital firms were forced to change through regulation or more drastic replacement of the capitalist infrastructure underlying the innovation economy.<sup>12</sup> Proponents of these ideas believe that venture capital excludes women and founders of color by design and that regulation is the only way to reconcile the inequity created by

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ANDREESSEN HOROWITZ (June 3, 2020) [hereinafter *Talent x Opportunity Fund*], <https://a16z.com/2020/06/03/talent-x-opportunity/> (stating that Andreessen Horowitz "Talent x Opportunity Fund" is a fund comprised of \$2.2 million in donations from firm partners as well as donations from outside donors).

<sup>10</sup> *Talent x Opportunity Fund*, *supra* note 9; Nitasha Tiku, *Black Tech Founders Say Venture Capital Needs to Move Past 'Diversity Theater,'* WASH. POST (June 10, 2020), <https://www.washingtonpost.com/technology/2020/06/10/racial-gap-vc-firms/>. Sara Kunst, a black investor, told reporters that "[Softbank's Opportunity Fund] is not a lot, but it's also more than anyone has ever done." *Id.* In the same article investor Elliot Robinson critiqued venture capital's response to calls for more diversity as "diversity theatre," citing the "inflation" of black investor's titles at certain firms and at these investors were not granted decision-making authority. *Id.*

<sup>11</sup> See, e.g., *Talent x Opportunity Fund*, *supra* note 9 ("Being equal before the law, but unequal before law enforcement, is atrocious. It is wrong. It is against our firm's values . . . . If your skin is dark, you're born a suspect. If you do not have the education, the mobility, the network, the social proof, the mentors, the business knowledge, then the Venture Capital world cannot see you."). For background on inequity in startup ecosystems, see generally Patin, *supra* note 7.

<sup>12</sup> See, e.g., Andy Rosen, *Mass. Lawmakers Want to Extend Antidiscrimination Laws to Venture Capitalists*, BOS. GLOBE, (Feb. 8, 2019) [https://www.bostonglobe.com/business/2019/02/08/lawmakers-want-extend-antidiscrimination-laws-venture-capitalists/RNgNaaOm6Q2U9IyzBAeKgM/story.html?s\\_campaign=bostonglobe%3Asocialflow%3Afacebook&fbclid=IwAR2IPBpPVkzOFf687E2WwB-sH7rwfQyTN\\_OUAr-7DXNvuQ5AbrlwtuHQxKw#comments](https://www.bostonglobe.com/business/2019/02/08/lawmakers-want-extend-antidiscrimination-laws-venture-capitalists/RNgNaaOm6Q2U9IyzBAeKgM/story.html?s_campaign=bostonglobe%3Asocialflow%3Afacebook&fbclid=IwAR2IPBpPVkzOFf687E2WwB-sH7rwfQyTN_OUAr-7DXNvuQ5AbrlwtuHQxKw#comments). See generally WENDY LIU, ABOLISH SILICON VALLEY: HOW TO LIBERATE TECHNOLOGY FROM CAPITALISM 213 (John E. Turner & Rhian E. Jones eds., 2020). Liu argues that the capitalist incentives create negative externalities in the startup ecosystem, including exclusionary investment practices and wealth inequity. LIU, *supra* note 12, at 213. In response, Liu argues that technological innovation should be disconnected from capitalist incentives and innovation should be reduced to those technologies that serve a public good. *Id.*

these exclusionary practices.<sup>13</sup> To accomplish their regulatory goals, some lawmakers believe that antidiscrimination rights afforded to employees in employee-employer relationships should apply to founder-investor relationships even before the existence of a contractual relationship between the parties.<sup>14</sup> These laws would force venture capital firms to develop anti-discriminatory compliance programs and checks around their investment decisions to demonstrate that each founder and investment decision is treated equitably based on their race or gender identity.<sup>15</sup> VCs would likely look to their lawyers to advise and assist their firm's development of these compliance programs, which must operationalize societal expectations of equity in the way the firms decide to distribute capital.<sup>16</sup> It would make sense then, for the legal community surrounding these VCs to preempt anti-discriminatory regulation by immediately assessing their firm's practices and policies against societal and regulatory expectations of equity. Although these regulations have not yet emerged, this regulatory role is well within the startup lawyer's scope of responsibility.<sup>17</sup>

Nevertheless, new regulation is not without limitation. In 2020, the Supreme Court weakened antidiscrimination laws by increasing

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<sup>13</sup> See, e.g., LIU, *supra* note 12 at 188–205 (proposing a number of fixes to the Silicon Valley ecosystem, many of which include significant regulation and government oversight).

<sup>14</sup> See Rosen, *supra* note 12.

<sup>15</sup> See, e.g., Mass. S. 939, 191st Cong. § 4 (2019). This bill, introduced in Massachusetts, would prohibit “any person whose business includes sponsoring, guaranteeing or granting funds or engaging in investment transactions to discriminate against any person in the sponsoring, guaranteeing or granting of funds or making available such funds, because of race, color, religion, sex, gender identity, sexual orientation.” *Id.*

<sup>16</sup> See Reed Albergotti, *Black Start-Up Founders Say Venture Capitalists Are Racist, but the Law Protects Them*, WASH. POST (July 22, 2020), <https://www.washingtonpost.com/technology/2020/07/22/black-entrepreneurs-venture-capital/> (noting that, in response to proposals for new civil rights laws with harsher enforcement mechanisms, Kristin Johnson, a professor at Tulane University Law School says, “The legal obligations would prompt an organization to develop essentially a compliance framework.”).

<sup>17</sup> To use an example within the contemporary regulatory landscape as a parallel, in California, investor-founder interactions are covered by similar laws prohibiting sexual harassment in these encounters, however, the law does not cover race-based discrimination. CAL. CIV. CODE § 51.9(a)(1)(B) (West 2019).

plaintiffs' burden at the pleading stage.<sup>18</sup> Moreover, given the already existing wealth disparity that makes entry into the innovation economy harder for Black people,<sup>19</sup> maintaining cash reserves for anti-discrimination litigation against VCs is not only antithetical to "lean startup" pedagogy, but also unrealistic for founders who are trying to operate a startup organization on shoestring budgets.<sup>20</sup> Not to mention the scarlet letter that would likely attach to any founder who decided to use their cause of action against a venture capital firm, which is supported by an industry wholly dependent on reputation and warm introductions.<sup>21</sup> For these reasons, anti-discriminatory legislation in this space may do more harm than good to Black founders as these laws will only give VCs an excuse to be discriminatory with little threat of being litigated against. Regardless of whether such legislation is introduced, however, startup lawyers will likely have to become comfortable with identifying, diagnosing, and correcting policies, behaviors and practices that produce inequitable results.

Among all parties involved, the startup lawyer is the best situated actor in the ecosystem to have this type of influence on the industry's norms.<sup>22</sup> Given the inequities that the tech and innovation

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<sup>18</sup> See *Comcast Corp. v. Nat'l. Assoc. of African-American-Owned Media*, 140 S. Ct. 1009, 1013 (2020) (noting that district court dismissed National Association of African American-Owned Media's claim on grounds that 1981 Act, which guarantees the right to contractor to Black people, requires that plaintiffs establish "but for" causation at the pleading stage). While the Ninth Circuit reversed, the Supreme Court remanded the case claiming that the Ninth Circuit had wrongly assessed the claim under a "different and mistaken test." *Id.* at 1019.

<sup>19</sup> Pantin, *supra* note 7, at 421–22.

<sup>20</sup> See Steve Blank, *Why the Lean Start-Up Changes Everything*, HARV. BUS. REV. (May 2013) (discussing 'Lean Startup' methodology, which discourages startups from wasting resources on operations unrelated to product and market development).

<sup>21</sup> See Albergotti, *supra* note 16, ("Legal hurdles aside, the black entrepreneurs said complaining about race discrimination, let alone hiring a lawyer and taking action, would amount to a career death sentence. In fact, lawyers said they weren't aware of a black entrepreneur ever bringing a discrimination lawsuit against a venture capital firm over an investment decision.").

<sup>22</sup> Venture Capital literature repeats the importance of the lawyer in the overall health of the ecosystem. See SCOTT KUPOR, *SECRETS OF SAND HILL ROAD*:

community claim they want to address, law schools situated within tech hubs have a responsibility to educate startup lawyers who can identify, diagnose, and eliminate policies, practices, and behaviors that create and continue racial inequity, even in the absence of antidiscrimination legislation. The label “startup lawyer” is somewhat novel and purposefully abstract. According to some practicing attorneys, almost any “type” of lawyer can be a startup lawyer because startups need advice on a range of legal domains.<sup>23</sup> In this view, employment lawyers can be startup lawyers, commercial litigators can be startup lawyers, intellectual property lawyers can be startup lawyers, public interest lawyers can be startup lawyers, regulatory compliance attorneys (e.g., those attorneys working for the SEC, FTC, or other regulatory body) can, certainly, be startup lawyers. While startup law may not be a legal discipline, legal scholars agree that the term “startup lawyer” specifically refers to those attorneys who specialize in finding ways

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VENTURE CAPITAL AND HOW TO GET IT 125 (2019) (“Law firms also tend to be important avenues into venture firms. . . . [L]awyers are often upstream of the VCs and in a position to see opportunities at their most nascent state.”); BRAD FELD & JASON MENDELSON, VENTURE DEALS: BE SMARTER THAN YOUR LAWYER AND VENTURE CAPITALIST 206 (4th ed. 2019) (“[Y]our lawyer is a reflection on you, and if you choose a lawyer who is inexperienced, is ineffective, or behaves inconsistently, it will reflect poorly on you and decrease your negotiating credibility.”); Coyle Green, *Startup Lawyering 2.0*, 95 N.C. L. REV. 1403, 1417 (2017) (citing to a previous study on startup lawyering in silicon valley that stated that startup lawyers serve as reputational intermediaries by declining to take entrepreneurs as clients that “challenge the community’s taken for granted assumptions or that threaten the community’s social cohesion.”); FELD & HATHAWAY, *supra* note 4, at 269 (recounting, as an accomplished VC, how he built his network of entrepreneurs in Boulder, Colorado, by first asking a lawyer and a banker for access to their networks).

<sup>23</sup> See Sean Burke et al., *So You Want to Be a Startup Lawyer?*, CHAMBERS ASSOC., <https://www.chambers-associate.com/career-moves/so-you-want-to-be-a-startup-lawyer> (last visited May 7, 2021). As the authors note,

While there are aspects of the practice that are highly specialized (such as understanding VC deal terms and startup market conventions), being a startup lawyer requires at least some working knowledge across a broad array of legal domains, including tax, employment law, compensation, intellectual property, commercial law, corporate law and securities regulation.

*Id.*

to reduce transaction costs, ensure regulatory compliance, and counsel early-stage hypergrowth companies.<sup>24</sup>

Arguably, the most important role of a startup lawyer is to serve as a reputational intermediary between the investor and entrepreneur.<sup>25</sup> In terms of increasing equity in the ecosystem's outcomes, startup lawyers are a proven gateway for the overlooked and underrepresented trying to get their ideas in front of investors.<sup>26</sup> As a result, startup lawyers can be pivotal in helping the investor earn the entrepreneur's trust, so establishing durable relationships is a key part of a start-up lawyer's role.<sup>27</sup> By facilitating trusting relationships between investor and founder, startup lawyers instantly add value in a marketplace where being "founder-friendly" is table stakes for a venture capital firm's ability to attract limited partners and hypergrowth companies.<sup>28</sup> Startup lawyers are

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<sup>24</sup> Coyle & Green, *supra* note 3, at 1404.

<sup>25</sup> *Id.* at 1419. ("In their capacity as reputational intermediaries, startup lawyers regularly introduce their clients to potential investors.")

<sup>26</sup> See, e.g., ARLAN HAMILTON, IT'S ABOUT DAMN TIME: HOW TO TURN BEING UNDERESTIMATED INTO YOUR GREATEST ADVANTAGE 23–25 (2020). When Arlan Hamilton set out to become a venture capitalist, Sam Altman the president of the flagship accelerator Y-Combinator, put Arlan in contact with a lawyer who Arlan described as one of the biggest fund formation lawyers there is who worked with her for free and "taught [her] so much" that she felt "confident enough to start approaching investors, angels, and managers, and private family offices." *Id.* Prior to starting her venture capital firm, Backstage Capital, Arlan, a Black lesbian woman, was a production coordinator of live music industry and experienced homelessness on her journey to becoming an investor. *Id.*

<sup>27</sup> *Report of the Task Force on Defining Key Competencies for Business Lawyers, Business Law Education Committee, ABA Business Law Section*, 72 BUS. LAW. 101, 144 (2016) [hereinafter ABA Core Competencies]. The ABA Business Law Section views attorneys' abilities to help their clients form "durable relationship[s] that will result in trust and communication throughout the life of the commercial relationship" as a core competency of transactional attorneys. *Id.* In the startup context, there is generally no relationship more important throughout the life cycle of a startup than the relationship between a founder and their venture capitalist. *Id.*

<sup>28</sup> Charles Duhigg, *How Venture Capitalists Are Deforming Capitalism*, NEW YORKER (Nov. 30, 2020), <https://www.newyorker.com/magazine/2020/11/30/how-venture-capitalists-are-deforming-capitalism>. According to Harvard Business School professor, Josh Lerner, "[P]roclaiming founder loyalty is kind of expected now." *Id.* This expectation forces VCs to compete on being complicit to a founder's demands. This most often manifests in relationships where the



expected to have relationships with VCs that help facilitate and close deals between investors and entrepreneurs.<sup>29</sup> These lawyers, further, conduct diligence on investment targets, advise founders on investor expectations with respect to legal entity formation, capitalization table management, and intellectual property protection.<sup>30</sup> Essentially, these lawyers help the innovation marketplace participants set expectations, allowing the two sides, investor and founder, to close deals quickly with minimal costs. These expectations and norms are codified by startup lawyers through the proliferation of standard documents and agreements as the ecosystem's common language is expressed in its term sheet terms, non-disclosure agreements, confidentiality agreements, and employment policies.<sup>31</sup> Through their gatekeeper function and ability to set norms and express values through contract, the startup

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founder expects investors not to interfere too much and to support their “audacious visions” with more cash even when the venture is lagging in standard business metrics. This type of support has become industry standard, and any sense that that investors have deviated from this norm with respect to Black founders in their portfolio could create litigation risks for the firm. *Id.*

<sup>29</sup> Coyle & Green, *supra* note 3, at 1420 (“Outside the venture capital context, it is rare for a corporate attorney to introduce clients to potential investors; it is a role more typically performed by investment bankers. Within the venture capital context, however, such introductions occur frequently.”). Commenting specifically on the role of a startup lawyer as a reputational intermediary, one New York lawyer stated that “we’ll make introductions when it makes sense for both parties. We have clients on both sides of the table and try to add value where we can with the relationships we have.”). *Id.* at 1420.

<sup>30</sup> ABA Core Competencies, *supra* note 27 at 104, 115, 121.

<sup>31</sup> See *Model Legal Documents*, NVCA, <https://nvca.org/model-legal-documents/> (last visited May 7, 2021). The National Venture Capital Association (the “NVCA”) helps set industry standards by providing model legal documents for VCs to use. *Id.* The NVCA hopes that,

“[b]y providing an industry-embraced set of model documents that can be used in venture capital financings[,] the time and cost of financings are greatly reduced and therefore principals time is freed from reviewing hundreds of pages of unfamiliar documents, thereby allowing parties to focus on high-level issues trade-offs of the deal at hand.”

*Id.* These “form” documents have been codified over many years by looking at the work of transactional, startup lawyers throughout the startup ecosystem).

lawyers' influence on the innovation ecosystem is significant and permanent.<sup>32</sup>

As trusted intermediaries, startup lawyers are in a prime position to eliminate those norms and policies that perpetuate racial inequity within the current venture capital ecosystem. To be clear, an ecosystem or community that relies on policies and practices that produce racial inequity is racist.<sup>33</sup> Under this definition, therefore, venture capital is widely understood to be a racist ecosystem.<sup>34</sup> The venture capital ecosystem thrives on systems and decision-making frameworks that aid investors with analyzing and deciding on hundreds of investment opportunities in a year and thousands over the life of a fund.<sup>35</sup> These systems and procedures rely on investors' "pattern matching" against certain known quantities.<sup>36</sup> Investors look for patterns in the company's financial data, market size, operational efficiencies, and regulatory barriers (among a host of other seemingly objective, metric-driven data points) to make an

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<sup>32</sup> VCs often articulate an expectation that entrepreneurs are selective in their choice for legal representation because a lawyer "is an integral partner who will guide a company through its corporate lifecycle . . . and act as a trusted adviser and connector to investors and other resources." FELD & MENDELSON, *supra* note 22, at 17. Moreover, VCs "highly recommend [finding] a lawyer with whom you have a personal connection [because] you deserve an attorney whom you trust completely and with whom you enjoy working." *Id.* at 18.

<sup>33</sup> IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 19 (2019) (defining a racist as "one who is supporting a racist policy through their actions or inactions or expressing a racist idea.").

<sup>34</sup> Albergotti, *supra* note 16.

<sup>35</sup> JEFFREY BUSSGANG, MASTERING THE VC GAME: A VENTURE CAPITAL INSIDER REVEALS HOW TO GET FROM START-UP TO IPO ON YOUR TERMS 77–78 (2011) (noting that VCs invest in roughly one in every three hundred pitches they receive).

<sup>36</sup> *Id.* at 94 ("[D]ifferent VC firms have different policies when it comes to making the final decision whether or not to invest. Some firms . . . explicitly vote on deals and score them across a number of dimensions (e.g., quality of team, size of market, nature of technology and competition, attractiveness of deal terms.); see Pantin, *supra* note 7, at 447 ("Even if the business has high-growth potential and high sales, the reality is that investors tend to bring founders into their portfolio that look like themselves, have the same status, and have the same levels of education").

educated guess on the firm's likelihood of success based on how closely the data reflects previously successful companies.<sup>37</sup>

While this seems like an objective decision-making process on the surface, most investors and founders will agree that that investors give significant, if not dispositive, weight to data points that are personal to the founders themselves.<sup>38</sup> This is where the pattern matching technique, as it exists now, produces racial inequity. In analyzing investment worthiness, VCs will give preference to founders who went to the same elite colleges and universities as the investors, had previous entrepreneurial experience, or are networked with other founders and investors who meet the same criteria.<sup>39</sup> Investors will also give preference to founders who obtained a "warm introduction" to the investment team.<sup>40</sup> Here, investors admit that, as a rule, VCs do not take meetings with founders who are not from the investor's insider network.<sup>41</sup> Founders who are not connected to someone within the investors' Ivy League or upper-class network are viewed as

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<sup>37</sup> BUSSGANG, *supra* note 35, at 94; *see also* FELD & MENDELSON, *supra* note 22, at 36 (describing details that VCs analyze at an early stage: "during this phase, a venture capitalist will ask for a lot of things, such as presentations, projections, customer pipeline or targets, development plan, competitive analysis, and team bios.").

<sup>38</sup> *See, e.g.*, Lydia Belanger, *You're More Likely to Get Startup Funding If You Went to One of These Schools*, ENTREPRENEUR (Sept. 9, 2016), <https://www.entrepreneur.com/article/282168>; Andrew Vasylyk, *Why VCs "Almost Blindly" Invest in Founders with Previous Exits*, MEDIUM (Aug. 28, 2018), <https://medium.com/startupsoft/why-vcs-almost-blindly-invest-in-founders-with-previous-exits-23824334a260>.

<sup>39</sup> Belanger, *supra* note 38; Vasylyk *supra* note 38.

<sup>40</sup> BUSSGANG, *supra* note 35, at 85. ("Of the nearly fifty companies that we at Flybridge Capital have invested in over the past eight-year history, not one of them came in cold."); *see also* Del Johnson, *Ban Warm Introductions!*, NOTEWORTHY (Aug. 6, 2019), <https://blog.usejournal.com/ban-warm-introductions-1e69169d57ba> ("Venture Capital funds must abandon their warm introduction requirements not just because they are anti-meritocratic, but because they are damaging to financial returns.").

<sup>41</sup> BUSSGANG, *supra* note 35, at 85; Paul Gompers et al., *How Venture Capitalists Make Decisions*, HARV. BUS. R., <https://hbr.org/2021/03/how-venture-capitalists-make-decisions> (last visited May 7, 2021) (finding, in a survey conducted by the *Harvard Business Review*, that 30% of deals come from a VC's former colleagues or "work acquaintances" while only 10% came from "cold" emails).

“outsiders” who are unlikely to be successful entrepreneurs based on their inability to break into an insider’s network.<sup>42</sup> Nevertheless, research has shown that, for all their prestige and academic pedigree, schools like Stanford, MIT, and Harvard systemically suffer from low racial and socioeconomic diversity.<sup>43</sup> Moreover research has shown that this self-selection methodology actually leads to lower financial returns.<sup>44</sup> Therefore, evaluating founders on the basis of school or school-based connection is, by design, exclusionary and will, by default, result in fewer Black founders having the opportunity to become proven entrepreneurs—a metric that also proves vital in the investment decision-making process.<sup>45</sup> This pattern matching investment technique that dominates venture capital decision-making disproportionately favors Ivy League white men with access to enough personal capital to sustain their livelihoods in high-cost-of-living cities like San Francisco, New York, or Boston.

This decision-making process stands in stark contrast to the startup ecosystem’s meritocratic ethos.<sup>46</sup> Moreover, this

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<sup>42</sup> BUSSGANG, *supra* note 35, at 42 (“One of the common factors that ties members of the VC club to each other is that a large number of them emerge from . . . Harvard and Stanford . . . a handful of other Ivy League schools and MIT.”); *see also id.* at 86 (“[W]hen an entrepreneur makes a cold approach[, as opposed to a warm introduction by another member of the VC’s network,] to a VC, it marks him as an outsider. The guy doesn’t know anybody?”).

<sup>43</sup> Gregor Aisch et al., *Some Colleges Have More Students from the Top 1 Percent Than the Bottom 60. Find Yours*, N.Y. TIMES (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html>; Howard Gold, *The Harsh Truth About Black Enrollment at America’s Elite Colleges*, MARKETWATCH (June 25, 2020), <https://www.marketwatch.com/story/the-harsh-truth-about-black-enrollment-at-americas-elite-colleges-2020-06-25>.

<sup>44</sup> *See* Sarah Lyons-Padilla et al., *Race Influences Professional Investors’ Financial Judgments*, 116 PROCEEDINGS NAT’L ACAD. SCI. 17225, 17229 (2019); Johnson, *supra* note 40. Del Johnson, a VC and Columbia law school graduate, argues that warm introductions support an exclusionary startup ecosystem and that the practice of warm introductions is antithetical to a meritocratic system and results in lower returns for investors. Johnson, *supra* note 40.

<sup>45</sup> Vasylyk, *supra* note 38.

<sup>46</sup> Johnson, *supra* note 40; Allyson Kapin, *Tech Aspires to Be a Meritocracy. But It’s Only a ‘Mirror-tocracy’*, AM. BANKER (Oct. 17, 2017), <https://www.americanbanker.com/opinion/tech-aspires-to-be-a-meritocracy-but-its-only-a-mirror-tocracy>.

exclusionary pattern matching also disadvantages successful Black entrepreneurs by underwriting investor's individual conscious and unconscious bias that disproportionately influence investment decisions.<sup>47</sup> Ultimately, when a Black founder, without a warm introduction, steps in front of a panel of white VCs, she will likely fail the pattern match and will be at a disadvantage throughout her pitch regardless of her product or strategy.<sup>48</sup> In these scenarios, diverse founders who fail to match the investor's patterns will likely hear "it's just too early for me" instead of a reasoned decision based on inclusive criteria that gives weight to the founder's strengths or the founder's proposal to fix a socioeconomic problem that would develop a market outside of the investor's pattern data.<sup>49</sup> In an industry built on risk-taking and being first in line to profit from picking big winners early, this sudden aversion to risk-taking when it comes to Black entrepreneurs echoes the racist and exclusionary rationales that lenders conjured in refusing to accept VA loans from Black soldiers returning from World War II.<sup>50</sup> To be sure, economic theorists have attributed today's racial wealth gap to these redlining practices and denial of capital.<sup>51</sup> Legal scholars have drawn a direct line from this denial of capital to Black people to the inequity that we see in the innovation economy today.<sup>52</sup> As a result of the venture

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<sup>47</sup> See Albergotti, *supra* note 16; Lyons-Padilla et al., *supra* note 44, at 17229.

<sup>48</sup> Johnson, *supra* note 40.

<sup>49</sup> James Norman, *A VC's Guide to Investing in Black Founders*, HARV. BUS. REV. (June 19, 2020), <https://hbr.org/2020/06/a-vcs-guide-to-investing-in-black-founders>.

<sup>50</sup> RICHARD ROTHSTEIN, *THE COLOR OF LAW* 70 (2017). After World War II the Veteran's Administration, adopted FHA policies and *Underwriting Manual* where Black home buyers were considered risky debtors undeserving of a mortgage guarantee in many cities. *Id.* The VA also made FHA-type deals with home developers that required mass-developed homes to be all white communities for home buyers to use FHA and VA benefits within those neighborhoods. *Id.*

<sup>51</sup> *Id.* at 185 (attributing disparity between current white household wealth and current Black household wealth to the denial of participation in the home "equity-accumulating boom" of the 1950s and 1960s); Pantin, *supra* note 7, 429–434 (discussing how discriminatory administration of federal legislation such as the G.I. Bill, National Labor Relations Act, and National Housing Act produced in an irreversible racial wealth gap that prevents aspiring entrepreneurs of color from capitalizing venture ideas).

<sup>52</sup> Pantin, *supra* note 7, at 438–441.

capital industry's pattern matching practices, in 2019, out of 9,300 venture capital-backed companies, only 227 had a Black founder.<sup>53</sup>

Business and transactional lawyers are expected to advise their clients on a range of legal, ethical, and business issues.<sup>54</sup> Startup lawyers help founders and investors make deals, mitigate regulatory risks, and establish the norms of the ecosystem.<sup>55</sup> To properly perform these duties, these attorneys measure themselves against a few core competencies.<sup>56</sup> Business lawyers are urged to provide their service in accordance with a set of core skills, values, and behaviors that make them "indispensable to the client."<sup>57</sup> One such value is to strive to promote fairness and justice.<sup>58</sup> Here, the business lawyer is expected to enhance the capacity of professional institutions to do justice.<sup>59</sup> It follows, then, that startup lawyers have a professional responsibility to correct the injustice of inequitable access to capital in the innovation ecosystem, which systematically excludes Black entrepreneurs and produces lower returns to venture capital firms.<sup>60</sup>

One such institution that could support the resolution of this inequity is the law school, where transactional law students form their opinions about future clients, economic injustice, and the transactional lawyer's role in resolving societal injustices and inequities.<sup>61</sup> To better support these students, law school transactional programs should heed the call of the American Bar Association's Commission on the Future of Legal Education and

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<sup>53</sup> Teare, *supra* note 8.

<sup>54</sup> See generally ABA Core Competencies, *supra* note 27.

<sup>55</sup> See generally Coyle & Green, *supra* note 3; ABA Core Competencies, *supra* note 27.

<sup>56</sup> See generally ABA Core Competencies, *supra* note 27.

<sup>57</sup> *Id.* at 148.

<sup>58</sup> *Id.* at 141–42.

<sup>59</sup> *Id.*

<sup>60</sup> Lyons-Padilla et al., *supra* note 44, at 17229.

<sup>61</sup> See Susan R. Jones, *Small Business and Community Economic Development: Transactional Lawyering for Social Change and Economic Justice*, 4 CLINICAL L. REV. 195, 214–15 (1997) (detailing story of a second-year law student in the George Washington University Small Business Clinic who, based on clients the student served, "was challenged with his biases and assumptions about who can and should be a small business owner.") As this story demonstrates, such experiences can have a dramatic impact on changing a law student's frameworks and biases.

“design educational experiences focused on contemporary and anticipated needs.”<sup>62</sup> Law schools must acknowledge that all legal problems exist in a broader context and future lawyers must develop multi-disciplinary communication skills to overcome both routine and structural barriers to justice and equity.<sup>63</sup> Given the clear evidence of racial inequity and disparity within the current startup ecosystem, law schools must include critical race theory as part of their curriculum for training young transactional lawyers.

It seems clear that a startup lawyer relying solely on formal education on contracts, property, business associations, intellectual property, and the promising “startup law” is less effective in resolving the friction points of tomorrow’s innovation ecosystem. Including critical race theory in the transactional curriculum exposes business-minded law students to a broader scope of discussion, a broader range of voices, and teaches students to recognize the “explicit assumption that racism is still deeply rooted in our society.”<sup>64</sup> Arising out of the 1960s civil rights movement, critical race theory recognizes that subjectivity and racist legacies within our institutions constrains the ability of these institutions to deliver racial equity.<sup>65</sup> Over time, techniques and methodologies to analyze institutional bias have emerged, and central to critical race theory, is an emphasis on interdisciplinary study “to challenge and expand the sense of what counts as specifically legal discourse, as well as the need to create and promote new modes of discourse.”<sup>66</sup>

This malleability of critical race theory can provide examples for transactional law students to consider and potentially apply to add value to their client engagements as a member of a clinic or private bar. For example, Professor Victor Quintanilla conducted an empirical study of dismissal rates of civil rights claims following *Ashcroft v. Iqbal*<sup>67</sup> because “implicit bias may operate where courts make highly subjective decisions based on malleable criteria.”<sup>68</sup> The

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<sup>62</sup> AM. BAR. ASS’N. COMM’N, ON THE FUTURE OF LEGAL ED., PRINCIPLES OF LEGAL EDUCATION AND LICENSURE IN THE 21ST CENTURY 7 (2020).

<sup>63</sup> *Id.* at 6.

<sup>64</sup> Zalesne, *supra* note 1, at 28.

<sup>65</sup> *Id.* at 28–29; *see also* Pantin, *supra* note 7, at 438–41.

<sup>66</sup> *See* Zalesne, *supra* note 1, at 29.

<sup>67</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>68</sup> Victor D. Quintanilla, *Critical Race Empiricism: A New Means to Measure Civil Procedure*, 3 U.C. IRVINE L. REV. 187, 195 (2013).

objective of the study was to understand how federal district courts have adjudicated Black plaintiff's claims of race-based employment discrimination at the pleading stage before and after "plausibility pleading" became law.<sup>69</sup> While the content of a judge's decision on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss involves a different input than an investor receiving a pitch, the observable metric—the occurrence of bias in an inherently subjective decision—is the same.

A transactional law student who is exposed to Professor Quintanilla's empirical analysis of bias in subjective decision-making is able to identify the flaws inherent in a "color blind" decision-making process that, because of implicit biases, results in racially disparate outcomes. A transactional lawyer, armed with a critical race theory lens, can then add value to an investor's firm by explaining what procedures and processes must be in place to even track this type of data. For example, transactional counsel may suggest that their clients draft the investment decision memos for each company they review that include the basis for the decision to invest or not invest and the pitching companies' demographic data. Transactional counsel could then regularly review these memos with their clients to determine whether implicit bias is factoring into the client's decision-making processes. Such an exercise will also support the development of the transactional lawyer's business acumen, in so far as she produces a framework and program that allows equitable decision-making to become a regularly tracked metric. The same metrics-driven framework could also be applied to later stages of the investor-founder relationship to track implicit bias throughout the life of the investment. Likewise, transactional attorneys exposed to Professor Zalesne's evidence of racial bias in contract and the assumptions made about Black plaintiffs by jurists in contract disputes are better informed to help an investor at a firm

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<sup>69</sup> Under *Ashcroft v. Iqbal* allegations in a plaintiff's complaint must allege sufficient facts for a judge to conclude that, if taken as true, the wrongdoing is plausible. *Iqbal*, 556 U.S. at 678. In anti-discrimination context, this means the plaintiff's allegations must plausibly support the conclusion that the defendant acted with anti-discriminatory intent. Quintanilla argues that *Iqbal's* requirement that judges rely on "judicial experience and commonsense," creates subjective and malleable criteria and "judges, like all other people, use heuristics and . . . systematic biases when making social judgments." Quintanilla, *supra* note 68, at 195.



that wants to hold themselves accountable to pricing startups fairly and negotiating equitably by reducing power and information imbalances that disproportionately impact founders and entrepreneurs of color.<sup>70</sup>

Transactional programs and professors geographically situated in established or growing tech hubs that fail to include critical race theory in their curriculum are either out of touch with the market or believe that the benefits of the status quo outweigh the costs. As tech ecosystems sprout up across the country in places like Atlanta,<sup>71</sup> Detroit,<sup>72</sup> Cincinnati,<sup>73</sup> and Miami,<sup>74</sup> VCs will begin to spend more money in these communities and will have to decide how they can add value and include entrepreneurs from these majority-minority communities. While it makes economic sense for local governments to recruit these VCs and startups to their municipalities, a sudden influx of capital, startups, and out-of-state talent will challenge these governments to retain newcomers while ensuring that the entire community benefits from the bargains these officials make with tech and venture capital leaders.<sup>75</sup> If, as newcomers to these communities, venture capital firms or other startup ecosystem

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<sup>70</sup> Zalesne, *supra* note 1, at 30. Zalesne's scholarship also supports a transparent documentation approach to improving data collection and analysis on issues of bias. *See id.* In that article, she states that the invisibility of Black Americans in mainstream commercial contracts is underpinned by the tendency for judges to omit from their opinions identifying specific characteristics of the parties involved in the contractual dispute. *Id.*

<sup>71</sup> Mary Ann Azevedo, *From the Shadows of the Fortune 500, Atlanta Emerges as a Tech Hub*, CRUNCHBASE NEWS (Oct. 2, 2019), <https://news.crunchbase.com/news/from-the-shadows-of-the-fortune-500-atlanta-emerges-as-a-tech-hub/>.

<sup>72</sup> Matt Burns, *5 VCs on the Future of Michigan's Startup Ecosystem*, TECHCRUNCH (Aug. 6, 2020), <https://techcrunch.com/2020/08/06/7-vcs-on-the-future-of-michigans-startup-ecosystem/>.

<sup>73</sup> Dana Givens, *This Cincinnati-Based Venture Capital Fund Wants to Invest \$50M on Midwest BIPOC Businesses*, BLACK ENTER. (July 8, 2020), <https://www.blackenterprise.com/this-cincinnati-based-venture-capital-fund-wants-to-invest-50m-on-midwest-bipoc-businesses/>.

<sup>74</sup> Sophia Kunthara, *Why Miami is the Next Hot Tech Hub: 'This is not a Retirement Decision'*, CRUNCHBASE NEWS (Jan. 5, 2021), <https://news.crunchbase.com/news/why-miami-is-the-next-hot-tech-hub/>.

<sup>75</sup> *See, e.g.,* Leigh-Ann Buchanan, *We Are Not 'Silicon' Anything. We are #MiamiTech — of, By and for This Community*, MIA.MI HERALD (Jan. 1, 2021), <https://www.miamiherald.com/opinion/op-ed/article248220415.html>.

leaders want to build racially equitable ecosystems, they will seek out startup lawyers who are comfortable analyzing and dissecting formal and informal policies and practices to determine their impact on racial inequity.

In the very near future transactional lawyering opportunities in upstart tech ecosystems like Miami and Atlanta will likely increase. Law schools that include professors who teach students how to critique racially inequitable institutions in transactional programs will provide their students with a competitive advantage in the innovation ecosystem of tomorrow. Good transactional counsel has sufficient legal and social acumen to prevent conflict and ease friction between parties.<sup>76</sup> Given the history of exclusionary practices in innovation ecosystems, the sudden influx of relationships between white investors and Black and Brown founders will give rise to additional friction as parties learn how to build successful businesses together. For example, if an investor has made good on the promise to invest in Black founders, the decision to advise a Black-led company to pivot the company's product or change a strategy should be handled with full knowledge of the interests at stake. A founder could resist such a pivot on grounds that the technology in the wrong hands could have a disproportionate impact on communities of color. An investor, on the other hand, with an obligation to limited partners, may argue that the best interest of the company is to widen the customer base for the technology. A lawyer without some understanding of how this dispute fits in the larger context of racial bias and institutionalized racism is ill-suited to resolve the conflict, thereby increasing transactional and litigation costs for both the company and the investment firm, souring the reputations of everyone involved, with the startup founder likely left with little to no recourse for any perceived discrimination. Lawyers who understand and can accurately diagnose bias in an investment firm's relationships with portfolio companies can intervene before an investor's advice turns into an allegation or a formal complaint. Those lawyers will be in high demand for both parties to a term sheet.

Our law schools are responsible for shaping the social engineers of tomorrow. The rise of transactional law clinics demonstrates that

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<sup>76</sup> ABA Core Competencies, *supra* note 27, at 134–35.

transactional attorneys are not an exception to this rule. The inability for Black communities to build, preserve, and bequeath wealth is directly linked to the historically exclusionary practices carried about by governmental, quasi-governmental, and market leading institutions.<sup>77</sup> The status quo practices of the venture capital industry are no different from these other institutions. Therefore, to break the back of economic racial inequity, startup lawyers must also show up with the tools needed to identify, articulate, and resolve obvious and non-obvious policies and practices that produce racial inequity systematically. To prepare these lawyers, law schools—especially those within emerging technology ecosystems—must make critical race theory a mandatory component of any organized transactional law curriculum or program.

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<sup>77</sup> See ROTHSTEIN, *supra* note 50, at 70.