

Clinical Diagnosis

UW's Technology Law and Public Policy Clinic—old law in new tech, and how lawyers can guide smarter policy

BY COLIN RIGLEY

Elliott Okantey is a self-described Luddite. He's reluctant to adopt new technology—stubborn even. When it's clear an industry is pushing the public in a certain direction—like telecomm companies incrementally creating an increasingly connected, smartphone-fueled world—he actively resists the new tech: Okantey didn't get his first smartphone until 2014.

It's important you know this about Okantey in order to appreciate that this wonkish public policy and government enthusiast, who now represents school districts and municipal governments through Porter Foster Rorick LLP, spent his final year of law school doing something

uncharacteristic. He spent it analyzing one of the hottest, most complex modern technological issues: autonomous vehicles.

"I figured I might as well use the organization of law school to get acquainted with the future," he said.

Okantey was one of about a dozen students who participated in the University of Washington School of Law (UW Law) Technology Law and Public Policy Clinic that year, a staple at the school for more than 15 years and one of only a handful of similar clinics in the country. In 2018, the clinic members were assigned Gov. Jay Inslee's 2017 executive order "tasking relevant agencies with supporting the safe testing and operation of autonomous vehicles in Washington."¹ Over the course of the school year, they dove deep into the emerging field of autonomous vehicles in an attempt to fit the rapidly developing technology within a historical legal context. They worked to establish a legal and policy framework for a technology that might seem more fitting for science fiction but is now an impending reality in a world that arguably is not prepared for it. But that's sort of the theme with projects the clinic takes on—finding the practical in the theoretical; grounding the future in the present, and in the past.

In its more than 15 years, the clinic has harnessed UW Law brainpower to explore other new and controversial technologies and has had real and direct impacts on Washington public policy, all while largely remaining out of the limelight.

Deborah Eddy served in the Washington Legislature

from 2007 to 2012 and was involved in the early years of the clinic, first learning of it during her time on the House Technology, Energy, and Communication Committee when clinic participants were examining telecommunication systems and fiber optic networks in the state.

"In that presentation, it was obvious to me that the policy clinic format had a lot to offer legislators," she said. "These were wonderful experiences for me ... I learned a lot from them, and I hope they learned something from me."

An attorney herself, Eddy said the clinic's work outlives individual projects, is more than an academic exercise, and could be a model for practicing lawyers to provide objective counterpoints to the entrenched interests that typically dictate policy.

"The real-world impact is always the same: the lobbyists and paid interest groups still drive the discussion," she said. "But with the policy clinic, there is a steady erosion of lobbyists' monopolistic control of the conversation."

BACK TO THE FUTURE?

Professor William (Bill) Covington, director of the Technology Law and Public Policy Clinic and senior law lecturer at UW Law, started his legal career in telecommunications, working on local policy and regulations during the early days of cable TV.

He launched the Technology Law and Public Policy Clinic in 2003 with initial funding through a cy pres grant. Each year since then, he combs through student applications to select a mix of diverse backgrounds, specialty areas, and technological proficiency. He then guides each group for a full year as the students take on projects ranging from purely exploratory (like the viability of public utility fiber internet in King County, found to be financially infeasible at the time) to boots-on-the-ground policy proposals. In 2016, for example, students in the clinic drafted Executive Order 16-01,² the basis for the state's private personal data collection rules later incorporated in House Bill 2875, which was signed into law that same year.³

Covington identifies potential projects in a number of ways, but primarily by writing the Legislature to solicit emerging technology issues in need of legal research and analysis. He also coordinates with experts in the technology, legal, and legislative sectors. In 2015, the clinic worked closely with Alex Alben, who was then chief privacy officer for the state of Washington, on an analysis of non-consensual pornography, more commonly known as "revenge porn." That project resulted in a background report for House Bill 1788, entitled "Sexual Exploitation in the Digital Age: Non-Consensual Pornography and What Washington Can Do to Stop It."⁴ The bill ultimately stalled in committee, but was superseded by a similar bill that created misdemeanor and felony penalties for non-consensual disclosure of intimate images of another person. RCW 9A.86.010.

In 2017, Covington and his research assistant at the time, Alex Palumbo, collectively spotlighted several projects begging for legal minds to dissect: notably, a request for policies to guide autonomous vehicles, sometimes re-

ferred to as AVs but perhaps more commonly known as driverless cars. The project was part of a work group first established by Inslee's executive order and codified in HB 2970,⁵ which clinic students helped lobby for.

"It was pretty much baptism by fire from the start," Palumbo said of the learning process for that project.

Throughout the year, the students made several trips to Olympia to speak before the House Public Safety Committee, the Executive Committee, and the Washington State Transportation Commission. (At a July 2018 commission meeting, one commissioner called the clinic's research a "win-win; they got some project credit and we got to use their brilliance.")

Palumbo continued working as the chief liaison between UW Law and the Legislature for the Autonomous Vehicles Work Group after the project was officially finished. He's since parlayed that experience, along with his master's in public policy, into a job with the New York City Mayor's Office of Information Privacy, which began last month.

"The responsibility is on me to understand the nuances of the technology world around me, of the social world around me, of the legal world, and to interpolate them," Palumbo said. "So we have no other choice. ... We're empowered with all this knowledge, all this education, unlimited information out there. As lawyers who like to think of themselves as sophisticated, professional individuals, the buck stops with us."

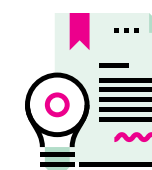
Still, new tech like driverless cars can be slippery to regulate. With no easily identifiable precedent, members of the clinic have to get creative, whether they're looking at historical context to guide topics such as blockchain cryptocurrency, remotely controlled drones, copyright and 3D printing—all of which are topics the clinic has explored—or other technological milestones that fundamentally challenge laws created when no one could anticipate the challenges the new technology would present.

"A sense of legal history gives me a perspective that we have dealt with big controversies before and that the tech economy will continue to develop and thrive, even if policy makers don't understand it," Alben, the former chief privacy officer, said via email about his experience working with the clinic on privacy issues.

Members of the clinic start with the fundamentals. For the autonomous vehicle project—as with all projects—Covington brought in engineers, programmers, public affairs representatives from tech companies, legislators, and other lawyers to share their expertise.

"When crafting public policy, you can never do enough," Covington said. "You can never talk to too many people. You can never access too many resources."

Doug Logan, now an associate at K&L Gates LLP, was in the clinic during his second year of law school. He worked primarily on a team examining the technical and privacy implications of domestic drones,⁶ but he also participated in the presentations and group discussions with the driverless car team.⁷ Surprisingly, he remembers, even some lawmakers thought driverless cars were too far from being a reality to worry about.



The UW clinic, and other non-traditional groups of legal professionals, provide at least one model for the constructive influence that attorneys can wield when they collaborate on not just the practice of law, but its creation.

Illustration: Getty / pressureUA

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"I think the legislators were pretty surprised when we were like, 'What are you going to do when these things show up on your roads?'" he said.

Students first had to settle on a clear definition of "autonomous." In the 2014 paper, "Automated Vehicles," the authors open with an outline of the levels of autonomy described by the National Highway Traffic Safety Administration: a scale ranging from no automation, to limited automation like blind-spot monitoring, to autonomous features like adaptive cruise control, to driver-assisted automation (think Tesla's half-step "autopilot" software update), and finally to fully driverless cars—no human required.

In breaking down legal issues raised by the initially impenetrable new technology, clinic participants first cast a backward glance—to early cases in the nearly two-century process of adapting legal structures to new technologies and modern commerce. For example, there was a time when it wasn't clear if liability could arise from hitting someone's property with a horse and buggy. The question was answered in *Davies v. Mann*, 152 Eng. Rep. 588 (1842), in which "a wagon driven by a team of three horses traveling downhill on a highway at a 'smartish pace' collided into a donkey grazing alongside a highway and killed it," Okantey, the self-described Luddite, said in a follow-up email to *NWLawyer*. Replace the donkey with a pedestrian and the wagon with a modern driverless car, and the same underlying questions of liability apply. "The court found that even though the donkey's owner had allowed the donkey to graze along the side of a highway, the driver of the speeding three-horse team could still be found negligent and held liable for the consequences of his negligence." Similarly, there was a time when the law was unclear as to whether manufacturer liability could arise from injuries suffered by a vehicle operator who did not purchase the vehicle. The early answer, in *Winterbottom v. Wright*, 10 M. & W. 109 (1842), was no.

As vehicles and commerce have become more sophisticated, so too have the legal frameworks. "If we can develop legal theories for manufacturer negligence and strict liability for putting dangerous products into the 'stream of commerce,' then surely we can figure out how to apportion liability for harm caused by a driverless vehicle," Okantey continued. "A driverless vehicle still has manufacturers and is making choices that have been programmed by software developers. Manufacturers, software developers, passengers and pedestrians can still be required to exercise some minimum level of care, either in theories of negligence or strict liability. If any of these



Students with the Technology Law and Public Policy Clinic following an October 2018, meeting with the Washington Traffic Safety Commission Safety Subcommittee on the topic of autonomous vehicles in Olympia.

Front row (left to right): Alex Palumbo, Estella Jung, Silas Alexander, Michael Schmidt.
Back row (left to right): Leeza Soulina, Mark Xiao, Bill Covington.

actors fails to meet the minimum level of care, the law can still apportion fault, as it has throughout our evolution from horse and buggy to this very day. We just have to decide what that minimum level of care is based on the activity in which an actor is engaged."

The clinic's format also illuminates that in real-world public policy analysis, strict legal knowledge is only part of the equation—it's equally if not more important to understand the people involved, their concerns, and the potential impacts of technology. That's one of the things Rachel Wilka—who worked on an autonomous vehicle project in 2014—took with her. Wilka remembers hearing widely disparate viewpoints including from one legislator who believed that every private property owner should give permission before driverless cars could legally operate on roads in front of their property, and another from Google representatives who expressed concern that regulation would hamper their ability to innovate and go to market.

All in all, Wilka discovered through the clinic that policy and regulatory processes, in even the most technical areas, are a lot "muddier" than many people might think. "There isn't really a uniform system," she said. Instead, Wilka discovered a disconnected pooling of reactive input from people who have the investment, commitment, and time to shape the end result.

For Wilka, that insight has provided benefits in droves. She is senior corporate counsel for Zillow, the online real estate platform headquartered in one of the fastest-growing cities in the country that is neck deep in the converging waters of technology and community impact.

"I think people see technology and the technology sector as its own niche market; things that aren't going to affect their lives in any meaningful way," Wilka said. But technology isn't the catalyst of societal change, she added, "technology is just an accelerant."

LET'S GET CLINICAL

Within Washington, UW Law is the only law school with a legal clinic specifically focused on technological public policy issues.

Gonzaga University School of Law has hosted conferences around such subjects as new technology and IP, created courses on emerging issues like artificial intelligence, and is preparing to launch a Center for Law, Ethics & Commerce with a series of lectures planned on technology, IP, and the law, according to a university spokesperson.

Seattle University School of Law has the Summer Institute for Technology, Innovation, and Entrepreneurship, with an immersion course to provide an inside view of startup culture as well as policy, theory, and legal practice curriculum on subjects including technology, real estate, artificial intelligence, and IP.

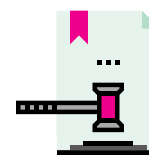
Nationally, there are a handful of tech and policy clinics, including at NYU, Berkeley, Georgetown, Colorado at Boulder, USC, Harvard, and Stanford. The American Bar Association also has resources for law students and practicing lawyers, such as its Section of Science & Technology Law (SciTech), which recently produced a seven-part educational series on blockchain technology and published a book on the subject.

SEAT AT THE TABLE

"How do you get attorneys with practice experience who can really help inform the policy debate, but to do it in a way that is not interest-driven?" queried Eddy, the former legislator mentioned earlier in this article.

Consider a hypothetical consumer-protection law under consideration: An attorney who represents injured consumers might see a need to provide an informed advocate's opinion to their legislator. "But in truth, that Amazon lobbyist is going to pound you like a nail," Eddy said.

The UW clinic, and other nontraditional groups of legal professionals, provide at least one model for the constructive influence that attorneys can wield when they

SIDEBAR
Get Involved

If you would like to lend your expertise to the Technology Law and Public Policy Clinic, contact Bill Covington at covinw@uw.edu. WSBA Section Executive Committees provide another way for legal professionals to guide state legislation. (Learn more by reading "How a WSBA Section Committee Can Change the Rules of the Game" at <https://nwsidebar.wsba.org/>.)

Photo courtesy of UW Technology Law and Public Policy Clinic

collaborate on not just the practice of law, but its creation. Eddy was one of several Washington attorneys who helped establish Washington Appleseed, a social justice initiative fueled by collective efforts of "volunteer lawyers and community partners to develop systemic solutions to community needs," according to the nonprofit's federal tax filings. Washington Appleseed has since dissolved, but over nearly 15 years, it served as a platform for lawyers to lend their unique insights to policy debates on issues like food assistance funding.

"Part of this I think presents a way for attorneys who are in more specialized areas; they have enormous value in helping educate legislators and the public," Eddy said.

For her part, Eddy didn't necessarily have the technical chops, but it didn't inhibit her ability to help the clinic, as she recalled in one story about her experience there: "My daughter asked me where I was going and I said I was off to meet students in the clinic, which was about cryptocurrency," Eddy says. "And my daughter says, 'Mom, what do you know about cryptocurrency?' You don't have to know the ins and outs of every particular technology in order to be effective in discussing the interaction between technology and the law. You need to know what questions to ask about that technology to kind of tease out its impacts—what's its scalability?—so you can grasp enough of the details about the technology to understand what policy issues will arise and how to solve them."

Students who spoke about their experience in the UW Law clinic shared similar realizations: they don't have to be experts in technology; they have to be experts in the law. The specific technology is just another variable.

"Either formally or informally, the law will adapt to change or be left behind," Okantey said. "But something's going to happen. It's important to know that legal analysis will be and should be a part of it." 🗣️

NOTES:

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2. State of Washington Office of the Governor, Executive Order 16-01, "Privacy Protection and Transparency in State Government 'Modernizing State Agency Privacy Protection,'" http://www.governor.wa.gov/sites/default/files/exe_order/eo_16-01.pdf.
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4. Farah Ali, Brian Conley, Heather Lewis, Charlotte Lunday, "Sexual Exploitation in the Digital Age: Non-Consensual Pornography and What Washington Can Do to Stop It," University of Washington School of Law Technology Law and Public Policy Clinic, 2015, <https://digitalcommons.law.uw.edu/techclinic/3/>.
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7. James Barker, Nicholas Pleasants, Shudan Zhu, Peter Montine, Rachel Wilka, "Automated Vehicles," University of Washington School of Law Technology Law and Public Policy Clinic, 2014, <https://digitalcommons.law.uw.edu/techclinic/4/>.



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