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Traumatized Systems Theory: Accountability for Recurrent Systemic Harm

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TRAUMATIZED SYSTEMS THEORY: ACCOUNTABILITY FOR RECURRENT SYSTEMIC HARM

e. christi cunningham[†]

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INTRODUCTION

Eva Rowe's parents, James and Linda Rowe, were both killed by an explosion at a British Petroleum ("BP") refinery in Texas City, Texas in March 2005.¹ Thirteen other workers were killed, and 170 people were injured when an outdated piece of equipment overfilled with a highly flammable liquid and ignited.² Before the explosion, a 2003 external audit found a "checkbook mentality" at the refinery and that the infrastructure was "poor."³

Ms. Rowe testified before the U.S. House Education and Labor Committee that she believed that BP murdered her parents with its corporate culture of greed for profits and requested legislation that would increase safety inspections in order to protect workers from future accidents.⁴ She ultimately settled her lawsuit against BP for an undisclosed amount after seeking 1.2 billion dollars in damages. In addition to monetary damages, Ms. Rowe's attorney said that the settlement included an agreement that BP would improve safety at the refinery and other facilities.⁵

Exactly a year later, in March 2006, more than 200,000 barrels of crude oil spilled from a pipeline at BP's Prudhoe Bay oil field in Alaska.⁶

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1. *BP Explosion Civil Lawsuit Settled*, CBS NEWS (Nov. 9, 2006, 10:20 AM), <https://www.cbsnews.com/news/bp-explosion-civil-lawsuit-settled/> [<https://perma.cc/DBK4-Q2YC>]. Katy Byron, *BP Plant Explosion Suit Settled for \$32 million*, CNN.com, <http://www.cnn.com/2006/LAW/11/09/refinery.suit/index.html> (Nov. 10, 2006, 5:24 AM).
 2. *Id.*
 3. *Id.*
 4. House Committee on Education and Labor, *BP-Texas City Disaster Hearing: Eva Rowe Testimony*, YOUTUBE (May 1, 2007), <https://www.youtube.com/watch?v=3nlqLK0JQ8M&feature=youtu.be> (showing Eva Rowe's testimony on March 22, 2007 before the U.S. House Education and Labor Committee).
 5. *BP Explosion Civil Lawsuit Settled*, *supra* note 1.
 6. *BP to Pay Out \$25m for 200,000-gallon Alaska Oil Spill in 2006*, THE GUARDIAN (May 4, 2011, 7:01 AM), <https://www.theguardian.com/environment/2011/may/04/bp-25m-north-slope-oil-spill> [<https://perma.cc/A5VV-XJLV>].

BP admitted that it “failed to adequately maintain its pipelines.”⁷ BP was later fined twenty-five million dollars, the largest per-barrel penalty ever imposed at that time.⁸

And then, almost exactly four years later, in April 2010, a BP oil exploration project at the Deepwater Horizon oil rig exploded, killing eleven workers and spilling four million barrels of oil over an eighty-seven-day period and resulting in the “largest spill of oil in the history of marine oil drilling operations.”⁹ Eventually, BP “paid \$75 billion in clean-water fees, legal settlements, grants to Gulf Coast researchers and state governments.”¹⁰

These are only some of the BP disasters. After each event, BP faced a variety of efforts to hold it accountable and control its activities.¹¹ Despite these efforts and despite changes in BP leadership, BP continued to engage in behavior that harms individuals, communities, itself, and the environment.¹²

Why are traditional remedies and forms of accountability sometimes ineffective in altering the behavior of organizations and groups of organizations that cause harm? This article hypothesizes that some systems are triggered, meaning that they have experienced trauma and

7. *Id.*

8. *Id.*

9. *Deepwater Horizon—BP Gulf of Mexico Oil Spill*, EPA, <https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill> [<https://perma.cc/UB4D-UBT4>] (last updated Dec. 4, 2020).

10. Steven Mufson, *Ten Years After Gulf of Mexico Oil Spill, Trump Administration Weakens Regulations*, WASH. POST (Apr. 19, 2020, 4:30 PM), https://www.washingtonpost.com/climate-environment/ten-years-after-gulf-of-mexico-oil-spill-trump-administration-weakens-reforms/2020/04/19/f935ec1c-7ffc-11ea-8013-1b6da0e4a2b7_story.html [<https://perma.cc/3PEX-AN8K>].

11. *See BP Fined \$2.4M for Refinery Safety Problems*, CNN MONEY (Apr. 25, 2006, 6:30 PM), https://money.cnn.com/2006/04/25/news/companies/bp_fine/ [<https://perma.cc/6FEE-YCH7>] (detailing the Department of Labor’s Occupational Safety and Health Administration \$2.4 million fine against BP for conditions in the Oregon, Ohio refinery that were reminiscent of conditions in their Texas City refinery which exploded the previous year); *Most Oil Companies in MTBE Lawsuits Settle*, NBC NEWS (May 9, 2008, 3:27 PM), <https://www.nbcnews.com/id/wbna24541226> [<https://perma.cc/4AYZ-S7ZG>] (outlining a class-action lawsuit finding a variety of oil companies, including BP, liable for water contamination when the gasoline additive MTBE was found in water systems across the country).

12. Abrahm Lustgarten & Ryan Knutson, *Reports at BP over Years Find History of Problems*, WASH. POST (Jun. 8, 2010), https://www.washingtonpost.com/wp-dyn/content/article/2010/06/07/AR2010060704826_pf.html [<https://perma.cc/C6K4-NCCP>] (“A series of internal investigations over the past decade warned senior BP managers that the oil company repeatedly disregarded safety and environmental rules and risked a serious accident if it did not change its ways.”).

act out in destructive or self-destructive, trauma-responsive ways. Many traditional forms of control—formal law, social and cultural pressures, and market forces—are insufficient to alter these systems and produce meaningful social change. Therefore, in addition to traditional forms of control, accountability for triggered systems must include trauma transforming prescriptions.

The goal is not to move harmful systems into a posture of victim; instead, the goal is to develop law and policy that produces lasting social change. Consideration of systemic trauma is not intended to excuse harmful behavior; instead, the goal is to find more effective ways of ending it. Trauma-informed systemic remedies should supplement, not replace, existing remedies. And trauma-informed remedies should be viewed as part of long-term strategies to address social injustice, rather than an immediate fix to some of the more urgent and existential challenges.

This article proposes a new legal theory—Traumatized Systems Theory. Traumatized Systems Theory considers the implications of social science research concerning organizational trauma for law and offers an area for further research, systems transformation—the identification and healing of triggered systems. Currently, two failed approaches to triggered systems perpetuate recurrent harm: 1) inverse accountability and 2) symptom-focused remedies. Inverse accountability means that individuals are held accountable for the outcomes of trauma caused by systems. When individuals suffer or are punished for responding to trauma that is inflicted, facilitated, funded, enabled or ignored by systems, accountability is inverse. The systems that cause the individual trauma are often not held accountable. Symptom-focused remedies are responses to systemic harm that address the harms or outcomes, without addressing the traumatic origins of the behavior. Often, symptom-focused remedies have exclusive or primary goals of controlling recurrent systemic harms or promoting efficiency. Instead, Traumatized Systems Theory hypothesizes that law and policy should facilitate trauma-informed systemic transformation as an equally important goal.

Part I sets the focus on recurrent systemic harm and provides examples from various areas of society. Part II discusses trauma and trauma response. Part III describes traumatized systems. Part IV presents Traumatized Systems Theory. Part V discusses precedent for considering the systemic mind when fashioning accountability. Finally, Part VI offers systems transformation as a supplemental approach to addressing triggered systems and recurrent systemic harm.

I. RECURRENT SYSTEMIC HARM

A starting point for Traumatized Systems Theory is recurrent systemic harm. Recurrent systemic harm is systemic harm done to

individuals and communities that persists despite efforts to remedy it.¹³ When harm is recurrent, legislative, regulatory, judicial, or market penalties may have the effect of temporarily diminishing or stopping the harm. But the harm returns later. Because some harmful systemic behavior is trauma-driven, traditional remedies are insufficient to address it. Focusing on recurrent harm does not rule out the possibility that a single harmful act may be trauma responsive; however, initially, the central concern is recurrent systemic harm because it may be more indicative of systemic trauma response.

A. *Defining Systems*

The political, scholarly, and social critiques of dysfunctional institutions and systems are extensive. Many people have identified “the system,” “the man,” or “them” as the cause of social ills, both colloquially and in scholarship and practice.¹⁴ These faulty institutions and systems may be public, like government agencies;¹⁵ private, like

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13. For an explanation of one form of systemic harm, systemic racism, and how minority communities are greatly impacted by a holistic societal problem, see *What Systemic Racism Means and The Way It Harms Communities*, NPR (Jul. 1, 2020, 5:00 AM), <https://www.npr.org/2020/07/01/885878564/what-systemic-racism-means-and-the-way-it-harms-communities> [<https://perma.cc/AH4Q-QCD9>].
 14. See Richard J. Holden, *People or Systems? To Blame is Human. The Fix is to Engineer*, 54 PRO. SAFETY 34 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3115647/> [<https://perma.cc/494W-P4RY>] (discussing tendency to blame individuals rather than systems); see also Stephan J. Nolan, *Referred Pain: Is the Tort System to Blame for Medical Malpractice Claims?*, 37 MD. BAR J. 38 (2004).
 15. See, e.g., Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, 56 SANTA CLARA L. REV. 457, 460 (2016) (describing design and effect of immigration court and adjudication); Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 663–64 (2016) (describing juvenile justice system counter-productive approach to juvenile offenders); Erik Luna, *Criminal Justice and the Public Imagination*, 7 OHIO ST. J. CRIM. L. 71, 105–10 (2009) (discussing government actions under the Patriot Act); Taimie L. Bryant, *Trauma, Law, and Advocacy for Animals*, 1 J. ANIMAL L. & ETHICS 63, 71–93 (2006) (discussing a dismissive approach of law to animal cruelty); William Wesley Patton, *When the Empirical Base Crumbles: The Myth that Open Dependency Proceedings do not Psychologically Damage Abused Children*, 33 L. & PSYCH. REV. 29, 36–44 (2009) (describing trauma caused by open dependency proceedings).

media and entertainment entities;¹⁶ hybrid, like the education system¹⁷ and prison-industrial complex;¹⁸ or social power structures, like patriarchy, white supremacy, imperialism, or capitalism. Scholars and practitioners have observed the many ways that institutions and systems inflict harm on individuals and communities.¹⁹

16. See, e.g., Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 67 (2017) (describing the role of media in perpetuating child victimization in sex trafficking). See also Robert H. Wood, *Violent Video Games: More Ink Spilled than Blood—An Analysis of the 9th Circuit Decision in Video Software Dealers Association v. Schwarzenegger*, 10 TEX. REV. ENT. & SPORTS L. 103, 108–10 (discussing non-regulation of violent video game industry despite possible psychological trauma to minors).
17. See, e.g., Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 HARV. L. REV. 2320, 2324–37 (2017) (describing terror as a university practice); Judith A. Reisman & Mary E. McAlister, *Materials Deemed Harmful to Minors are Welcomed into Classrooms and Libraries via Educational “Obscenity Exemptions”*, 12 LIBERTY U. L. REV. 517, 530–37 (2018) (describing sexual indoctrination of school curriculum); Judith A.M. Scully, *Examining and Dismantling the School-to-Prison Pipeline: Strategies for a Better Future*, 68 ARK. L. REV. 959, 987–90 (2016) (discussing emotional trauma that children in the school-to-prison pipeline may experience); Joseph O. Oluwole, *“Danger or Resort to Underwear”: The Safford Unified School District No. 1 v. Redding Standard for Strip Searching Public School Students*, 41 ST. MARY’S L.J. 479, 496–97 (2010) (discussing the trauma a child may experience from school strip searches).
18. See, e.g., Craig Haney, *The Psychological Effects of Solitary Confinement: A Systematic Critique*, 47 CRIME & JUST. 365, 370–78 (2018) (discussing trauma impact of solitary confinement); Bernice B. Donald & Marcus Gadson, *Rethinking Solitary Confinement*, 31 CRIM. JUST. 1 (2016) (same); Ashley Fansher & Rolando V. del Carmen, *“The Child as Witness”: Evaluating State Statutes on the Court’s Most Vulnerable Population*, 36 CHILD.’S LEGAL RTS. J. 1, 2–14 (2016) (discussing impact of court proceedings on children); Nahama Broner, Stacy S. Lamon, Damon W. Mayrl & Martin G. Karopkin, *Arrested Adults Awaiting Arraignment: Mental Health, Substance Abuse, and Criminal Justice Characteristics and Needs*, 30 FORDHAM URB. L.J. 663, 675 (2003) (discussing trauma effect of arrest and arraignment).
19. See, e.g., Melissa L. Breger, *Making Waves or Keeping Calm?: Analyzing the Institutional Culture of Family Courts through the Lens of Social Psychology Groupthink Theory*, 34 L. & PSYCH. REV. 55, 56 (2010) (describing groupthink and group decisionmaking adversely impacting parties in the family court system); Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. CAL. REV. L. & SOC. JUST. 195, 244–46 (2014) (analyzing where discretion lies in the government regarding immigration decisions); Antonia Castañeda, *Language and other Lethal Weapons: Cultural Politics and the Rites of Children as Translators of Culture*, 19 CHICANO-LATINO L. REV. 229 (1998) (illustrating in story form the systemic use of children as translators); Shabnam Javdani, Naomi Sadeh & Edelyn Verona,

Proposed solutions have focused both on changing the systems/institutions and on compensating or healing the individuals and communities that have been harmed.²⁰ These are extremely important and necessary works.

This article attempts to build on these works in three distinct ways—first, by focusing on a particular type of identifiable system, second by offering a new perspective on the problem of systemic oppression, and third by offering a supplemental form of accountability for oppressive systems.

“System,” for the purposes of this article, is a type of community. It refers to an organization or group of organizations. An organization is a community of individuals, and a system may be an organization or a community of organizations. It has structure and leadership. It often contains departments and factions. It communicates internally and externally, has rules that govern behavior, and its own culture.

Organizational identity is an important factor in the law’s approach to accountability for systems. In some cases, organizational identity is viewed vertically. The identity of the organization rests largely in its officers and top executives and their actions and decisions. This identity follows Frederick Winslow Taylor’s theory of scientific management, which allocated responsibility for thinking and planning to managers while workers implemented these goals through their labor.²¹ As Max Weber observed, the hierarchical and assembly-line structure of classical organization theory had the effect of attempting to control workers physically and emotionally for the sake of production.²²

Another view of organizational identity is horizontal, following theories of more democratized workplaces. “Social connection, interaction, and reciprocity lies at the heart of workplace social capital and is reflected in trust between and among employees and management, shared workplace values, norms of cooperation and reciprocity, *esprit*

Gendered Social Forces: A Review of the Impact of Institutionalized Factors on Women and Girls’ Criminal Justice Trajectories, 17 PSYCH., PUB. POL’Y & L. 161, 164–88 (2011) (detailing institutional factors leading women and girls to criminally offend).

20. See, e.g., Jennifer Honig & Susan Fendell, *Meeting the Needs of Female Trauma Survivors: The Effectiveness of the Massachusetts Mental Health Managed Care System*, 15 BERKELEY WOMEN’S L.J. 161, 168–72 (2000) (comparing Massachusetts’ mental health managed care to other states); Lupin Battersby, Lorraine Greaves & Rodney Hunt, *Legal Redress and Institutional Sexual Abuse: A Study of the Experiences of Deaf and Hard of Hearing Survivors*, 10 FLA. COASTAL L. REV. 67, 83–106 (2008) (discussing redress process for Deaf survivors of residential school sexual abuse).
21. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2072–73 (2003).
22. *Id.* at 2073.

de corps, and what some organizational behavior theorists call ‘organizational citizenship behavior.’”²³

A horizontal perception of organizational identity means that responsibility and decisionmaking is spread more broadly throughout the organization. More planning occurs at the unit level and information may be more compartmentalized.

A system may also be a group of organizations that share a common or related purpose. General Systems Theory suggests that it is possible to identify certain propensities in one organization that will be indicative of characteristics in other organizations. General Systems Theory describes organizations that are embedded within each other and connected and influenced by other systems.²⁴ According to General Systems Theory, the universe consists of nested systems and subsystems.²⁵ As developed by Ludwig von Bertalanffy, General Systems Theory hypothesizes common functionality among systems, such that the mapping of the dynamics of one system may be useful in understanding other systems.²⁶ Obvious examples are the ways in which some federal procedures and laws are echoed at the state level and then how some of those processes replicate at local and neighborhood levels. Scholars have also noted the working of complex systems in financial markets²⁷ and family dynamics,²⁸ for example. According to Bertalanffy:

There exist models, principles, and laws that apply to generalized systems or their subclasses, irrespective of their particular kind, the nature of their component elements, and the relation or “forces” between them. It seems legitimate to ask for a theory,

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23. Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 22 (2005) (footnote omitted).
 24. Joseph K Tan, *Health Care, Information Systems in*, in ENCYCLOPEDIA OF INFORMATION SYSTEMS (2003) <https://www.sciencedirect.com/topics/computer-science/general-system-theory> (“The structure of a system may involve a hierarchy of embedded subsystems, each having its own unified purpose that contributes jointly to the functioning of the larger system.”).
 25. See Mary Dowell-Jones & Ross Buckley, *Reconceiving Resilience: A New Guiding Principle for Financial Regulation?*, 37 NW. J. INT’L L. & BUS. 1, 22 (2017) (describing systems theory from an economic market viewpoint).
 26. See Ludwig von Bertalanffy, *Passages from General System Theory*, <https://www.panarchy.org/vonbertalanffy/systems.1968.html> (last visited June 21, 2021).
 27. Tan, *supra* note 24.
 28. Susan L. Brooks, *Representing Children in Families*, 6 NEV. L.J. 724, 724–26 (2006)(discussing family systems theory).

not of systems of a more or less special kind, but of universal principles applying to systems in general.²⁹

General Systems Theory is a scientific theory of connectedness suggesting that organizations exist within organizations and that at each level common relationships, characteristics, and functions exist.³⁰ General Systems Theory describes the probability that systems are connected and related and that dealing effectively with one system may inform the diagnosis and treatment of a problem in another system.³¹

Borrowing from General Systems Theory, Traumatized Systems Theory suggests that groups of organizations may be traumatized as a whole or may be affected by the trauma of one of its partners or divisions. Understanding and remedying the trauma of one organization in a group system may bring understanding and transformation for the entire group and may inform addressing recurrent systemic harm in other systems.

B. Examples of Recurrent Systemic Harm

There are many examples of systems that repeatedly inflict harm. The following are a few to set the stage and suggest the potential variety of application for Traumatized Systems Theory:

1. Corporate Risk-Taking

Some corporations and groups of corporations repeatedly engage in risky behavior, such as investment strategies or reporting practices, that are harmful to others and themselves. Scholars often focus on corporations whose failure have the potential to have broad consequences across the economy.³² These are organizations, like large banks, that have been considered too big to fail because their failure

29. von Bertalanffy, *supra* note 26.

30. Tan, *supra* note 24 (“[General Systems Theory] begins with the empirical observation that all ‘systems,’ regardless of their disciplinary domain, share some important similarities in their underlying structure.”).

31. Gregory Mitchell, *Bertalanffy’s General Systems Theory*, MIND DEVELOPMENT, <https://mind-development.eu/systems.html> [<https://perma.cc/F3FC-5HU6>] (last visited Feb. 28, 2021) (“The systems view looks at the world in terms of relationships and integration.”).

32. See Steven L. Schwarcz, *Misalignment: Corporate Risk-Taking and Public Duty*, 92 NOTRE DAME L. REV. 1, 4 (2016) (footnote omitted) (“[A] firm’s failure would be externalized onto other market participants as well as onto the public, including ordinary citizens impacted by an economic collapse.”); John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. LEGAL ANALYSIS 35, 73 & n.62 (2014) (discussing the public impact of corporate risk-taking); Steven L. Schwarcz, *Too Big to Fool: Moral Hazard, Bailouts, and Corporate Responsibility*, 102 MINN. L. REV. 761, 770 (2017) (same).

would have catastrophic rippling effects on the economy. At the same time, risky behavior on the part of smaller corporations can cause harm to people involved at all levels, including shareholders, investors, and consumers of corporate products. Corporate abuses are common, and victims are often left with compensation equaling only a fraction of their loss or no compensation at all.

2. Systemic Racism

Systemic racism is the harm done by structures and institutions at every level of society to preserve racial dominance and subordination.³³ Racial scapegoating—blaming a particular group of people for a crisis or danger—is one form of systemic racism that is repeatedly used to manipulate power. Early uses of racial scapegoating involved vilifying indigenous peoples in order to facilitate expansion for European settlers.³⁴ Subsequently, at the federal level, racial scapegoating has resulted in the internment of Japanese Americans,³⁵ the demonization of African American women as welfare queens,³⁶ the post-9/11 harassment of Muslim people as terrorists,³⁷ and the detention and deportation of Latin American refugees as criminals.³⁸

On the state level, recurrent racial scapegoating has manifested as gerrymandering geographically identifiable populations because of their effect on the allocation of political power.³⁹ At the local level, recurrent

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33. Thomas Kleven, *Systemic Classism, Systemic Racism: Are Social and Racial Justice Achievable in the United States?*, 8 CONN. PUB. INT. L.J. 37, 37 (2009) (defining systemic racism as “the political and economic institutions of the society [that] are structured and operate to systematically disadvantage . . . ethnic minorities”).
 34. Gregory Ablavsky, *The Savage Constitution*, 63 DUKE L.J. 999, 1014–16 (2014) (explaining that Native Americans were portrayed as aggressors whose violence justified stripping them of their land); David Wilkins, *The Manipulation of Indigenous Status: The Federal Government As Shape-Shifter*, 12 STAN. L. & POL’Y REV. 223, 226 (2001) (discussing treatment of Native Americans as a “depraved race” and deliberate undermining of societal structure and tribal sovereignty).
 35. See *Korematsu v. United States*, 323 U.S. 214, 215–217 (1944).
 36. See Premilla Nadasen, *From Widow to “Welfare Queen”: Welfare and the Politics of Race*, 2007 BLACK WOMEN, GENDER & FAMS. 52, 53.
 37. See Hilal Elver, *Racializing Islam Before and After 9/11: From Melting Pot to Islamophobia*, 21 TRANSNAT’L L. & CONTEMP. PROBS. 119 (2012).
 38. See Rebecca Sharpless, *“Immigrants are Not Criminals”: Respectability, Immigration Reform and Hyperincarceration*, 53 HOUS. L. REV. 691, 722–25 (2016).
 39. See Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 596–97 (2002); see also Daniel P. Tokaji, *Denying Systemic Equality: The Last Words of the Kennedy Court*, 13 HARV. L. & POL’Y

racial scapegoating manifests as white flight from neighborhoods or to private schools because Black families have integrated.⁴⁰ This results in school districts' segregation then desegregation then re-segregation. Racial scapegoating also manifested in the wars on crime and drugs, and the resulting police brutality and mass incarceration.⁴¹ In private industry, recurrent racial scapegoating may take the form of attacks on affirmative action.⁴²

3. Artificial Intelligence

Some uses of artificial intelligence may provide examples of recurrent systemic harm because the complex symmetry of data and commands that make AI function constitute organizations nested within each other—systems. Professors Mark Lemley and Bryan Cassey point out that artificial intelligence systems acting on “poorly curated data sets . . . run the risk of simply perpetuating existing biases by continuing to favor historical *haves* against *have-nots*.”⁴³ And recent headlines told the story of a prominent AI ethics researcher who was fired from Google while attempting to publish a paper concerning learned bias in AI systems that analyze and generate language.⁴⁴

For the most part, AI involves machine learning. So it is cognitive, almost by definition. To the extent that AI learns bias, it is learning some of the unconscious thoughts and patterns of its designers, trainers, and data. However, a subsection of AI is evolving to include emotional behavior. “Affective Computing” involves AI reading emotions:

REV. 539, 540–41 (2019); Daniel P. Tokaji, *Gerrymandering and Association*, 59 WM. & MARY L. REV. 2159, 2175 (2018).

40. See Steven L. Nelson, *Still Serving Two Masters? Evaluating the Conflict Between School Choice and Desegregation Under the Lens of Critical Race Theory*, 26 B.U. PUB. INT. L.J. 43, 52–53 (2017); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 628–630 (1983).
41. See Hannah LF Cooper, *War on Drugs Policing and Police Brutality*, 50 SUBSTANCE USE & MISUSE 1188, 1188–89 (2015); see also *Race and the Drug War*, DRUG POL'Y ALL., <https://drugpolicy.org/issues/race-and-drug-war> [<https://perma.cc/6BEE-G6SL>] (last visited Feb. 21, 2021) (“The drug war has produced profoundly unequal outcomes across racial groups, manifested through racial discrimination by law enforcement and disproportionate drug war misery suffered by communities of color.”).
42. See, e.g., *Fac., Alumni, & Students Opposed to Racial Preferences v. New York Univ.* L. Rev., No. 18–CV–9184 (ER), 2020 WL 1529311, at *1–2 (S.D.N.Y. 2020), *appeal filed*, No. 20–1508 (2nd Cir. May 7, 2020).
43. Mark A. Lemley & Bryan Casey, *Remedies for Robots*, 86 U. CHI. L. REV. 1311, 1338 (2019).
44. E.g., *Behind the Paper that Led to a Google Researcher's Firing*, WIRED (Dec. 8, 2020, 4:39 PM), <https://www.wired.com/story/behind-paper-led-google-researchers-firing/> [<https://perma.cc/P9JB-6BLG>].

They can listen to voice inflections and start to recognize when those inflections correlate with stress or anger. Machines can analyze images and pick up subtleties in micro-expressions on humans' faces that might happen even too fast for a person to recognize.⁴⁵

Therefore, just as artificial intelligence may reflect the biases of its designers, trainers, and data, it may also reflect their trauma. Because artificial intelligence has society-wide dimensions through information collection and dissemination and growing cultural dependence on digital information, any trauma-responsive harms in AI have the potential to exponentially expand harm.

II. TRAUMA AND TRAUMA RESPONSE

Trauma is harm that, among other things, predictably produces recurrent behavioral responses. Systems experience trauma and evince trauma response in the form of recurrent harm to individuals, communities, and themselves. This article is the first to apply the social science concerning organizational trauma to formulate legal theory. The social science of organizational trauma evolved from the science of individual trauma and trauma response. Like individuals, organizations may experience trauma by being victimized or by harming others. Also, like individuals, traumatized organizations experience trauma symptoms or responses that are recurrent and difficult to control.

A. *Trauma*

“Trauma” refers both to harm to the body and harm to the mind and spirit. It is easy to understand how a blow to the body can affect an individual. Broken bones and torn muscle may hamper mobility both immediately after the trauma occurs and into the future. Sometimes, the arthritis that results from the trauma does not manifest until much later. A blow to the mind and spirit is similar to a blow to the body. In fact, neuroscientists have discovered that psychological trauma produces biological changes in the brain.⁴⁶ “[T]rauma produces actual physiological changes, including a recalibration of the brain’s alarm system, an increase in stress hormone activity, and alterations in the

45. Meredith Somers, *Emotion AI, Explained*, MIT SLOAN SCH. MGMT: IDEAS MADE TO MATTER (Mar. 8, 2019), <https://mitsloan.mit.edu/ideas-made-to-matter/emotion-ai-explained> [https://perma.cc/VU9K-9TC5].

46. BESSEL VAN DER KOLK, *Prologue to THE BODY KEEPS THE SCORE: BRAIN, MIND, AND BODY IN THE HEALING OF TRAUMA* (2014).

system that filters relevant information from irrelevant.”⁴⁷ The effects may manifest immediately or far into the future.⁴⁸

The Substance Abuse and Mental Health Services Administration (SAMHSA) completed extensive collaborative work in formulating a “concept of trauma” in individuals that could be shared among constituencies of practitioners, researchers and survivors and used by individuals and communities in receiving services and implementing policy.⁴⁹ “Individual trauma results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional, or spiritual well-being.”⁵⁰

The SAMHSA definition entails the three “e”s of trauma— 1) events (and circumstances, happening once or repeatedly, that are actual or threats of physical or psychological harm or neglect that imperils development);⁵¹ 2) experience of the event, which may vary from person to person and “may be linked to a range of factors”;⁵² and 3) effects of the adverse experience, which may be short term or long term and occur immediately or with some delay.⁵³

Two of the best-known studies of trauma, the National Child Trauma Stress Network (NCTSN) report⁵⁴ and the Centers for Disease

47. *Id.*

48. See Vincent J. Felitti, Robert F. Anda, Dale Nordenberg, David F. Williamson, Alison M. Spitz, Valerie Edwards, Mary P. Koss & James S. Marks, *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. PREVENTIVE MED. 245, 251 (1998) (concluding that childhood adverse experiences may result in adult morbidity); Kate Aschenbrenner, *Ripples Against the Other Shore: The Impact of Trauma Exposure on the Immigration Process Through Adjudicators*, 19 MICH. J. RACE & L. 53, 60–63 (2013) (describing effects of trauma).

49. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN.’S TRAUMA & JUST. STRATEGIC INITIATIVE, SAMHSA’S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 7 (2014), <http://store.samhsa.gov/shin/content//SMA14-4884/SMA14-4884.pdf>.

50. *Id.* (emphasis omitted).

51. *Id.* at 8.

52. *Id.*

53. *Id.*

54. E. Jane Costello, Alaattin Erkanli, John A. Fairbank & Adrian Angold, *The Prevalence of Potentially Traumatic Events in Childhood and Adolescence*, 15 J. TRAUMATIC STRESS 99 (2002). See *Child Traumatic Stress: What Policy Makers Should Know*, NATIONAL CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/sites/default/files/resources>

Control-Kaiser Permanente Adverse Childhood Experience (ACE) Study,⁵⁵ reveal its prevalence and impact. The NCTSN reported on a North Carolina longitudinal general population study that found that approximately 67% of children and adolescents had experienced a potentially traumatic event by the age of 16.⁵⁶ The ACE Study was inspired when Dr. Vincent Felitti, who was the chief of Kaiser Permanente's Department of Preventive Medicine in San Diego, California in the mid-1980s, accidentally discovered a correlation between obesity and childhood sexual abuse.⁵⁷

Dr. Felitti's focus had been obesity, and he was perplexed by the high dropout rate from his obesity clinic of patients who were having success in losing weight.⁵⁸ People who were 300 pounds overweight would lose 100 pounds and then drop out of the program.⁵⁹ Dr. Felitti began interviewing patients in the clinic in order to uncover factors contributing to obesity and the dropout rate:

The turning point in Felitti's quest came by accident. The physician was running through yet another series of questions with yet another obesity program patient: How much did you weigh when you were born? How much did you weigh when you started first grade? How much did you weigh when you entered high school? How old were you when you became sexually active? How old were you when you married?

"I misspoke," he recalls. "Instead of asking, 'How old were you when you were first sexually active?' I asked, 'How much did you weigh when you were first sexually active?'" The patient, a woman, answered, "Forty pounds."

/child_traumatic_stress_what_policymakers_should_know.pdf] (last visited Feb. 28, 2021).

55. Felitti et al., *supra* note 48. See *About the CDC-Kaiser ACE Study*, CENTER FOR DISEASE CONTROL AND PREVENTION (Apr. 13, 2020), https://www.cdc.gov/violenceprevention/aces/about.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Facestudy%2Fabout.html [https://perma.cc/X725-S2NQ].
56. NATIONAL CHILD TRAUMATIC STRESS NETWORK, *supra* note 54 at 15; William E. Copeland, Gordon Keeler, Adrian Angold & E. Jane Costello, *Traumatic Events and Posttraumatic Stress in Childhood*, 64 ARCHIVES GEN. PSYCH. 577, 577, 580 (2007).
57. Jane Ellen Stevens, *Childhood Trauma: Root Causes of a Public Health Crisis*, 32 DEL. LAW. 10, 10–11 (2015) (discussing history of the ACE study).
58. *Id.* at 10.
59. *Id.*

He didn't understand what he was hearing. He misspoke the question again. She gave the same answer, burst into tears and added, "It was when I was four years old, with my father."⁶⁰

Subsequent interviews with other patients revealed a pattern of childhood sexual abuse and obesity.⁶¹

When Dr. Felitti partnered with epidemiologist Robert Anda at the Center for Disease Control, further exploration expanded the types and categories of adverse experiences considered.⁶² The ACE Study was "one of the largest investigations of childhood abuse and neglect and household challenges and later-life health and well-being."⁶³ Through the ACE Study, "[m]ore than 17,000 Health Maintenance Organization (HMO) members undergoing a comprehensive physical examination chose to provide detailed information about their childhood experience of abuse, neglect, and family dysfunction."⁶⁴ The study considered seven categories of adverse childhood experiences, divided into three types of abuse (psychological abuse, physical abuse, sexual abuse) and four categories of household dysfunction (violence against mother, living with household member who is substance abuser, living with household member who is mentally ill or suicidal, or living with a household member who was ever imprisoned).⁶⁵

The ACE study found that more than half of the study participants had been exposed to one or more adverse experiences during childhood,⁶⁶ and more than one in five reported three or more such experiences.⁶⁷

60. *Id.* at 11.

61. *Id.*

62. Karen Oehme, Anthony J. Ferraro, Nat Stern, Lisa S. Panisch & Mallory Lucier-Greer, *Trauma-Informed Co-Parenting: How a Shift in Compulsory Divorce Education to Reflect New Brain Development Research Can Promote Both Parents' and Children's Best Interests*, 39 U. HAW. L. REV. 37, 46–49 (2016).

63. CENTER FOR DISEASE CONTROL AND PREVENTION, *supra* note 55. *See also* Stevens, *supra* note 57, at 10 (calling the ACE Study "the most important public health study you never heard of").

64. *Adverse Childhood Experiences (ACEs)*, ALASKA CHILD.'S TR., <https://www.alaskachildrenstrust.org/aces> [<https://perma.cc/X7GQ-63QT>] (last visited Feb. 19, 2021).

65. Felitti et al., *supra* note 48, at 248.

66. *Id.* at 249.

67. *About the CDC-Kaiser ACE Study: Data and Statistics*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/violenceprevention/acestudy/about.html> [<https://perma.cc/ABT6-9RUE>] (last updated Apr. 13, 2020) (presenting data on the prevalence of various forms of trauma).

B. “Perpetrator” Trauma: Trauma to Those who Inflict Trauma

Another aspect of trauma that is less often discussed is the trauma that comes from causing trauma to others. “This will hurt me more than it hurts you” is a familiar adage attributed to parents who are spanking their children. In the context of trauma, research indicates that the concept is true:

[Trauma results from] being an active participant in causing harm or trauma to others, whether in the line of duty or outside of the law, such as in criminal activity. Psychologist Rachael MacNair’s research suggests that traumatic effects of harming others, intentionally or unintentionally, can be as severe as or more severe than what victims and survivors experience.⁶⁸

In other words, inflicting harm may produce equal or more trauma response than being a victim of harm.

Saira Mohamed refers to this aspect of trauma as “perpetrator trauma.”⁶⁹ She engages in the difficult and uncomfortable goal of humanizing perpetrators of mass atrocities, arguing that they are human and not monsters. Her central focus is “the idea that *perpetrators can experience their crimes as trauma*—that is, that commission of the crime itself causes a psychological injury to the perpetrator, which can result in particular adverse physical, social, or emotional consequences.”⁷⁰ The concept of perpetrator trauma blurs the line between perpetrator and victim in another manner. As the discussion that follows indicates, victims of trauma are particularly prone to violent and aggressive behavior either against others or *themselves*, and the idea of perpetrator trauma raises the prospect that inflicting trauma may be trauma responsive behavior manifesting as self-harm through harm to others.

Whether as victim or perpetrator, research shows that trauma is pervasive and global, and has serious life-long implications for health and behavior.

C. Trauma Response

Trauma predictably produces trauma symptoms and responses. Just like the presence of a physical illness or injury may be diagnosed through the existence of certain known and predictable symptoms,

68. CAROLYN YODER, *THE LITTLE BOOK OF TRAUMA HEALING: WHEN VIOLENCE STRIKES AND COMMUNITY SECURITY IS THREATENED* 14 (2005) (citing RACHAEL MACNAIR, *PERPETRATION-INDUCED TRAUMATIC STRESS: THE PSYCHOLOGICAL CONSEQUENCES OF KILLING* (2002)).

69. Saira Mohamed, *Of Monsters and Men: Perpetrator Trauma and Mass Atrocity*, 115 COLUM. L. REV. 1157, 1162–64 (2015).

70. *Id.* at 1162.

psychological injury produces known and predictable responses.⁷¹ The ACE study, for example, was inspired by Dr. Felitti's observation of common behavior among patients in the obesity clinic, dropping out after a period of success.⁷² In addition, common symptoms among veterans returning home was the catalyst for a resurgence of interest in psychological trauma following the Vietnam War.⁷³

When trauma involves abuse, neglect, interpersonal dysfunction, or loss, for example, common responses include difficulty in regulating physical and emotional functions, difficulty in regulating attention and behavioral functions, and difficulty in stabilizing identity and relationship functions.⁷⁴ Physical and emotional symptoms may include tantrums or immobilization due to difficulty tolerating and recovering from feelings of fear, anger, or shame; difficulty with eating, sleeping, or elimination; over or under reactivity to sound or touch; and numbness.⁷⁵ Attention and behavioral difficulty may mean preoccupation with threat or difficulty judging safety and danger cues; impaired capacity for self-protection and extreme risk taking; maladaptive self-soothing; self-harm; and difficulty sustaining goal-directed behavior.⁷⁶ "Most studies find significantly increased rates of internalizing disorders (especially major depression-dysthymia and suicidal ideation) and externalizing disorders (oppositional defiant behaviors, attention deficit hyperactivity disorder, self-destructive behaviors) in maltreated children and adolescents."⁷⁷ Self and relational difficulty may mean "intense preoccupation with the safety of the caregiver or other loved ones;" low self-esteem and self-loathing;

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71. See Bradley C. Stolbach, Reese Minshew, Vikki Rompala, Renee Z. Dominguez, Tanja Gazibara & Robert Finke, *Complex Trauma Exposure and Symptoms in Urban Traumatized Children: A Preliminary Test of Proposed Criteria for Developmental Trauma Disorder*, 26 J. TRAUMATIC STRESS 483, 483 (2013) ("Clinicians and researchers have suggested that ongoing trauma, coupled with compromised caregiving, may result in a distinct constellation of symptoms.").
72. See *supra* notes 57–61 and accompanying text.
73. *Posttraumatic Stress Disorder*, AMERICAN PSYCHIATRIC ASSOCIATION (2013), <https://www.aging.pa.gov/publications/policy-procedure-manual/Documents/PTSD%20Fact%20Sheet.pdf> [<https://perma.cc/468J-TYGQ>]. Both the DSM-IV and DSM-V list characteristic symptoms of trauma. *Id.*
74. Stolbach et al., *supra* note 71, at 484.
75. See *id.* app. at 488–89.
76. *Id.* at 489.
77. Michael D. De Bellis, *Developmental Traumatology: The Psychobiological Development of Maltreated Children and its Implications for Research, Treatment, and Policy*, 13 DEV. AND PSYCHOPATHOLOGY 539, 544 (2001) (citing NAT'L RSCH COUNCIL, UNDERSTAND CHILD ABUSE AND NEGLECT (1993)).

distrust, defiance or lack of reciprocal behavior in relationships; physical or verbal aggression; inappropriate attempts for intimate contact; or either a lack of empathy or excessive responsiveness to the distress of others.⁷⁸

Although symptomology is particularly pronounced when the trauma occurs during childhood, adults who experience trauma also exhibit trauma response.⁷⁹ In *The Body Keeps the Score: Brain, Mind and Body in the Healing of Trauma*, Dr. Bessel van der Kolk, former director of the Trauma Center and a leader in trauma research and practice, discusses the trauma of soldiers returning home from war:

Soldiers returning home from combat may frighten their families with their rages and emotional absence. The wives of men who suffer from PTSD tend to become depressed, and the children of depressed mothers are at risk of growing up insecure and anxious. Having been exposed to family violence as a child often makes it difficult to establish stable, trusting relationships as an adult.⁸⁰

Dr. van der Kolk's description of secondary trauma illustrates how predictable responses to trauma by adults may produce trauma in other adults and in children, which produces a cycle of trauma. His description highlights that while there are cultural and individual distinctions in trauma response, to a significant degree, the symptomology of trauma response is predictable and common.

D. Non-cognitive Trauma Response

Trauma response is non-cognitive. Neuroscience has revealed that trauma may alter the functioning of the "emotional brain," which is composed of the brain stem (also known as the reptilian brain) and the limbic system (also known as the mammalian brain).⁸¹ The limbic system regulates fear, rage, male sexual behavior, addiction, motivation, and memory.⁸²

The emotional brain is non-cognitive; it develops before the cognitive part of the brain and controls the basic functions that a person

78. Stolbach et al., *supra* note 71, app. at 489.

79. See VAN DER KOLK, *supra* note 46, at 7–11 (discussing trauma in war veterans).

80. *Prologue to id.*

81. *Id.* at 56, 61; see also Charles A. Nelson, III, *The Effects of Early Life Adversity on Brain and Behavioral Development*, DANA FOUNDATION (Oct. 22, 2012), <https://dana.org/article/the-effects-of-early-life-adversity-on-brain-and-behavioral-development/> [https://perma.cc/7EC2-MGCX].

82. V. RajMohan & E. Mohandas, *The Limbic System*, 49 INDIAN J. PSYCH. 132, 135–37 (2007).

has when she is born, like crying, eating, sleeping, and expelling bodily toxins, as well as the emotions.⁸³ The emotional brain is responsible for trauma response and acts automatically, using “preprogrammed escape plans, like the fight-or-flight responses. These muscular and physiological reactions are automatic, set in motion without any thought or planning on our part, leaving our conscious, rational capacities to catch up later.”⁸⁴

Trauma response, then, is not an aspect of how someone thinks, whether consciously or unconsciously. Trauma response is not cognition. Instead, it is often a reflexive or instinctual reaction to fear or threat.

E. Repetition and Control: Spotlight on Trauma Symptoms

Two symptoms of trauma are both particularly troubling and particularly relevant to Traumatized Systems Theory—symptom repetition and limited controllability.

1. Symptoms Repetition: Recurrence and Relationship

Trauma is an event of such magnitude that it etches into the physical, emotional, and spiritual memory of the individual or community. Responses to trauma often create a loop in time, when an event from the past is recorded in the unconscious fight-or-flight processes of an individual or community and relived in the present in new relationships. This traumatic imprinting produces a compulsive response to repair or alter the original trauma-inflicting interaction or relationship.⁸⁵ As a result, trauma response often involves repetition of the trauma.⁸⁶ Survivors of trauma often re-experience the trauma over and over, either as victim or perpetrator.⁸⁷ As a result, violence, self-destructive behaviors, and re-victimization are often unconscious manifestations of trauma re-enactment.⁸⁸ One of the most important goals of some trauma-related policy is preventing re-victimization, “the

83. *Id.* at 135; VAN DER KOLK, *supra* note 46, at 55–56.

84. VAN DER KOLK, *supra* note 46, at 57.

85. Bessel A. van der Kolk, *The Compulsion to Repeat the Trauma: Re-enactment, Revictimization, and Masochism*, 12 PSYCHIATRIC CLINICS N. AM. 389, 389 (1989).

86. *Id.*

87. *See id.* at 390 (“In behavioral re-enactment of the trauma, the self may play the role of either victim or victimizer.”); Lauren E. Gibson, *Erin’s Law: Preventing Child Sexual Abuse through Education*, 44 J.L. & EDUC. 263, 267–68 (2015).

88. van der Kolk, *supra* note 85, at 390–91.

likelihood of [trauma] victims becoming victims of [trauma] again later in life and exhibiting risky . . . behavior as they grow older.”⁸⁹

Trauma symptomology that manifests in recurrent traumatic events has been described as “repetition compulsion”⁹⁰: “[m]any traumatized people expose themselves, seemingly compulsively, to situations reminiscent of the original trauma. These behavioral reenactments are rarely consciously understood to be related to earlier life experiences.”⁹¹ Although children are more prone to this response, adults who experience trauma also evince repetition.⁹² Freud theorized that the function of the repetition was to produce mastery of the experience.⁹³ In that sense, the repetition compulsion response is about relationship, an unconscious compulsion to gain control of the outcome in the initial traumatic interaction or relationship by re-living it.⁹⁴ Instead, of repairing or altering the ruptured past relationship, repetition often produced additional cycles of trauma for the survivor in contemporary relationships.⁹⁵

2. Trauma Response is not Easily Controlled

As repetition and recurrence suggest, trauma response is not easily controlled. That does not mean that trauma is impossible to control or heal. However, trauma survivors are often not even aware that their actions are trauma responsive.⁹⁶ Because trauma response occurs in the parts of the brain outside of the prefrontal cortex, it is not easily regulated by cognitive functions that inhibit inappropriate action or moderate empathy and understanding.⁹⁷ The difficulty comes not only in healing traumatic harm, but also in controlling the symptoms of and responses to the trauma.⁹⁸ For individual trauma survivors whose initial experience of trauma involved some loss of power or control, the

89. Gibson, *supra* note 87, at 268.

90. van der Kolk, *supra* note 85, at 390–91.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 389.

95. *Id.*

96. VAN DER KOLK, *supra* note 46, at 45 (reasoning that the trauma survivors “may not be aware that they are reexperiencing and reenacting the past”).

97. See TIAN DAYTON, EMOTIONAL SOBRIETY: FROM RELATIONSHIP TRAUMA TO RESILIENCE AND BALANCE, at xvii (2007); VAN DER KOLK, *supra* note 46, at 62–63.

98. Debra Niehoff, *Invisible Scars: The Neurobiological Consequences of Child Abuse*, 56 DEPAUL L. REV. 847, 875 (2007) (discussing the difficulty of eradicating traumatic response).

assertion of control in the present, in an effort to regulate trauma response, may have the effect of triggering and re-victimizing.⁹⁹

The goal of noting that trauma response is not easily controlled is not to enter the longstanding debate about whether trauma survivors who inflict trauma are morally culpable for the harm that they cause.¹⁰⁰ Although scholars have debated whether trauma-responsive action is a choice¹⁰¹ and whether triggered actors should be held responsible for their actions,¹⁰² Traumatized Systems Theory assumes that those who inflict harm are and should be accountable for their actions, whether as individuals or systems. Accountability can take many forms, however, and may involve accountability to make efforts to heal in order to avoid harming in the future. In addition, as a practical matter, the most effective policy may involve something in addition to cognitively oriented control.¹⁰³

Linda Fentiman, for example, has examined the use of criminal law to attempt to control drug use among pregnant women.¹⁰⁴ She observes that environmental factors, such as trauma, contribute to drug use,¹⁰⁵ and that efforts to control drug use through criminal deterrence have been counterproductive.¹⁰⁶ Although she suggests that addiction is a

99. See Jennifer Honig & Susan Fendell, *Meeting the Needs of Female Trauma Survivors: The Effectiveness of the Massachusetts Mental Health Managed Care System*, 15 BERKELEY WOMEN'S L.J. 161, 173–77 (2000) (discussing past and present loss of control).

100. See, e.g., Seth D. Harris, *Innocence and The Sopranos*, 49 N.Y. L. SCH. L. REV. 577, 578–99 (2004) (questioning Supreme Court's "innocence" jurisprudence, comparing trauma responsive non-innocent actors to survivors and bystanders).

101. *Id.* at 615 (arguing that childhood trauma does not mean that one does not choose wrongdoing or is innocent). See Francis X. Shen, *Neurolegislation: How U.S. Legislators are Using Brain Science*, 29 HARV. J. L. & TECH. 495, 496 (2016) (noting that neuroscience has raised debate about whether people have free will and its implications for law).

102. See Linda C. Fentiman, *Rethinking Addiction: Drugs, Deterrence, and the Neuroscience Revolution*, 14 U. PA. J. L. & SOC. CHANGE 233, 235 (2011) ("Rivers of ink have been spilled and acres of forests have been destroyed discussing whether our expanded understanding of the biological and environmental factors that shape human decision-making demands a change in the laws of criminal responsibility.").

103. See Honig & Fendell, *supra* note 99, at 173–77 (discussing ineffectiveness of coercive control on trauma survivors); see also RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) (suggesting "choice architecture" to affect automated cognitive decision making).

104. Fentiman, *supra* note 102, at 233, 235, 260–61.

105. *Id.* at 246.

106. *Id.* at 237–41.

choice,¹⁰⁷ the success from using incentives, as opposed to punishment, to address drug addiction may be attributed to neuroplasticity and the capacity of the brain to reprogram with positive reinforcement rather than control.¹⁰⁸

The limited effectiveness of control on trauma response also has implications for organizational and systemic survivors. Even though organizations affected by trauma do not have an emotional brain that is affected by trauma through biological reactions, trauma response in organizations is similarly difficult to control. Neuroscience suggests that the biological aspects of trauma may have social or communal effect. For example, mirror neurons in the frontal lobes hold the “ability to ‘feel into’ someone else.”¹⁰⁹ Mirror neurons facilitate empathy, imitation, and synchrony, which enable individuals to pick up on the emotional state and intentions of others, including trauma-influenced states.¹¹⁰ Therefore, the difficulty of controlling trauma in individuals may translate into similar difficulty in organizational communities. However, just as memories imprinted by trauma in individuals may be healed through the neuroplasticity of the brain, collective traumatic memories in organizations probably can also be healed by retraining emotional reflexes, in addition to attempting to reign them in.

III. TRAUMATIZED SYSTEMS: TRIGGERED SYSTEMS

Traumatized systems are organizations or groups of organizations that have experience trauma and exhibit trauma response—triggered systems. Triggered systems mimic triggered individuals in many ways: they are often aggressive; their actions are often unaligned with and disproportionate to the present circumstances; and the harmful actions, policies, and practices that triggered systems inflict do not resolve the systems’ originating traumas and situations. Instead, they often cause additional harm to the system and to others.

An organization or group of organizations is a type of community. Trauma affects communities, as well as individuals. “[S]ometimes the tissues of community can be damaged in much the same way as the tissues of mind and body.”¹¹¹ Communities experience trauma when some overwhelming event affects the community as a whole.

107. *Id.* at 246–47.

108. *Id.* at 247–49.

109. VAN DER KOLK, *supra* note 46, at 58.

110. *Id.* at 58–59.

111. Michal Alberstein, *ADR and Collective Trauma: Constructing the Forum for the Traumatic Fuss*, 10 CARDOZO J. CONFLICT RESOL. 11, 17 (2008) (quoting I KAI ERIKSON, *A NEW SPECIES OF TROUBLE: EXPLORATIONS IN DISASTER, TRAUMA, AND COMMUNITY* 230 (1994)); *see also* Joel B. Eisen, *The Trajectory of “Normal” after 9/11: Trauma, Recovery and Post-*

Some scholars have suggested community trauma is a form of collective memory.¹¹² Jody Lyneé Madeira describes collective memory as the process of individuals sharing life events and memories and interpretations of those events.¹¹³ The communal effort of processing the events shapes and reshapes perceptions of what has occurred.¹¹⁴ Collective memory also plays a part in forming and reforming identity for groups and individuals. “Groups may therefore perform memory work by constructing areas of common knowledge which create social bonds between members.”¹¹⁵ Some aspects of identity, then, are communal creations, products of collective understanding.

Cultural trauma is a specific type of collective memory.¹¹⁶ “Cultural trauma occurs ‘when members of a collectivity feel they have been subjected to a horrendous event that leaves indelible marks on their group consciousness, marking their memories forever and changing their future identity in fundamental and irrevocable ways.’”¹¹⁷ In some ways, then, community trauma plays a part in defining the community, as knowledge, memory, understanding, and relationships within the community emerge in response to trauma.

Madeira uses the Oklahoma City bombing as a case study of community trauma while making references to the bombings of Hiroshima and Nagasaki and the Holocaust.¹¹⁸ In addition to the harm done to the specific victims of the bombing, individual members of the

Traumatic Societal Adaptation, 14 FORDHAM ENV'T. L.J. 499, 528–53 (2003) (discussing communal response to trauma and a model for post-traumatic societal adaptation). See generally David Dante Troutt, *Trapped in Tragedies: Childhood Trauma, Spatial Inequality, and Law*, 101 MARQ. L. REV. 601 (2018) (discussing the connection between complex childhood trauma and spatial inequality).

112. See Jan Assmann, *Collective Memory and Cultural Identity*, NEW GERMAN CRITIQUE, no. 65, Spring–Summer 1995, at 125–133 (discussing Maurice Halbwachs’ shift of earlier views of collective memory as biological to cultural).

113. Jody Lyneé Madeira, *When It’s So Hard to Relate: Can Legal Systems Mitigate the Trauma of Victim-Offender Relationships?*, 46 HOUS. L. REV. 401, 418–19 (2009).

114. *Id.* at 418–24.

115. *Id.* at 419 (citing MAURICE HALBWACHS, ON COLLECTIVE MEMORY 52 (Lewis A. Coser trans., 1992)).

116. *Id.* at 420.

117. *Id.* at 421 (quoting JEFFEREY C. ALEXANDER, THE MEANINGS OF SOCIAL LIFE: A CULTURAL SOCIOLOGY 85 (2003)).

118. *Id.* at 419–20. On April 19, 1995, thousands of pounds of fuel oil and fertilizer were used to bomb the nine-story Alfred P. Murrah Federal Building in Oklahoma City. 162 people were killed, including 19 children, and nearly 700 more were injured. *Id.* at 403.

victims' families formed networks to gather and exchange information, find solace, and offer support.¹¹⁹ "In essence, memory offers a form and content for addressing the Oklahoma City bombing in that it both structures and explains the evolving understandings of the bombing and its perpetrators formed by individuals and groups."¹²⁰ Trauma, then, can be a communal experience with collective memories and collaborative understanding.

Organizations have been identified by social science as a particular type of community that experiences trauma. "Organisational trauma [i]s a set of responses to one or more events that reach beyond the organisation's ability to handle the situation adaptively, which culminates to dysfunctional patterns of behaviour."¹²¹ Trauma can manifest in the organization as a whole or in particular units of the organization, as well as in the individual members of the organization.¹²²

Organizational trauma response is not a cognitive phenomenon involving thinking processes and errors. Instead, like individual trauma, organizational trauma response is an instinctive reaction.¹²³ Organizational trauma symptoms manifest in a variety of dysfunctional behaviors,¹²⁴ internally and externally, similar to individual trauma response. Hostility and abusive or manipulative behavior toward individuals or other organizations or communities may be some of the external symptoms of organizational trauma.¹²⁵ Internally, trauma

119. *Id.* at 419.

120. *Id.*

121. STANISLAV HASA & RICHARD BRUNET-THORNTON, *IMPACT OF ORGANIZATIONAL TRAUMA ON WORKPLACE BEHAVIOR AND PERFORMANCE*, at xix (2017) (citation omitted).

122. William A. Kahn, *The Revelation of Organizational Trauma*, 39 *J. APPLIED BEHAV. SCI.* 364, 366 (2003).

123. HASA & BRUNET-THORNTON, *supra* note 121, at xvii ("When confronted with a stressful event that surpasses the ability to cope, this experience may lead to trauma. This condition, an emotional response that jeopardizes psychological integrity, produces a series of symptoms that includes flashbacks, strained relationships, and physical manifestations. If such an event affects a significant portion of a group as in the case of an ethnic cluster or a nation, it disrupts the social structure and the sense of community. Incidental reports in the literature suggest that formally established institutions, organisations, and businesses are not immune from suffering symptoms of collective trauma.")

124. *Id.* ("The organization develops symptoms disconnected from the trauma itself.")

125. Kahn, *supra* note 122, at 367 (citation omitted) ("[Symptoms] act as social defenses against the anxiety and the pain that the originating trauma triggers in the unconscious life of the organization. Like individual defenses against trauma, these social defenses assume lives of their own. Like individual defenses, they call attention to rather than suppress trauma.")

symptoms in organizations may mean poor performance or production, institutional conflict, dysfunctional, risky, or self-destructive decision-making, and low employee morale.

Like individual trauma response, trauma responsive behavior in organizations is recurrent:

[C]ollective trauma disrupts and alters the structure of social bonds of a community or a group of people. An important conclusion relative to collective trauma is that the traumatic events does not only affect the direct participants, but is trans-generational. More specifically, the next generation that has not personally experienced the incident may replicate the maladaptive behaviour patterns of the direct victims.¹²⁶

In other words, not only may an organization experience the compulsion to repeat trauma, but organizations may repeat trauma symptoms because subsequent generations of employees experience the trauma through the transgenerational collective memory of the organization.

Trauma response in organizations is difficult to control. “When affected by events with a strong adverse impact, an organization, all or part, may exhibit signs of collective traumatization that in turn, deteriorates social bonds, damages external relations, and possibly instigate secondary and transgenerational traumatisation.”¹²⁷ As a result, remedies for traumatized systems must take into account the recurrent and difficult-to-control motivations of their behavior.

Unlike many other communities, traumatized systems are often situated in positions of financial, social, or political power, which means that their actions affect many individuals or communities. The effect that traumatized systems have on individuals and communities may be particularly severe because of the type of relationships that traumatized systems often have with individuals and communities. Some psychological research has revealed that interpersonal trauma, or trauma at the hands of a caregiver, has the effect of impairing or suppressing memory of the trauma more than other types of trauma.¹²⁸ This type of trauma, sometimes referred to as “betrayal trauma,”¹²⁹ often produces more pronounced trauma symptoms in the survivors, such as “poorer physical health, anxiety, depression, dissociation, borderline personality disorder characteristics, shame, hallucinations,

126. HASA & BRUNET-THORNTON, *supra* note 121, at xviii–xix (citation omitted).

127. *Id.* at xvii.

128. Carly P. Smith, Jennifer M. Gómez & Jennifer J. Freyd, *The Psychology of Judicial Betrayal*, 19 ROGER WILLIAMS U. L. REV. 451, 454–55 (2014).

129. *Id.*

self-harm, and re-victimization,” because the trauma was perpetrated by someone upon whom the survivor depended or trusted.¹³⁰

This research indicates that betrayal trauma also occurs when institutions that survivors trust or depend upon perpetrate trauma.¹³¹ According to betrayal trauma theory, when institutions, like the judicial system, for example, or law enforcement, educational systems, religious organizations, or organizations having a particular relationship with the survivor, inflict trauma through omission or commission, the consequences for the survivor are similarly severe to interpersonal trauma.¹³²

Not all organizations and systems are trauma driven. Many or perhaps most organizations and systems have positive impacts on individuals and communities. Even organizations that cause harm may not be responding to trauma. Instead, their behavior may be an efficient choice, or it may be influenced by unconscious error or bias. Neutral systems are organizations and groups of organizations that affect individuals and communities, but are not driven by their own trauma response.

When harm is recurrent and irrational, however, it suggests something other than neutral systemic action. There are many examples of recurrent systemic harm that seem to involve something other than rational decisionmaking, including law enforcement’s use of children as informants in the “war on drugs;”¹³³ “strip searching children who are allegedly victims of abuse and neglect in a nonmedical setting;”¹³⁴ visitation orders for parents who are incarcerated for acts of violence against another parent;¹³⁵ legal and social practices that

130. *Id.* (footnotes omitted).

131. *Id.* at 459.

132. *See id.* at 459–60.

133. Andrea L. Dennis, *Collateral Damage? Juvenile Snitches in America’s “Wars” on Drugs, Crime, and Gangs*, 46 AM. CRIM. L. REV. 1145, 1149 (2009). *See also* Alexandra Emily Bochte, *The Double-Edged Sword of Justice: The Need for Prosecutors to Take Care of Child Victims*, 35 CHILD.’S LEGAL RTS. J. 200, 202 (2015) (noting the traumatizing effects of testifying on child witness); Sarah Kroll, *Opposing Viewpoints: The Sixth Amendment and Child Witnesses*, 35 CHILD.’S LEGAL RTS. J. 257, 257–58 (2015) (same).

134. Autumn R. Ascano & Joseph A. Meader, *Juridogenic Harm and Adverse Childhood Experiences*, 62 S.D. L. REV. 797, 801 (2017).

135. Dana Harrington Conner, *Do No Harm: An Analysis of the Legal and Social Consequences of Child Visitation Determinations for Incarcerated Perpetrators of Extreme Acts of Violence against Women*, 17 COLUM. J. GENDER & L. 163, 229 (2008); *see also* Rosie Gonzalez & Janice Corbin, *The Cycle of Violence: Domestic Violence and its Effects on Children*, 13 SCHOLAR 405, 428–29 (2010) (discussing healthcare professionals, police, and courts’ effect of perpetuating domestic violence).

exacerbate health disparities;¹³⁶ separation of immigrant parents and children;¹³⁷ and the treatment of native people.¹³⁸

Traumatized systems often manifest common characteristics—trauma history, recurrently harmful behavior, and unresponsiveness to efforts to control harmful outcomes. Trauma history for organizations and systems may come in a variety of different forms. Organizations and groups of organizations may experience victimization through chronic underfunding, hostile business practices of other organizations, natural disasters like COVID-19 or a hurricane, or broader systemic factors like an economic depression. On the other hand, systems and organizations may have a history of trauma due to their own harmful actions. Perpetrator trauma also manifests in systems.¹³⁹ Organizations whose purpose includes punishing individuals or separating families have a high risk of trauma.

Recurrently harmful behavior refers to behavior that is repeated and is not rational, rather defensive or reflexive, resembling fight or flight. Recurrent harm often manifests in policies and practices that harm individuals and communities. Police shootings of unarmed Black and Latinx people, chronically inadequate education, and repeatedly directing environmental hazards into Black and Latinx communities are examples of recurrent systemic harm.

Unresponsiveness to control-based remedies means that efforts to prevent future harms through judicial precedent, regulation, legislation, media pressure, boycott, or some other method of control are unsuccessful over time. Sometimes, the harm does not subside. At other times, while efforts to control the harm may produce beneficial outcomes for a generation or two, ultimately, the harm returns.

136. Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U. L. REV. 275, 299–300 (2015).

137. Madison Burga & Angelina Lerma, *The Use of Prosecutorial Discretion in the Immigration Context after the 2013 ICE Directive: Families are Still Being Torn Apart*, 42 W. STATE L. REV. 25, 52–53 (2014) (prosecutorial discretion trauma impact on immigrant children).

138. Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding Schools Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45, 72–76 (2006) (intergenerational effects of boarding schools); Patrice H. Kunesh, *A Call for an Assessment of the Welfare of Indian Children in South Dakota*, 52 S.D. L. REV. 247, 256–57 (2007) (intergenerational effects of government policies); Catherine A. O’Neill, *Environmental Justice in the Tribal Context: A Madness to EPA’s Method*, 38 ENV’T. L. 495, 498 (2008) (effect of EPA’s mercury rule); Sarah Deer, *Relocation Revisited: Sex Trafficking of Native Women in the United States*, 36 WM. MITCHELL L. REV. 621, 674–82 (2010) (colonial links and law and policy facilitating sex trafficking of Native women).

139. See Mohamed, *supra* note 69, at 1188–89.

This article adds a lens to consider the implications of oppressive systems as trauma survivors. The aim is not to distract attention away from individuals and communities that have been harmed by these systems; rather, the aim is to suggest that ending many persistent societal problems affecting individuals and communities may require an additional perspective.

IV. TRAUMATIZED SYSTEMS THEORY

This article introduces a new legal theory—Traumatized Systems Theory. Traumatized Systems Theory posits that a primary function of law is to mediate relationships—relationships among individuals, organizations, groups of organizations, communities, states, nations, groups of nations, and species. Traumatized Systems Theory observes that these relationships are affected not only by the trauma-responsive behavior of individuals, but also by the trauma-responsive behavior of systems. Traumatized systems are organizations or groups of organizations whose behavior is motivated to some degree by their response to organizational trauma.

Traumatized Systems Theory lies at the intersection of social science concerning organizational trauma, general systems theory, and law. And it stands on the shoulders of legal theories that critique the neutrality of law—critical legal studies, legal realism, critical race theory, feminist theory, Latcrit, and queer legal theory. Traumatized Systems Theory hypothesizes that in addition to other factors that may affect behavior and relationships, at a systemic level, such as cost and efficiency, white supremacy, patriarchy, and hetero-binary centrism, trauma response also affects behavior. In fact, some aspects of white supremacy, patriarchy, and hetero-binary centrism may be trauma responsive.

Traumatized Systems Theory argues that many efforts to address recurrent systemic harm have failed because existing legal theories and remedies do not account for the trauma-responsive nature of the behavior. The compulsion to repeat is significant for the legal theory of traumatized systems because of its implications for behavior and relationship. Traumatic recurrence means that the relationships at which law is directed may be multidimensional, occurring simultaneously in the present and some relived, traumatic past. Legal theories that attempt to predict laws' effect on behavior and relationship are incomplete to the extent that they overlook the significance of trauma.

TRIGGER WARNING

For example, to the extent that traumatized systems contribute to the abuse of children, by omission or commission, they have a relationship with the individuals involved in the abuse and individuals

subsequently harmed by them. Research and empirical data indicate that individuals who commit crimes “have often been physically or sexually abused as children Self-destructive acts are common in abused children.”¹⁴⁰ Girls who were abused are more likely to be abused as adults, and children who are sexually abused have a higher risk of engaging in criminal activity or becoming prostitutes.¹⁴¹ Dr. van der Kolk cites a study by Diana Russell that found a link between childhood incest and future victimization.¹⁴² Although incest survivors were seldom conscious of the trauma response, “[v]ictims of father-daughter incest were four times more likely than nonincest victims to be asked to pose for pornography,” and were also at higher risk for other forms of abuse and drug use.¹⁴³

Blaming the victim is not an appropriate response to repetition compulsion, however. Repetition compulsion in individuals may be a source of many deeply misguided suppositions that blame individual survivors for harm done to them or assert a simplistic analysis of consent by individual survivors. Repetition compulsion in individuals is an infection from a traumatic wound. To attribute the consequences of that infection to the wounded individual rather than the system that caused or exploits the injury is a frequent error, identified in this article as “inverse accountability.” Instead, accountability for the consequences of trauma should fall primarily on the systems that inflict traumatic wounds that fester into cycles of trauma response in individuals.

Repetition compulsion also affects systems and their behavior. Repetition and recurrence mean that systems that are trauma-affected, either through victimization or by victimizing,¹⁴⁴ may respond repeatedly to their own trauma, inflicting harm on individuals and communities over and over. Law and policy aimed at addressing recurrent harm must not only address the relationships in the present but should also take into account trauma-originating relationships of the past.

Trauma in systems may help to explain why some systems create policies that are harmful by design or do not even approach solving

140. van der Kolk, *supra* note 85, at 390–91 (citing A.N. Groth, *Sexual Trauma in the Life Histories of Rapists and Child Molesters*, 4 VICTIMOLOGY 6 (1979); Theoharis K. Seghorn, Robert A. Prentky & Richard J. Boucher, *Childhood Sexual Abuse in the Lives of Sexually Aggressive Offenders*, 26 J. Am. Acad. Child & Adolescent Psychiatry 262 (1987)).

141. *Id.* at 390–93.

142. *Id.* at 391 (citing DIANA E. H. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* (1986)).

143. *Id.*

144. See discussion of perpetrator trauma, *supra* note 139 and accompanying text.

some of the social problems that they purport to address.¹⁴⁵ It acknowledges that some organizations and institutions use their rules and practices as acts of aggression against individuals and communities. Some of these behaviors are clearly conscious, intentional, and calculated. Other behaviors may be unconscious and recurrent efforts of systems to resolve past trauma. These efforts fail, only succeeding in victimizing others and re-victimizing the system itself.

Despite efforts to regulate BP, the company continued to engage in unsafe practices and continued inflicting devastating harm on individuals and communities.¹⁴⁶ If BP was triggered, it provides a helpful illustration of some of the problems that Traumatized Systems Theory seeks to address. First, the BP disasters illustrates that there are gaps in effective systems accountability. Second, it illustrates the insufficiency of control as a methodology. Third, it illustrates the fundamental unfairness of inverse accountability.

A. *Accountability Gaps*

The gap that Traumatized Systems Theory seeks to address is the failure of law and policy to attempt to remedy systemic trauma in addition to attempting to control its symptoms. Accountability that supplements existing remedies may take many forms, including responsibility to identify trauma response, acknowledge the trauma to those affected, and heal the trauma within the system in order to stop recurrent, harmful trauma response. Courts routinely consider organizational thinking, either conscious or unconscious, when making determinations about accountability and liability.¹⁴⁷ Courts have also recognized that corporations experience trauma. For example, under Delaware law shareholders in a derivative suit may be excused from the procedural step of first demanding action from the board if they plead a sufficient connection between the board and the “corporate trauma” to indicate bad faith on the part of a majority of the board in monitoring corporate action.¹⁴⁸ Situations described as corporate trauma include mine closure due to repeated worker injury and death;¹⁴⁹ hackers stealing the “confidential data of over 33,000 federal employees,

145. See also Mark Sidel, *Richard B. Lillich Memorial Lecture: New Directions in the Struggle Against Human Trafficking*, 17 J. TRANSNAT'L L. & POL'Y 187, 202–04 (2008) (describing policies that condemn but do not actually enforce punishment or prevention of human trafficking).

146. See discussion of BP disasters, *supra* notes 1–12.

147. See discussion of the organizational mind, *infra* Part V.

148. *South v. Baker*, 62 A.3d 1, 14 (Del. Ch. 2012); see FED. R. CIV. P. 23.1.

149. *In re Hecla Mining Co. Derivative S'holder Litig.*, No. 2:12-CV-000119-MHW, 2014 WL 689036, at *8 (D. Idaho Feb. 20, 2014).

potential employees, and contractors;”¹⁵⁰ and Cambridge Analytica impermissibly gathering and analyzing “data from millions of Facebook users in order to influence U.S. elections.”¹⁵¹

Although courts and policymakers acknowledge the fact of organizational trauma, the implications of that trauma are not accounted for in law and policy. And even though trauma predictably produces trauma response, systems and organizations are not described as having acted in trauma responsive ways and remedies are not crafted to address systemic trauma. Even if an organization experiences trauma through victimization (rather than being a perpetrator), through natural disaster or hostile corporate attack, for example, the organization must be held accountable for the underlying trauma once it begins to produce harmful symptoms.

The vast majority of remedies only address symptoms—damages to compensate victims, regulatory adherence, monitoring, and fines to attempt to prevent future harmful symptoms. But, as Dr. Felitti learned in the obesity clinic, addressing symptoms may be futile if the underlying trauma is not addressed. Recurrent systemic harm will persist unless systems are held accountable for their underlying trauma.

If BP was a triggered system, gaps existed in the response to the harms that it inflicted because BP’s organizational trauma was never addressed directly. BP has a long history of conflict and misery tied to near-death experiences as a company.¹⁵² In 1901, William Knox D’Arcy gained the right to explore for oil in what is now Iran.¹⁵³ Seven years of disease and disappointment later, the Anglo-Persian oil company, as BP was originally called, discovered oil, but by 1914 the company was near bankruptcy for the second time, having no purchasers for its oil.¹⁵⁴ Britain then invested heavily in the company, and it literally fueled both the first and second world wars such that “war without oil” was “unimaginable.”¹⁵⁵ During these times, workers on the pipelines and in the oil fields endured desperate conditions, with considerable food

150. Corp. Risk Holdings L.L.C. v. Rowlands, No. 17-CV-5225(RJS), 2018 WL 9517195, at *2, *3 (S.D.N.Y. Sept. 28, 2018).

151. *In re* Facebook, Inc. S’holder Derivative Priv. Litig., 367 F. Supp. 3d 1108, 1116 (N.D. Cal. 2019).

152. Ishaan Tharoor, *A Brief History of BP*, TIME (June 2, 2010), <http://content.time.com/time/magazine/article/0,9171,1993882,00.html> [<https://perma.cc/9R5D-7KBA>].

153. *Id.*

154. *Early History*, BP, <https://www.bp.com/en/global/corporate/who-we-are/our-history/early-history.html> [<https://perma.cc/4MQ4-MSCN>] (last visited June 9, 2020).

155. *Id.*

shortages, disease, and pestilence.¹⁵⁶ After a democratically elected government nationalized the company's holdings in Iran, a joint CIA and British intelligence operation toppled the government and imposed a puppet government led by an autocratic Shah,¹⁵⁷ who was eventually overthrown by a revolution that involved taking American hostages.¹⁵⁸ Although BP has cast itself as an environmentally conscious company,¹⁵⁹ it has repeatedly acted in ways that harm itself, its workers, and the environment.

As part of its plea deal following the Deepwater Horizon disaster, BP was required "to hire two corporate monitors for four years to supervise safety procedures and to focus on ethics and compliance."¹⁶⁰ There were also "probationary conditions, such as revising their oil-spill response plan, hiring outside auditors, and disclosing future safety violations."¹⁶¹ Like the settlement and regulatory measures following the disaster at Texas City, these measures would only address the symptoms of BP's trauma. Regulatory measures that guided BP to explore how its past relationships and experiences affect its practices and reactions, or measures that facilitated reckoning with its past and acknowledging the effects on present relationships, may have prevented future harms.

B. Control Paradigm

Mechanisms for addressing systemic trauma response should include non-control-based measures. Courts and legislatures generally approach both individual and systemic trauma-responsive behavior through a control lens. Historically, the rule of law has sought to resolve social problems and improve human and planetary conditions by punishing, deterring, protecting, prohibiting, or regulating particular acts. These acts include the panoply of criminal, contractual, intentional, negligent, or productive behaviors that are affected by law and policy. The archetypal method for addressing social problems, then, is control.¹⁶² Through the control paradigm, formal law (such as legislation, regulation or court order), informal law (such as social or cultural processes and pressure), and markets have been used to resolve

156. Tharoor, *supra* note 152.

157. *Id.*

158. *Shah flees Iran*, HISTORY (Jan. 14, 2020), <https://www.history.com/this-day-in-history/shah-flees-iran> [<https://perma.cc/CQJ8-75AK>].

159. Tharoor, *supra* note 152.

160. *Commonwealth v. Pi Delta Psi, Inc.*, 211 A.3d 875, 891 (Pa. Super. Ct. 2019), *appeal denied*, 221 A.3d 644 (Pa. 2019).

161. *Id.*

162. See Arnold S. Rosenberg, *Motivational Law*, 56 CLEV. ST. L. REV. 111, 114-15 (2008) (discussing use of laws to motivate behavior).

social problems and improve human and planetary conditions by controlling, either negatively or positively, the actions of individuals, communities, and systems.¹⁶³ The control paradigm describes both force that is imposed on systems and force that systems impose on others. In other words, systems may be both actors and objects in the control paradigm.

Often, the control paradigm is an effective means of achieving accountability for conscious behavior. Law and economic theorists, for example, have suggested that a rational actor may be influenced by certain forms of control which create costs.¹⁶⁴ Critical Race Theorists and Feminist Theorists have often advocated justice by controlling racist and misogynistic behaviors using the deterrent and punitive effects of law.¹⁶⁵ When behavior is unconscious, but still cognitive, theorists have suggested alternative forms of control, through nudges and unconscious bias training.¹⁶⁶ However, neuroscientific discoveries reveal possible limitations in efforts to control.¹⁶⁷

Where societal problems are driven to some extent by trauma response, Traumatized Systems Theory asserts that a paradigm based exclusively in control may have limited or even adverse effect. Not only is trauma response unconscious, it is also non-cognitive. Rather than involving thinking processes (whether conscious or unconscious), trauma response is instinctual and reflexive, making it more difficult to control. In addition, control-based approaches are often directed at symptoms (death, injury, economic harm, or damage to property, for example) and individual actors, rather than causes and systems. They also usually take a linear approach to cyclical or multidimensional circumstances.

The critique of the control paradigm is less about the *value* of control and more about considering the *futility* of control in trauma-affected situations. Like a hydra that grows two heads when one is cut off, trauma symptoms tend to regenerate in response to control-exclusive approaches. In addition, the critique of the control paradigm is not about whether there should be accountability, but who is accountable and what the goals and means of accountability are.

163. Cf. Holden, *supra* note 14, at 34–41 (describing “causal attribution theory,” which identifies “the tendency to attribute causality and blame to person factors”).

164. See Manuel A. Utset, *Rational Financial Meltdowns*, 10 HASTINGS BUS. L.J. 407, 422 (2014) (discussing rational actors).

165. See Owen D. Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827, 924 (1999).

166. See THALER AND SUNSTEIN, *supra* note 103, at 19–22.

167. See *Trauma*, AM. PSYCH. ASS’N (June 11, 2015), <http://www.apa.org/topics/trauma/> [<https://perma.cc/89GV-4PQ4>] (explaining that trauma can cause people to have unpredictable emotions).

Traumatized Systems Theory suggests that systems be held accountable in addition to individuals and that a goal of accountability should include addressing the trauma symptom-inducing origins in both systems and individuals. The focus of this article, however, is traumatized systems.

Examples of non-control-based remedies include some alternative dispute resolution and restorative justice approaches that focus on facilitating communication and understanding.¹⁶⁸ Effective non-control-based remedies for traumatized systems is an area for research and development. Different remedies may be appropriate for different systems. Some initial thoughts about remedies are discussed later in this article. Some remedies for traumatized systems will necessarily involve control because stopping the harm is an important aspect of starting to heal.

C. Inverse Accountability

Systemic trauma produces systemic trauma response, which may harm the system itself, other systems, individuals, and communities. And harms suffered by individuals and communities may produce additional trauma responses. While the trauma response of organizations is not acknowledged in law and policy, trauma response in individuals is well-documented.¹⁶⁹ There are many ways that individual trauma survivors of systemic harm pay a price for their trauma response. Individual trauma survivors often suffer adverse physical and mental health, disproportionate rates of incarceration, and difficulty in forming and sustaining healthy relationships, for example.¹⁷⁰

Traumatized Systems Theory characterizes this phenomenon as inverse accountability because individual victims of systemic trauma are held accountable for their resulting trauma response, and not the systems that traumatized them. For example, Megan Glynn Crane tells

168. See Alberstein, *supra* note 111, at 31; Susan K. Serrano, Eric K. Yamamoto, Melody Kapilialoha MacKenzie & David M. Forman, *Restorative Justice for Hawai'i's First People: Selected Amicus Curiae Briefs in Doe v. Kamehameha Schools*, 14 ASIAN AM. L.J. 205, 218–19 (2007) (describing an “educational program by Hawaiians for Hawaiians” as an effort to repair historical and continuing harm); Cheryl Niro, *Healing Victims, Offenders and Communities: Restorative Justice*, 87 ILL. BAR J. 568, 569 (1999) (discussing restorative justice in the criminal context). *But see* ANNALISE ACORN, COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE 16–18 (2004) (critiquing restorative justice).

169. See, e.g., Genevieve Frances Steel, *Constructing the Trident of the Reasonable Person: Enough Is Enough! It's Time for the Reasonable Indian Standard*, 12 ELON L.J. 62, 64 (2020) (proposing a “reasonable Indian standard” due to historical trauma).

170. See discussion of trauma response, *supra* Part II.

the story of a client, an adolescent boy, who had been subject to traumatizing criminal interrogations.¹⁷¹ Although her focus is the trauma caused by the criminal justice system's interrogation of juveniles, the story that she tells describes inverse accountability—a child being held accountable, through interrogation, for his response to previous victimization by systemic actors. Professor Crane recounts:

Before he was picked up by police, his life was colored by neglect, maltreatment, and several specific incidents of trauma. His father had never been in the picture and he was raised by a crack-addicted mother, sometimes with the help of his crack-addicted grandmother. In the months leading up to his arrest, he had been breaking into his neighbors' homes to steal food because his mother had spent all of their money on drugs instead of groceries. My client's school records and documented comments from his teachers indicated that what he endured at home had a pervasive and ongoing impact on his cognitive, emotional, and social functioning.¹⁷²

In other words, Professor Crane's client was the progeny of an unbroken, multigenerational chain of trauma. Multiple organizations and systems harmed Professor Crane's client before he entered the interrogation room. Systems that should ensure that illegal drugs are not available for purchase, that are responsible for identifying those in need of drug treatment and helping them, that are responsible for educating and protecting children, and that are responsible for supporting families all failed—or worse facilitated the trauma to her client. His response to those systemic harms was, among other things, criminal behavior.

The systems that harmed this child were not, in all likelihood, held accountable in any way. Instead, the child was held accountable for these systems' actions and failures—"repeatedly interrogated by the police over the course of two days—including middle-of-the-night interrogations, without a parent or any other interested adult present."¹⁷³ According to Professor Crane: "despite access to detailed information regarding the sad history of his childhood, neither his defense attorney, nor the forensic psychologist who examined him, nor the judge who admitted and found his confession credible, recognized

171. Megan Glynn Crane, *Childhood Trauma's Lurking Presence in the Juvenile Interrogation Room and the Need for a Trauma-Informed Voluntariness Test for Juvenile Confessions*, 62 S.D. L. REV. 626, 630 (2017).

172. *Id.*

173. *Id.*

that my client's traumatic history might have made him vulnerable in the interrogation room."¹⁷⁴

Inverse accountability, then, means that individuals are held accountable for the outcomes of trauma caused by systems. Inverse accountability begins with a traumatized system.¹⁷⁵ When trauma-responsive behavior of a traumatized system results in harm to individuals, the effects may be physical or emotional damage. Often, this damage is uncompensated, and individuals must bear the cost. Even when individuals receive compensation, it does not undo the damage, which may have lasting and multigenerational implications. That is inverse accountability. In addition, the harm to individuals may be traumatic and lead to trauma response in individuals, resulting in self-harm or harm to others which often results in punishment. That also is inverse accountability.

The tragedy of inverse accountability from a policy perspective is that holding individual victims accountable for the harms of traumatized systems is not only unjust, it is also futile and wasteful. Since individuals did not originate the chain of harmful behavior, punishing them will not stop future harmful behavior over time. Focusing on accountability for the offending system would have a much broader and lasting effect. Of course, systems often experience some repercussions for their harm—media coverage, scathing editorials, termination of an administrator or two, program changes. But tweaks and “fixes” to traumatized systems will have only temporary benefit. Systems transformation is also necessary.

V. REGULATION OF THE SYSTEMIC MIND

Using law to transform trauma in the systemic mind follows from longstanding precedent taking account of the organizational mind in other contexts. Recognizing the influence of trauma on organizations and groups of organizations would be a reasonable doctrinal approach because the personification of organizations is well-established in law,

174. *Id.*

175. See, e.g., Timothy W. Bjorkman, *A State in Shackles: The Effect of A Dysfunctional Childhood on Crime and Imprisonment*, 62 S.D. L. REV. 211, 245 (2017) (discussing ingrained state practices that tend to exacerbate jail and prison crowding and destabilize lives); Lucia H. Seyfarth, *Child Soldiers to War Criminals: Trauma and the Case for Personal Mitigation*, 14 CHI.-KENT J. INT'L & COMP. L. 117, 135 (2013) (advocating mitigation due to trauma for child soldiers); Tamar R. Birckhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. 1, 1–4, 1 n.5 (2015) (discussing how adult imprisonment of youth often leads to harsh punishment and trauma response, particularly in New York, where juvenile court ends at age 15).

and courts and policymakers routinely consider the organizational mind when attempting to control organizational behavior. These controls, however, have limited their focus to cognitive aspects of the organizational mind, either conscious or unconscious. Traumatized Systems Theory asserts that control and non-control-based remedies must also address the non-cognitive, trauma-responsive aspect of the systemic mind. Individual trauma survivors are often held inversely accountable for systemic harms. And although many courts and policymakers have developed trauma-informed approaches to individual behavior,¹⁷⁶ they have not fashioned trauma-informed remedies to address systemic harm.

From conflict within families, workplaces, and schools to conflict between racial, religious, and ethnic groups to conflict between nations, trauma response and traumatized systems are influencing forces to varying degrees. Attempts to address some systemic behavior will be insufficient as long as courts and policymakers limit their consideration of the organizational mind to organizations' cognitive processes, whether conscious or unconscious. Instead, courts and policymakers should also consider the non-cognitive reality of organizations and the implications of systemic trauma-induced behavior.

A. *Personification Revisited*

Systems' accountability has often depended on an explicit personification of systems. In personifying organizations, courts often consider the organizational mind, the thinking and psychology of the organizational community apart from the thinking of individual members or agents of the community. Courts have also admitted evidence on cognitive error and unconscious thinking of organizations. Traumatized Systems Theory suggests that these considerations are incomplete because they do not consider unconscious, *non-cognitive*, trauma-affected processes of systems, as they do conscious and unconscious *cognitive* processes. This section reviews courts' and legislatures' personification of organizations and liability resulting from organizational conscious and unconscious thinking.

Corporations provide an example. Both courts and legislatures have personified corporations, recognizing them as legal persons with rights, as well as civil and criminal liabilities. Justice Stevens recounted the history of corporations in his partial dissent in *Citizens United v.*

176. See Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 5–7 (2018) (discussing trauma-informed sentencing). See also Erin R. Collins, *Status Courts*, 105 GEO. L.J. 1481, 1523–24 (2017) (advocating for the creation of trauma courts).

Federal Election Commission.¹⁷⁷ Initially, corporations were viewed with caution.¹⁷⁸ Their charters limited them to the public functions and services for which they were incorporated.¹⁷⁹

Over time, the function, power, and wealth of corporations expanded. They evolved from chartered entities, restricted to their public functions, to units that can own property and transact business like natural persons.¹⁸⁰ The point here is not to condone or critique the personhood of corporations, only to observe this well-established legal fact¹⁸¹ and hypothesize its implications in this context.

A narrow majority in *Citizens United* held that corporations have First Amendment rights of political speech equal to natural persons and that distinctions in the regulations of speech based on legal versus natural personhood are unconstitutional.¹⁸² The split in *Citizens United* was both ideological and conceptual. The ideological split involved protecting the interests of wealthy corporations versus protecting the electoral process against corruption and undue influence of wealthy corporations. In his partial dissent, Justice Stevens lamented a departure from precedent and the potential for corruption and distortions to the electoral process from unfettered corporate speech and spending.¹⁸³

The conceptual split in *Citizens United* involved divergent views of corporate identity. In his concurrence, Justice Scalia suggested that the majority's view of corporate identity was that corporations represent the collective interests of its members and shareholders.¹⁸⁴ He characterized corporations as an "association of individuals."¹⁸⁵ The dissent, on the other hand, viewed corporations as inanimate entities whose political influences may not always represent the interests of shareholders. Justice Stevens' dissent warned:

177. 558 U.S. 310, 427–28 (2010) (Stevens, J., concurring in part and dissenting in part).

178. *Id.* at 427.

179. *Id.* at 427–28.

180. See Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1472 (1987); see also Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121, 1123 (2000).

181. In *Santa Clara County v. Southern Pacific Railroad Company*, the Supreme Court held without argument that the Fourteenth Amendment's Equal Protection Clause applies to corporations. 118 U.S. 394, 394–95 (1886).

182. *Citizens United*, 558 U.S. at 319 (majority opinion).

183. *Id.* at 465–66 (Stevens, J., concurring in part and dissenting in part).

184. *Id.* at 392 (Scalia, J., concurring).

185. *Id.*

[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their “personhood” often serves as a useful legal fiction. But they are not themselves members of “We the People” by whom and for whom our Constitution was established.¹⁸⁶

The conceptual split in *Citizens United* is consistent with divergent views of the corporate person in other judicial decisions, legislative policy, and legal theory. Corporate identity tends to take one of three forms: the collective form (horizontal identity), described by Justice Scalia’s concurrence in *Citizens United*;¹⁸⁷ an inanimate legal fiction, discussed in the partial dissent; or a top-down reflection of board leadership and executive management (vertical identity).

Divergent views of corporate identity have resulted from the evolution of organizational structure in the United States.¹⁸⁸ During the late nineteenth century and early twentieth century organizational identity transformed.¹⁸⁹ The application of the concept of scientific management, made famous by Fred Taylor, resulted in the proliferation of hierarchical and authoritarian-styled businesses.¹⁹⁰ “[S]cientific management’s basic aim was to establish breathtaking new powers over the management of the firm, and indeed over workers themselves, and to persuade employees and the public that managers were properly responsible for even the most minute details of the production process.”¹⁹¹

The emergence of scientific management meant that many organizations did not just grow organically, arriving by happenstance. Instead, the structure and operation of organizations was consciously and meticulously designed. The influence of scientific management produced a vertical, top-down corporate identity as opposed to a horizontal view of corporations as a collective community.

Judicial perceptions of corporate identity, as either vertical or horizontal, tend to affect the view of the organizational mind and the likelihood of corporate liability.¹⁹² Despite Justice Stevens’s observation

186. *Id.* at 466 (Stevens, J., concurring in part and dissenting in part).

187. *Id.* at 392 (Scalia, J., concurring).

188. John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, COLUM. L. REV. 1, 3 (2003) (“The central ideas of enterprise liability found their first significant expression . . . in the efforts of late nineteenth- and early twentieth-century engineers to remake the firm.”).

189. *Id.*

190. *Id.*

191. *Id.*

192. See Paul B. Maslo, *The Case for Semi-Strong-Form Corporate Scierter in Securities Fraud Actions*, 108 MICH. L. REV. FIRST IMPRESSIONS 95, 98

that corporations have no consciences, beliefs, feelings, thoughts or desires, the personification of corporations has produced judicial decisions that have considered liability for organizations based on various theories of corporate cognition.¹⁹³ In general, organizations may be held vicariously liable for the actions or omissions of agents acting within the scope of employment to benefit the organization when the agent's intent or mental state can be imputed to the corporation.¹⁹⁴ However, some scholars and policymakers have articulated theories for considering the thought processes of organizations separate and apart from the intent or cognition of any agent.¹⁹⁵ These theories of organizational cognition involve both conscious thought and unconscious or automated cognitive processes.

B. Conscious Systemic Cognition: Accountability for Conscious Organizational Thinking

What does it mean for an organization—a system or subsystem—to engage in conscious thought? How has the law held systems accountable for conscious cognition?

The organizational mind and organizational consciousness as discussed here mean that courts and legislatures consider the knowledge and intent of the organization, as if it were a natural person. Separate and apart from the knowledge and intent of individual members or agents, the organizational community has a conscious, thinking mind. Courts and scholars have considered theories for holding organizations accountable in both criminal and civil law for actions resulting from the conscious thoughts of the organizational community.

1. Organizational Criminal Liability for Conscious Cognition

Criminal liability usually requires a particular mental state, *mens rea*, the state of mind that the prosecution must prove that the defendant had in order to obtain a conviction.¹⁹⁶ Historically, organizations have been free from most criminal prosecution in the absence

(2010). See also Patricia S. Abril & Ann Morales Olazábal, *The Locus of Corporate Scierter*, 2006 COLUM. BUS. L. REV. 81, 83 (2006) (“Like the mythical multiheaded monster, Hydra, a corporation has many minds.”).

193. For an extensive discussion of corporate mental states, see Mihailis E. Diamantis, *Corporate Criminal Minds*, 91 NOTRE DAME L. REV. 2049, 2067–74 (2016).

194. Melissa Ku & Lee Pepper, *Corporate Criminal Liability*, 45 AM. CRIM. L. REV. 275, 277 (2008).

195. See Diamantis, *supra* note 193, at 2071–74.

196. Blake Weiner, Kimberly Austin, John Lapin & Mary McCullough, *Corporate Criminal Liability*, 55 AM. CRIM. L. REV. 961, 964 (2018).

of proof that some agent with *mens rea* violated the law.¹⁹⁷ Sometimes organizational culpability is tied to perceptions of organizational identity, whether an organization is hierarchically structured or whether thinking is spread across the organization. In top-down organizations, culpability is tied to the *mens rea* of key executives.¹⁹⁸ However, criminal culpability does not require a vertical perception of organizational identity, linked to the thinking and actions of an agent.

The “collective knowledge” doctrine, for example, “imputes to a corporation the aggregate constructive knowledge of all or some of its employees for the purpose of creating the necessary guilty intent, or scienter.”¹⁹⁹ Under the collective knowledge doctrine, “the acts of a corporation are ‘simply the acts of all of its employees operating within the scope of their employment.’”²⁰⁰ According to the collective knowledge doctrine, a corporate defendant has “constructive knowledge of any material fact learned by its agents and officers during the scope of their employment” and “may be liable even if no single employee is entirely at fault.”²⁰¹ This approach “prevents corporations from evading liability by compartmentalizing and dividing employee duties.”²⁰² Under the collective knowledge doctrine, organizational identity is horizontal, as the organizational community or collective.²⁰³ Culpability, then, may be based on the knowledge and thinking processes of the collective.

In some cases, courts have found that organizations had “collective knowledge” sufficient to establish *mens rea*, even when no responsible agent could be identified.²⁰⁴ In *Commonwealth v. Springfield Terminal*

197. See Kathleen F. Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431, 448 (1985).

198. See Diamantis, *supra* note 193, at 268–69 (discussing corporate *mens rea*).

199. Bailey Wendzel, Matthew Angelo, Mariana Jantz & Alexis Peterson, *Corporate Criminal Liability*, 56 AM. CRIM. L. REV. 671, 680 (2019).

200. *Id.* at 681 (quoting *United States v. Bank of New England, N.A.*, 821 F.2d 844, 856 (1st Cir. 1987)).

201. *Id.*

202. *Id.*

203. See Diamantis, *supra* note 193, at 2077–80 (discussing corporate *mens rea* based on recent discoveries in cognitive science).

204. Brickey, *supra* note 197, at 448 (citing *Inland Freight Lines v. United States*, 191 F.2d 313, 315 (10th Cir. 1951)) (“The mechanism used to hold a corporation liable for crimes requiring a culpable mental state absent [proof of a responsible agent] is imputation to the corporation of the ‘collective knowledge’ of the employees as a group.”); *United States v. T.I.M.E.-D.C., Inc.*, 381 F. Supp. 730, 738 (W.D. Va. 1974); *United States v. Sawyer Transp., Inc.*, 337 F. Supp. 29, 30–31 (D. Minn. 1971), *aff’d*, 463 F.2d 175 (8th Cir. 1972).

Railway Company (and seven companion cases), four corporate defendants were convicted of failing to satisfy a statutory requirement of reporting the release of hundreds of gallons of diesel fuel, spilled from a freight locomotive.²⁰⁵ The defendants argued that *mens rea* had not been established because prosecutors had not proven that “an agent or employee imputed to the corporation by the doctrine of respondeat superior” had knowledge of the spill.²⁰⁶ On appeal, the court held that for a statutorily created *mens rea* requirement of mere knowledge, collective knowledge of employees or agents was sufficient.²⁰⁷

This collective-knowledge approach has not been universally adopted, however.²⁰⁸ In addition, some scholars note that the collective-knowledge doctrine concerns knowledge and not specific intent.²⁰⁹ They caution that “[o]nly when an employee possesses a particular state of mind can a corporation be held to have that particular state of mind.”²¹⁰ Yet examining organizational cognition in this context, independent of the conscious cognition of any agent, is something that courts and scholars have considered.²¹¹

2. Corporate Civil Liability for Conscious Cognition

In addition to criminal liability, conscious thinking processes of organizational communities are currently a factor in civil liability. Examples may be found in the cases involving securities statutes. Under the Private Securities Litigation Reform Act of 1995 (PSLRA),²¹² plaintiffs must plead that the corporate defendant had a particular state of mind in order to survive a motion to dismiss.

The Securities Exchange Act of 1934 creates a private right of action for purchasers and sellers of securities who are harmed by deceptive practices.²¹³ Section 10(b) of the act prohibits the use of

205. *Commonwealth v. Springfield Terminal Ry. Co.*, 951 N.E.2d 696, 701–03 (Mass. App. Ct. 2011).

206. *Id.* at 704.

207. *Id.* at 706.

208. *See Pugh v. Tribune Co.*, 521 F.3d 686, 697 (7th Cir. 2008); *see also* Matthew L. Mustokoff, *Secondary Actors, Respondeat Superior and the Limitations of Corporate Scier: The Seventh Circuit’s Pugh Decision*, 36 SEC. REG. L.J. 237, 238–42 (2008).

209. Wendzel et al., *supra* note 199, at 681.

210. *Id.* at 681–82.

211. *See Ku & Pepper, supra* note 194, at 284 (discussing collective knowledge doctrine).

212. Pub. L. No. 104-67, 109 Stat. 737 (1995).

213. *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318 (2007).

deceptive practices,²¹⁴ and Rule 10b-5 implements the act by further defining the prohibition.²¹⁵ To deter frivolous or abusive suits under the act, Congress enacted the PSLRA.²¹⁶ The PSLRA raises the pleading requirement for securities fraud above what had previously been required for fraud claims by Federal Rule of Civil Procedure 9(b).²¹⁷ Under the PSLRA's heightened pleading standard, any complaint alleging false or misleading statements must: 1) "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading,"²¹⁸ and 2) "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."²¹⁹

Because the PSLRA requires proof of the state of mind of corporate defendants, it provides evidence of precedent for legal accountability of the systemic mind. And scholarly and judicial interpretations of this statute provide even more support. In considering plaintiffs' proof of the corporate mind, some scholars have asked "where corporate scienter resides."²²⁰ For example:

Does it reside in the mind of the jailed CEO? In the mind of the chief financial officer who prepared the report but received a reduced prison sentence in exchange for his testimony at the CEO's trial? In the minds of the regional sales managers, some of whom falsified numbers included in the fraudulent report? In the minds of the hundreds of rank and file employees who bought into the aggressive culture of meeting Wall Street's financial performance targets at any and all costs?²²¹

In other words, scienter may reside at many points within the corporate community.

Teamsters Local 445 Freight Division Pension Fund v. Dynex Capital Inc. provides an example.²²² In *Dynex*, Merit, the subsidiary of

214. 15 U.S.C. § 78j(b) (2018).

215. 17 C.F.R. § 240.10b-5 (2014).

216. § 1, 109 Stat. 737.

217. For fraud, generally, the Federal Rules of Civil Procedure state that "the circumstances constituting fraud . . . must [be] state[d] with particularity" but provides that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." FED. R. CIV. P. 9(b).

218. 15 U.S.C. § 78u-4(b)(1) (2018) (quoted in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007)).

219. § 78u-4(b)(2) (quoted in *Tellabs, Inc.*, 551 U.S. at 321).

220. *Abril & Olazábal*, supra note 192, at 83.

221. *Id.*

222. 531 F.3d 190, 192 (2d Cir. 2008).

Dynex, a financial services company, made thousands of risky loans to purchasers of manufactured homes and then issued securities backed by the loans between 1996 and 1999.²²³ In addition, Dynex and Merit engaged in a number of questionable practices, including understating the repossession rate and “‘an internal control deficiency’ related to the recording of loan losses.”²²⁴ Teamsters Local 445 Freight Division Pension Fund purchased \$450,000 in these securities.²²⁵ Shortly after the securities were issued, purchasers of the manufactured homes began defaulting on the loans and foreclosure sales fell far short of the loan amounts.²²⁶ “In October 2003, Dynex disclosed that it had understated the repossession rates on [some of the securities] collateral by approximately 34%.”²²⁷ This announcement was followed by downgrades in the securities credit ratings.²²⁸ In the end, the price of the securities decreased by as much as 85%.²²⁹ The Teamsters alleged that Dynex intentionally sought risky loans but failed to disclose this practice in the bond-offering materials.²³⁰ The Teamsters alleged that “the defendants ‘misrepresented the cause of the bond collateral’s poor performance; misrepresented the reasons for restating its loan loss reserves; and concealed the loans’ faulty underwriting.’”²³¹

The district court denied the motion to dismiss even though it did not find that the plaintiff had pleaded scienter as to “any specific officer or employee of either [of the defendant companies].”²³² In other words, the district court held that the plaintiff had pleaded scienter in the corporate mind sufficient to survive a motion to dismiss, even though the plaintiff had not pleaded scienter of any individual employee.²³³ The

223. *Id.*

224. *Id.* at 193.

225. *Id.*

226. *Id.* at 192–93.

227. *Id.* at 193.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* (quoting *In re Dynex Capital, Inc. Sec. Litig.*, No. 05 Civ. 1897(HB), 2006 WL 314524, at *1 (S.D.N.Y. Feb. 10, 2006)).

232. *Dynex*, 531 F.3d at 192.

233. Warren R. Stern & Geoffrey A. Starks, *Defining Corporate Scienter*, SEC. LITIG. REP., Sept. 2006, at 1 (“The Court refused to infer that the individual defendants had acted knowingly or recklessly because the allegations did not show that they received personal benefits from the alleged fraud, did not identify specific reports to those defendants that contradicted the public statements, and did not allege that they recklessly underwrote loans or knew of any identified individual who did.”).

corporate mind existed independent of its executives and employees for purposes of surviving a motion to dismiss.

The Second Circuit affirmed the district court's holding in *Dynex* that pleading scienter only in the corporation was sufficient to survive a motion to dismiss.²³⁴ Referring to the Supreme Court's decision in *Tellabs, Inc.*, which clarified the meaning of the requirement that plaintiff prove a "strong inference" of scienter and defined scienter as "a mental state embracing intent to deceive, manipulate, or defraud,"²³⁵ the Second Circuit held that a strong inference of scienter could be presented by pleading the requisite mental state only for the corporation and not for any individual employee.²³⁶ To ultimately prove corporate liability, however, the court reaffirmed that a plaintiff must prove that a corporate agent acted with scienter and that the act and mental state are "attributable to the corporation."²³⁷ Despite the possibility of finding organizational scienter, the Second Circuit reviewed the case *de novo* and determined that the plaintiff had failed to establish a strong inference against the corporate defendants.²³⁸ Nevertheless, the case provides precedent for courts' consideration of the conscious organizational mind.

C. Unconscious Systemic Cognition: Accountability for Unconscious Organizational Cognition

Beyond consideration of *conscious* cognition in criminal and civil cases, legal precedent exists for accountability for *unconscious* systemic cognition. Consideration of the unconscious or automated actions of *individuals* is well-established in the legal theory of behavioral realists and some judicial decisions.²³⁹ Cognitive psychology explains that individuals sometimes act due to unconscious thoughts. These unconscious thoughts are a part of unconscious cognition of "normal"

234. *Dynex*, 531 F.3d at 192 (vacating the district court's order, but noting that "there are circumstances in which a plaintiff may plead the requisite scienter against a corporate defendant without successfully pleading scienter against a specifically named individual defendant").

235. *Id.* at 194 (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007)).

236. *Id.* at 195.

237. *Id.* (citing *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 853 (2d Cir. 1981); *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 513 F.3d 702, 708 (7th Cir. 2008)).

238. *Dynex*, 531 F.3d at 196–97.

239. See, e.g., Martha Chamallas, *The Disappearing Consumer, Cognitive Bias and Tort Law*, 6 ROGER WILLIAMS U. L. REV. 9, 23 (2000) (describing "implicit hierarchies" as "subtly steering the interests of less dominant social groups to the margins" in the context of law school curricula and explaining these hierarchies as masked value judgments).

brain processes.²⁴⁰ Unconscious cognition, then, is distinct from behavior based on conscious thoughts of which the individual is aware. It is also distinct from trauma-motivated behavior, which is neither thought-based nor conscious.

At least two independent tracks of scholarship have developed concerning unconscious thought.²⁴¹ One track, originating from behavioral economists, responds to the neoclassical economic models that assumed that actors behave rationally²⁴² and pursue a goal of efficiency.²⁴³ This track explains why actors do not always act rationally, but instead act according to unconscious, automated thinking processes, referred to as heuristics.²⁴⁴ Cass Sunstein and other behavioral economists have described the normal brain processes as functioning on two levels—System 1, which are fast and automatic thought processes and System 2, which are slower deliberative thought processes.²⁴⁵ The automated functioning of System 1 supports quick decisionmaking and uses “heuristics, which are mental shortcuts or rules of thumb that function well in many settings but lead to systematic errors in others.”²⁴⁶ Some common System 1 heuristics include:

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240. Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CALIF. L. REV. 969, 972 (2006) (arguing that “in formulating and interpreting legal rules, legislatures and courts should pay close attention to the best available evidence about people’s actual behavior” and consider “the behavioral effects of legal rules”). *See also* Allan G. King & Syeeda S. Amin, *The Propensity to Stereotype as Inadmissible “Character” Evidence*, 27 A.B.A. J. LAB. & EMP. L. 23, 34 (2011) (explaining that proponents of implicit bias describe it as “inherently ‘human’”).
241. *See* Jolls & Sunstein, *supra* note 240, at 973 (discussing separate evolutions of implicit bias scholarship and heuristic bias scholarship).
242. *See* Stephanie Plamondon Bair, *Malleable Rationality*, 79 OHIO ST. L.J. 17, 22 (2018) (describing rational choice theory).
243. *See* Brendan S. Maher, *Regulating Employment-Based Anything*, 100 MINN. L. REV. 1257, 1300 (2016) (describing use of shortcut strategies rather than rationality in the context of employment regulation). *See also* David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENV’T AFFS. L. REV. 1, 58 n.335 (2005) (citing Cass R. Sunstein, *Congress, Constitutional Moments, and the Cost-Benefit State*, 48 STAN. L. REV. 247, 253 (1996)) (discussing behavioral economics in the context of environmental law). *But see* Fred S. McChesney, *Behavioral Economics: Old Wine in Irrelevant New Bottles?*, 21 SUP. CT. ECON. REV. 43, 44–49 (2013) (critiquing behavioral economics).
244. Jolls & Sunstein, *supra* note 240 at 973–75. *See also* Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 215 (2018).
245. Jolls & Sunstein, *supra* note 240, at 974. *See also* Selmi, *supra* note 244, at 215.
246. Jolls & Sunstein, *supra* note 240, at 973–74.

“representativeness heuristic, by which events are seen to be more likely if they ‘look like’ certain causes,”²⁴⁷ and erroneous “judgments about potentially harmful events.”²⁴⁸ One suggestion for addressing behavioral errors based on automated thinking has been to control such irrationality by “nudging” actors’ unconscious thoughts to rational choices.²⁴⁹

A second track of scholarship concerns implicit bias—a normal, automated cognitive process.²⁵⁰ This scholarship attempts to explain persistent racism in the absence of *de jure* discrimination. “[T]he science of implicit cognition suggests that actors do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivate their actions.”²⁵¹ While

247. *Id.* at 974–75.

248. *Id.* at 975.

249. See THALER & SUNSTEIN, *supra* note 103, at 6 (suggesting “choice architecture” to affect automated cognitive decision making).

250. Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 348–49 (2007) (“Since the late 1980’s, legal scholars have identified various ways in which unconscious or implicit racial biases influence the legal process.”) (citing Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 331–36 (1987); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 946 (2006); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497–1539 (2005)).

251. Greenwald & Krieger, *supra* note 250, at 946. *But see* Selmi, *supra* note 244, at 213–14 (2018) (challenging the idea that implicit bias is actually unconscious and uncontrollable).

A variety of mental processes function implicitly, or outside of conscious awareness. Greenwald & Krieger, *supra* note 250, at 947. These include “implicit memory, implicit perception, implicit attitudes, implicit stereotypes, implicit self-esteem, and implicit self-concept.” *Id.* (citations omitted). Two of these unconscious mental processes—implicit attitudes (favorable or unfavorable judgments) and implicit stereotypes (unconscious associations of social groups with particular traits)—function as implicit bias. *Id.* at 948, 949, 951.

The Implicit Association Test (IAT) has been widely cited as providing evidence of implicit bias. *Id.* at 952. The test measures respondents’ response time in associating certain categories like black and white with valuations like pleasant and unpleasant. *Id.* at 952–53. Implicit bias is measured by variations in response time in associating each category with positive or negative valuations. *Id.* at 952. Results indicate that implicit bias is extremely widespread. Jolls & Sunstein, *supra* note 240, at 971. Most people, including members of traditionally disadvantaged groups, “tend to prefer white to African-American, young to old, and heterosexual to gay.” *Id.* (citing Greenwald & Krieger, *supra* note 250, at 955, 957–58; Anthony G. Greenwald, Debbie E. McGhee & Jordan L.K. Schwartz, *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*,

legislatures and regulators historically adopted rules to prohibit conscious and intentional acts of discrimination,²⁵² some behavioral realists advocate remedies for unconscious or implicit bias.²⁵³

Most scholarship and policy have focused on implicit bias individuals, though some scholars have examined unconscious cognitive influences on a systemic level.²⁵⁴ Accountability for unconscious

74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1474 (1998); Brian A. Nosek, Mahzarin R. Banaji & Anthony G. Greenwald, *Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Web Site*, 6 GRP. DYNAMICS: THEORY, RSCH. & PRAC. 101, 105 (2002)). While whites showed an implicit preference for members of their own group, African-Americans did not, instead having equal proportion of preference for African-Americans and whites. Jolls & Sunstein, *supra* note 240, at 971 (citing Greenwald & Krieger, *supra* note 250, at 956). Research on the relationship between implicit bias and behavior is ongoing. Jolls & Sunstein, *supra* note 240, at 971–72 (citing Alexander R. Green, Dana R. Carney, Daniel J. Pallin, Long H. Ngo, Kristal L. Raymond, Lisa I. Iezzoni & Mahzarin R. Banaji, *Implicit Bias in Physicians and its Prediction of Thrombolysis Decisions for Black and White Patients*, SOC'Y OF GEN. INTERNAL MED., Sept. 2007, at 1231, 1232; Jeffrey J. Rachlinski, Sheri Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009)). However, many researchers have found that the IAT is predictive and that there is a correlation between implicit bias and behavior. Greenwald & Krieger, *supra* note 250, at 961–62. Scholars have observed the implications of implicit bias in criminal justice and in civil contexts such as employment discrimination, voting rights, and patent and trademark. See Darren Lenard Hutchinson, “Continually Reminded of Their Inferior Position”: Social Dominance, Implicit Bias, Criminality, and Race, 46 WASH. U. J.L. & POL'Y 23, 32 (2014) (comparing implicit bias theory and social dominance theory in the context of criminal justice); Linda Hamilton Krieger and Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1057 (2006) (considering the implications of implicit bias in employment discrimination); Arusha Gordon and Ezra D. Rosenberg, *Barriers to the Ballot Box: Implicit Bias and Voting Rights in the 21st Century*, 21 MICH. J. RACE & L. 23, 24–25 (2015) (considering the implications of implicit bias in voting); Jenna DiJohn, *Examining the Outer-Limits of Trademark Law in the Religious Context and a Potential Implicit Bias for Non-Secular Litigants: Eller v. Intellectual Reserve, Inc.*, 25 DEPAUL J. ART, TECH. & INTELL. PROP. L. 209, 229 (2014) (considering the implications of implicit bias in patent and trademark).

252. See Selmi, *supra* note 244, at 198–99 (describing discrimination).

253. Greenwald & Krieger, *supra* note 250, at 962. *But see* Selmi, *supra* note 244, at 197 (challenging the “narrative that contemporary discrimination is the product of implicit bias that is automatic, unconscious, pervasive, and beyond one’s control”).

254. Systemic implicit bias is automatic biases in “supposedly race-neutral legal theories (such as retribution or rehabilitation) and jurisprudential approaches to well-considered constitutional doctrines (such as Eighth Amendment excessiveness analysis).” Justin D. Levinson & Robert J. Smith, *Systemic Implicit Bias*, 126 YALE L.J.F. 406, 408 (2017). Systemic

systemic cognition is an emerging trend and has generally focused on corporate culture.²⁵⁵

In some cases, courts have acknowledged that corporate culture may produce unconscious organizational behavior. As with liability for conscious organizational cognition, organizations' liability in cases involving unconscious cognitions tends to vary with the perception of corporate identity. Where organizational identity is defined horizontally, as the collective community of the organization, liability is less likely than when organizational identity is defined vertically, as executive management.

For example, comments made by executives who are not directly involved in unlawful behavior may nevertheless be evidence of the unconscious motivations of the organization. Both *Hamblin v. Alliant Techsystems, Inc.*²⁵⁶ and *Chirido v. Mineral Technologies, Inc.*²⁵⁷ involve individual claims of age discrimination. In both cases, the court held that evidence of corporate culture, in addition to the actions of a particular employee-agent, was admissible to prove organizational motive and liability.²⁵⁸

implicit bias is also automatic biases in legal processes such as policing, jury selection, case triage, and sentencing. See Robert J. Smith, *Reducing Racially Disparate Policing Outcomes: Is Implicit Bias Training the Answer?*, 37 U. HAW. L. REV. 295, 298 (2015) (noting automatic biases in policing); Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 150 (2010) (noting automatic biases in jury selection); Lawrence, *supra* note 250, at 942 (theorizing ideology of unconscious racism); Charles R. Lawrence III, *Local Kine Implicit Bias: Unconscious Racism Revisited (Yet Again)*, 37 U. HAW. L. REV. 457, 458 (2015) (describing racism as more than the actions of individuals); Levinson & Smith, *supra*, at 409 (noting automatic biases in sentencing). See also L. Song Richardson, *Systemic Triage: Implicit Racial Bias in the Criminal Courtroom*, 126 YALE L.J. 862, 866 (2017) (reviewing NICOLE VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT (2016)) (“[I] use the phrase *systemic* triage to highlight that *all* criminal justice system players are impacted by such expansive criminal justice policies and policing practices—not only public defenders, but also the entire cadre of courtroom players, including prosecutors and judges.”).

255. See Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 111–16 (1997).

256. 636 N.W.2d 150 (Minn. Ct. App. 2001).

257. No. 06-5523, 2009 WL 1118191 (E.D. Pa. Apr. 23, 2009).

258. See, e.g., *Hamblin*, 636 N.W.2d at 154 (“Here, there is evidence that Toby Warson, Honeywell’s President of Defense and Marine Systems, made an ageist remark. Because Warson himself did not actually terminate Hamblin, the remark is not direct evidence of disparate treatment or pretext. The

In *Hamblin*, an executive who was not involved in the employment decision made an ageist comment. The court observed that “[w]hile a single remark may be insignificant in itself, the echoing of this remark in a human resources memorandum and at a managers’ meeting creates a question as to whether a discriminatory corporate culture existed.”²⁵⁹ The court remarked further that “[d]iscrimination is often the result of subtle, unconscious predispositions.”²⁶⁰ The court acknowledged that corporate culture plays a role in fostering discrimination: “numerous circuit courts have acknowledged that ‘age discrimination may simply arise from an unconscious application or stereotyped notions of ability rather than from deliberate desire to remove older employees from the workforce’ and on that basis have ruled in the plaintiff’s favor.”²⁶¹

In other words, corporate culture influenced by unconscious systemic biases may be the basis for organizational liability. The court in *Chirido* made a similar observation concerning corporate thinking and culture: “In an employment discrimination case, even a stray remark by a nondecisionmaker may be admissible. The Third Circuit has recognized an exception to the general rule that stray remarks are inadmissible for remarks that reflect ‘a cumulative managerial attitude.’”²⁶²

Evidence of an organization’s corporate culture is evidence of the organization’s thinking, beliefs, and motives, which may include unconscious behavior.

Courts have also considered corporate culture and unconscious corporate cognition in the context of class action suits. The Supreme Court addressed the theory in *Wal-Mart Stores, Inc. v. Dukes*,²⁶³ but rejected it as a basis for certification based on the facts of that case.²⁶⁴ *Dukes* involved a Title VII sex discrimination class action by former and current female employees of Wal-Mart, “one of the most expansive

fact that the comment was made by a top executive, however, is significant because ‘when a major company executive speaks, “everybody listens” in the corporate hierarchy.’” (first citing *Diez v. Minn. Mining & Mfg.*, 564 N.W.2d 575, 579 (Minn. Ct. App. 1997); and then quoting *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1995)).

259. *Id.*

260. *Id.*

261. *Id.* (citing Rebecca H. White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 509 (2001)).

262. *Chirido*, 2009 WL 1118191, at *1 (first citation omitted; then quoting *Ryder v. Westinghouse*, 128 F.3d 128, 133 (3d Cir. 1997)).

263. 564 U.S. 338 (2011).

264. *Id.* at 356 (“In a company of Wal-Mart’s size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction.”).

class actions ever.”²⁶⁵ The District Court and Court of Appeals certified a class of 1.5 million plaintiffs who alleged that discretionary pay and promotion resulted in discrimination against women.²⁶⁶

An issue in *Dukes* turned on class certification. Class certification, under Federal Rule of Civil Procedure 23(a), among other things, requires proof of commonality, that the class has common issues of law and fact.²⁶⁷ Citing *General Telephone Co. v. Falcon*²⁶⁸ and writing for the majority, Justice Scalia identified the plaintiffs’ burden as establishing “‘significant proof’ that Wal-Mart ‘operated under a general policy of discrimination’” that would be common to all class members.²⁶⁹

The corporate identity described in *Dukes* was horizontal. In fact, the challenged practice was the subjectivity and discretion that managers had in making promotion decisions under the unconscious influence of Wal-Mart’s corporate culture.²⁷⁰ To prove commonality, the plaintiffs relied on expert testimony of Dr. William Bielby concerning a “‘social framework analysis’ of Wal-Mart’s ‘culture.’”²⁷¹ Dr. Bielby testified that Wal-Mart had a “‘strong corporate culture,’ that made it ‘vulnerable’ to ‘gender bias.’”²⁷² Writing in her partial dissent, Justice Ginsburg explained the unconscious actions of Wal-Mart’s lower management:

Wal-Mart provides no standards or criteria for setting wages . . . and thus does nothing to counter unconscious bias on the part of supervisors.

Wal-Mart’s supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means Wal-Mart used to maintain a “carefully constructed . . . corporate culture,” such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores “on a

265. *Id.* at 342.

266. *Id.* at 343.

267. FED. R. CIV. P. 23(a)(2).

268. 457 U.S. 147, 152 (1982).

269. *Dukes*, 564 U.S. at 353 (quoting *General Telephone Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)).

270. *Id.* at 343.

271. *Id.* at 346 (quoting *Dukes v. Wal-Mart Stores Inc*, 603 F.3d 571, 601 (9th Cir. 2010) (en banc)).

272. *Id.* at 354 (quoting *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 152 (N.D. Cal. 2004)).

close and constant basis,” and “Wal-Mart TV,” “broadcast . . . into all stores.”²⁷³

In other words, the organizational community was under the influence of a corporate culture that affected the unconscious decisionmaking of Wal-Mart’s supervisors. Yet because Dr. Bielby could not identify what percentage of decisions at Wal-Mart were affected by the culture of stereotyping, the Court concluded that plaintiffs’ proof was “worlds away” from that needed to establish a common policy of discrimination at Wal-mart.²⁷⁴

Subsequent to *Dukes*, lower courts continue to consider unconscious influences on corporate culture as sufficient to advance plaintiffs’ class actions. In *Ellis v. Costco Wholesale Corp.*,²⁷⁵ the District Court granted the plaintiffs’ motion for certification of a nationwide class of current and former Costco employees who were denied promotion to General Manager or Assistant General Manager.²⁷⁶ Plaintiffs argued that personnel decisions were affected by unconscious corporate influences—“social science and cognitive bias research showing that ‘the Costco culture and subjective promotion processes discriminate against women.’”²⁷⁷ Unlike the organizational identity in *Dukes*, which was horizontal, the organizational identity of Costco was vertical.

Considering *Dukes*, the District Court granted class certification on remand to a modified class.²⁷⁸ The District Court found that: “Costco’s top management—from Senior VPs up—meets once every four weeks at company headquarters in Washington. In addition to other matters, personnel and potential candidates for promotion are ‘frequently discussed among top-level managers, both at weekly meetings and the monthly meetings at Costco headquarters in Issaquah, Washington.’”²⁷⁹

So rather than assessing the unconscious thinking of an entire community of managers across stores, as in *Dukes*, the plaintiffs in *Ellis* challenged Costco’s cognitive processes through its top management.²⁸⁰

273. *Id.* at 371 (Ginsburg, J., concurring in part and dissenting in part) (first citation omitted; then quoting *Dukes*, 222 F.R.D. at 151–53).

274. *Id.* at 354–55 (majority opinion).

275. 285 F.R.D. 492 (N.D. Cal. 2012).

276. *Id.* at 496.

277. *Id.* at 500–01 (citing *Ellis v. Costco Wholesale Corp.*, 240 F.R.D. 627, 640 (N.D. Cal. 2007)).

278. *Id.* at 503 (describing plaintiffs’ “hybrid class,” requesting injunctive relief for current employees and monetary relief for former and current employees).

279. *Id.* at 497 (citations omitted).

280. *Id.* at 520. In explaining its conclusion concerning the commonality element, the court noted that the class in *Ellis* was much smaller than the class in *Dukes* and concerned female employees who were seeking specific positions

After *Dukes*, other courts have considered unconscious cognitive process but determined that they were insufficient to establish commonality. For example, in *In re: Navy Chaplaincy*,²⁸¹ the plaintiffs sought certification for a class of 2500 present and former non-liturgical Protestant chaplains in the United States Navy.²⁸² The plaintiffs alleged that the Navy and several of its officers discriminated on the basis of religion, maintained a culture of denominational favoritism and infringed on their First Amendment rights.²⁸³

Like the plaintiffs in *Dukes*, the plaintiffs in *In re Navy Chaplaincy* argued that the organization's cognition and belief system were a common factor affecting the class. The plaintiffs defined "'organizational culture' as a[] 'set of common understandings,' composed of shared 'values,' 'assumptions,' and 'beliefs,' 'around which action is organized.'"²⁸⁴ The plaintiffs argued that the "common issue in each class member's individual case [was] the Navy's systemic and institutionalized culture of prejudice against Non-liturgical chaplains and the faith groups they represent, and the resulting twin unconstitutional message of favoritism for preferred denominations and prejudice" against the plaintiffs.²⁸⁵

The District Court denied class certification, finding that the plaintiffs did not prove that the "culture of prejudice [was] so strong as to suggest that the Chaplain Corps operated under a 'general policy' of discrimination."²⁸⁶ Like the corporate identity in *Dukes*, the corporate identity in *In re: Navy Chaplaincy* was described as "decentralized," helping to defeat the use of corporate culture as a common, unconscious, behavioral motivation.²⁸⁷

Similarly, in *Davis v. Cintas Corp.*, a plaintiff alleged that corporate culture resulted in discriminatory discretionary decisionmaking by managers.²⁸⁸ The circuit court affirmed the district court's denial of certification because the hiring process was only partially subjective; therefore, corporate culture could not have constituted a "general policy

and specific employment practices, rather than all female employees and practices. *Id.* at 509. Like Wal-Mart, Costco lacked guidelines, but it imposed uniform promotion policies and practices. *Id.* at 498.

281. 306 F.R.D. 33 (D.D.C. 2014)

282. *Id.* at 46.

283. *Id.* at 33.

284. *Id.* at 49 (citation omitted).

285. *Id.* (citation omitted).

286. *Id.*

287. *Id.* at 50.

288. 717 F.3d 476, 486 (6th Cir. 2013)

of discrimination.”²⁸⁹ In addition, the corporate identity was the community of “thousands of Cintas managers at hundreds of Cintas facilities.”²⁹⁰ The plaintiffs could not establish that behavior spread over such a diverse collective was driven by common discriminatory influences.²⁹¹

Whether or not the courts in these cases found evidence of commonality that was sufficient for class certification, all of these cases recognized the possibility of unconscious cognitive processes of organizations that affected organizational behavior.

The purpose of this discussion has not been to provide an exhaustive catalogue of the ways that scholars, courts, and policy makers have considered liability or culpability for the organizational mind. Instead, the purpose here has been to demonstrate that scholars, courts, and policy makers have long been accustomed to factoring the implications of organizational “thinking,” including unconscious thinking, on organizational behavior and liability.

VI. TRAUMATIZED SYSTEMS’ TRANSFORMATION

Eva Rowe felt that BP murdered her parents. Even though the settlement that she received did not bring her parents back, sometimes, there is some feeling of justice and satisfaction when the “bad guys” pay for what they have done.²⁹²

Traumatized systems transformation does not offer that same gratification, in an obvious way. Though traumatized systems may “get what they deserve” as a result of other available remedies, systems transformation focusses primarily on understanding and change.

If BP had been diagnosed as a traumatized system when Eva Rowe’s parents were killed, would a supplemental transformative remedy, policy, or settlement term have prevented the Deepwater Horizon disaster?

Maybe.

Transformation involves healing the harms or hurt of the past so that they do not direct behavior in the present or future. Transformation is a necessary aspect of accountability for traumatized systems in at least two contexts: 1) to redress specific harms; and 2) to develop effective policy with lasting benefits.

289. *Id.* at 487, 489.

290. *Id.* at 487 (quoting *Serrano v. Cintas Corp.*, Nos. 04–40132, 06–12311, 2009 WL 910702, at *1 (E.D. Mich. Mar. 31, 2009)).

291. *Id.* at 487.

292. Mimi Swartz, *Eva v. Goliath*, TEX. MONTHLY (July 2007), <https://www.texasmonthly.com/articles/eva-vs-goliath/> [https://perma.cc/LD3U-SC4K].

When claims are brought against traumatized systems for specific wrongs, transformative remedies should be one part of accountability. Control-based remedies, including compensatory and punitive damages, as well as injunctive relief and regulatory sanctions, are necessary to attempt to make victims whole from the harms of traumatized systems and to attempt to put an immediate (even if only temporary) stop to certain harmful practices. If specific harms caused trauma to individuals or communities, damages, injunctive relief, and regulatory action may help victims take steps to moderate the effects of trauma and limit the likelihood of trauma response and inverse accountability.

Control-based remedies, however, are predictably not enough to address the wrongdoing of traumatized systems or to heal trauma in the systems or the harm to individual victims. In situations where systems act out their trauma, in addition to necessary efforts to control the harm, sanction the system, and compensate the victims, a primary goal of law and policy should be identifying the underlying causes of the behavior, holding systems responsible for outcomes, and facilitating healing systems transformation. A systems-transformation approach requires accountability that promotes resolution and evolution. In other words, rather than simply controlling traumatized systems, the goal of law and policy in creating accountability for systemic trauma response should be to establish accountability for the traumatic sources and promote healing and transformation.

Policymakers, therefore, should consider supplemental, transformative remedies for harms by triggered systems. Where liability has otherwise been found, supplemental remedies should be available when plaintiff proves systemic trauma. A plaintiff proves a prima facie case of systemic trauma by establishing that the organization or system: 1) has a history of trauma; 2) inflicts recurrent harm; and 3) has been unable to stop its harmful behavior in response to control-based remedies. Once a plaintiff establishes a prima facie case, the burden shifts to the defendant to prove that some element of the plaintiff's prima facie case is not true. If the defendant fails, the plaintiff is entitled to supplemental, transformative remedies.

Recounting is one possible transformative remedy. Recounting means that the organization or organizational group would be required to explore its trauma history and how that history may have affected departments and operations. The defendant would be required to provide that information to the plaintiff. In addition to any damages award, making a plaintiff whole includes allowing that plaintiff to understand better what happened, that the plaintiff may have been harmed because the defendant's behavior is influenced by some past harm or hurt and the defendant's recurring responses to it.

Awareness from recounting may be a form of relief for both traumatized systems and survivors of systemic harm. Understanding that organizational harm is a trauma response allows everyone involved to shift perspective. Some attention then goes to examining the origins

of the organizational trauma, seeing patterns of organizational trauma response and harm, and viewing individuals and communities as survivors of systemic cyclical harm. Awareness and acknowledgement of systemic trauma may empower individuals and communities to better understand their circumstances and empower everyone involved to find solutions.

Another potential transformative remedy is repairing. Repairing involves periodic reports to a plaintiff concerning steps that the defendant is taking to replace harmful patterns within affected departments with positive and collaborative alternatives. Knowing that the plaintiff's injury has been a catalyst for positive change may assist in making some plaintiffs whole.

Repairing may also increase justice outcomes for traumatized systems. By understanding how trauma history affects its decisions and operations, traumatized systems may improve the conditions for some individuals working in the system and improve the performance and efficiency of the system. BP, for example, is currently undergoing a massive transformation from a fossil-fuel focus to a renewable-energy focus.²⁹³ As a result, “geologists, engineers and scientists have been cut to less than 100 from a peak of more than 700 a few years ago.”²⁹⁴ If BP is a traumatized system and CEO Bernard Looney's climate revolution transformation addresses BP's trauma history, then BP may be able to break free of old patterns. But if BP is a traumatized system and the transformation does not address BP's history of trauma, then BP's recurrent harm will continue in some form in the context of producing renewable energy.

Recounting and repairing acknowledge the relationships that are created when systems harm individuals or communities. Acknowledging the relationships helps to ground the trauma in time and place, so that it does not travel forward into a plaintiff's or defendant's future, like other traumas from the past.

A third possible transformative remedy for specific wrongs may be the development of theories of extended liability for systemic harms. Science reveals that trauma has multigenerational effects.²⁹⁵ One study showed that the infant children of mothers who experienced childhood trauma displayed “altered brain circuitry” for fear response and

293. Ron Bousso, *BP's oil exploration team swept aside in climate revolution*, REUTERS (Jan. 24, 2021, 7:13 PM), https://www.reuters.com/article/us-oil-exploration-bp-insight/ups-oil-exploration-team-swept-aside-in-climate-revolution-idUSKBN29U00C?feedType=mktg&feedName=businessNews&WT.mc_id=Partner-Google [<https://perma.cc/9YM4-TFRJ>].

294. *Id.*

295. *See, e.g., Childhood Neglect Leaves Generational Imprint*, NEUROSCIENCE NEWS (Jan. 19, 2021), <https://neurosciencenews.com/childhood-neglect-generational-17597/> [<https://perma.cc/JM5B-LKYX>].

anxiety.²⁹⁶ Systemic harms, then, may foreseeably injure a subsequent generation. Currently, the remedies for those harms are available to the direct victims and their beneficiaries. Transformative theories of extended liability provide a rule of thumb that harm to subsequent generations is foreseeable. It would not only help to alleviate some aspects of inverse accountability, it would also help to give a truer and more complete perspective of outcomes, consequences, and relationships, which might facilitate healing.

These transformative remedies and the burden-shifting method of awarding them are just one set of potential methods of addressing specific harms of traumatized systems. More research is needed.

In addition to addressing specific wrongs, a transformative approach is necessary for creating effective social policies with lasting benefits. Policy should attempt to advance change without triggering systems or communities. To the extent that triggering traumatized systems or communities cannot be avoided, policy should anticipate trauma-responsive behavior and incorporate compassionate contingency measures that facilitate healing and policy objectives.

More research is needed for developing transformative policy approaches, and the nature of the transformative approach will depend on whether it is implemented on a federal, state, local or organizational level. Nevertheless, as a general matter, transformative policies should seek to identify recurrent harm. Systems tracing may be one way of identifying recurrent harm. Systems tracing involves tracking the organizations that interacted with or influenced individuals who are harmed or who harm others and holding the systems accountable if the evidence indicates a strong correlation. Systems tracing begins to build capacity to address the problem of inverse accountability. It assumes that many harms result from systemic causes.

For example, consideration of mitigating factors, such as childhood trauma, is a well-established aspect of sentencing in capital cases. Many Supreme Court cases have discussed the role of mitigation in capital sentencing.²⁹⁷ In *Lockett v. Ohio*, the Supreme Court held that an Ohio statute that limited the factors considered in capital cases violated the Eight and Fourteenth Amendment requirement that the sentencer be allowed to consider any aspect of a defendant's character or record in all but the rarest cases.²⁹⁸

Just as the criminal justice system sometimes considers the trauma history of some convicted individuals, systems tracing simply carries that process a few steps further. By asking what systems took part

296. *Id.*

297. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 105 (1982).

298. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

through omission or commission in a harmed or harmful individuals' trauma history, evidence of recurrent systemic trauma may appear.

Traumatized systems tracing builds on the theory of trauma systems therapy, which attempts to provide trauma-informed care for individuals by examining the systems that affect the individual.²⁹⁹ Similarly, Therapeutic Jurisprudence considers the interaction of legal processes and the therapeutic needs and inputs of clients and practitioners³⁰⁰ in order to advocate for a multidisciplinary approach that could produce positive therapeutic effects on stakeholders.³⁰¹ Traumatized systems tracing takes these considerations a step further, considering the implications for healing in the systems as well as the individuals.

When recurrent systemic harm occurs, policy makers should routinize exploration of the system's trauma history and how that history affected departments and branches of the system and their practices. Policies should assist traumatized systems in developing transparency as a method of healing for both the system and those affected by it. Policies should encourage traumatized systems to anticipate their trauma responsive behaviors and how those reactions will affect individuals and communities. Policies should encourage traumatized systems to practice alternative, positive patterns to reprogram what would otherwise be instinctive, responsive behaviors.

CONCLUSION

This article theorizes addressing many persistent social problems by directing attention to some of the most insidious actors—traumatized systems. To help victims of traumatized systems, this article has suggested transformative accountability for triggered systems, in addition to control. Many areas of investigation remain, including the development of methodologies for identifying and healing traumatized systems, for effectively balancing control and healing, and for addressing interconnected systems.

299. See discussion of Trauma Systems Theory, *supra* Part IV.

300. Marla Kahn, *Jurisprudential Countertransference*, 18 *TOURO L. REV.* 459, 473 (2015).

301. *Id.* at 473–76.