

CORPORATE PERSONHOOD: POSSIBILITIES FOR PROGRESSIVE, TRANS-DOCTRINAL LEGAL REFORM

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Abstract: Kent Greenfield’s *Corporations Are People Too (And They Should Act Like It)* reclaims the legal theory of corporate personhood from the conservative right and champions it for the progressive left. Greenfield argues that corporate personhood, properly construed, can further progressive goals by limiting certain corporate powers, increasing corporate accountability, and enabling corporate management to govern in the interests of all stakeholders. Greenfield advances a progressive account of corporate personhood and elaborates its implementation in constitutional law and in corporate law. This symposium response extends Greenfield’s conception of corporate personhood to related questions in securities law and tort law. This is a first step intended to advance a legal reform project that further translates corporate personhood into a coherent doctrine that reaches across U.S. law.

INTRODUCTION

The claim that “corporations are people” has incited fiery debate across the political spectrum. The conservative right brandishes corporate personhood as a victory for the free market whereas the progressive left attacks the notion as an affront to democratic accountability. In a compelling reformulation of this familiar narrative, Kent Greenfield’s *Corporations Are People Too* claims corporate personhood as a progressive objective.¹ He takes as his starting point the presumption that corporations should be good for society, and argues that embracing corporate personhood actually advances this agenda.

Greenfield has been a leading voice in progressive corporate law for over two decades.² Long before critiques of shareholder primacy became

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¹ See KENT GREENFIELD, *CORPORATIONS ARE PEOPLE TOO (AND THEY SHOULD ACT LIKE IT)* (2018).

² See, e.g., Kent Greenfield, *The Place of Workers in Corporate Law*, 39 B.C. L. REV. 283 (1998); Kent Greenfield, *The Third Way: Beyond Shareholder or Board Primacy*, 37 SEATTLE U. L. REV. 749 (2014); Kent Greenfield, *There’s a Forest in Those Trees: Teaching About the Role*

mainstream,³ Greenfield was highlighting the failures of American corporate law and advocating for corporate decision making that is stakeholder-focused and that governs in the interests of a corporation's plural constituencies.⁴ Once again, his newest book takes a bold position, claiming the controversial notion of "corporate personhood" from conservatives and championing it for progressives.⁵

Corporate personhood properly construed, Greenfield argues, advances progressive goals by limiting certain corporate powers,⁶ increasing corporate accountability,⁷ and enabling corporate management to govern in the

of *Corporations in Society*, 32 GA. L. REV. 1011 (2000). Greenfield's 2006 book, *The Failure of Corporate Law*, offered a compelling counter-narrative to the then-prevailing law and economics account of the corporation. KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2006) [hereinafter GREENFIELD, *THE FAILURE OF CORPORATE LAW*]. He went beyond the principal-agent problem at the center of mainstream corporate law scholarship to outline key failures of corporate law including costly externalities, the absence of corporate commitment to communities, shareholder primacy at the expense of other stakeholders, and short-termism. *Id.* at 1–2. He sketched out possibilities for reforming the American corporation to make it "more rational, democratic, accountable, and law-abiding." *Id.* at 416. Greenfield argued that a public conception of corporate law should replace the current private conception, and took direct aim at the canonical notion of shareholder supremacy. *Id.* at vii. In the years since, these once fringe arguments have become part of the mainstream scholarly and popular discourse.

³ Recent statements from the business and finance community evidence changing expectations of the modern corporation and its obligations to the public. In his 2018 and 2019 annual letters to investors, Larry Fink, the CEO and Chairman of the world's largest investment fund, declared his firm's commitment to building "a better framework for serving all . . . stakeholders," asserting that "[p]rofits are in no way inconsistent with purpose." Larry Fink, *Larry Fink's Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), <https://www.blackrock.com/hk/en/insights/larry-fink-ceo-letter> [<https://perma.cc/4QHF-YNL2>]; Larry Fink, *Larry Fink's 2019 Letter to CEOs: Purpose & Profit*, BLACKROCK (2019), <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter> [<https://perma.cc/J29M-QY5K>]. In August 2019, nearly 200 CEOs of some of the country's largest companies signed on to a *Statement on the Purpose of a Corporation* disavowing the long-enshrined principle of shareholder primacy, and instead committing themselves to leading their companies "for the benefit of all stakeholders." *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans,'* BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/7CKN-QCCW>]. The next month, *The Financial Times* announced a major reorientation with the release of its "New Agenda" and mission to "encourage business leaders to . . . promote stronger corporate purpose." *FT Sets the Agenda with New Brand Platform*, FIN. TIMES (Sept. 16, 2019), <https://aboutus.ft.com/en-gb/announcements/ft-sets-the-agenda-with-new-brand-platform/> [<https://perma.cc/7WUY-Z9JY>]. Its editor, Lionel Barber, noted that the "liberal capitalist model . . . has come under strain, particularly the focus on maximizing profits and shareholder value," and advanced that "[t]he long-term health of free enterprise capitalism will depend on delivering profit with purpose." Lionel Barber, *From the Editor*, FIN. TIMES, <https://aboutus.ft.com/en-gb/new-agenda/> [<https://perma.cc/2WKQ-W433>]. Consensus is building around the conclusion that shareholder primacy is dead.

⁴ See generally GREENFIELD, *THE FAILURE OF CORPORATE LAW*, *supra* note 2.

⁵ See GREENFIELD, *supra* note 1.

⁶ *Id.* at 9–11.

⁷ *Id.* at 11–12.

interests of all stakeholders.⁸ He advances a framework for determining which constitutional rights should be granted to corporations that is based on an analysis of the corporation's objectives and an evaluation of the right in question.⁹ He further elaborates a vision of corporate law reform that incorporates a stakeholder-focused model of corporate governance.¹⁰

Greenfield's rejection of shareholder primacy and embrace of stakeholder theory open up new opportunities for orienting corporate governance in line with a progressive agenda. His trailblazing work unpacks constitutional and corporate law questions and offers answers to them. A fully developed legal regime that realizes the possibilities of progressive corporate personhood, however, will require reforms that extend to other legal areas. Part I of this symposium response begins by examining how Greenfield has defined and defended personhood in constitutional law and in corporate law.¹¹ Part II extends his pragmatic approach to corporate personhood beyond these two legal domains and considers its implications for securities law and tort law as additional examples for developing a progressive legal account of corporate personhood.¹²

I. DEFENDING THE CORPORATE "PERSON" IN CONSTITUTIONAL AND CORPORATE LAW

In *Corporations Are People Too*, Kent Greenfield deploys the notion of personhood to signify different, yet complementary, interpretations of the corporate entity.¹³ His elaboration of personhood in the corporate context is pragmatic, focusing on the functions and objectives of the corporation rather than beginning with a historical or philosophical genealogy of personhood. When discussing corporate personhood in constitutional law, Greenfield advances three key features of corporate persons: 1) they are legally separate entities who "can sue, be sued, enter into contracts, own property, buy stuff, and sell stuff," 2) they are "made up of people," and 3) they are "holders of constitutional rights."¹⁴ Personhood makes corporations more accountable to the public by preventing shareholders from attributing their religious beliefs to the companies they own,¹⁵ providing a limit on government power and granting corporations standing to assert their due process

⁸ *Id.* at 27.

⁹ *See id.* at 19.

¹⁰ *See id.* at 209–14.

¹¹ *See infra* notes 14–29 and accompanying text.

¹² *See infra* notes 30–46 and accompanying text.

¹³ *See* GREENFIELD, *supra* note 1.

¹⁴ *Id.* at 2–3.

¹⁵ *Id.* at 9–11.

rights when those rights are relevant to their economic purpose,¹⁶ and providing the public a “deep pocket to sue” when harmed.¹⁷ Greenfield’s framework for determining the limits of corporate personhood in constitutional law derives from the premise that “corporations should receive the rights necessarily incidental to serving [their] economic purpose and should not receive those that are not germane to that purpose.”¹⁸

Greenfield methodically reviews some of the key legal challenges to corporate personhood in constitutional law. He notes that cases concerning corporate constitutional rights can be generally classified as easy, medium, or hard. For “easy” legal cases, he argues that corporations should obviously have constitutional rights. These cases concern checks on government power like protection from uncompensated takings under the Fifth Amendment and procedural due process protections against capricious governmental acts.¹⁹ More complicated cases in the “medium” and “hard” categories concern criminal procedure. These include cases dealing with the Fourth Amendment protection against unreasonable searches and seizures and the Fifth Amendment protection against self-incrimination. For this class of cases, determining whether a right should extend to a corporate person must take into account “[t]he difference between the public nature of corporations and the private . . . nature of humans”²⁰ Greenfield identifies the most difficult category of questions as those concerning “equality, religion, and fundamental rights.”²¹ For these questions, he argues, “we need to look at the purpose of the right in question and ask whether such purpose is furthered by extending it to corporations.”²² Cutting through all these cases of varying complexities is a focus on the corporation’s purpose. Greenfield argues that a corporation should enjoy only those rights that advance its purpose.²³

Greenfield claims that although progressives have been trying to limit corporate rights through constitutional law, corporate law is in fact better suited to achieving that goal.²⁴ In the corporate law context, he once again advocates for expanding corporate personhood as the solution for dealing

¹⁶ *Id.* at 62, 66–69.

¹⁷ *Id.* at 11–12.

¹⁸ *Id.* at 62. “[W]e need to look at the purpose of the right in question and ask whether such purpose is furthered by extending it to corporations.” *Id.* at 103.

¹⁹ *Id.* at 70–74.

²⁰ *Id.* at 74–75.

²¹ *Id.* at 81.

²² *Id.* at 103.

²³ *See id.* at 19–20.

²⁴ *Id.* at 170 (“The best hope for constraining corporate power and legitimizing corporations’ participation in the public square is not an adjustment in constitutional doctrine but an adjustment to corporate governance within corporate law.”).

with negative corporate externalities.²⁵ When discussing personhood in corporate law, Greenfield uses the term to capture a decision-making rationality that is complex, self-aware, and socially conscious. The ideal corporate citizen “owe[s] a robust set of duties to society and to stakeholders that go beyond shareholder primacy.”²⁶ Greenfield advances that this rationality allows for “better corporate decision making,” and reduces economic inequality and “short-termism.”²⁷ In this context, Greenfield’s discussion of personhood sets out the boundaries of the corporation’s proper constituency; that is, the people who make up the corporate entity and who have legitimate claims to its benefits. Greenfield argues that shareholder primacy is too narrow to capture the legitimate agents and beneficiaries of the corporation,²⁸ but does not provide a clear theory for determining where those boundaries should lie instead. Further development of corporate personhood in corporate law will have to answer this question. A corporation’s more obvious or “easy” constituents might include its employees and representatives from the community where it is based. Beyond that, however, defining the parameters of a corporate citizen’s accountability becomes more challenging. If the corporate citizen is expected to be responsible to its neighbors, for example, what does this mean in the age of globalization and the multinational corporation? What defines and/or limits the corporate person’s footprint? How should corporate subsidiaries be accounted for? Greenfield’s assertion of corporate personhood opens the door to such questions, but further theoretical and doctrinal development will be required to arrive at a more fully-fledged characterization of the progressive corporate person.

II. TRANSLATING CORPORATE PERSONHOOD ACROSS LEGAL DOCTRINE

A shift from shareholder primacy to stakeholder theory promises a new vision of corporate governance that is more aligned with progressive concern for the public interest. Such a move is only the beginning of a legal reform project concerned with the corporation’s personhood. This endeavor will require critical development of key questions within other doctrinal areas that, together, might enable the progressive orientation of the corporation that Greenfield has been promoting for decades.

Greenfield’s framework envisions a new construct of personhood centered on the corporation’s purpose, granting to it those rights that further its purpose and limiting those that do not. It also develops a secondary ques-

²⁵ See *id.* at 214–23.

²⁶ *Id.* at 208.

²⁷ *Id.* at 214–23.

²⁸ See *id.* at 186–207.

tion concerning the corporation's agents and beneficiaries—who makes up the corporation?²⁹ This section attempts to extend Greenfield's progressive corporate personhood and to sketch out some of the legal questions it implies using examples from securities law and tort law.

A. Corporate Personhood and Securities Law

A conceptualization of corporate personhood that moves away from shareholder primacy presents some unique considerations for securities law. If, to answer the constitutional law questions, we start by addressing “what the corporation is for,” and to answer the corporate law questions we start by addressing “who the corporation acts for,” then to answer securities law questions we have to start by addressing “who the corporation speaks to.” This question goes to the heart of the securities disclosure regime and its founding objectives.

Mandatory securities disclosure in the United States originated in the wake of the 1929 stock market crash. At the time, many perceived that investors' uninformed speculation in securities had provoked the crash.³⁰ The Securities Act was promulgated in 1933 with the purpose of balancing asymmetry in the amount and quality of information available to managers versus that available to investors.³¹ It required companies to disclose “material” facts to investors in order to enable informed decision making during the issuance and registration of securities.³² The Securities Exchange Act (SEA), promulgated in the following year, established the Securities and Exchange Commission and charged it with mandating and overseeing periodic reporting by publicly traded companies.³³ If the architecture of the SEA and the securities disclosure regime aims to protect investors' interests, then a stakeholder theory of the firm requires revisiting the audience for corporate disclosures.

A corporation's legitimate constituency is comprised of the stakeholders whose interests inform management's decisions. If corporate management governs to maximize shareholder interest, it follows that “material” disclosures would concern financial performance and would be communicated to an investor audience. If, however, corporate management makes decisions in the interest of a broader constituency, then the legal definition

²⁹ See GREENFIELD, *supra* note 1, at 187–89.

³⁰ Kevin S. Haeberle & M. Todd Henderson, *A New Market-Based Approach to Securities Law*, 85 U. CHI. L. REV. 1313, 1322 (2018).

³¹ *The Laws That Govern the Securities Industry*, SEC (Oct. 1, 2013), <https://www.sec.gov/answers/about-lawsshtml.html> [<https://perma.cc/3F42-BVWB>].

³² See Securities Act of 1933, 15 U.S.C. § 77d-1(c) (2018).

³³ See Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78qq (2018); Haeberle & Henderson, *supra* note 30; *The Laws that Govern the Securities Industry*, *supra* note 31.

and scope of materiality must correspond accordingly. Early versions of these considerations can already be found in recent securities litigation concerning corporate environmental, social, and governance disclosures.³⁴ A more ambitious foray into progressive corporate personhood must engage directly with the purposes of the securities regime.

B₂ Corporate Personhood and Tort Law

In tort law, corporate personhood raises questions concerning the types of harms for which the corporation is liable, including the corporate person's obligation to broader society and the types of harms that are attributable to the corporate person.³⁵ Such classic tort law questions will have to be revisited and revised through the lens of a corporate personhood agenda.

Tort doctrine has grappled with the unique challenges and opportunities presented by the modern corporation, especially during periods of dramatic industrial and commercial transition. The twentieth century, for example, saw major industrial shifts to mass manufacturing and a changing relationship between companies and consumers. These shifts spawned doctrinal innovations like market share liability and strict liability, which reconceptualized the public role and responsibility of corporations in bearing the costs of product-related injury.³⁶ Market share liability allowed plaintiffs

³⁴ See, e.g., Caitlin Ajax & Diane Strauss, *Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?*, 45 *ECOLOGY* L.Q. 703, 703 (2019). Ajax and Strauss observe the growing popularity of consumer claims and securities litigation involving "sustainability disclosures . . . by companies." *Id.* These cases are premised on an understanding that corporate ESG disclosures have become material and, as a consequence, legally actionable under consumer law and securities law. See *id.*

³⁵ See, e.g., Benjamin Ewing, *The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility*, 8 *J. TORT L.* 1, 20 (2015) ("Even if tort law in principle could embody special interpersonal norms of responsibility, the contemporary corporate form may routinely undermine, or at least substantially complicate, its ability to do so. . . . It is not clear, in the absence of argument, whether corporations are or can be the kinds of moral agents to whom notions like attributive responsibility apply.").

³⁶ Market share liability, for example, appeared in the case of *Sindell v. Abbott Laboratories*, 607 P.2d 924, 937 (Cal. 1980). In that case, plaintiffs brought class action claims against a group of companies that all produced the same drug. In bringing their claims, plaintiffs could not trace the specific drug ingested to a specific manufacturer. The Supreme Court of California held that plaintiffs could hold manufacturers collectively liable, with each company bearing liability for the aggregate judgment in accordance with its proportionate market share. *Id.* ("The presence in the action of a substantial share of the appropriate market also provides a ready means to apportion damages among the defendants. Each defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries."); see also Richard Kaye, Annotation, "Concert of Activity," "Alternate Liability," "Enterprise Liability," or Similar Theory as Basis for Imposing Liability upon One or More Manufacturers of Defective Uniform Product, in Absence of Identification of Manufacturer of Precise Unit or Batch Causing Injury, 63 A.L.R. Fed. 5th 195, 195 (1998) ("The bar has therefore created new theories of collective liability potentially aimed at

to hold product manufacturers liable by recovering damages in proportion to a manufacturer or manufacturers' total market share, even where the specific producer of a particular product could not be determined.³⁷ In advancing theories of strict liability, drafters of the Second Restatement of Torts reasoned that corporations were the best positioned parties to redistribute the costs of accidental injury as a sort of public insurer,³⁸ and that they should therefore bear liability based on policy grounds.³⁹ Courts embraced

holding an individual manufacturer, or an entire industry, responsible for products that cannot easily be traced back to the actual manufacturer.”). Similarly, strict liability doctrine emerged as a response to new dynamics between product manufacturers and consumers. Judge Traynor’s concurrence in *Escola v. Coca Cola Bottling Co.* highlighted the role that mass production has had in transforming the relationship between buyers and sellers, noting that as mass production has replaced handicrafts, the relationship between producers and consumers has resulted in consumers no longer being able to evaluate products on their own. *See* 150 P.2d 436, 443 (Cal. 1944) (Traynor, J., concurring) (“As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. Manufacturing processes, frequently valuable secrets, are ordinarily either inaccessible to or beyond the ken of the general public. The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-marks.”). Later, in 1963, Judge Traynor cited his own concurrence in *Escola* to reference the policy justification to imposing strict liability, which is to distribute the costs of injury from defective products to the product manufacturers rather than the consumers. *See* *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897, 901 (Cal. 1963) (“We need not recanvass the reasons for imposing strict liability on the manufacturer. They have been fully articulated in the cases cited above. The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”).

³⁷ *See, e.g., In re Methyl Tertiary Butyl Ether (“MTBE”) Prod. Liab. Litig.*, 175 F. Supp. 2d 593, 619 (S.D.N.Y. 2001) (“Under market-share liability, when a plaintiff is unable to identify the specific manufacturer of a fungible product that caused her injury, the plaintiff may recover damages from a manufacturer or manufacturers in proportion to each manufacturer’s share of the total market for the product.”).

³⁸ The reporters appointed were William Prosser and John Wade who were aided by an advisory committee comprised of prominent judges, law professors, and practitioners, including, among others, academic members Fleming James, Jr. of Yale and W. Page Keeton of Texas. *See, e.g.,* Fleming James, Jr., *Products Liability*, 34 TEX. L. REV. 192 (1955) (“In modern context, strict liability for accidental harms tends to distribute fairly equitably the inevitable casualties of enterprise.”); *see also, e.g.,* Page Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 859 (1963). Keeton identified risk spreading as one possible theoretical basis for imposing strict liability on a manufacturer: “[i]f . . . the underlying basis for the imposition of strict liability is the notion that the manufacturer is a better risk bearer because of his capacity to shift losses incurred from the use of the products to the consuming public generally . . . then the problem is one of allocating between the particular user and the manufacturer losses resulting from the various risks or hazards that inhere in the use of a product.” Keeton, *supra*, at 859.

³⁹ *See, e.g.,* Page Keeton, *Products Liability—Current Developments*, 40 TEX. L. REV. 193, 205–06 (1961) (“[T]he cases imposing liability are doing so on policy grounds, the notion being that ‘with mammoth accumulation of capital and large volume of sales comes an increasing facility for risk distribution without strain.’”) (quoting Millard H. Ruud, *Manufacturers’ Liability for*

this rationale, highlighting the unique features of mass producers like their capitalized structures and the greater bargaining power they maintain in relation to consumers.⁴⁰ Progressive corporate personhood in the tort law domain will need to reengage questions about how to distribute the risks and costs of corporate-driven development fairly and effectively, whether in the context of product-related accidents, systemic risks like climate change, or public health crises like the opioid epidemic.

In recent years, public-interest litigation efforts have been attempting to wield public nuisance law as a cost-spreading mechanism for public harms by targeting the deep pockets of corporations. Recent tort litigation concerning the costs of the opioid crisis and of climate change on state and local governments demonstrates a public appetite for expanding the scope of corporate liability to cover systemic or societal harms using broader interpretations of public nuisance doctrine. In 2018, a number of local governments and cities including San Francisco, Oakland, and New York filed public nuisance lawsuits against fossil fuel companies for the costs of climate change.⁴¹ Although their public nuisance theory was ultimately not successful, the same theory has recently led to legal victories against corporate defendants in the context of the opioid crisis.⁴² An Oklahoma court ruled against Johnson & Johnson in a case concerning the pharmaceutical company's role in the public health crisis. The presiding judge found that it

Representations Made by Their Sales Engineers to Subpurchasers, 8 UCLA L. REV. 251, 280 (1961)).

⁴⁰ The case law of at least thirty states makes specific reference to mass-producers, distinguishing them from small-scale manufacturers, and noting the public policy objectives of holding them strictly liable. See, e.g., *Consumers Power Co. v. Miss. Valley Structural Steel Co.*, 636 F. Supp. 1100, 1111 (E.D. Mich. 1986) ("The parties were undoubtedly of greatly different bargaining strength, the goods and their specifications were not bargained for but instead were mass produced, loss shifting from the consumer to the manufacturer would have the beneficial effect of improving design and manufacture of the goods, and the manufacturers could more easily shift the loss over society as a whole."); *Hawkeye Sec. Ins. Co. v. Ford Motor Co.*, 199 N.W.2d 373, 382 (Iowa 1972) ("Recovery under a theory of strict liability in tort results from a public policy decision that protects the consumer from the inevitable risks of damage or harm brought about by mass production and complex marketing conditions. Thus, strict liability in tort serves a necessary purpose."); *Melody Home Mfg. v. Barnes*, 741 S.W.2d 349, 360–61 (Tex. 1987); *Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152, 157 (Utah 1979); *Webb v. Navistar Int'l Transp. Corp.*, 692 A.2d 343, 346 (Vt. 1996) ("[S]trict products liability is justified on the ground that manufacturers are in the best position to spread the cost of injury resulting from defective products by passing it on to consumers as a cost of doing business.").

⁴¹ John Schwartz, *Judge Dismisses Suit Against Oil Companies Over Climate Change Costs*, N.Y. TIMES (June 25, 2018), <https://www.nytimes.com/2018/06/25/climate/climate-change-lawsuit-san-francisco-oakland.html?auth=login-email&login=email> [https://perma.cc/RH65-NGLW].

⁴² See Dino Grandoni, *The Energy 202: Here's Why Lawyers Suing Oil Companies Are Following the Opioid Cases*, WASH. POST (Sept. 3, 2019), <https://www.washingtonpost.com/news/power-post/paloma/the-energy-202/2019/09/03/the-energy-202-here-s-why-lawyers-suing-oil-companies-are-following-the-opioid-cases/5d6d4c86602ff171a5d7338f/> [https://perma.cc/4JUN-ETey]; Schwartz, *supra* note 41.

had breached state public nuisance law,⁴³ providing an example for thousands of similar lawsuits.⁴⁴ A key challenge to these public nuisance cases argues that such legal theories unfairly conscript companies to cover the costs of complex and multifactorial social problems.⁴⁵ Those advocating for an expanded interpretation of public nuisance, however, attribute greater liability to corporations by virtue of their scale, the magnitude of their contribution to the public crisis in question, and their ability to bear the expense of abating the consequential costs.⁴⁶

CONCLUSION

Embracing corporate personhood for progressive ends has wide-reaching implications for contemporary American jurisprudence. Kent Greenfield has laid the cornerstone of an ambitious and timely legal reform project by developing a framework for conceptualizing corporate personhood in constitutional and in corporate law. This symposium response has drawn the broad strokes of the types of questions that progressive corporate personhood implies for securities and tort law. Extending this project to other legal domains will require identifying and addressing relevant questions that personhood presents for established doctrine. It will be the charge of progressive legal scholars to take up Greenfield's mantle and further trans-

⁴³ Jan Hoffman, *Johnson & Johnson Ordered to Pay \$572 Million in Landmark Opioid Trial*, N.Y. TIMES (Aug. 26, 2019), <https://www.nytimes.com/2019/08/26/health/oklahoma-opioids-johnson-and-johnson.html> [https://perma.cc/YE5R-K5X6].

⁴⁴ See *id.*; Brian Mann, *Purdue Pharma Reaches Tentative Deal to Settle Thousands of Opioid Lawsuits*, NPR (Sept. 11, 2019), <https://www.npr.org/2019/09/11/759967610/purdue-pharma-reaches-tentative-deal-to-settle-thousands-of-opioid-lawsuits> [https://perma.cc/K8GW-528R].

⁴⁵ See, e.g., *Johnson & Johnson to Appeal Flawed Opioid Judgment in Oklahoma*, JOHNSON & JOHNSON (Aug. 26, 2019), <https://www.jnj.com/johnson-johnson-to-appeal-flawed-opioid-judgment-in-oklahoma> [https://perma.cc/N6H4-HM3D] (“‘Janssen did not cause the opioid crisis in Oklahoma, and neither the facts nor the law support this outcome,’ said Michael Ullmann, Executive Vice President, General Counsel, Johnson & Johnson. ‘We recognize the opioid crisis is a tremendously complex public health issue and we have deep sympathy for everyone affected.’”).

⁴⁶ See, e.g., Complaint for Public Nuisance at 5, *People v. BP P.L.C.*, No. CGC-17-561370, 2017 Cal. Super. LEXIS 6139 (Sept. 29, 2017) (“Defendants are substantial contributors to the public nuisance of global warming that is causing injury to the People and thus are jointly and severally liable. Defendants’ cumulative production of fossil fuels over many years places each of them among the top sources of global warming pollution in the world. . . . The People seek an order requiring Defendants to abate the global warming-induced sea level rise nuisance to which they have contributed by funding an abatement program to build sea walls and other infrastructure that is urgently needed to protect human safety and public and private property in San Francisco. The People do not seek to impose liability on Defendants for their direct emissions of greenhouse gases and do not seek to restrain Defendants from engaging in their business operations. This case is, fundamentally, about shifting the costs of abating sea level rise harm—one of global warming’s gravest harms—back onto the companies. After all, it is Defendants who have profited and will continue to profit by knowingly contributing to global warming, thereby doing all they can to help create and maintain a profound public nuisance.”).

late corporate personhood into coherent doctrine that reaches across U.S. law.

Preferred Citation: Aisha I. Saad, *Corporate Personhood: Possibilities for Progressive, Trans-Doctrinal Legal Reform*, 61 B.C.L. REV. E. SUPP. I.-21 (2020), <https://lawdigitalcommons.bc.edu/bclr/vol61/iss9/3>.

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