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Social License and Publicness

Hillary A. Sale

Georgetown University Law Center, has75@georgetown.edu

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Abstract.

This article deploys the sociological theory of social license, or the acceptance of a business or organization by the relevant communities and stakeholders, in the context of the board of directors and corporate governance. Corporations are generally regulated and treated as “private” actors, and corporate law falls into the zone of “private” law. The construct of the corporation as “private” allows for considerable latitude. Yet, corporate decision makers are the beneficiaries of economic and political power and, the decisions they make have impacts that extend well beyond the boundaries of the entities they represent. Using Wells Fargo and Uber as case studies, this article explores, how the failure to account for the public nature of corporate actions, regardless of whether “legal” license exists, can result in the loss of “social” license through publicness, or the interplay between inside corporate governance players and the outside actors who report on, recapitulate, reframe and, in some cases, control the company’s information and public perception. The theory of social license is that businesses (and other entities) exist with permission from the communities in which they are located, as well as with permission from larger communities and stakeholders. In this sense, businesses are social, not just economic, institutions and, thus, they are subject to public accountability and, at times, public control. Social license derives not from legally-granted permission, but instead from the development of legitimacy, credibility, and trust within the relevant communities and stakeholders. It can prevent demonstrations, boycotts, shut downs, negative publicity, and the increases in regulation that are a hallmark of publicness – but it must be earned with consistent trustworthy behavior and is bilateral, not unilateral. As a result, the company’s
social license can be a tool for risk management in particular and managing publicness more generally.

By developing and deploying social license and publicness in the context of board decision-making, this article adds to the discussions in the literature from other disciplines, like for example the economic theory on reputational capital, and provides boards with a set of standards with which to engage and to help address the publicness of the companies they represent. Thus, social license can become part of proactive cost benefit decision making. As a result, discussing, weighing, and developing social license is not just in the zone of what boards can do, but is something that they should do. Indeed, the failure to do so can have dramatic business consequences.

Introduction.

On January 16, 2019, Larry Fink, the CEO of BlackRock investment management company, one of the largest institutional shareholders, released a letter addressed to the CEOs of public companies. In that letter, Fink points out how society and shareholders alike are making increasing demands of companies, asking them to respond to broad societal changes.

“Stakeholders are pushing companies to wade into sensitive social and political issues – especially as they see governments failing to do so effectively. As CEOs, we don’t always get it right. And what is appropriate for one company may not be for another. One thing, however, is certain: the world needs your leadership. As divisions continue to deepen, companies must demonstrate their commitment to the countries, regions, and communities where they operate, particularly on issues central to the world’s future prosperity.”

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3 Id.
4 Id.
Fink presses CEOs to take leadership on various issues and to focus not only on shareholders, but also to consider the impact of their companies on all of their stakeholders. On January 12, 2018, Fink issued a letter with similar themes. In that letter, he also argued that boards should, as a matter of company strategy explore their impact on and interaction with all stakeholders, including “shareholders, employees, customers, and the communities in which they operate.” Further, Fink stated that corporate governance modes must be developed that allow boards (and not just CEOs) to better direct and oversee the long-term strategies of their companies. To this end, Fink instructs boards to ask themselves the following questions about their companies:

“What role do we play in the community? How are we managing our impact on the environment? Are we working to create a diverse workforce? Are we adapting to technological change? Are we providing the retraining and opportunities that our employees and our business will need to adjust to an increasingly automated world? Are we using behavioral finance and other tools to prepare workers for retirement so that they invest in a way that will help them achieve their goals?”

These exhortations, coming from the leader of one of the world’s largest institutional investors and investment companies, represents a stark shift from the traditional shareholder primacy theory or the idea that shareholder value is the exclusive objective of corporations. Indeed, the BlackRock letters demand that boards alter their corporate governance strategy to effectively anticipate and address a wide variety of stakeholder concerns – arguing that those who do not will lose their license to operate – a term that arises out of the sociological literature.

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6 Id.
7 Id.
8 Id.
How are boards to implement such a significant change to their traditional governance and business concerns? And, how might such a change improve long-term corporate value? This article suggests that boards can adapt and deploy the social license theory as an effective tool to implement stakeholder-based corporate governance practices that are good for shareholders and stakeholders alike. In combination with publicness, the social license theory provides boards with an approach to understanding its three key roles (strategy, risk, and people) and undertaking them with a deeper understanding of the company’s relationship with and role in society and the outside pressures that can derail even the most well-developed strategies and goals.

This article explores the construct of social license, or the acceptance of a business or organization by the relevant communities and stakeholders, in the context of the board of directors and corporate governance. Corporations are generally regulated and treated as “private” actors, and corporate law falls into the zone of “private” law. The board is at the fulcrum of the corporate entity. It is charged with managing governance and overseeing management, and the private status of corporate entities provides considerable latitude for director decision making. Yet, time and time again, companies fail to account for the public nature of their actions, including those for which they otherwise have legal permission or legal license. Social license theory, prominent in sociological studies of community and business relations, provides a powerful construct both for scholars examining corporate actions and for boards to consider when developing business strategies and weighing risk. It adds to the discussions in the literature from other disciplines, like for example the economic theory on reputational capital, and provides boards with a set of standards with which to engage and to help address the publicness of the companies they represent. Indeed, social license can become part of proactive cost benefit decision making. As a result, discussing, weighing, and developing social license is not just

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9 See, e.g., Del. Code Ann. tit. 8, § 141(a) (West 2014).
10 See, e.g., Lucian Arye Bebchuk, The Case for Increasing Shareholder Power, 118 Harv. L. Rev. 833, 913 (2005) (arguing one reason for these continued failures is that “the evolution of governance arrangements—which are in part designed to constrain and regulate management--has been for too long left to a process controlled by management”).
in the zone of what boards can do, but is something that they should do. Indeed, the failure to do so can have dramatic business consequences.

Social license and publicness, a theory about which I and other corporate scholars have previously written, are connected.¹¹ Publicness is the interplay between inside corporate governance players and the outside actors who report on, recapitulate, reframe and, in some cases, control the company’s information and public perception.¹² Corporate decision makers are the beneficiaries of considerable economic and political power and, consequently, the decisions they make have impacts that extend well beyond the boundaries of the entities they represent. These outside constituencies include the media and the general public. Although the freedom corporate actors enjoy is already subject to laws and regulations, publicness, too, creates limits on the powers of those actors -- but not necessarily through court decisions, legislation, or regulation. In this manner, publicness concerns the space above the legally-licensed line and the zone of the license to operate.

Social license also occupies this space. The theory of social license is that businesses (and other entities) exist with permission from the communities in which they are located, as well as with permission from larger communities and stakeholders. In this sense, businesses


¹² See Sale, J.P. Morgan, supra note 14 at 1630 (“O]utside parties do more than listen; they reframe and often critique the stories, in ways that may force corporations to alter their preferred governance structure--regardless of their legal status as private or public.”); see also Sale, Public Governance, supra note 14 at 1013-14; Sale, The New “Public” Corporation, supra note 14 at 141.
are social, not just economic, institutions and, thus, they are subject to public accountability and, at times, public control. Even if not explicit, businesses require both legal license and social license to operate. Thus, social license derives not from legally-granted permission, but instead from the development of legitimacy, credibility, and trust within the relevant communities and stakeholders. It can prevent demonstrations, boycotts, shut downs, negative publicity, and the increases in regulation that are a hallmark of publicness. As a result, the company’s social license can be a tool for risk management in particular and managing publicness more generally. Importantly, unlike legal licenses which can be applied and paid for, social license, or the license to operate, must be earned with consistent, trustworthy behavior, along with solutions and compromises achieved through dialogue with relevant sectors of the community. In this sense, social license is bilateral, not unilateral, thus both differing considerably from legal license and connecting to the process and substance of publicness.


16 Geert Demuijnck & Bjorn Fasterling, supra note 18 at 675. See also Dirk Matten et. al., Behind the Mask: Revealing the True Face of Corporate Citizenship, 45 J. OF BUS. ETHICS 109, 110 (2003).
This Article deploys publicness and social license together, analyzing them and developing the theory of social license in the context of, and as a tool for, engaged director decision making. Both publicness and social license are implicated when the pressure for changes in the decision-making structure and the allocation of power within a corporation comes from “outsiders.” When outsiders effectively make themselves part of the governance dialogue, publicness is at work. In some cases, decision-making transfers from officers and directors, with some input from shareholders, to stakeholders and others.\(^{17}\) Much of this shift occurs through the publicness process explored below and, as this article argues, can be managed with an effective social license. Interestingly, in this sense, social license occupies space that corporate law and fiduciary duties purport to control.\(^{18}\)

Today, publicness grows through a public-private dialectic that derives, at least in part, from the ease and availability of media. Scrutiny is 24/7, and the failure of corporate actors to understand this dynamic results in costly challenges and failures. Further, when situations erupt, the existing level of corporate publicness can multiply due to the way in which outsiders and the media create feedback loops. The financial crisis, about which I and many others have written, reveals this aspect of publicness.\(^{19}\) Consider, for example, how the reactions of citizens to the financial crisis produced

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\(^{18}\) A successful social license engenders both internal and external corporate trust, for example. Trust is an essential component of corporate law that is, arguably, not effectively managed by current corporate fiduciary doctrine. *See* Lawrence E. Mitchell, *Fairness and Trust in Corporate Law*, 43 Duke L. J. 425 (1993).

demands for accountability and resulted in the Dodd-Frank Act and increased government intervention and regulation.20

Publicness in the corporate governance structure also develops as companies make choices, including those about risks and risk taking.21 The company’s risk choices, and its management of them, impacts not just the traditional governance participants - shareholders, officers, and directors - but also community stakeholders and the public.22 Risk failures can be costly – and not just for the company. In the wake of risks gone bad, employees lose their jobs, local communities suffer, and people even lose their lives.23 The result for corporations is increased scrutiny and pressure, as well as, when outcomes are particularly bad, new laws and regulations.24 Examples abound. Consider BP’s oil spill in the Gulf of Mexico or the financial crisis of 2008-2009. Social license was lost in these situations, and, as this article argues, had the decision makers been more focused on social license and its importance to the growth and sustainability of their businesses, they may well have made different choices in the initial stages that would have prevented or diminished the outcomes of publicness.

Part I of this Article examines the concept of publicness in greater detail, developing its substantive and procedural aspects. Part II then illustrates the role publicness played in the recent corporate scandals of Wells Fargo and Uber. Part III focuses on the various stages of social license theory, drawing on examples from companies that actively engaged in creating and maintaining social license as a tool for ensuring sustainable business growth. Finally, Part IV reevaluates the Wells Fargo and Uber scandals by applying social license theory to analyze how the companies failed to earn social licenses, assess

20 See Sale, Public Governance, supra note 14 at 1027 (arguing that the Dodd-Frank Act was “borne out of the corporate failure to self-govern” and “the public’s desire for a quid pro quo or retribution”).
22 See, e.g., Horrigan, supra note 20.
the impact of that failure on their respective scandals, and explore what they can do to build social licenses. The result is a deep dive into the sociological literature for the purpose of developing the role of the board and the understanding of corporate governance theory more broadly.

I. Publicness and Corporate Governance.

This part of the article provides a detailed examination of publicness. The theory of publicness has both substantive and procedural aspects. Substantively, publicness concerns the permissive nature of firms. Companies devolve from the public. Their “private” status is the result of legislative grants and is thus permissive. Therefore, corporations are creatures of the state, and it is this government-granted power that gives them legal legitimacy, limited liability, and the opportunity to expand and grow. Indeed, historically, corporate entities were granted status on a case-by-case basis. Early entities granted this status were often quasi-public in nature, like public transit and other authorities today. Moreover, the potential and actual impact of corporate entities has long been a subject of discussion and concern, with, for example, the role of banks with respect to the money supply and on the economy receiving particular scrutiny.

25 Of course substance and procedure, as distinctions in the law, are easily collapsed. Nevertheless, for the purposes of this article, I use the distinction to help delineate the types of publicness boards face.
26 James D. Cox, Corporate Law and the Limits of Private Ordering, 93 WASH. U.L. REV. 8 (2015); Bone, supra note 16 at 279-84. See also Jean L. Cohen & Andrew Arato, CIV. SOC’Y & POL. THEORY 352 (1992) (“[T]he private . . . ‘spheres’ have always been constituted and regulated by law, even if what is constituted includes a domain of autonomous judgment that can come into conflict with law.”).
27 Indeed, publicness, as “derived from political authority, affects virtually every organization.” BARRY BOZEMAN, ALL ORGANIZATIONS ARE PUBLIC: BRIDGING PUBLIC AND PRIVATE ORGANIZATIONAL THEORIES 13 (1987).
29 Thompson, supra note 31.
Thus, even though entities are allowed to incorporate and operate with considerable degrees of freedom, that freedom is permissive and, it turns out, easily circumscribed. Why? Because corporate entities wield economic and political power. Their decisions and choices impact employees and communities, and, in the case of something like the financial crisis, the economy and citizens much more broadly. And this is the zone of social license – the zone that BlackRock wants boards to give more space in their governance decisions. Demands for accountability are the natural and instinctive response to this accumulation of power, and the simplest forms of accountability come through regulation and constraints on private ordering. Thus, the public, through the legislature and other officials, constrains corporate choices ex ante through laws and regulations a form of substantive publicness.

Substantive publicness also exists in the form of ex post enforcement. This enforcement, via investigations and litigation, occurs when companies violate public norms. The most recent example is the Dodd-Frank Act and the multiple investigations and

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30 Indeed, the “private” status of corporations is in fact a construct. Cf. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW 277 (1990) (exploring similar issues in the context of family law and stating that “[t]racing the presence of state power in the family sphere, historically described as removed from the state, suggests something powerful about boundaries: both sides of a boundary are regulated, even if the line was supposed to distinguish the regulated from the unregulated.”).


enforcement actions against banks in the wake of the 2008-2009 financial crisis. Prior to that, a wave of enforcement grew out of the Enron and Worldcom scandals and from the options backdating scandal and the dot-com crash. More recently, Wells Fargo and Uber have also experienced their share of substantive publicness.

Interestingly, ex post enforcement is both public and private. Class actions are a key example of “private” litigation that supplements the public enforcement system. Resources at the federal and state levels are constrained. Thus, in the context of securities litigation (and, arguably, state fiduciary duty claims), courts have regularly asserted that private litigation is important to preserving market integrity and supplementing the government’s enforcement reach.

Publicness is also a process and that process, in turn, results in changes to substantive publicness. Our understanding of the substantive aspect of publicness, which highlights the publicly permissive nature of private ordering, develops over time. Why? Because the forces that drive it metamorphose, thus changing the process of publicness itself. Media, for example, is currently an important component of the process of publicness. Media coverage allows members of the public to participate in a dialogue about corporate actions and choices. That dialogue, in turn, plays a role in how the government makes enforcement and regulatory changes. Directors who fail to understand the power of the news media and the growth of social media are neglecting their role. For example, in response to crises, media coverage, and public pressure, government has increased its role in developing and supporting substantive

34 See Robert B. Thompson, Collaborative Corporate Governance: Listing Standards, State Law, and Federal Regulation, 38 Wake Forest L. Rev. 961, 965 (2003) (“The SEC took several actions in the wake of the Enron scandal and related reports of corporate misdeeds. The WorldCom fiasco helped propel Congress toward legislation and within a month, the President had signed the Sarbanes-Oxley Act of 2002.”); see also Langevoort & Thompson, supra note 14 at 374 (stating that “nearly all the examples of the melding of investor and broader social interests that have changed the meaning of publicness are reactions to highly salient (usually scandalous) events involving large public companies”).

Regulatory surges are an inevitable response to widespread crises, but as the Wells Fargo and Uber situations reveal, even an individualized scandal can invoke the publicness process. The role that media and its accessibility (through blogs and comments on news articles, for example) plays, now accelerates the process side of publicness.

When entities fail to acknowledge their publicness, or to manage with an understanding of it, the omission can result in a process through which private ordering is diminished. Ignoring the social license can lead to the elimination of private privileges and their replacement with laws, regulations, and substantive publicness. Media coverage and public outrage develops and the process of publicness creates pressure that, in turn, for example, resulted in several new layers of federal regulation for boards of directors in response to the financial crisis of 2008-2009. As a result of congressional action, both the Sarbanes-Oxley and Dodd-Frank Acts now regulate director qualifications for the board and for some committees. In addition, federal regulation requires boards to have particular committees (audit, compensation, and nomination and governance). The regulations also set forth requirements for “independent” members of these committees. Yet, committees and membership were, before the governance crises mandating them, subject to private ordering. Thus, these examples also reveal how the process of publicness results in the substance of publicness.

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37 See, e.g., Coffee, supra note 36.
38 Cf. Laura A. Rosenbury, Between Home and School, 155 U. P.A. L. Rev. 833, 846-50 (discussing, in the context of family-law, how legal doctrine shapes childhood both through substance and omissions).
41 15 U.S.C. § 7241(a)(5); 124 Stat. 1376 (2010). See also Guhan Subramanian, Bargaining in the Shadow of Takeover Defenses, 113 YALE L.J. 621, 682 (2003) (predicting that, in addition to the federal government, Delaware courts may also continue “mov[ing] in a pro-shareholder, antimanagerial direction in order to avoid further federal preemption on (historically) state corporate law issues”).
42 17 CFR 229.407.
II. The Publicness of Wells Fargo and Uber.

Consider two companies: Wells Fargo, a publicly-held bank perceived to be a leader in the financial services industry, and Uber, a privately-held start-up. Both companies are reeling from scandals, as well as the resulting media attention and publicness process. Through their respective responses to these scandals, the companies demonstrate the power and cost of publicness and are excellent case studies for examining the role that social license can play in the boardroom and in managing the process and substance of publicness.

A. Wells Fargo.

Wells Fargo has met with considerable publicness as a result of its recent account scandal. This fact pattern provides an opportunity for analyzing how the process of publicness, and the attendant substantive outcomes, have impacted the company, and where board attention to social license could have made a difference. Ultimately, Wells Fargo’s paid a steep price. Its CEO, John Stumpf, was ousted and lost millions when the company clawed back his pay, out-of-pocket costs for Wells Fargo have reached $2 billion and are climbing, and its actions are subject to scrutiny resulting in government imposed governance changes.\(^{44}\) He, along with many of his colleagues, failed to appreciate the power of publicness and its potential impact on the company and its license to operate.

At the end of the fourth quarter of 2018, Wells Fargo was ranked third in terms of deposits and fourth among U.S. banks based on assets ($1.9 Trillion),\(^{45}\) a decline from its standings in 2017. At the end of the first quarter of 2017, Wells Fargo ranked third among U.S. banks based on assets ($2.0 Trillion).\(^{46}\) In 2016, according to Forbes, it was the 7\(^{th}\) largest company in the world based on assets, profits,


sales, and revenue.\textsuperscript{47} In terms of revenue alone, it was the 26\textsuperscript{th} largest company in the United States.\textsuperscript{48} Indeed, no matter the measure or index, Wells Fargo is a very large company.

Since 2016, Wells Fargo, a financial services company providing banking, insurance, investments, mortgage, and consumer and commercial financial services,\textsuperscript{49} has been reacting to a series of revelations about its sales and other practices. These revelations have badly damaged the company’s reputation and earnings model. The bank had long operated in a decentralized manner, with three key operating segments: community banking, wholesale banking, and wealth management.\textsuperscript{50} The roots of this scandal are in the community bank segment.

So, what was at the heart of the Wells Fargo scandal? Lack of attention to the company’s status, its social license, and the process of publicness. This lack of attention manifested as unacceptable consumer practices, toxic incentives, and grievous risk management. Wells Fargo employees engaged in a series of fraudulent transactions, including opening unauthorized customer bank, credit card, auto insurance, and other accounts. Customers did not know about these accounts, and many did not realize the accounts existed – even after being charged fees. Employees – at least 5000 of them – were pressured and incentivized to create these accounts. In some cases, the pressure was “extreme.”\textsuperscript{51} Employees said they received multiple calls from supervisors per day, demanding updates on sales goals.\textsuperscript{52} The bank ranked them against each other, with compensation and promotion tied to the goals.\textsuperscript{53} Some employees were specifically encouraged to sell unnecessary products.\textsuperscript{54} Sales rankings were circulated regularly and eliminated only after regional leaders pushed back, citing a culture of shaming and perpetual sales

\textsuperscript{47} Id.
\textsuperscript{48} Wells Fargo, supra note 48.
\textsuperscript{49} Wells Fargo, supra note 49.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 7.
\textsuperscript{52} Id.
\textsuperscript{53} Id. at 20.
\textsuperscript{54} Id. at 7.
Further, employees who could not meet the goals feared peaking in the fourth quarter of 2013. Why did cross-selling occur? Because that is how banks make money. In general, a single account at a bank brings little profit; however, some products, like mortgages, are quite lucrative. The more accounts or products a consumer has, the more likely that consumer is to stay with the bank and to engage in higher dollar transactions. A simple set of calculations based on the number of customers and the increased number of products per customer during the high-pressure cross-selling period at Wells Fargo, reveals the bank likely made billions through cross-sells. Although not all of these cross-sells were the result of fraud, the power of the cross-sell termination or “career-hindering criticism.” In fact, “sales integrity - related allegations and associated terminations and resignations increased relatively steadily from the second quarter of 2007,” is nevertheless evident.

The Wells Fargo situation is typical of other sales-related frauds. As sales grow, the pressure to sustain and increase sales also grows. In fact, the sales model at the Community Bank was volume-focused and “relied heavily on year-over-year sales growth.” The result was more pressure on the sales force and that, in turn, lead to sales-integrity issues. From sandbagging (withholding sales in a particular

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55 Id. at 20.
56 Id.
58 Touryalai, supra note 60. “The idea is that having a greater share of a customer’s wallet means it will be tougher for him to leave the bank.” Id.
59 Davidson, supra note 60. “Wells Fargo has surely made tens of billions of dollars, and likely hundreds of billions, by employing its aggressive cross-selling approach.” Id.
60 Wells Fargo, supra note 49 at 7.
61 Id.
quarter to push them into the next) to accounts with de minimis funding, the evidence of problems both existed and grew.\textsuperscript{64} When an investigative newspaper report exposed the issues, the company’s board finally focused on the problem and the pressure for sales growth “moderated somewhat.”\textsuperscript{65} Integrity problems and other issues also decreased.\textsuperscript{66}

Nevertheless, the problems persisted for a very long time. As early as 2002, the Community Bank began to see growth in sales practice violations.\textsuperscript{67} An internal report from 2004 reveals both an increase in violations, as well as an increase in terminations.\textsuperscript{68} But there was little willingness to address the issues. According to the 2017 report of an independent investigation, prepared at the behest of the Wells Fargo board of directors (the “2017 Independent Report”), the Community Bank’s efforts to address the concerns were “incremental, implemented slowly and insufficient to address the root causes of the problem.”\textsuperscript{69} In part, this was because the leadership was “disincl[ed]” to see the systemic nature of the fraud.\textsuperscript{70} Instead, the culture was one of blame for employees and lack of analysis as to the root causes. This was true despite employees calling the company’s hotline and reporting problems.\textsuperscript{71}

Moreover, the account-creation process went on for many years, ending only when the situation publicly imploded. Indeed, before this consumer fraud hit the presses, an analyst from Rafferty Capital, who had personal experience banking with Wells Fargo following the Wachovia merger, stated that he did not believe the story Wells Fargo told: that doughnuts, seating, and service accounted for its continued growth and success. Instead, in his opinion, employee

\textsuperscript{64} \textit{Independent Directors}, \textit{supra} note 65 at 21.
\textsuperscript{65} \textit{Id.} at 6.
\textsuperscript{66} \textit{Id.}
\textsuperscript{67} \textit{Id.} at 31.
\textsuperscript{68} \textit{Id.}
\textsuperscript{69} \textit{Id.} at 41.
\textsuperscript{70} \textit{Id.} at 6.

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management and incentives had to be the reason.\textsuperscript{72} He was half right. That does not, however, actually answer the “how” question. How did these practices happen, on a fairly large scale, without anyone higher up knowing or noticing? The answer is that people did know. However, Wells Fargo’s culture and organizational structure prevented the information from flowing upwards and that, in turn, contributed to the board’s failure to do its job – monitoring the company’s public nature and preventing the process of publicness.

Interestingly, Wells Fargo exited the financial crisis of 2008-2009 with a relatively clean and positive reputation. Its CEO, John Stumpf, was praised for his management style and the way in which Wells Fargo weathered the crisis. One magazine article described Wells Fargo as the “big winner in the financial crisis” and analyzed how Stumpf, and the Wells Fargo business model, resulted in it growing and thriving at a time when the rest of the banking industry was still recovering.\textsuperscript{73} Ironically, at the time that article appeared in The Economist, the practices that caused the recent scandal were gathering steam within the company.\textsuperscript{74}

The decentralized nature of Wells Fargo contributed to the scandal. Decentralization and deference to business unit leaders is a hallmark of the company. The leader of the Community Bank at the time of the scandal was Carrie Tolstedt. She was widely perceived to be both very successful and close to Stumpf, who was himself a proponent of decentralized management.\textsuperscript{75} She was also criticized as insular, defensive, and “notoriously resistant to outside intervention and oversight.”\textsuperscript{76} This, in combination with decentralization, contributed to the lack of visibility into the cross-selling issues and the inevitable demands for accountability that ensued. Indeed, decentralization “challenges the notion of a strong corporate culture and governance.” Simply put, the more you decentralize, the more you

\textsuperscript{73} \textit{Id.}
\textsuperscript{74} INDEPENDENT DIRECTORS, supra note 65 at 31. The report reveals that in 2004 there was both an increase in violations and an increase in terminations triggered by those violations. \textit{Id.}
\textsuperscript{75} \textit{Id.} at 99.
\textsuperscript{76} \textit{Id.} at 13.
allow for decisions to be made, and messages to be carried, in
different ways.  

Consider the decentralization of the risk function. At Wells Fargo, lines of business had their own risk managers who answered to the heads of their business, and not, for example, to a central risk-management person. 78 Thus, it was not until after the 2008-2009 financial crisis, in 2011, that the board created a Risk Committee to oversee risk across all the units at Wells Fargo. 79 The Risk Committee apparently decided that the right approach was to grow the central risk function, endow it with both the responsibility and the ability to oversee risk in the lines of business, and provide it with increased funding. 80 This process did not begin until 2014, however, and took three years to complete. 81

Other functions at Wells were also decentralized. For example, the Community Bank had its own Human Resources department. 82 Consequently, the problems with employee terminations, turnover, and other issues in the Community Bank were seen in isolation and not compared to those of other divisions. 83 Fragmentation compounded the problem, diminishing transparency and visibility.

Moreover, the perception at Wells Fargo was that the issues were of “modest significance.” 84 The internal understanding of “customer harm” was limited to fees and penalties (the zone of legal license), as opposed to brand, reputation, or consumer trust. 85 Yet, brand, reputation, and trust are precisely in the space of publicness and, as explored in Part III, are in the zone of social license. They are also issues within the domain of the board and its fiduciary duties –

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78 INDEPENDENT DIRECTORS, supra note 65 at 11.
79 Id. at 12.
80 Id.
81 Id.
83 INDEPENDENT DIRECTORS, supra note 65 at 12.
84 Id. at 14.
85 Id.
despite the fact that the Wells board did not seem to be paying attention.

So, what did the Wells board know, and when did it know it? Well, we know now that Stumpf was in fact aware of the problems at least as early as 2002. Recall that the board had established a Risk Committee in 2011, but that it did not really begin work until 2014. Then, following the Los Angeles Times news articles in early 2014, management began to identify and report risky sales practices to the board and the Risk Committee. But it was too little, too late. In May 2015, the Los Angeles City Attorney sued, alleging “widespread and improper sales practices.” Scrutiny of Wells Fargo increased. As the process of publicness began to take hold, so did the costs to the company and the board, including the cost of hiring outside consultants to investigate and report on the scandal and develop proposals for change.

Nevertheless, as the 2017 Independent Report makes clear, management information to the board was inadequate and inaccurate. For example, the board was told that 230 employees had been terminated, but those figures were not aggregated (despite requests from the Risk Committee) and, therefore, underrepresented the significance of the terminations. In addition, according to the 2017 Independent Report, management provided information on enhanced monitoring that lacked detailed and concrete plans; yet, neither the board nor the Risk Committee insisted on better plans.

This failure on the part of the board occurred as the scope of the scandal grew. For example, to meet cross-sell sales targets, employees opened millions of fake accounts, without customer consent, over a period of at least five to seven years. There were unauthorized deposit accounts and unauthorized credit card applications. Initial estimates of fees to the bank were relatively low,

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87 INDEPENDENT DIRECTORS, supra note 65 at 15.
88 Id.
89 Id. at 16.
90 Id. at 17.
$2.6 million, in comparison to the size of Wells Fargo and what was later revealed. Moreover, as the company continues to release information, it is increasingly apparent that the size of the scandal is far larger than initially reported, perhaps going back 15 years, impacting many more customers, and bringing in more fees.

The dollar costs of the scandal are very large and growing. The company paid $185 million in fines in 2016 and a considerable amount in legal costs. In the first quarter of 2017, it spent an additional $80 million in costs related to the situation. Moreover, the company initially predicted that the level of clean-up spending would continue to increase through most of 2017, resulting in dollar costs (to be distinguished from opportunity costs) in the range of $425 million. More recent predictions are even higher. Then, in 2018, Wells Fargo agreed to pay out $575 million for violating consumer protection laws as a part of a settlement covering consumers in all fifty states.

Since the scandal, Wells Fargo has also lost another CEO. Tim Sloan stepped down on March 28, 2019. Sloan became the CEO after Stumpf’s forced resignation. His attempts to clean up the company’s image were unsuccessful. After his departure, Wells Fargo stated that it would look for external candidates, a move supported by Warren Buffet, whose company Berkshire Hathaway is Wells Fargo’s single

94 Apparently, the bank had projected that it would spend 40-50 million. Shen, supra note 94.
95 Id.
97 The settlement comes after plaintiffs suing Wells Fargo survived a motion to dismiss in a Northern California court on October 4, 2017. Shareholders sued the board of directors for violation of federal securities laws and breach of fiduciary duties under Caremark. The litigation received a lot of attention for passing the standard under Caremark, which is notoriously difficult. See In re Wells Fargo & Co. S’holder Derivative Litig., 282 F. Supp. 3d. 1074 (N.D. Cal. Oct. 4, 2017).
Buffett commented that although there are good candidates from Wall Street and the financial sector, “they are going automatically going to draw the ire of a significant percentage of the Senate and the U.S. House of Representatives, and that’s just not smart.”

The company has also closed over 400 branches and plans to close 800 more by 2020. The Federal Reserve has placed limits on the growth of the company restricting the firm from increasing past its total asset size beyond that listed as of the end of 2017. Wells Fargo must make “sufficient improvements” to prevent misconduct before the limitations will be lifted. Employees have also filed law suits related to the sales goals and terminations. Investigations abound, with the SEC and the Department of Justice and other government agencies involved. Now, estimates of the out-of-pocket costs to Wells Fargo are at $2 billion and climbing.

Further, each investigation carries the risk of uncovering new issues and further publicness. For example, auto-insurance fraud was announced in July of 2017. The Consumer Financial Protection Bureau and Office of the Comptroller of the Currency also fined Wells

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102 Id.
Fargo a total of $1 billion for the auto-insurance scandal in 2018.\textsuperscript{106} Fines and settlement costs, of course, do not include the time of employees, managers, and directors that could have been spent on real growth and technological advancements. These are the opportunity costs of failing to account for publicness.\textsuperscript{107}

Time spent responding to Congress and congressional investigations is also an opportunity cost. As is typical in this type of situation, Congress became part of the governance and business discussion. Senators demanded an investigation by the Justice Department\textsuperscript{108} and members of the House Financial Services Committee demanded Stumpf’s presence and resignation (which came to pass).\textsuperscript{109} One Republican member described the scandal as follows: “Fraud is fraud. Theft is theft. And what happened at Wells Fargo over the course of many years cannot be described any other way.”\textsuperscript{110} Arbitration clauses are endemic; nevertheless, Senators “slammed” Wells Fargo for the inclusion of mandatory arbitration clauses for customer accounts, arguing that the clauses enabled the frauds.\textsuperscript{111} Still others asked the Department of Labor to investigate whether the company’s actions with respect to employees violated the Fair Labor Standards Act.\textsuperscript{112} And, Senator Elizabeth Warren, D. Mass, declared that Stumpf should face criminal charges.\textsuperscript{113} Further, in 2019, a House committee called Wells Fargo’s CEO, Tim Sloan, in again to testify. Right after the hearing, the Office of the Comptroller of the Currency issued a statement. “We continue to be disappointed with [Wells Fargo’s] performance under our consent orders and its inability to execute


\textsuperscript{108} Blake, \textit{supra} note 106.

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.} (quoting Jeb Hensarling Chairman, House Financial Service Committee).

\textsuperscript{111} \textit{Id.; New Protections against Mandatory Arbitration}, CONSUMER FINANCIAL PROTECTION BUREAU (July 10, 2017), https://www.consumerfinance.gov/arbitration-rule/.

\textsuperscript{112} Blake, \textit{supra} note 111.

\textsuperscript{113} \textit{Id.}
effective corporate governance and a successful risk management program.”

Moreover, “Wells Fargo isn't sure it will ever recover from the slowdown.” Why? Because the numbers it hit in the past were achieved through high pressure sales targets paired with incentives. As the cause of the frauds, those targets and incentives have been eliminated. The past quarterly and annual results were, however, inflated by the frauds and loom as targets the company cannot now reach.

Indeed, the “understandability” or accessibility of this scandal (false consumer accounts), in combination with the direct consumer impact, prompted Senator Jon Tester (D. MT) to respond to Stumpf’s congressional testimony with the following: you have “done something I’ve never seen in 10 years: You have united this committee — and not in a good way.” Although “the public expects international financial banks to lose billions in nefarious ways … learning that the American checking account has been co-opted has insidious wrinkles. This is supposed to be one of the most trusted things in the world.”

In fact, what Wells did was to risk its credibility in the community and diminish trust in the banking system, and it did so at a time when the banks were already at a low point in terms of community support. The board appears to have been a victim of the Wells Fargo mythology, built, in part by the media that tore it down. In short, the board failed to account for the power of publicness, the risks of its

115 Shen, supra not 94.
incentive system and sales tactics, or its social license. As a result, it continues to suffer from the process of publicness in the public arena and is encountering considerable substantive publicness in the form of enforcement and pressure for governance changes.

B. UBER

The Uber scandals have demonstrated that publicness does not occur only in publicly-held companies. Instead, Uber’s situation reveals that it, too, is a creature of the public, and thus, can also be subject to substantive and process publicness when scandal erupts. Indeed, as a result of its scandals, Uber’s CEO was ousted and replaced, board membership and governance practices were changed, and corporate choice continue to be scrutinized by the government and media. Not surprisingly, lawsuits against the company piled up.\(^{119}\)

Uber – started ten years ago – connects drivers to riders through an app at rates usually less than those charged by taxi services.\(^{120}\) Uber is pursuing an IPO aiming for a valuation of $100 billion.\(^{121}\) Its growth has been “remarkable,”\(^{122}\) and yet, the company still has no

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“sustainable or profitable business model.” In fact, the company burns through cash. Uber burned through $8 billion as of August 2017, and currently burns through $1 billion a year.

How do we know these numbers? They are the result of the process of publicness. Uber is a private company and, therefore, is not required to release its financials publicly. However, when faced with a series of scandals, Uber made its financials public in order to argue that “its revenue growth is outpacing losses, [and] hoping to show the business is on a strong trajectory.” Yet, as analysts have pointed out, the company is a “cash burning machine,” facing a series of scandals and controversies, which, in turn, have created pressure on the governance structure and business choices. In short, Uber has been forced to reexamine its “private” status through the process of publicness and is now facing substantive publicness as well.

Let’s examine the scandals. They have been percolating for several years but, as a result of more recent news attention, are being repeated and reassessed. For example, in 2012, Uber invoked surge pricing in the wake of Hurricane Sandy, doubling fares while public transportation was unavailable. This issue is now cited repeatedly as an instance of Uber’s social insensitivity and pursuit of its own ends, without regard to impact on the public. In 2013-2014, Uber

123 Id.
126 Newcomer, supra note 127.
127 Id.
was accused of booking fake rides and spamming Lyft drivers. As in the Wells Fargo scandal, the people doing the canceling were Uber employees, including employees paid to recruit drivers. Uber then attempted to keep its drivers from working for both companies by texting them and falsely claiming that it was illegal to do so. When the truth was publicly revealed, the company back-tracked on its practices.

Next, an Uber executive suggested that the company hire opposition researchers and journalists to aid the company in attacking the personal lives and families of reporters who wrote “unflattering” stories about the company. Apparently, he made this comment in response to an article by a female reporter who accused Uber of sexism and misogyny. When his suggestion was made public it contributed to pressure on the company to step up its reaction to sexism and other cultural deficiencies.

Then, there is the God View technology. In late 2014, it was revealed that the God View program, which was imbedded in the Uber app, allowed Uber to track the location of users 24/7. Uber was in fact doing so, “Spying on celebrities,” including Beyoncé and reporters. When the spying was revealed, it attracted outrage among users.
Indeed, one famous tech user deleted the app and described “the privacy violation as symptomatic of Uber’s wider arrogance and dirty business practices.”137 In 2016, after revelations from a whistleblower, the Company entered into a settlement that required it to remove “all personally identifiable information of riders ... limit[] employee access to personally identifiable information of riders, and. . . audit[] employee access to personally identifiable information in general.”138

However, 2017 is the year in which many of the problems became transparently public and thus escalated. The first issues were with Uber’s self-driving vehicle pilot program in California, which Uber started without applying for the proper permits. On the first day of the program, vehicles ran red lights and created hazards in bike lanes.139 The company’s response was to blame human error for the mistakes, but The New York Times reported that the mistakes were in fact in the self-driving technology.140 Uber was forced to remove the cars from the road,141 but later launched self-driving cars in Arizona, where one crashed.142

Also in 2017, Waymo, a unit of Google parent Alphabet, sued Uber, accusing it and Anthony Levandowski, the engineer in charge of the program, of trade secret violations.143 The claim was that Levandowski, who used to work for Waymo, took several gigabytes of confidential documents when he left Waymo after meeting with Uber executives.144 The case settled abruptly in 2018 with Uber

137 Hill, supra note 139.
138 It also paid a $20,000 fine. Welch, supra note 140.
141 Levin, supra note 143.
144 Id.
agreeing to refrain from using Waymo hardware or software in Uber’s self-driving cars. Additionally, Waymo will receive .34% equity in Uber as part of the settlement agreement.\textsuperscript{145}

Uber also settled a false advertising claim for $25 million in 2017.\textsuperscript{146} Those misled were its customers—both with respect to the customer safety policy and fees for tolls and airport drop offs.\textsuperscript{147} The company also paid $28.5 million to settle class actions with similar allegations.\textsuperscript{148} Nevertheless, it now faces still another class action for the approximately 160,000 drivers in California who claim they are employees, not independent contractors.\textsuperscript{149} So far, the dollar value of the settlements is relatively small but, as the process of publicness unfolds, more cases and settlements will occur.

Indeed, Greyball, which has attracted government enforcement interest, may well become one such case. Uber’s legal team approved the use of Greyball, a tool that allowed Uber to identify and evade law enforcement in the communities in which it was operating.\textsuperscript{150} The program allowed Uber to identify law enforcement officials who were attempting to catch Uber’s illegal operations by using the application to arrange rides.\textsuperscript{151} When Uber thought it had identified potential enforcement officials hailing rides, it would provide them with a fake ghost-car version of the app and no driver would be dispatched.\textsuperscript{152} In doing so, it was able to evade both enforcement and the costs of enforcement, including payments for impounded cars and tickets of drivers operating illegally.\textsuperscript{153} The


\textsuperscript{147} Id.

\textsuperscript{148} Id.

\textsuperscript{149} Id.


\textsuperscript{152} Id.

\textsuperscript{153} Issac, supra note 154.
Department of Justice is currently investigating Uber’s use of Greyball.\textsuperscript{154}

Travis Kalanick, Uber’s CEO, was also caught on camera yelling at an Uber driver.\textsuperscript{155} Why? Because the driver asked him about decreased fares.\textsuperscript{156} Kalanick later issued an apology and said he would seek leadership help – noting that it was “the first time [he was] willing to admit that [he] need[ed] leadership help.”\textsuperscript{157} This sort of statement, unthinkable in a publicly-held company, is a direct result of the pressure that was building on Uber, and the CEO, to be more responsive to the public. It was also a direct result of the company’s failure to operate as if it existed with permission – perhaps because it never sought permission in the first place; instead, its business model involved operating outside of the regulatory environment.\textsuperscript{158}

In September 2017 the company was featured in yet another highly-publicized controversy. This time when the city of London decided not to renew Uber’s private hire vehicle license, new CEO Dara Khosrowshahi released a public apology letter in the \textit{Evening Standard}, acknowledging that Uber needed to change its practices and run the business with “humility, integrity and passion.”\textsuperscript{159} This language represents a sharp change from Kalanick’s brash, public

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\textsuperscript{157} Travis Kalanick, \textit{A Profound Apology}, Uber (Feb. 28, 2017), https://newsroom.uber.com/a-profound-apology/.


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flaunting of regulation – and an understanding that the company’s legal license, and not just its social license, to operate was in jeopardy.

The biggest hit, however, appears to have occurred when Susan Fowler, a former employee, published a blog with details of sexual harassment and gender bias at the company. The blog included a description of messages from her manager about his open relationship and desire to find women with whom to have sex. According to Fowler, Uber’s Human Resources personnel responded to her report about the situation by stating that it was the man’s first offense and that he was a high performer, before addressing Fowler’s “options,” neither of which addressed the actions of her harasser. According to the blog, Fowler later learned both that the man had in fact pursued other women and that Human Resources knew. This blog, which contained other details mentioned below, was the catalyst for at least two internal investigations, as well as eventual changes in the board structure and Kalanick’s resignation.

The largest investigation as a result of these scandals and the growing level of scrutiny resulted from Fowler’s blog post and was initiated by the Uber board of directors. Eric Holder led this investigation and it involved over 200 interviews, a review of over 3 million documents, and, in addition to the lawyers, a consulting firm assisted in the effort to collect information from a broad group of

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161 Id.

162 Id. The options Fowler was given were 1) to “go and find another team and then never have to interact with this man again” or 2) “stay on the team” and “understand that he would most likely give me a poor performance review when review time came around, and there was nothing they could do about that.” Id.

163 Id. Not surprisingly, the number of women engineers at Uber declined over a period of years from 25% to 6%. Id.


employees. In short, this investigation and the resulting report (the “Holder Report”) was not cheap.

Although Uber is a private company, it is a consumer-focused one, and the process of publicness and the need to show it was open to change, forced it to make the Holder Report public. The Holder Report contains a series of recommendations aimed at changing the company’s culture and developing trust, transformation, and accountability. These proposals include: diminishing Kalanick’s role (the report was released prior to his resignation), establishing criteria for the COO, developing performance reviews to create accountability in senior leadership, improving and empowering diversity efforts, and ensuring that Human Resources operates appropriately and under the supervision of the board. A well-functioning company would already have all of these procedures and policies in place, but Uber did not—perhaps in part because it was not publicly held and, therefore, not subject to the type of ex ante, substantive publicness described in Part I of this Article. And, perhaps because its board failed to understand the role of social license.

Notably, however, the Holder Report also called for enhanced board oversight, with an independent chair, an oversight committee, improved compensation programs, and increased internal controls both at the board level and beyond. These are the same types of substantive publicness that Sarbanes-Oxley and Dodd-Frank have already imposed on publicly-traded companies as part of the publicness inherent in the social control of capital and access to capital that the federal securities laws prescribe. Now, as a result

168 HOLDER, supra note 170.
169 Id.
170 Id.
of the process of publicness, they will become part of Uber’s governance – despite its “private” status.

Uber’s board was not atypical for a private, venture-backed firm where the focus is capital raising and sustaining a business long enough to exit at a profit. But the desire of Kalanick (and, arguably other Unicorn and tech CEOs) to maintain power and operate outside of the public zone, resulted in a very large company without internal controls or attention to social license. Now, however, Uber will operate more like a publicly-held company and, through its new CEO, has acknowledged its failures and the need to attend to its social license.

Moreover, following the board’s acceptance of the Holder Report, a form of substantive publicness, Kalanick stepped down as CEO – after previously saying he would take only a leave of absence. Kalanick was not alone. Uber, like Wells Fargo, has lost a string of its executives due to its scandals. Levandowski stepped down.172 Jeff Jones, President of Ridesharing, resigned after only a few months in his role.173 Rachel Whetstone, SVP of Communications and Policy, resigned.174 Brian McClendon, the head of mapping also resigned, and so did Raffi Krikorian, one of the self-driving leaders.175 Amit Singhal, SVP of Engineering is out.176 Ed Baker, the VP of Product and

Growth is out. And, so is Gary Marcus, Head of Uber AI Labs; Sherif Marakby, VP of Global Vehicle Programs; Josh Mohrer, GM of New York City; Guatam Gupta, Head of Finance; Eric Alexander, Head of Asia Business; Emil Michael, SVP of Business and Sallie Yoo, General Counsel.

In addition, the company announced it had fired 20 employees in response to a separate investigative report (the “Perkins Coie Report”), produced by the Perkins Coie firm, on harassment issues. The Perkins Coie Report, too, was initiated in response to Fowler’s blog. The Perkins Coie Report stated that the firm had initiated investigations into 215 harassment claims, and that although 100 claims required no action, 57 were still under review and 31 employees were being enrolled in training or counseling. As with the governance issues addressed in the Holder Report, Uber is now publicly discussing its employment processes – attempting to justify them to the public.

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185 Id.
186 Id.
Nevertheless, in the midst of the Holder and Perkins Coie reports and discussions, a member of the board made a sexist comment.\textsuperscript{188} The statement was made when the only female member of the board at the time, Arianna Huffington, noted that another woman was joining the board.\textsuperscript{189} A male member of the board, also an investor, responded by saying that there would be “more talking” on the board as a result.\textsuperscript{190} The comment was rapidly released to the press, the process of publicness ensued, and David Bonderman, the board member who made the comment, then apologized and resigned.\textsuperscript{191}

As these examples reveal, as result of the publicness attendant to its numerous scandals, Uber lost the privilege of keeping its decisions and processes “private.” Instead, internal debates, employment matters, and financials are made public, both by the company and by employees. The aforementioned blog post, in addition to sexual harassment claims, detailed wasted resources, withheld business-critical information, abandoned projects, and “unrelenting chaos.”\textsuperscript{192} The blog even related a bizarre story about an initial decision to buy leather jackets for all of Uber’s engineers, but then deciding to buy them just for the men.\textsuperscript{193} The justification? There were so few women left in the department that the discount for women’s jackets was no longer available.\textsuperscript{194} This story seems like a parody in light of issues being raised about the company more broadly, but is arguably emblematic of the larger culture at Uber.

Importantly, from a process of publicness perspective, the point is that this story, too, is public. The public now knows the depth of the culture issues that Human Resources and others were ignoring, and it also knows that employees used the publicness process to expose it.

\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Heather Somerville, Uber Director David Bonderman Resigns from Board Following Comment about Women, REUTERS (June 13, 2017, 8:48 PM), https://www.reuters.com/article/us-uber-bonderman-idUSKBN195053.
\textsuperscript{192} Fowler, supra note 164.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
Or, in the words of a column from vox, a former employee “deftly and surgically laid out the map that the media and others would use to prove to its out-to-lunch board and waffling investors that Uber CEO Travis Kalanick had to go.”¹⁹⁵ Two venture capitalists agreed and hand-delivered a letter to Travis Kalanick asking him to resign as CEO immediately. The contents of that letter are now public as a result of the Waymo litigation.¹⁹⁶

As a result of the scandals and the growing level of scrutiny of Uber, the company remains in an unrelenting process of publicness and consequently the board’s decision-making process also became public. Details of the CEO search process were provided to the media.¹⁹⁷ Names of potential CEOs were vetted not only by the board, but by the media as well.¹⁹⁸ The fractured nature of the board became a topic of conversation.¹⁹⁹ Indeed, one editorial compared the press leaks at Uber to those of the Trump White House, concluding that the White House press relations were tighter than Uber’s.²⁰⁰ These leaks and the dramas are bad for investors and for business. They reveal insiders using outsiders (the media) to make governance changes. Insiders are deploying the process of publicness to create sufficient pressure to make the company more accountable, transparent, and substantively public.

The process of publicness also impacted Uber’s business model. Uber made its way into the business world with an idea and an app that was premised on operating outside of the regulatory environment. In order to evade legal licensing and other processes, it termed its business “ride-sharing.” The purpose of using this term was to avoid taxi status; and the semantic sleight of hand worked for a period of

¹⁹⁷ Swisher, supra note 199.
¹⁹⁹ Swisher, supra note 199.
²⁰⁰ Id.
time. But now, publicness is catching up. The scandals and business model (“ask forgiveness, not permission”) converged, and regulatory and other actions increased. Investigations blossomed, internally and externally, and even abroad.\textsuperscript{201} The CEO was ousted and replaced, board membership and governance practices changed, and actions were scrutinized by the government and the media. Not surprisingly, lawsuits against the company piled up in the wake of the scandals, and in some instances, have resulted in costly settlement agreements.\textsuperscript{202} In short, Uber is a textbook example of how process publicness leads to substantive publicness.

Although it is too early to know whether the impact on Uber’s business was significant, the competition did gain traction—no small matter, given Uber’s burn rate. Lyft is Uber’s biggest competitor and, although Uber still has the largest percentage of travelers, Lyft’s share has been growing.\textsuperscript{203} In February of 2015, Uber captured 90% of the market.\textsuperscript{204} Now, Lyft has 29 percent of the market, up three percentage points from last year but significantly from 2015.\textsuperscript{205} Lyft’s growth has outpaced Uber’s, especially on the West Coast where Lyft’s market shares are among its largest.\textsuperscript{206} In fact, Lyft has 44 percent of the market in Seattle, Washington.\textsuperscript{207}

Further, even though the average Lyft ride may be less expensive than the average Uber ride,\textsuperscript{208} the companies are seen as competitive on pricing and reliability. Thus, competition is largely in the zone of “brand and experience.”\textsuperscript{209} Lyft drivers make more money and report

\textsuperscript{201} Isaac, \textit{supra} note 154.
\textsuperscript{202} \textit{Supra} note 122.
\textsuperscript{205} \textit{Id}.
\textsuperscript{206} \textit{Id}.
\textsuperscript{207} \textit{Id}.
\textsuperscript{209} Lev-Ram, \textit{supra} note 208.
being more satisfied than Uber drivers, and at least one company announced that, in light of the ethical issues at Uber, it would not reimburse employees who use Uber for business travel. Indeed, delete-the-app boycotts grew throughout 2017. In cities in which both Lyft and Uber were well-established, these boycotts were problems for Uber. In short, the scandals, failures, and chaos at Uber, in combination with the process of publicness, increased Lyft’s business opportunities.

Finally, the process of publicness and its impact did not stop with Uber. To the dismay of those in Silicon Valley, Uber’s scandal parade has resulted in calls for reform at other companies. Declaring that “Uber was a failure of Silicon Valley’s start-up machine,” Farhad Manjoo of The New York Times argued that Uber is just one of many companies flouting regulations and the rule of law. He states that Uber suffered from a failure of oversight from investors, directors, and partners and anyone else—in part because it was privately held and not subject to the ex ante regulatory, substantive form of publicness. Certainly, Uber’s board lacked an understanding of both publicness and social license. As a result, it faces an array of

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212 Nick Statt, #Deleteuber Reportedly Led 200,000 People to Delete Their Accounts, VERGE (Feb 2, 2017, 9:00 PM), https://www.theverge.com/2017/2/2/14493760/delete-uber-protest-donald-trump-accounts-deleted.


214 Lev-Ram, supra note 208.
enforcement actions and litigation, both of which are forms of ex post publicness.\textsuperscript{215}

III. The Theory of Social License

The lessons to be learned from both the Wells Fargo and Uber scandals, and from their resulting publicness outcomes, are powerful ones. Social license theory provides both a tool for exploring these issues and a potential mechanism to help boards engage in and think about for risk management and oversight, spaces where the state-law based fiduciary duties have withered. Indeed, at least part of the issue at Wells Fargo was that managers at the Community Bank did not appreciate the potential harm because, in part, they “failed to frame the issue appropriately.”\textsuperscript{216} Terminations were not assessed in the context of customer harm. Harm was evaluated only with respect to false fees or charges, not with respect to the associated misuse of personal information or reputational risk to the bank.\textsuperscript{217} In short, the problems were assessed only in an isolated and transactional fashion, without attention to the long-run consequences of the choices and risks and how those could compound through the process of publicness. The focus was legal license, or evading it, not publicness or risk management or corporate sustainability and relationships -- the zone of social license. The same is true of Uber and its board and officers.

Social license theory, then, offers a mechanism for understanding and managing the role of accountability and publicness in corporations. In fact, adapting the construct of social license to the corporate governance context provides an analytical approach for boards to use when managing publicness and risk. In that sense, then, it is a tool for cost benefit analysis that deepens the understanding of costs and promotes a bilateral approach to a

\begin{footnotesize}
\begin{enumerate}
\item INDEPENDENT DIRECTORS, \textit{supra} note 65 at 32.
\item \textit{Id}.
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company’s place with its communities and stakeholders. Social license can also play a gap-filling role for fiduciary duties.

The term, “social license to operate,” is frequently used in extractive industries. It is a term that is easier to define in the negative, i.e. how a company loses it, than in the positive, i.e. how a company earns it. But, as the use of the term and its implications have grown over the years, so too have models for conceptualizing social license and understanding its value as an analytical tool. Indeed, the World Bank and other international organizations discuss social license as a driver for investment decisions, making understanding and developing social licenses critical for entities. As this part of

Stakeholder theory has its origins in Professor Merrick Dodd’s 1932 article. Dodd, supra note 20. See also Allen, supra note 20; Blair & Stout, supra note 20; Bone, supra note 16; Lee, supra note 20; Horrigan, supra note 20; John M. Conley & Cynthia A. Williams, Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement, UNC Legal Studies Research Paper No. 05-16 (2005). But see generally Stephen M. Bainbridge, § 1.5 CORPORATION LAW AND ECONOMICS (2002) (discussing agents, costs, and theory of firm); Stephen M. Bainbridge, In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green, 50 WASH. & LEE L. REV. 1423, 1441-42 (1993) (explaining that the business judgment rule alleviates agency costs and only protects decisions that benefit shareholders); Milton Friedman, The Social Responsibility of Business Is to Increase Its Profits, N.Y. TIMES MAG., Sept. 13, 1970, at 32-33.


See, e.g., Boutilier & Thomson, supra note 18.

Demuijnck & Fasterling, supra note 18. In this regard, social license connects to soft law. Soft laws are rules, regulations, or methods practiced by public or private bodies that are unaccompanied by the procedural formalities necessary to give the rules a specific legal status. See, e.g., Chris Brummer, Why Soft Law Dominates International Finance- And Not Trade, 13 J. INT’L ECON. L. 623 (2010). Soft law thus gains its force not from its legal character, but from its public character. It is law that “presents itself not just as a set of commands by the powerful [or] a set of rules recognized among an elite, but as a set of norms made publicly and issued in the name of the public...that ordinary people can in some sense appropriate as their own, qua members of the public.” J Waldron, Can There Be a Democratic Jurisprudence? 58 EMORY L.J. 675, 684 (2009). See also Benedict Kingsbury & Megan Donaldson, From Bilateralism to Publicness in International Law, (Public Law & Legal Theory Research Paper Series, Working Paper No. 11-07, Jan. 2011). Kingsbury further posits that soft law, imbued with publicness, “is a necessary element in the concept of law under modern democratic conditions...by publicness is meant the claim made for law that it has been wrought by the whole society, by the public, and the connected claim that law addresses matters of concern to the society as such.” Benedict Kingsbury, The Concept of ‘Law’ in Global Administrative Law, 20 EUR. J. OF INT’L L. 23, 31 (2009). In this way, social license and other forms of soft law have the “potential to engage a broader range of human motivations, needs, emotions, and moral reasoning, and thus might more effectively encourage behaviors that optimize society’s regulatory goals than do approaches that rely only on appeal to the instrumental considerations or self-interest of the regulated entity.”
the Article reveals, social license is also a useful analog to publicness and to corporate governance more generally.

The basic concept of social license is that businesses (and other entities) exist with permission from the communities in which they are located, as well as with permission from larger communities and stakeholders.\(^{[222]}\) As noted in the BlackRock letter, business are more than just economic institutions; they are also social institutions.\(^{[223]}\) As a result, they are subject to more than just legal oversight. They are subject to public accountability and, at times, public control and need to attend to social license.\(^{[224]}\)

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\(^{[222]}\) In this respect, social license is related to the theories of social capital and social contract. All three theories emphasize the power inherent in using social resources that stem from possession of a network of relationships of mutual acquaintances that provides each of its members with the support of collectively owned and maintained capital. Objective interactions in physical, economic, social, and/or cultural spaces form this network of relationships, and interactions between parties within the network form the basis of its power. See Pierre Bourdieu, The Forms of Capital, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241-58 (J. Richardson ed., 1986); Janine Nahapiet & Sumantra Ghoshal, Social Capital, Intellectual Capital, and the Organizational Advantage, 23 THE ACADEMY OF MANAGEMENT REVIEW 2 (Apr. 1998); James S. Coleman, Social Capital in the Creation of Human Capital, 94 AMERICAN JOURNAL OF SOCIOLOGY 585 (1988); Amitai Etzioni, The Responsive Community: A Communitarian Perspective, 61 AMERICAN SOCIOLOGICAL REVIEW 1 (1996).

\(^{[223]}\) Fink, supra note 2. Consider also how leadership and followership theory connect here. This theory examines how leaders and subordinates interact with each other in order to accomplish organizational goals. In this manner, both leadership-followership relations and social license to operate focus on leveraging the social processes of complex relationships to accrue institutional benefits. For an examination of how leaders and followers are instrumental actors in corporate social responsibility, see Tamsin Angus-Leppan, Louise Metcalf, & Sue Benn, Leadership Styles and CSR Practice: An Examination of Sensemaking, Institutional Drivers, and CSR Leadership, 93 J. OF BUS. ETHICS 2, 189-213 (May 2010). See also Lianne M. Lefsrud & P. Devereaux, Being Entrepreneurial in Your Storytelling: An Institutional Tale (Ross School of Business Working Paper Series, Working Paper No. 1207, Nov. 2013).

\(^{[224]}\) Melé & Armengou, supra note 16. See also Bone, supra note 16 (noting that corporations have a social contract with their constituents and societal stakeholders). Social license bears an obvious resemblance to corporate social responsibility. Indeed, it can be conceptualized as a consequence of the corporate social responsibility movement’s “mounting pressures on companies to be seen as responsible corporate citizens.” Cynthia A. Williams, Corporate Social Responsibility and Corporate Governance 23 (Osgoode Hall Law School Legal Studies, Research Paper No. 32, 2015). Social license arguably tests the common claim that external regulation of corporate social responsibility is necessary to provide a more coherent governance system with enhanced political legitimacy, however. See William W. Bratton & Michael L. Wachter, Shareholder Primacy’s Corporatist Origins: Adolf Berle and The Modern Corporation, 34 J. CORP. L. 100, 150 (2008). Like many forms of soft law, social license actually gains its social legitimacy from its apolitical and public character. See, e.g., Waldron, supra note 227.
Of course, businesses require legal licenses, including permits, securities registration (for public companies), and other regulatory approvals, but these provide only a baseline. Legal licenses form a set of permissions that allow a company to operate within legal bounds. Social license, however, is a form of permission derived from the community, stakeholders, and others, and it exists in the realm beyond legal license. In this sense, it is a form of self-regulation. Social license derives not from legally-granted permission, but instead from the development of legitimacy, credibility, and trust within the community context. When it operates effectively, social license can prevent demonstrations, boycotts, shut downs, and negative publicity, as well as the increases in regulation that are a hallmark of publicness.\textsuperscript{225}

A company’s social license is not legally constructed; it is socially constructed. Thus, the approval and acceptance of a company and its projects derive from its social license, for which the reach may well exceed that of legal license. As one author states, “social license is the judgment by communities about whether [a] company is a proper and fitting entity that deserves to be part of [a] community. It’s a judgment about the legitimacy of [the] company or operations.”\textsuperscript{226} Indeed, social license can “make” a business, contributing to its survival and success.\textsuperscript{227} Conversely, the loss of it can have very dramatic implications, including legal liability, reputational losses, and even the risk of violence against employees and company assets.\textsuperscript{228} Failure to consider and develop social license can result in

\textsuperscript{225} Hanna, Vanclay, Langdon, & Arts, supra note 17. Front end regulation, of course, has its costs. It can dampen the entrepreneurial spirit. Social license is not regulation. It is self-regulation and long-run focused. There is evidence that ongoing corporate concern for social license and corporate social responsibility can aid companies embroiled in criminal investigations, as well. For instance, corporations with strategic corporate social responsibility programs pay, on average, 2 million dollars less in fines during Foreign Corrupt Practices Act enforcements. \textit{See} Harrison Hong & Inessa Liskovich, \textit{Crime, Punishment, and the Halo Effect of Corporate Social Responsibility} (Nat’l Bureau of Econ. Res., Working Paper 21215 May 2015). \textit{See also} Allen Ferrell, Hao Liang, & Luc Renneboog, \textit{Socially Responsible Firms} (Finance Working Paper No. 432/2014 August 2016) (noting that there is a positive relationship between corporate social responsibility efforts and firm value).

\textsuperscript{226} Hanna, supra note 225 at 18. See also Bone, supra note 16 (stating that since corporations are a community of stakeholder constituencies, the public concession of authority to a corporation may only be legitimized through a public purpose).

\textsuperscript{227} Demuijnck & Fasterling, supra note 18.

\textsuperscript{228} Id.
business failures, increased levels of regulation, and publicness in the form of both substance and process. Thus, managing a company’s social license is a form of risk management and a tool for managing publicness.229 And, according to one study from Witold Henisz at the Wharton School of Business, it can translate into actual dollars.230

There are many companies and boards that currently use social license to examine company policies and business strategies.231 It is, however, important to note that social license is not completely within a company’s control, nor is it a quid pro quo. Instead, entities “earn” social license through organizational actions that are justified in the “eyes of society” and are not achieved through manipulation.232 Effective and sustained social license requires moral legitimacy, and that, in turn, is earned through consistent, trustworthy behavior, along with solutions and compromises achieved through dialogue with relevant sectors of the community.233 The dialogue is key. Effective social license is bilateral and not the result of public relations and marketing alone.

A. The Stages of Social License.

Although scholars have explored the concept of social license through various lenses, they tend to emphasize three key stages: legitimacy, credibility, and trust.234 These stages correspond to the benefits of social license: acceptance, approval, and identity. As noted previously, entities must earn and maintain their social licenses. Failure to do so, as the case studies discussed in this section reveal, can result in significant costs and business losses.

229 See, supra note 18.
230 See When Engaging with Your Stakeholders Is Worth Its Weight In Gold, KNOWLEDGE@WHARTON (Jul. 20, 2011), http://knowledge.wharton.upenn.edu/article/when-engaging-with-your-stakeholders-is-worth-its-weight-in-gold/.
232 Demuijnck & Fasterling, supra note 18.
233 Id. See also Matten, supra note 19 at 110.
234 Demuijnck & Fasterling, supra note 18; Hanna, supra note 225.
1. Legitimacy.

The first stage, legitimacy, is the easiest to achieve and thus forms the baseline of social license. Below legitimacy, social license is absent or “withdrawn.” Legitimacy leads to the social acceptance of the entity. Legitimacy exists when the community and stakeholders give the company the benefit of the doubt, believing that concerns will be addressed and that the company is committed to working with the community when issues arise. The legitimacy level of social license thus is often tacit, though not necessarily silent. It requires a widespread perception of fairness. This perception can be achieved through consistency and good procedures. Legitimacy can also require fair distributions of benefits.

Interestingly, once achieved, legitimacy tends to be “resilient to particular events.” If a company departs from accepted norms, it will risk its legitimacy; however, as long as the history between the company and the stakeholders is stable, a single event is unlikely to disrupt legitimacy. Instead, stakeholders are likely to view the particular event as “unique.” Significant scandals and sustained, repeated questionable activities, however, can undermine legitimacy.

Consider the example of BP and the Baku-Tblisi-Ceyhan (BTC) pipeline it built in Georgia. The process of developing a social license for this project took multiple years, and was both a requirement of lenders as well as a commitment by BP. At the time of construction,

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236 Demuijnck & Fasterling, supra note 18.
238 David Jijelava & Frank Vanclay, Legitimacy, Credibility, and Trust as the Key Components of a Social License to Operate: An Analysis of BP’s Projects in Georgia, 140 J. Of Cleaner Production 1077, 1082 (2017).
239 Demuijnck & Fasterling, supra note 18.
240 Id.
241 Id.
the pipeline was the “largest cross-border infrastructure construction project in the world.” As a result of BP’s efforts in the community, scholars have concluded that the project had both economic and socio-political legitimacy. Moreover, according to the scholars who analyzed this project for legitimacy, BP’s strategy documents speak directly of social license as important to its business.

Recall that, in effect, legitimacy “boils down to fairness” both in terms of process and benefits. To develop legitimacy on the Georgia project, BP worked with the community in advance of choosing a location for the pipeline. The company commissioned a regional review, which the International Finance Corporation, one of the lenders on the project, described as “ground breaking.” This review addressed a multitude of issues, including “human rights, revenue management, and security.” In addition, BP engaged in an “extensive public consultation and disclosure program,” a $25 million community investment program, a program to build NGO capacity, a program for environmental investment, and a program to develop links with small and medium enterprises.

For BP to achieve legitimacy for the pipeline, it had to build an understanding of the communities’ cultures and then tailor its relationship and programs to those unique cultures. The regional review it completed was a significant contribution to earning its legitimacy. The review also provided BP with considerable information about various stakeholder groups and allowed it to provide more moderate proposals, built through consensus, that in some cases were less extensive than initial proposals by some groups. In short, the review helped BP assess the best route for

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243 Jijelava & Vanclay, supra note 244.
244 Id.
245 Id.
246 International Finance Corporation, supra note 247.
247 Id. at 13.
248 Id. at 1.
249 Jijelava & Vanclay, supra note 244.
250 Id.
251 International Finance Corporation, supra note 247.
the pipeline and determine what further actions were critical to engaging with the citizens and groups to be impacted, and allowed BP to negotiate for different, and in some cases, less expensive outcomes.252

Some of the specific commitments that BP followed through on were obligations on labor supply and community investment.253 Sharing the economic benefits of the project in this manner was central to the fairness perception legitimacy requires.254 For example, BP committed its contractors and subcontractors to hiring local workers. This was important to the local citizens, and it helped BP avoid the types of unrest and tension that can arise when a company brings workers from outside of the community.255 BP also spent $30 million to invest in programs that enriched the pipeline communities, including programs for energy efficiency and rebuilding school and civic buildings.256 Additionally, individuals within 500 meters of the pipeline received compensation for relocating and reported being generally satisfied with the amount and the process, for calculating the compensation.257

In short, with pressure and requirements from lenders, BP worked to earn a social license. It compiled considerable information about what was important and necessary to local communities and then followed through with funding and policies that established its legitimacy in those communities. The scholars who reviewed the project several years after its completion concluded that, “although there were some concerns about compensation and other issues, there was no fundamental opposition to the idea of the pipelines.258

That said, BP and this pipeline are both controversial and legitimacy is the lowest level of social license. The pipeline and the process of

252 Id. at 15.
253 Id. at 27.
254 Jijelava & Vanclay, supra note 244.
255 Id.
256 Id.
257 Id. To be sure, there are those who were on the other side of the 500 meter line who complained that the line was arbitrary. Id.
258 Id.
building it was scrutinized and criticized by various groups, and the sheer size of it, combined with the tragedy of the Deepwater Horizon deaths and oil spill, ensure that human rights and other groups will scrutinize BP’s actions. The ongoing scrutiny is, arguably, part of social license. That is, social license is not a one and done phenomenon. As the next example will show, it requires continued attention and dialogue, because it is bilateral and not just “public relations.”

B. Credibility.

The next level of social license is termed “credibility.” Credibility requires the prior existence of legitimacy. Here, the focus is on the company working with stakeholders to achieve more than just tacit approval. The company’s goal is to build a relationship that involves initial trust and stakeholder voice in the company’s operations.

Credibility, like legitimacy, requires action and interaction above the legally required line. For credibility to exist, the entity and the project must be “believable,” and the entity’s promises must be both realistic and achievable. Put differently, before an entity can earn credibility, the stakeholders must perceive it to be honest.

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260 This disaster cost BP its social license and it has seemingly worked to rebuild credibility and trust. John Morrison, Government Approval Not Enough, Businesses Need Social License, YALEGLOBAL ONLINE (Oct. 21, 2014), https://yaleglobal.yale.edu/content/government-approval-not-enough-businesses-need-social-license. See also, Sanyal, supra note 266.
262 Boutilier & Thomson, supra note 18; Demuijnck & Fasterling, supra note 18; Kathleen M. Wilburn & Ralph Wilburn, Achieving Social License to Operate Using Stakeholder Theory, 4 J. OF BUS. ETHICS 3, 14 (2011).
263 Boutilier & Thomson, supra note 18; Robert G. Boutilier, Frequently Asked Questions About the Social License to Operate, 32 IMPACT ASSESSMENT AND PROJECT APPRAISAL 4, 263-27 (2014); Demuijnck & Fasterling, supra note 18; Wilburn & Wilburn, supra note 268; Blair, Williams, & Lin, supra note 18.
264 Boutilier & Thomson, supra note 18; Boutilier, supra note 269; Demuijnck & Fasterling, supra note 18; Wilburn & Wilburn, supra note 268.
265 Jijelava & Vanclay, supra note 244.
266 Id.
In addition to honest and open communication, credibility requires deliverables.\textsuperscript{267} Thus, credibility requires both that the company has certain characteristics and that the community believe it has them.\textsuperscript{268} Those key qualities include a “high level of technical competence, a high level of skills, and a commitment to social performance.”\textsuperscript{269} The latter requires both assessment of potential social and environmental issues in advance of the project and mitigation and monitoring programs throughout, as well as ongoing social programs and compliance commitments.\textsuperscript{270}

Under social license theory, entities that lack credibility face an array of problems and business threats. For example, entities without credibility may have business operations jeopardized by boycotts and other manifestations of social pushback.\textsuperscript{271} When an entity establishes credibility, however, it moves beyond the legitimacy-acceptance line and into stakeholder approval.\textsuperscript{272}

San Cristobal, a large mine located in two communities in Bolivia, provides an interesting example of the evolution (and devolution) of credibility. Initially, the mineral extraction activities were operated by a fully-owned subsidiary of Sumitomo Corporation.\textsuperscript{273} When the company moved into the area, it worked to establish legal and social licenses, gaining both rights to the minerals and permission from the community to start work.\textsuperscript{274} It developed legitimacy by communicating and providing employment for locals.\textsuperscript{275}

After a few years of developing information about the land and minerals, it became apparent that there were extensive minerals underground, and the company wanted to expand its operations.\textsuperscript{276} At this point, it increased discussions with the community and

\textsuperscript{267} Id.
\textsuperscript{268} Boutilier & Thomson, supra note 18; Blair, Williams, & Lin, supra note 18.
\textsuperscript{269} Jijelava & Vanclay, supra note 244.
\textsuperscript{270} Id. See also Blair, Williams, & Lin, supra note 18.
\textsuperscript{271} Demuijnck & Fasterling, supra note 18.
\textsuperscript{272} Jijelava & Vanclay, supra note 244.
\textsuperscript{274} Id.
\textsuperscript{275} Id.
\textsuperscript{276} Id.
reached an agreement to relocate people away from the mining sites. The company empowered the community to manage many aspects of the relocation, including selecting the new site, designing houses and infrastructure, and more. At this stage, the community members began to feel like co-owners and partners in the project— a key component of credibility.

Shortly after the people relocated, however, women in the community expressed dissatisfaction with the housing. They had not been included in the decision-making process and were dissatisfied with the results. In addition, for various reasons, including falling metal prices, the company’s value assessment of the project changed, and it laid off employees. According to scholars who later assessed this project, at this point, the company completely lost its credibility with the community. Community members no longer believed in the programs and processes developed with the company. Why? Because the company responded to market signals by backing away from commitments and, thereby, disrupting the credibility it had built.

The company thus faced serious issues. It did not want to close the mine altogether, but it needed to stabilize its relationship with the citizens. The company initiated an employment program that extended beyond the mine into tourism and agriculture, providing the community with employment opportunities even during times when mineral prices decreased mining activity. The company then engaged in other sustained actions to improve the community, and, according to the scholars evaluating the project, stakeholders began to see the company as credible again.

A change in mine management, however, again depleted the developing social license. The new management had no knowledge
of the history and commitments between the company and the communities. Top management at the new company stopped meeting with community members. Then, commitments on employment and training fell through. Indeed, despite the fact that the communities had almost full employment, the company’s credibility was lost, and later the company again had to invest years in rebuilding it.

What happened? The company had set out to develop a relationship, but at various points it either lost interest or focus. It failed to follow through on its commitments, which is crucial to the believability standard. Eventually, the company realized that its approach was threatening the existence and profitability of the mine and it worked to resolve the issues and reestablish its social license. It reiterated its commitments and established a community-based program to assess and comply with all of the prior commitments. Then, as the projects came to fruition over time, the community again began to see the company as credible. Here, understanding social license and its bilateral nature might have resulted in earlier and sustained traction for the business within the community.

C. Trust.

The final level of social license is trust, which is a strong, durable form of credibility. Like credibility, trust is cumulative and requires an entity to have already achieved both legitimacy and credibility. At the trust stage, the entity moves from acceptance and approval to a state where the stakeholders personally identify with the entity. Here, the stakeholders have confidence that the entity’s decisions will at least be neutral, if not always in the community’s best

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285 Id.
286 Id.
287 Id.
288 Id.
289 Id.
290 Id.
291 Id.
292 Jijelava & Vanclay, supra note 244.
293 Id. at 1084.
294 Id. at 1078.
interests. This stage can be described as akin to psychological identification, in which the company and the community perceive their interests to be aligned.

When trust is attained, stakeholders may see their future as tied to that of the entity, with responsibility for the accompanying benefits and burdens. As a result, trust can carry a set of risks. A community that closely identifies or comes to depend on an entity is at risk if that entity decides to withdraw. The withdrawing entity is also at risk. Boycotts, demonstrations, or even violence on the part of community stakeholders can result when trust is violated. Thus, arguably, trust may be the component of social license that has the least traction – at least for some companies.

Nevertheless, as Gap’s attempts to address human rights issues arising out of labor issues in its supply chain reveals, trust can produce real benefits for a company that has achieved it. After facing considerable pressure over child and bonded labor, and other human rights issues, Gap worked to build relationships with various stakeholders. Over a period of years, it developed a set of principles that it documented in a Social Responsibility Report. This report was notable at the time because it admitted to prior issues, thus providing transparency, and also stated an ongoing commitment to improving factory conditions.

Gap continues to produce this report today and has engaged NGOs and others in its monitoring efforts, thus increasing its believability.

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295 *Id.* at 1079.
296 *Id.* at 1084. *See also* Bone, *supra* note 16 at 301.
298 Boutilier & Thompson, *supra* note 279.
among such groups.\textsuperscript{303} In addition, the company has committed itself to “forging sustainable solutions” and “creating lasting change.”\textsuperscript{304}

Some of the key factors it developed to achieve those goals are the types of factors any company, or board, might consider, including inspecting, monitoring, and measuring; integrating compliance into business practices; collaborating with external stakeholders to address the systemic and cultural issues contributing to the human rights challenges; and communicating transparently with stakeholders.\textsuperscript{305}

The establishment of, and adherence to, these principles was significant for the company, in part because many of the issues contributing to the human rights problems were outside of its control.\textsuperscript{306} The principles and adherence to them was part of building credibility. Trust was more complicated, but once the company established its credibility and commitment to long-term resolution of the issues, it earned trust even among stakeholders who had recently boycotted it.\textsuperscript{307} In fact, this trust relationship was crucial when, several years later, information surfaced that one of the company’s suppliers in India was using bonded labor.\textsuperscript{308} This time, stakeholders who had previously opposed Gap rose to its defense.\textsuperscript{309} The Ethical Trading Initiative’s actions in defense of Gap are an example of trust in the company’s commitment to preventing human rights violations and reveals a strong level of identification between the company and the stakeholder.\textsuperscript{310}

\textsuperscript{303} Morrison, supra note 306. NGOs and other third-party assurance entities are increasing their roles in corporate monitoring efforts as corporations strive to achieve legitimacy in the wake to social, environmental, and political pressures. See also Blair, Williams, & Lin, supra note 18 at 348.

\textsuperscript{304} Gap Inc., supra note 307.

\textsuperscript{305} Id. Companies around the world are increasingly turning to third-party assurance entities for assistance in identifying and monitoring these factors in global supply chains. See Blair, Williams, & Lin, supra note 18.

\textsuperscript{306} Morrison, supra note 306.


\textsuperscript{308} Morrison, supra note 306.

\textsuperscript{309} Id.

It is important to note, however, that not all company/stakeholder relationships require the full legitimacy-credibility-trust process of social license.\textsuperscript{311} Depending on the nature of the industry and its expected longevity in the community, some companies may cooperate effectively with stakeholders by developing only legitimacy.\textsuperscript{312} Indeed, for low-commitment, fluid transactions, legitimacy may be all that is necessary.\textsuperscript{313} As social capital in the relationship, and the company’s stake in a project or strategy grows, however, credibility and trust become more important to the company and the overall success of the project.\textsuperscript{314}

All three of these case studies exhibit social license in operation. They reveal how a board might deploy the social license theory in its strategy and as a for risk management. Of course this theory, like many others is not a panacea. Nevertheless, the case studies explored here reveal companies worked to achieve social license because it is both profitable and powerful.\textsuperscript{315} These case studies also reveal that social license is not just about public relations campaigns, which are one-sided in nature. Instead, enacting the social-license theory requires sustained engagement with multiple parties, believable and fulfilled commitments, strong transparency, ongoing communication, and relationship building.

IV. Wells Fargo, Uber, and Social License.

As the case studies in Part III reveal, the social license framework – legitimacy, credibility, and trust, along with their corollaries of acceptance, approval, and identity– is a powerful tool for the forward-thinking on the part of an organization that Fink suggested in his letter to CEOs.\textsuperscript{316} This realm, of course, is the space in which boards perform some of their most important functions. Yet, as the Wells Fargo and Uber examples detail, the process of publicness can

\textsuperscript{311} Boutilier & Thomson, supra note 18; Boutilier, supra note 269.
\textsuperscript{312} Boutilier & Thomson, supra note 18; Boutilier, supra note 269.
\textsuperscript{313} Boutilier & Thomson, supra note 18.
\textsuperscript{314} Boutilier & Thomson, supra note 18; Boutilier, supra note 269; Horrigan, supra note 20 at 517.
\textsuperscript{316} Fink, supra note 2.
engulf the board and prevent it from focusing on the long-run goals and strategy of the company, instead, forcing it into continual reaction mode. This section of the Article examines the scandals at Wells Fargo and Uber through the lens of social license theory, developing it as a framework for boards to engage with and oversee management and, thereby, to fulfill their long-term strategy and risk-management roles, and even their fiduciary duties, while tempering both the substance and process of publicness.

A. Wells Fargo’s Social License.

Let’s begin with Wells Fargo. Its new CEO recently stated that, to regain lost trust, the bank “must continue to be transparent with all ... stakeholders and go beyond what has been asked ... by regulators.” This statement is at odds with the bank’s prior vision of itself as a trusted community bank. Wells Fargo saw itself as a “community bank” that was localized and connected. To succeed, Wells Fargo, like all banks, must persuade people to give it their savings. That, in itself, requires legitimacy, credibility, and trust – the fundamental components of a social license. Yet, after the initial set of scandals was revealed, Wells Fargo was forced to close 400 branch banks and continues to have trouble persuading customers to build accounts. This situation recalls the 1929 run on the banks--a situation resulting from panic and fear--and an accompanying loss of legitimacy, credibility, and trust in the system. Although there is reason to believe the Wells Fargo scandal may not be repeated at other banks, it nevertheless goes to the heart of the prerequisites for a strong financial system: trust between consumers and their banks.

317 Horrigan, supra note 20 at 538.
320 This trust is required in capitalist systems where corporate managers are conferred with “immense private economic and political power. Langevoort, supra note 34. See also, Sale & Thompson, supra note 14 at 530 (noting “that the Depression may have been prolonged by a lack of confidence in the markets”); see also H.R. Rep. No. 73-85 (1933).
How did Wells Fargo lose its social license? Recall that it came out of the 2008-2009 financial crisis with the strongest reputation and, seemingly, business of any of the banks. It appeared to be unsullied by the issues plaguing the other banks. Nevertheless, as it pressed forward on its cross-sell strategy, it fell victim to its own mythology, failing to consider the consequences of that strategy, or to create systems to manage the risks of its business decisions— even after the 2009 financial crisis.

From 2010-2015, Wells Fargo’s assets grew by 46% and its net income grew by over 85%. Its stock prices also grew, making it the most valuable bank in the world. Community banking contributed more to that growth than any other division at the bank, and the community bank’s performance was directly connected to cross-selling. Analysts made buy recommendations based on the cross-selling growth. In fact, the cross-sell ratio at Wells Fargo (6.27) was more than twice the average for U.S. banks (2.71) - a discrepancy that should have provoked dialogue and inspection in the boardroom (and by analysts). Indeed, all of this information was publicly discussed and presumably available to the board, and yet it seemingly failed to provoke questions about what accounted for this bank’s success. Those deliberations, however, might well have created an opportunity to investigate whether the success was legitimate, whether management’s responses were credible and

321 For another example of a bank which emerged from the financial crisis with a strong reputation, but which lost it due to publicness, see Sale, supra note 14.
322 See, e.g., Rachel L. Ensign, What the Wells Fargo Cross-Selling Mess Means for Banks, WALL ST. J. (Sept. 15, 2016, 6:55 PM), https://www.wsj.com/articles/what-the-wells-fargo-cross-selling-mess-means-for-banks-1473965166 (noting that Wells Fargo’s cross-sell ratio was 6.27 while the average ratio of other banks is only 2.71).
324 An Examination of Wells Fargo’s Unauthorized Accounts and the Regulatory Response: Hearing Before the Subcomm. on Banking, Hous., and Urban Affairs, 114th Cong. 28 (2016) (Statement of John G. Stumpf, Chairman and Chief Exec. Officer, Wells Fargo & Co.) (describing cross sell growth overtime).
325 See, e.g., Ensign, supra note 328.
326 See Hillary A. Sale, Monitoring Caremark’s Good Faith, 32 DEL. J. CORP. L. 719 (2007) (discussing a Board’s duty to investigate in good faith various “red-flags”).
informed, what the downside risks were, and how they were being measured and managed.  

Moreover, those discussions might well have revealed that cross-selling did not occur in a vacuum. Rather, it transpired in a world of incentives and coercion. There were quarterly bonuses for junior employees and annual bonuses for district managers.  

There were also quotas, which employees say were unrealistic and, when combined with comments from managers, resulted in pressure to open the fake accounts, including at least one opened for a homeless woman that had fees of $39.00 per month.  

This is a salient example in the context of legitimacy, as it becomes impossible to give the benefit-of-the-doubt to a bank whose employees engage in this sort of swindle, hustle, and outright fraud.

Indeed, the actual number of unauthorized accounts remains unknown. The company admitted to 2.1 million such accounts in 2016, but in July of 2017, it expanded its investigation to include earlier years and the number has increased.  

The bank, however, investigated only the years 2008-2011 and there are indications that the practices go back as far as 2002.  

And, Wells’ then CEO, Tim Sloan, resisted pressure to look back further for more violations.  

This set of choices, and the media churn around it, makes clear that neither the bank, nor apparently its board, has a handle on the depth of its problems. Meanwhile, the account scandal is steadily growing

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327 See Sale & Thompson, supra note 14 at 528 (discussing how disclosure should reduce agency costs for directors’ monitoring function but are only as useful as the questions they raise among the board).


331 Cowley, supra note 324.


333 Id.
and diminishing any remaining credibility. Indeed, Tim Sloan resigned in March 2019. 334.

Further, the process of publicness exposed additional frauds. 335 Take for example, the car loan-repossession story-- the “latest Wells Fargo scandal.” 336 Between 20,000 and 570,000 337 customers of the bank were enrolled in and charged for car insurance without their knowledge, and when some of them failed to make payments on the unknown insurance, they had their cars repossessed as a result. 338 This is a new, but likely, cross-sell connected. Even though Wells Fargo has said it is “extremely sorry” and promised to refund customers and work with credit bureaus to make it right, it lacks credibility at this stage. 339 After all, credibility requires believability, but each new scandal forces the bank to deploy a new investigation and publicly admit to new problems, thereby, further diminishing its credibility.

In fact, the problems at Wells Fargo that contributed to the loss of its social license seem to have been endemic. As the New York City Comptroller Scott Stringer said in response to the auto-loan revelations, “This is a full-blown scandal -- again. It's unbelievable, outrageous, sad, and yet quintessential Wells Fargo.” 340 This comment reflects on the internal workings of the bank that created the issues, and it reveals the ongoing devolution of its social license with which the board must now contend. The process of publicness contributed to the bank losing its social license, but Wells Fargo also lost its social license because its rhetoric, ethics, and sales policies did not correlate with its incentives. Sales manuals required signatures

334 Flitter, Cowley, & Enrich, supra note 101.
335 As noted, publicness has the tendency to snow-ball, continually increasing. Joan MacLeod Heminway, Crowdfunding and the Public/Private Divide in U.S. Securities Regulation, 83 U. Cin. L. Rev. 477, 484 (2014) (“This theory of publicness is a dynamic, progressive, iterative one. Publicness leads to more publicness, which leads to more publicness, and so on.”).
338 Egan, supra note 342.
339 Egan, supra note 343.
340 Id.
and consent for all “solutions” or services, but the incentives and pressure produced the opposite. The picture simply did not match the soundtrack.

Moreover, employees who pushed back suffered retaliation, including harassment and firings.341 Consider this headline: “I called the Wells Fargo ethics line and was fired.”342 These types of allegations go back for quite a few years, to long before the scandal was “discovered.” Indeed, there is evidence of employees raising issues through established bank procedures and then being terminated.343 Thus, in addition to revealing that employee stakeholders do not trust the bank, the scandals reveal something more troubling: a company culture focused on growth at the expense of its customers, its employees, and the stability of the banking system. In short, the series of scandals “undermines confidence, which is the most important asset of [the] bank.”344

Recall that a perception of fairness is central to establishing legitimacy. According to the academics who studied the Georgia pipeline, BP worked to build legitimacy by expending resources engaging with and investing in the communities where it wanted “to do business.” It hired local workers and engaged stakeholders. In contrast, Wells Fargo undermined its legitimacy by treating its workers unfairly. Indeed, when the fake accounts scandal began to surface, the bank used its employees as scapegoats, blaming and firing them rather than owning up to and taking responsibility for the sales culture the leadership created.

Furthermore, Wells, like Sumitomo in the San Cristobal mine situation, lacks a coherent and consistent set of actions to build its credibility. The leadership involved in the San Cristobal mine went through several changes, and the company’s interest in the mine

342 Egan, supra note 74.
343 Id.
344 Wells Fargo: What It Will Take to Clean Up the Mess, KNOWLEDGE@WHARTON (Aug. 08, 2017), http://knowledge.wharton.upenn.edu/article/wells-fargo-scandals-will-take-clean-mess/.
varied with mineral prices. The company’s failure to follow through on commitments lead to disbelief in its statements and promises. Then, when mineral prices increased, the company lacked the support it needed and was forced to increase its local expenditures in order to rebuild its social license and, thereby, build its business.

Despite the fact that Wells Fargo was not planning to go out of business or even to put growth on hold, it now faces a situation similar to Sumitomo’s. The unrelenting process of publicness and the years of inattention by the board and management has resulted in a company that is unable to gain its footing. Here is where engaging in and thinking about social license might have aided the board. Boards, of course, pay attention to company financials and hear regular reports about growth and challenges. As noted above, most of the growth was coming from the Community Bank. Indeed, the “solutions practice” was key to the bank’s growth strategy, with cross-sell numbers significantly above those of other banks – yet no one noticed. Ironically, the premise of building those consumer relations was to make consumers sticky, a long-run strategy requiring at least the legitimacy and credibility that is now undercut by the frauds.

Moreover, although the board’s role is not to implement strategy, it is charged with overseeing strategy development and setting pillars against which management can execute. The board’s role is to ask questions and question answers to provide effective challenges to management’s thinking. The questions appear to have been missing here. A focus on legitimacy, credibility, and trust, with discussions about what was underpinning the remarkable 18-year growth in cross-sales, might have led to discovery of the faulty execution of the strategy. In short, situations where the numbers are “too good to be true” are just the type of situations on which boards, fulfilling their fiduciary duties, watching out for sustained and systemic problems, and acting with social license in mind, should focus.

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345 The corporate governance scheme assigns the role of monitoring management to the directors. See, e.g., Del. Code Ann. tit. 8 § 141(a) (West 2014).
346 The board’s lapses are also revealed in the way in which the risk committee developed. The board was slow to put one in place. Then, even once it was in existence, it was plagued by misrepresentations from the management. Committee members raised concerns but did not push back on Stumpf, thus failing to assert themselves in the interests of credibility and trust.
The bank also squandered the trust it appeared to have achieved after successfully navigating the recent financial crisis. Recall the Gap case study from Part III. Gap built trust by admitting its complicity in human rights and labor violations, stating an ongoing commitment to reforming its labor practices, and then following through by increasing transparency and monitoring. Initially, it seemed that Wells might adopt this example by issuing a report of its own, outlining its failures in managing the cross-sell approach. However, the slew of scandals that have come to light after the issuance of that report, and the bank’s reluctance to investigate reports of pre-2008 cross-selling, indicates that Wells may have been focused on accepting responsibility only for those scandals that had already been revealed--rather than executing on a more comprehensive approach to reform and compliance.

Here is where attention to social license might have been beneficial. If the Wells Fargo board had been operationalizing social license from the beginning, initial questions would have focused on legitimacy. Post-financial crisis, all banks are subject to scrutiny and are targets for the media and the process of publicness. Indeed, it is fair to say that the industry as a whole is not in the zone of “benefit of the doubt.” Thus, management reports on strategy execution could have been followed by with questions about the potential pitfalls and challenges, and how those, in turn, might impact an already shaky position of legitimacy among stakeholders.347

Similarly, the board should inquire as to the incentive effects imbedded in strategy execution choices. These are the exact questions that, when executing on its oversight responsibility (and fulfilling its fiduciary duty of loyalty/good faith),348 a board should pursue. Indeed, the oversight role requires the board to posit

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348 HOLDER, supra note 170. These types of situation can also be indicative of accounting fraud, like at Worldcom, and require the board’s attention.
whether incentives might lead to unethical and illegal behavior. Incentives gone wrong, as in the Wells Fargo example, can have a dramatic impact on credibility. Indeed, when employees are creating fake accounts for customers or adding unauthorized auto insurance to car loans, the bank is risking its legitimacy, credibility, and trust.

Moreover, engagement of this sort could have assisted the board in monitoring the company’s strategy execution and fulfilling its risk management role. Boards engage in risk management in multiple ways. For example, audit committees receive reports from whistleblower hotlines on a regular basis, including reports of allegations like those at Wells Fargo or, for example, safety violations at manufacturing or mining companies. Boards also receive reports tracking changes in levels of internal and external complaints, as well as risky investments. In addition, Human Resources may provide updates about terminations or significant personnel issues. This sort of information is key to risk management and in the zone of board oversight. The failure to attend to it over time results in failures, publicness, and the loss of social license.

Although it is unclear whether the Wells Fargo board received any of this sort of information, ex post investigations reveal that the information the board did receive was fragmented, because of the company’s decentralized nature and, perhaps, due to management evasion. Information holes certainly contributed to the sustained nature of the account and other cross-sell problems, and to the fraud. Yet, if the board had pressed with questions about strategy and its downside risks, it would have ensured dialogue about the types of underlying facts necessary to develop legitimacy, credibility, and trust and thus helped to protect the company’s social license.349 This type of engagement is also consistent with the board’s fiduciary duty of loyalty/good faith, and with its role in ensuring that

349 In this sense, a focus on social license correlates with the information-forcing-substance theory that I and others have developed for the role that the federal securities laws play in the fiduciary duty space. See, e.g., Sale & Langevoort, supra note 38; Sale, supra note 19; Sale & Thompson, supra note 14; Hillary A. Sale, Independent Directors as Securities Monitors, 61 BUS. LAW. 1375, 1380 (2006).
management is on track with respect to understanding and vetting risks to the company.  

B. Uber’s Social License.

In the beginning, Uber appears to have met the sort of low level, benefit-of-the-doubt standard required for legitimacy. It provided rides for less than taxis – and with greater reliability. It found a niche in a market that was perceived as overpriced. The demand for transportation of this sort was quite large, and Uber capitalized on it. Moreover, the center of its business—the app—worked. Drivers showed up as promised and most rides were uneventful, which helped Uber move from legitimacy to credibility among its customer base. Indeed, that is how it won supporters and stakeholders and attracted repeated rounds of funding.

Yet, Uber’s business model was premised on not applying for legal licenses. It treated government regulators as “an impediment, not an entity to partner with or seek approval from.” Termed “regulatory entrepreneurship,” by some academics, Uber’s rhetoric focused on its aspirations to change the laws and regulations. Its behavior, however, seems to have gone well beyond simply eluding regulation through “ride-sharing,” instead creating a pervasive sexual harassment culture inside the company and building a business model premised on law breaking and lawlessness.

Name the stakeholder, and Uber appears to have had an argument with it. Its insistence on law breaking has resulted in high billables for its lawyers, but has also engendered a series of “high-profile spats and setbacks.” The company has had a succession of disputes

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351 Lev-Ram, supra note 208.

352 See, e.g., Elizabeth Pollman & Jordan Barry, Regulatory Entrepreneurship, 90 S. CAL. L. REV. 383 (2017). This is a term that puts a very generous gloss on what was, in effect, operating outside the rule of law.

353 Lev-Ram, supra note 208.
with city governments, taxi drivers, and even with its own workers.”\textsuperscript{354} It built software systems to evade law enforcement and to lobby regulators and legislatures, creating a sandwich of evasion and protection. On the protection side, Uber took advantage of the fact that the regulatory environment was largely local in nature, allowing for a divide and conquer approach – that, as one city after another caved under the pressure, made Uber’s lawbreaking seem normal and even positive.\textsuperscript{355}

Of course, the patterns and culture have become transparent only in the wake of a series of scandals exposed through the process of publicness, thus allowing Uber to grow until the publicness occurred. Moreover, two key stakeholders, investors and riders, were “sticking with” Uber, and those stakeholders were the ones that provided the money. Yet, as discussed in Part II, Uber can no longer count on them. And, without them, Uber would have nothing – no business license and no social license.

Uber’s loss of its social license did not occur for want of opportunity to develop it. Like BP, Uber could have built strong legitimacy by employing local workers and investing in the communities where it was developing its service. In contrast to BP, which established a dialogue with and worked to treat local workers fairly and invested in the communities,\textsuperscript{356} Uber mistreated its workers and disregarded community regulations and norms. Uber lied to employees by telling them they could not legally work both for Lyft and Uber;\textsuperscript{357} its CEO verbally abused a driver (at least once);\textsuperscript{358} it operated without legal license;\textsuperscript{359} it disregarded and displaced local taxi drivers;\textsuperscript{360} and it charged surge prices during crises and disasters.\textsuperscript{361} In short, Uber chose to reject the power of legitimacy.

\textsuperscript{355} See, \textit{e.g.}, Pollman & Barry, \textit{supra} note 358.
\textsuperscript{356} See, \textit{supra} notes 217-234 and accompanying text
\textsuperscript{357} See, \textit{supra} notes 108-109 and accompanying text.
\textsuperscript{358} See, \textit{supra} notes 133-135 and accompanying text.
\textsuperscript{359} See, \textit{supra} note 136 and accompanying text.
\textsuperscript{360} See, \textit{supra} notes 98 and 327 and accompanying text.
\textsuperscript{361} See \textit{supra} note 106 and accompanying text.
It similarly failed to take advantage of opportunities to build credibility or trust, instead meeting community concerns with hostility and displaying an inability to reform its corporate culture of aggression, harassment, and exploitation. Recall how Sumitomo worked to rebuild its credibility by ensuring that it followed through on its commitments to the community. Uber, on the other hand, committed to addressing the pervasive culture of sexual harassment within the company, and then continued to engage in conduct that exacerbated rather than ameliorated that problem. Trust requires that stakeholders have confidence that actions will be (at least) neutral. The process of publicness, however, has revealed that Uber was unconcerned with developing its relationships with its stakeholders and that its statements are not believable.

The series of scandals is eroding its social license in other ways as well. Lyft is attracting a larger and larger share of the market and signing contracts with Waymo and General Motors. Whether customers will continue to leave Uber remains to be seen, but the indicators are that it is happening. The unrelenting negative process of publicness has taken a toll. From delete-the-app boycotts to companies choosing not to reimburse employees for Uber rides, Uber’s business is under challenge – primarily because the company lost the trust of its stakeholders. Its investors know this and are concerned, both because Uber is overvalued and because it is not profitable and has a very high burn rate, which means that new and repeated capital infusions are required to keep it afloat.\footnote{Blair Hanley Frank, \textit{Uber Investors Reportedly Push CEO Travis Kalanick out of Company}, \textit{VentureBeat} (June 20, 2017 10:51 PM), https://venturebeat.com/2017/06/20/uber-investors-reportedly-push-ceo-travis-kalanick-out-of-company/}

Like Sumitomo in the San Cristobal mine case, Uber must reassure not just its investors, but also its stakeholders. The board’s recent actions convey that it is aware of this need. It has taken steps to stabilize the company and rebuild trust with its stakeholders: two of its venture capitalists left the board; searches for independent directors are underway; the board adopted the Holder Report, elevating the status of the board with respect to management and
resulting in Kalanick’s resignation, personnel policies are under revision; and a new CEO has been chosen. All of these are steps to save the company and prevent its market share from continuing to slip. They are also taking steps toward reestablishing aspects of the company’s social license by treating publicness as part of the cost benefit rubric.

Like the Gap, Uber has begun to increase its transparency. It is releasing information to the public even when not legally required, revealing an understanding that attention to legitimacy through transparency is key to its recovery and to sustaining relationships. The board must now develop a consistent expectation that management will provide information and develop internal processes to ensure that the company’s strategy does not negatively impact efforts to rebuild the company’s social license. The Holder Report is, of course, not binding in a legal sense, but what Uber learned the hard way is that it is tied to Uber’s legitimacy, credibility, and trust. As the San Cristobal mining case study made clear, credibility requires transparency, consistency, and honesty. The board must now model those traits. The business model and level of deterioration and distraction inside the company, however, may mean that the process to rebuild will be protracted. Reestablishing social license will require implementing compliance, oversight, and risk-management systems that result in transparent, legitimate, and credible behaviors. Paying attention to those issues will help to rebuild Uber and is a powerful way to manage both the substance and process of publicness.

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365 As Don Langevoort and I have written elsewhere, the failure to effectively and actively engage in this type of risk management may well indicate that directors have failed to make decisions about risk oversight. The failure to decide is a form of abdication and is not protected by the business judgment rule. Sale & Langevoort, supra note 38. See, e.g., Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984) (“[I]t should be noted that the business judgment rule operates only in the context of director action. Technically speaking, it has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act.”).
Conclusion.

The BlackRock letter makes clear that shareholders understand that long-term corporate success requires boards to pursue governance models that anticipate and respond to stakeholder concerns. This article posits that social license theory is a powerful tool that boards can employ to manage those concerns. To this end, the article develops the social license theory in the context of both publicness and the board of directors and its role in overseeing strategy and risk management. The social license theory adds to the discussions in the literature about reputational capital and other theories and provides an additional tool for corporate governance scholars to leverage in analyzing fiduciary duties (and governance gaps), as well as the effects of publicness that ensue when risk management fails. Indeed, social license has at its core concepts of sustainability and relationship building; it is about value creation, long term focus, and sustained and systematic governance. As the examples in Part III reveal, companies from the mining industries to Gap have used social license to build and maintain their businesses and company reputations – revealing the power of the theory in action.

Social license in the hands of the board may also empower compliance and other risk management personnel.366 What we know from the research is that systematic inspections and programs are likely more effective than programs based on incentives and penalties, because the latter tend to undermine individual motivations to comply.367 In addition, self-regulatory structures perform well only when third-party monitoring exists.368 Thus, having a board that is engaged in and thinking about the company’s legitimacy, credibility, and trust will support compliance and risk management more generally and, thereby, help to ensure strategy execution and the board’s fulfillment of its fiduciary duties.

367 Uri Gneezy & Aldo Rustichini, A Fine Is a Price, 29 J. LEGAL STUD. 1 (2000); Short & Toffel, supra note 372 at 371.
368 Short & Toffel, supra note 372 at 371; Blair, Williams, & Lin, supra note 18.
In sum, as the Wells Fargo and Uber case studies reveal, social license theory can be conceptualized as a tool for boards and a framework for engaging in the fiduciary duty of oversight and risk management. Strategy execution is not risk free, and the failure to project and consider risks in both companies was a board failure. Of course, risks and profits are correlated, but so are risks and publicness. The role of directors is to hold management accountable for engaging in actual risk management and to ensure that systems are in place to catch and manage risks. Thus, whether the problems are fraud and cheating, as at Wells Fargo, or sexual harassment and law breaking, as at Uber, the board’s role is to develop sustained and systematic risk management programs and to be sufficiently engaged in monitoring corporate decision-making to ensure that strategy and profit-seeking are balanced with the stakeholder concerns that publicness makes apparent. Here is where social license theory can play a role – it provides boards with a framework for executing their fiduciary duties, engaging in a forward-thinking cost benefit analysis, and weighing choices for legitimacy, credibility, and trust, with systems in place to build transparency and accountability. In this manner, social license can also help to protect companies from the process of publicness and thereby avoid the inevitable outcome of that process – additional substantive publicness.