THE CORPORATE PURPOSE OF SOCIAL LICENSE

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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 treated as "private" actors and thus are regulated by "private" corporate law. This construct allows for considerable latitude. Corporate actors are not, however, solely "private." They 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 a "legal" license exists, can result in the loss of "social" license. This loss occurs through publicness, which is the interplay between inside corporate governance players and 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 permission from the greater community and outside 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,

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boycotts, shutdowns, negative publicity, and the increases in regulation that are a hallmark of publicness—but social license must be earned with consistent, trustworthy behavior. Thus, social license is bilateral, not unilateral, and should be part of corporate strategy and a tool for risk management and managing publicness more generally.

By focusing on 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, such as the economic theory on reputational capital, and provides boards with a set of standards with which to engage and address the publicness of the companies they represent. Discussing, weighing, and developing social license is not just in the zone of what boards can do, but is something they should do, making it a part of strategic, proactive cost-benefit decision-making. Indeed, the failure to do so can have dramatic business consequences.

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INTRODUCTION

On January 14, 2020, 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.[1] In that letter, Fink pointed out that society and shareholders alike are making increasing demands of companies, asking them to respond to broad societal changes:[2]

1. Larry Fink, *Annual Letter to CEOs: A Fundamental Reshaping of Finance*, BLACKROCK (2020), https://www.blackrock.com/corporate/investor-relations/2020-larry-fink-ceo-letter [https://perma.cc/T6BY-P562?type=image].

2. *Id*.

> As I have written in past letters, a company cannot achieve long-term profits without embracing purpose and considering the needs of a broad range of stakeholders. A pharmaceutical company that hikes prices ruthlessly, a mining company that shortchanges safety, a bank that fails to respect its clients—these companies may maximize returns in the short term. But, as we have seen, again and again, these actions that damage society will catch up with a company and destroy shareholder value. By contrast, a strong sense of purpose and a commitment to stakeholders helps a company connect more deeply to its customers and adjust to the changing demands of society.[3]

Fink pressed CEOs to lead on various issues and focus not only on shareholders, but also to consider the impact of their companies on all of their stakeholders. Fink issued similar letters highlighting these themes in January of 2018 and 2019.[4] He 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."[5] Further, Fink argued 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.[6] To this end, Fink instructed boards to ask 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?[7]

These exhortations represent a stark shift from traditional shareholder primacy rhetoric.[8] Fink is not alone.[9] He and others are demanding that

3. *Id*.

4. Larry Fink, *Annual Letter to CEOs: Purpose & Profit*, BLACKROCK (2019), https://www.blackrock.com/corporate/en-us/investor-relations/2019-larry-fink-ceo-letter [https://perma.cc/F4GP-9QK8?type=image]; Larry Fink, *Annual Letter to CEOs: A Sense of Purpose*, BLACKROCK (2018), https://www.blackrock.com/corporate/en-us/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/BM7N-L2YH?type=image] [hereinafter Fink, *Annual Letter 2018*].

5. Fink, *Annual Letter 2018*, *supra* note 4.

6. *Id*.

7. *Id*.

8. Shareholder primacy is the idea that shareholder value is the exclusive objective of corporations. *See, e.g.*, Stephen Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT'L LAW. 45, 45–46 (2002).

9. *See, e.g.*, Press Release, Bus. Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'* (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-econ

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.

How are boards to implement these significant changes 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 social license theory as an effective tool to implement stakeholder-based corporate governance practices that benefit shareholders and stakeholders alike. In combination with publicness, social license theory provides boards with an approach to understanding their three key roles (strategy, risk, and people) and to undertaking those roles with attention to the company's relationship with society and the outside pressures that can derail even the most well-developed strategies and goals.

This Article explores the construct of social license, 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.[10] 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 again, companies fail to account for the public nature of their actions, including those for which they otherwise have legal permission or legal license.[11] Social license theory, prominent in sociological studies of community and business relations, provides a powerful construct for both scholars examining corporate actions and boards developing business strategies and weighing risk. It adds to the discussions from other disciplines, such as the economic theory on reputational capital, and provides boards with a set of standards to help address the publicness of the companies they represent, making it a part of proactive cost-benefit decision-making.

omy-that-serves-all-americans [https://perma.cc/5HBG-QK4N] (announcing new commitments to all stakeholders, including a commitment to "protect the environment by embracing sustainable practices across our businesses"); *see also* Martin Lipton, Steven A. Rosenblum & Karessa L. Cain, *Thoughts for Boards of Directors in 2020*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 10, 2019), https://corpgov.law.harvard.edu/2019/12/10/thoughts-for-boards-of-directors-in-2020 [https://perma.cc/4MJK-EXZZ] (arguing boards will need to focus on the corporation's "economic and societal ecosystem in order to build a sustainable and long-term value proposition").

10. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (2021).

11. *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").

Social license and publicness, a theory about which I and other corporate scholars have previously written, are connected.[12] 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.[13] 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 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.

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 permission from the greater community and outside stakeholders. In this sense, businesses are social, not just economic, institutions. Thus, they are subject to public accountability and, at times, public control.[14] Even if not explicit, businesses require both legal license and social license to operate. Social license derives not from legally granted permission, but instead from the development of legitimacy, credibility, and trust within the relevant communities and

12. *See generally* Hillary A. Sale & Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, 93 WASH. U. L. REV. 487 (2015); Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629 (2014) [hereinafter Sale, *J.P. Morgan*]; Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012 (2013) [hereinafter Sale, *Public Governance*]; Hillary A. Sale, *The New "Public" Corporation*, 74 L. & CONTEMP. PROBS. 137 (2011) [hereinafter Sale, *The New "Public" Corporation*]; Robert B. Thompson & Donald C. Langevoort, *Redrawing the Public-Private Boundaries in Entrepreneurial Capital Raising*, 98 CORNELL L. REV. 1573 (2013) [hereinafter Thompson & Langevoort, *Redrawing*]; Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337 (2013) [hereinafter Langevoort & Thompson, *"Publicness"*]; Joan MacLeod Heminway, *Crowdfunding and the Public/Private Divide in U.S. Securities Regulation*, 83 U. CIN. L. REV. 477 (2014); Joan Macleod Heminway & Shelden Ryan Hoffman, *Proceed at Your Peril: Crowdfunding and the Securities Act of 1933*, 78 TENN. L. REV. 879 (2011); Jill E. Fisch, *The Mess at Morgan: Risk, Incentives and Shareholder Empowerment*, 83 U. CIN. L. REV. 651 (2015); Cary Martin Shelby, *Are Hedge Funds Still Private? Exploring Publicness in the Face of Incoherency*, 69 SMU L. REV. 405 (2016).

13. *See* Sale, *J.P. Morgan*, *supra* note 12, 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 12, at 1013–14; Sale, *The New "Public" Corporation*, *supra* note 12, at 141.

14. Domènec Melé & Jaume Armengou, *Moral Legitimacy in Controversial Projects and Its Relationship with Social License to Operate: A Case Study*, 136 J. BUS. ETHICS 729, 730–34 (2016); *see also* Jeffrey Bone, *Legal Perspective on Corporate Responsibility: Contractarian or Communitarian Thought*, 24 CAN. J. L. & JURIS. 277, 288 (2011) (noting that corporations possess a social contract with their constituents and societal stakeholders).

stakeholders. It can prevent demonstrations, boycotts, shutdowns, negative publicity, and the increases in regulation that are a hallmark of publicness.[15] As a result, the company's social license can be a tool for managing risk in particular and for managing publicness more generally.[16] 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.[17] In this sense, social license is bilateral, not unilateral, connecting to the process and substance of publicness and differing considerably from legal license.

This Article analyzes publicness and social license together, 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 come from "outsiders." When outsiders 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 outsiders.[18] Much of this shift occurs through the publicness process explored below and, as

15. Phillippe Hanna, Frank Vanclay, Esther Jean Langdon & Jos Arts, *Conceptualizing Social Protest and the Significance of Protest Action to Large Projects*, 3 EXTRACTIVE INDUS. & SOC'Y 217, 217–19 (2016). Front-end regulation, of course, has its costs. It can dampen the entrepreneurial spirit. Social license, in contrast, is not formal regulation. It is self-regulation and long-run focused.

16. Robert G. Boutilier, Leeora D. Black & Ian Thomson, *From Metaphor to Management Tool—How the Social License to Operate Can Stabilise the Socio-Political Environment for Business*, *in* INT'L MINE MGMT. 2012, at 227, 227–37 (2012); *see also* Margaret M. Blair, Cynthia A. Williams & Li-Wen Lin, *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325, 344 (2008) (detailing how corporations increasingly turn to third-party assurance networks as a tool for managing social, environmental, and governance risks). However, proponents of social license view it as more than simple risk management. It is just as much about joint understanding. *See* ROBERT G. BOUTILIER & IAN THOMSON, SOCIALICENSE.COM, MODELLING AND MEASURING THE SOCIAL LICENSE TO OPERATE: FRUITS OF A DIALOGUE BETWEEN THEORY AND PRACTICE (2011), https://socialicense.com/publications/Modelling%20and%20Measuring%20the%20SLO.pdf [https://perma.cc/TLF9-6LKS]; Geert Demuijnck & Björn Fasterling, *The Social License to Operate*, 136 J. BUS. ETHICS 675, 680–81 (2016).

17. Demuijnck & Fasterling, *supra* note 16, at 675; *see also* Dirk Matten, Andrew Crane & Wendy Chapple, *Behind the Mask: Revealing the True Face of Corporate Citizenship*, 45 J. BUS. ETHICS 109, 110 (2003).

18. For perspectives on the relationship between corporations, stakeholders, and communities, see E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1145–50 (1932); William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 266–67 (1992); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 287–319 (1999); Bone, *supra* note 14, at 284–94; Ian B. Lee, *Citizenship and the Corporation*, 34 L. & SOC. INQUIRY 129, 131 (2009); Bryan Horrigan, *Fault Lines in the Intersection Between Corporate Governance and Social Responsibility*, 25 U. N.S.W. L.J. 515, 532–51 (2002); MICHAEL R. DIAMOND, CORPORATIONS: A CONTEMPORARY APPROACH 759–62 (5th ed. 2019) (describing "other constituency" statues that allow boards of directors to take the interests of named constituencies, such as labor or local communities, into account when making corporate decisions).

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.[19]

Today, publicness grows through a public-private dialectic that derives, at least in part, from the ease and availability of media. Scrutiny is twenty-four hours a day, seven days a week, 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 feedback loops created by outsiders and the media. The financial crisis, about which I and many others have written, reveals this aspect of publicness.[20] Consider, for example, how the reactions of citizens to the financial crisis produced demands for accountability and resulted in increased government intervention and regulation, most notably the Dodd-Frank Act.[21]

Publicness in corporate governance develops as companies make choices, including those about risks and risk-taking.[22] The company's risk choices, and its management of them, impact not just the traditional governance participants— shareholders, officers, and directors— but also community stakeholders and the public.[23] Risk failures can be costly— and not just for the company. In the wake of risks gone bad, employees lose their jobs, local stakeholders suffer, and community members even lose their lives.[24] The result for corporations is increased scrutiny and pressure, as well as, when outcomes are particularly bad, new laws and regulations.[25] 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,

19. 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, 475–80 (1993).

20. *See* Sale, *Public Governance*, *supra* note 12, at 1013–14; Sale, *The New "Public" Corporation*, *supra* note 12, at 141; John C. Coffee, Jr. & Hillary A. Sale, *Redesigning the SEC: Does the Treasury Have a Better Idea?*, 95 VA. L. REV. 707, 711–16 (2009).

21. *See* Sale, *Public Governance*, *supra* note 12, 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.*, Sale, *J.P. Morgan*, *supra* note 12.

23. *See, e.g.*, Horrigan, *supra* note 18.

24. Sabrina Tavernise, *Report Faults Mine Owner for Explosion that Killed 29*, N.Y. TIMES (May 19, 2011), http://www.nytimes.com/2011/05/20/us/20mine.html?mcubz=0 [https://perma.cc/PXY6-URNT].

25. Press Release, Consumer Fin. Prot. Bureau, CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers Their Day in Court (May 5, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court [https://perma.cc/X6TS-M3YR].

as this Article argues, had the decision-makers been more focused on social license and its importance for the growth and sustainability of their businesses, they may well have made different risk choices and 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 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 to ensure sustainable business growth. Finally, Part IV applies social license theory to the Wells Fargo and Uber scandals to analyze how the companies failed to earn social licenses, assess the impact of that failure on their respective scandals, and explore how they could have created and maintained social licenses. The result is a more robust understanding of corporate governance and the board's role, informed by the sociological literatures and an analysis of social license.

I. PUBLICNESS AND CORPORATE GOVERNANCE

This part of the Article explicates the substantive and procedural aspects of the theory of publicness.[26] 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.[27] 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.[28] Indeed, historically, corporate entities were granted status on a case-by-case basis.[29] Early entities with this status were often quasi-public in nature, like public transit and other authorities

26. 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.

27. James D. Cox, *Corporate Law and the Limits of Private Ordering*, 93 WASH. U. L. REV. 257, 257–58 (2015); Bone, *supra* note 14, at 279–84; *see also* JEAN L. COHEN & ANDREW ARATO, CIVIL SOCIETY AND POLITICAL 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.").

28. 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. Robert B. Thompson, *Why New Corporate Law Arises: Implications for the Twenty-First Century*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? 3 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019); Hillary A. Sale, *Delaware's Diminishment?*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS THE LAW KEEPING UP? 110 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019); Bone, *supra* note 14, at 279–84. *See generally* Samuel Williston, *History of the Law of Business Corporations Before 1800*, 2 HARV. L. REV. 105 (1888).

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 their impact on the economy receiving particular scrutiny.[30]

Thus, even though entities are allowed to incorporate and operate with considerable degrees of freedom, that freedom is permissive and easily circumscribed.[31] Why? Because corporate entities wield economic and political power.[32] Their decisions and choices impact employees, communities, and the environment, and, in the case of the 2008–2009 financial crisis, the economy and citizens much more broadly. 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 responses to the accumulation of power, and the simplest forms of accountability come through regulation and constraints on private ordering.[33] 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 through *ex post* enforcement. This enforcement, via investigations and litigation, occurs when companies violate public norms.[34] Recent examples include the Dodd-Frank Act and the

30. Thompson, *supra* note 29.

31. 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").

32. DONALD C. LANGEVOORT, SELLING HOPE, SELLING RISK: CORPORATIONS, WALL STREET, AND THE DILEMMAS OF INVESTOR PROTECTION 18 (2016); *see also* Lee, *supra* note 18, at 131; ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 45–69 (1932) (developing arguments related to the power of corporations and the economy).

33. *See, e.g.*, Steven L. Schwarcz, *Private Ordering*, 97 NW. U. L. REV. 319, 321–44 (2002); Barak D. Richman, *Firms, Courts, and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 COLUM. L. REV. 2328, 2337–51 (2004); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 430 (2003); *see also* Sale, *Public Governance*, *supra* note 12, at 1013–14; Sale, *The New "Public" Corporation*, *supra* note 12, at 141; Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections upon Federalism*, 56 VAND. L. REV. 859, 904 (2003) (noting that government governance grows in response to scandals and incrementally over time).

34. Edward B. Rock & Michael L. Wachter, *Islands of Conscious Power: Law, Norms, and the Self-Governing Corporation*, 149 U. PA. L. REV. 1619, 1653–63 (2001); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016–19, 1063–66 (1997). *See generally* John C. Coffee, Jr., *A Theory of Corporate Scandals: Why the U.S. and Europe Differ* (Ctr. for L. & Econ. Stud., Working Paper No. 274, 2005), http://ssrn.com/abstract=694581; John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019 (2012) [hereinafter Coffee, *The Political Economy*]; Sale, *Public Governance*, *supra* note 12, at 1013–14; Sale, *The New "Public" Corporation*, *supra* note 12, at

multiple investigations and enforcement actions against banks in the wake of the 2008–2009 financial crisis. Prior to that, waves of enforcement grew out of the Enron and Worldcom scandals, the options-backdating scandal, and the dot-com crash.[35] 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.[36]

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, impacting 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.[37] That dialogue, in turn, plays a role in how the government makes enforcement and regulatory decisions. Directors who fail to understand the power of the 24/7 news cycle and the growth of social media are neglecting their role. For example, the government has increased its role in developing and supporting substantive publicness in response to media coverage and public pressure, and in the face of crises.[38]

141; Thompson & Sale, *supra* note 33.

35. *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, *"Publicness," supra* note 12, at 374 ("[N]early 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.").

36. Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988); Erica P. John Fund, Inc. v. Halliburton Co., 563 U.S. 804, 810–11 (2011); Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 475 (2013); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 267 (2014); *see also* Sale & Thompson, *supra* note 12, at 537–38; Hillary A. Sale & Donald C. Langevoort, *"We Believe":* Omnicare*, Legal Risk Disclosure and Corporate Governance*, 66 DUKE L.J. 763, 783 (2016).

37. Consider WeWork and Away. Alyssa Newcomb, *The Year in Scandal: Business Leaders Who Hit the Headlines*, NBC NEWS (Dec. 30, 2019), https://www.nbcnews.com/business/business-news/year-scandal-business-leaders-who-hit-headlines-n1108596 [https://perma.cc/E4LA-U4FE] (discussing Adam Neumann's exit from WeWork and Away's reorganization challenges).

38. Langevoort & Thompson, *"Publicness," supra* note 12; Sale, *The New "Public" Corporation*, *supra* note 12; Sale, *Public Governance*, *supra* note 12; Sale, *J.P. Morgan*, *supra* note 12.

Regulatory surges are an inevitable response to widespread crises,[39] but as the Wells Fargo and Uber case studies reveal, even an individualized scandal can invoke the publicness process. The process, in turn, is accelerated by news media and social media.

When entities fail to either acknowledge their publicness or manage with an understanding of it, the omission can result in a process through which private ordering is diminished.[40] Ignoring the social license can lead to the elimination of private privileges and their replacement with laws, regulations, and substantive publicness. For example, as media coverage and public outrage developed in response to the financial crisis of 2008–2009, the process of publicness created pressure that resulted in federal regulation for boards of directors. Then, Congress passed the Dodd-Frank Act[41] (and before it, the Sarbanes-Oxley Act[42]) regulating director qualifications for the board and some committees.[43] In addition, federal regulation requires boards to have particular committees (audit, compensation, and nomination and governance) and sets forth requirements for "independent" members of these committees.[44] Prior to that government regulation, board committees and their membership were subject to private ordering.[45] These examples underscore how the process of publicness results in the substance of publicness.

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 once privately held start-up. Both companies reeled from scandals and the resulting media attention and publicness process. Through their respective responses to these scandals, the companies demonstrated the power and cost of publicness and thus are excellent case studies for examining the role that social license can play in the boardroom and in managing the process and substance of

39. *See, e.g.*, Coffee, *The Political Economy*, *supra* note 34.

40. *Cf.* Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 846–50 (2007) (discussing, in the context of family law, how legal doctrine shapes childhood both through substance and omissions).

41. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in relevant part at 12 U.S.C. §§ 5301, 5481–5603).

42. Sarbanes-Oxley Act, Pub. L. No. 107–204, 116 Stat. 745 (2002) (codified in relevant part at 15 U.S.C. §§ 7241–46).

43. 15 U.S.C. § 7241(a)(5); 124 Stat. 1376; *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").

44. 17 C.F.R. § 229.407 (2021).

45. Sale, *J.P. Morgan*, *supra* note 12.

publicness.

A. WELLS FARGO

In the years following 2016, Wells Fargo, a financial services company providing banking, insurance, investments, mortgage, and consumer and commercial financial services,[46] had to react to a series of revelations about its sales and other practices and contend with publicness. Its fact pattern provides an opportunity to analyze how the process of publicness and the attendant substantive outcomes impacted the company, as well as where board attention to social license could have made a difference. Ultimately, Wells Fargo paid a steep price. Out-of-pocket costs for the company reached $3 billion as of December 2018,[47] and its CEO, John Stumpf, was ousted and lost millions when the company clawed back his pay.[48] In 2020, Stumpf was also fined $17.5 million in settlements with the Office of the Comptroller of the Currency and agreed to a lifetime ban from the banking industry.[49] 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. Wells Fargo's actions remain subject to scrutiny, resulting in government-imposed governance changes.

According to Forbes, in 2019, Wells Fargo fell from the seventh largest public company in the world based on assets, profits, sales, and revenue to tenth.[50] Wells Fargo also declined in the ranking of U.S. banks based on assets. For example, it was ranked fourth among U.S. banks at the end of the third quarter of 2019 ($1.9 trillion),[51] a decline from its standing of third based on assets in 2017 ($2.0 trillion).[52] In short, the scandals damaged the company's reputation and earnings model, and Wells Fargo "isn't sure it will ever recover from the slowdown."[53] Why? Because the numbers it hit in the

46. WELLS FARGO TODAY: 4Q20 (Dec. 2020), https://www08.wellsfargomedia.com/assets/pdf/about/corporate/wells-fargo-today.pdf [https://perma.cc/97SL-4YNQ].

47. *See infra* note 115 and accompanying text.

48. Bill Chappell, *Wells Fargo Claws Back $75 Million More from 2 Executives Over Fake Accounts*, NPR (Apr. 10, 2017, 10:08 AM), https://www.npr.org/sections/thetwo-way/2017/04/10/523254069/wells-fargo-claws-back-75-million-more-from-2-executives-over-fake-accounts [https://perma.cc/88UQ-HUCK].

49. Stacy Cowley & Emily Flitter, *Wells Fargo's Ex-Chief Fined $17.5 Million Over Fake Accounts*, N.Y. TIMES (Feb. 21, 2020), https://www.nytimes.com/2020/01/23/business/wells-fargo-ceo-fine.html [https://perma.cc/V595-5SXT].

50. Jonathan Ponciano & Sarah Hansen, *The World's Largest Public Companies 2019: Global 2000 by the Numbers*, FORBES (May 15, 2019, 5:50 PM), https://www.forbes.com/sites/jonathanponciano/2019/05/15/worlds-largest-companies-2019-global-2000 [https://perma.cc/V5AU-K56Z].

51. Wells Fargo & Co., Quarterly Report (Form 10-Q), at 3 (Nov. 1, 2019).

52. Wells Fargo & Co., Annual Report (Form 10-K), at 1 (Mar. 1, 2018).

53. *Id.*; Lucinda Shen, *Wells Fargo Says Sales Scandal Could Hurt Growth Permanently*, FORTUNE (Apr. 13, 2017, 4:00 PM), https://fortune.com/2017/04/13/wells-fargo-report-earnings [https://perma.cc/SL7H-PZA9].

past were achieved through high-pressure sales targets paired with incentives. Those targets and incentives have been eliminated, but past quarterly and annual results that were inflated by the frauds still exist as targets.

So, what was at the heart of the Wells Fargo scandal? Lack of attention to the company's social license and the process of publicness. This lack of attention manifested as unacceptable consumer practices, toxic incentives, and grievous risk management. The bank had long operated in a decentralized manner, with three key operating segments: Community Banking, Wholesale Banking, and Wealth Management.[54] The roots of the scandal are in the Community Bank segment, where employees perpetuated a cross-selling scheme. Employees engaged in a series of fraudulent transactions, including opening unauthorized customer bank accounts, credit cards, auto insurance, and other accounts in order to meet their sales goals. Customers did not know about these accounts when they were created, and many did not realize the accounts existed—even after they were charged fees. Employees—at least 5,000 of them—were pressured and incentivized to create these accounts. In some cases, the pressure was "extreme."[55] Employees reported receiving multiple calls per day from supervisors, demanding updates on sales goals.[56] They were encouraged to sell unnecessary products.[57] The bank ranked employees against each other, with compensation and promotion tied to the rankings.[58] Sales rankings were circulated regularly and eliminated only after regional leaders pushed back, citing a culture of shaming and perpetual sales pressure.[59] Further, employees who could not meet the goals feared termination or "career-hindering criticism."[60]

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.[61] The more accounts or

54. Wells Fargo & Co., *supra* note 52, at 1.

55. INDEP. DIRS. OF THE BD. OF WELLS FARGO & CO., SALES PRACTICES INVESTIGATION REPORT 7 (2017), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/presentations/2017/board-report.pdf [https://perma.cc/3TZD-XFM2] [hereinafter 2017 INDEPENDENT REPORT].

56. *Id*.

57. *Id*.

58. *Id*. at 20.

59. *Id*.

60. *Id*. at 7.

61. *See, e.g.*, Adam Davidson, *How Regulation Failed with Wells Fargo*, NEW YORKER (Sept. 12, 2016), http://www.newyorker.com/business/currency/the-record-fine-against-wells-fargo-points-to-the-failure-of-regulation [https://perma.cc/AYK4-A2QU]; Halah Touryalai, *Despite Wells Fargo's Fake Accounts Fiasco, Cross-Selling Remains Key Strategy*, FORBES (Sept. 13, 2016), https://www.forbes.com/sites/halahtouryalai/2016/09/13/despite-wells-fargos-fake-accounts-fiasco-cross-selling-remains-key-strategy/#368767ab7cc5 [https://perma.cc/Q3HH-FDGP].

products a customer has, the more likely that customer is to stay with the bank and to engage in higher dollar transactions.[62] 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.[63] Although not all cross-sells were the result of fraud, the power of the cross-sell is nevertheless evident.[64] In fact, "sales integrity-related allegations and associated terminations and resignations increased relatively steadily from the second quarter of 2007," peaking in the fourth quarter of 2013.[65]

The Wells Fargo situation is typical of other sales-related frauds. As sales grow, the pressure to sustain and increase sales also grows. Indeed, the sales model in the Community Bank segment was volume focused and "relied heavily on consistent year-over-year sales growth."[66] The result was more pressure on the sales force leading to sales-integrity issues.[67] From sandbagging (withholding sales in a particular quarter to push them into the next) to accounts with *de minimis* funding, the evidence of problems grew.[68] When an investigative newspaper report exposed the issues, the company's board finally focused on the problem and the pressure "moderated somewhat."[69] Integrity problems, among other issues, also decreased.[70]

Nevertheless, the problems had persisted for a long time. As early as 2002, the Community Bank saw growth in sales-practice violations.[71] An internal report from 2004 reveals both an increase in violations and an increase in terminations.[72] But there was little willingness to address the problems. According to the 2017 independent investigation report ("2017 Independent Report"), prepared at the behest of the Wells Fargo Board of Directors, the Community Bank's efforts to address the concerns were "incremental, implemented slowly and insufficient to address the root cause of the problem."[73] Leadership was "disinclin[ed]" to see the systemic nature

62. Touryalai, *supra* note 61 ("The idea is that having a greater share of a customer's wallet means it will be tougher for him to leave the bank.").

63. Davidson, *supra* note 61 ("Wells Fargo has surely made tens of billions of dollars, and likely hundreds of billions, by employing its aggressive cross-selling approach.").

64. *Id*.

65. Wells Fargo & Co., Proxy Statement (Schedule 14A), at 6 (Apr. 10, 2017).

66. 2017 INDEPENDENT REPORT, *supra* note 55, at 19.

67. Chris Arnold, *Former Wells Fargo Employees Describe Toxic Sales Culture, Even at HQ*, NPR (Oct. 4, 2016, 5:04 AM), http://www.npr.org/2016/10/04/496508361/former-wells-fargo-employees-describe-toxic-sales-culture-even-at-hq [https://perma.cc/AUL3-Y9GS].

68. 2017 INDEPENDENT REPORT, *supra* note 55, at 21.

69. *Id*. at 6.

70. *Id*.

71. *Id*. at 31.

72. *Id*.

73. *Id*. at 6.

of the fraud.[74] Instead, the culture was one of blame for employees and lack of analysis as to the causes, even though employees had called the company's hotline and reported problems.[75]

The account-creation process went on for many years, ending only when the situation imploded publicly. Indeed, before the fraud hit the presses, an analyst from Rafferty Capital, who had personal experience banking with Wells Fargo, 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 management and incentives had to be the reason.[76] He was half right. That does not, however, actually answer the "how" question. How did these practices happen—on a large scale—without anyone higher up knowing or noticing? The answer is: people did know. Nevertheless, 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 from the financial crisis" and analyzed how Stumpf and the Wells Fargo business model resulted in the bank growing and thriving at a time when the rest of the banking industry was still recovering.[77] Ironically, when the article appeared in *The Economist*, the practices that caused the recent scandal were gathering steam within the company.[78]

The decentralized nature of Wells Fargo contributed to the scandal. Deference to business unit leaders was a hallmark of the company. The Community Bank leader, Carrie Tolstedt, a proponent of decentralized management, was widely perceived to be both very successful and close to Stumpf.[79] She was also criticized as insular, defensive, and "notoriously resistant to outside intervention and oversight."[80] In combination with

74. *Id*.

75. Matt Egan, *I Called the Wells Fargo Ethics Line and Was Fired*, CNN MONEY (Sept. 21, 2016, 1:26 PM), http://money.cnn.com/2016/09/21/investing/wells-fargo-fired-workers-retaliation-fake-accounts/index.html [https://perma.cc/XVQ3-KERD].

76. *Riding High: The Big Winner from the Financial Crisis*, ECONOMIST (Sept. 14, 2013), https://www.economist.com/news/finance-and-economics/21586295-big-winner-financial-crisis-riding-high [https://perma.cc/M3KE-4XG3].

77. *Id*.

78. 2017 INDEPENDENT REPORT, s*upra* note 55, at 31 (revealing that in 2004 there were increases in both violations and in terminations triggered by those violations).

79. *Id*. at 7, 110.

80. *Id*. at 13.

decentralization, her approach contributed to the lack of visibility into the cross-selling issues and the inevitable demands for accountability. As decentralization increased, decisions and messages were carried out in different ways.[81]

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 rather than to a central risk-management person.[82] Further, 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.[83] The Risk Committee decided that the right approach was to grow the central risk function, endow it with both the responsibility and the ability to oversee risk across all business lines, and provide it with increased funding.[84] Nevertheless, this process did not begin until 2013 and took multiple years to implement.[85]

Other functions at Wells Fargo were also decentralized. For example, the Community Bank had its own human resources department.[86] 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.[87] In short, fragmentation compounded the issues, diminishing transparency and visibility.

Moreover, the perception at Wells Fargo was that these issues were of "modest significance."[88] The internal understanding of "customer harm" was limited to fees and penalties (the zone of legal license), as opposed to brand, reputation, or customer trust.[89] Yet, brand, reputation, and customer trust are precisely in the space of publicness and, as explored in Part III, in the zone of social license. They are also issues within the domain of the board and its fiduciary duties—despite the fact that the Wells Fargo board did not think so at the time.

So, what did the Wells Fargo board know, and when did it know it?

81. *See* Matt Kelly, *Third-Party Risks in Decentralized Organizations*, RADICAL COMPLIANCE (Aug. 4, 2016), http://www.radicalcompliance.com/2016/08/04/third-party-risks-in-decentralized-organizations [https://perma.cc/LN2Y-KVUX].

82. 2017 INDEPENDENT REPORT, s*upra* note 55, at 11.

83. *Id*. at 12.

84. *Id*.

85. *Id*.

86. Bethany McLean, *How Wells Fargo's Cutthroat Corporate Culture Allegedly Drove Bankers to Fraud*, VANITY FAIR (May 31, 2017), https://www.vanityfair.com/news/2017/05/wells-fargo-corporate-culture-fraud [https://perma.cc/MD4V-AKLG].

87. 2017 INDEPENDENT REPORT, s*upra* note 55, at 12.

88. *Id*. at 14.

89. *Id*. at 14–15.

Stumpf was aware of the problems at least as early as 2002.[90] The board established a Risk Committee in 2011, but the committee did not begin work until 2013. Then, following the *Los Angeles Times* articles in early 2014, management began to identify and report risky sales practices to the board and the Risk Committee.[91] Yet, it was too little, too late. In May 2015, the Los Angeles City Attorney sued, alleging "widespread improper sales practices."[92] Scrutiny of the bank 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.[93] 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.[94] In addition, according to the 2017 Independent Report, management provided the board information on enhanced monitoring that lacked detailed and concrete plans; yet, neither the board nor the Risk Committee insisted on revised plans.[95]

The board failures occurred as the scope of the scandal grew. For example, over a period of five to seven years, to meet cross-sell targets, employees opened millions of fake accounts, without customer consent, including unauthorized deposit accounts and credit card applications.[96] Initial estimates of fees to the bank were relatively low, $2.6 million, in comparison to both the size of Wells Fargo and the amount of fees later revealed.[97] Yet, as the company continued to release information, it became increasingly apparent that the size of the scandal was far larger than initially reported, perhaps going back fifteen years, impacting many more customers

90. Wilfred Frost & Dawn Giel, *Wells Fargo Board Slams Former CEO Stumpf and Tolstedt, Claws Back $75 Million*, CNBC (Apr. 10, 2017, 12:29 PM), https://www.cnbc.com/2017/04/10/wells-fargo-board-slams-stumpf-and-tolstedt-claws-back-millions.html [https://perma.cc/5YAZ-JS8G].

91. 2017 INDEPENDENT REPORT, *supra* note 55, at 15.

92. *Id.*

93. *Id.*

94. *Id.* at 16.

95. *Id.* at 17.

96. Lucinda Shen, *Wells Fargo Says Sales Scandal Could Hurt Growth Permanently*, FORTUNE (Apr. 13, 2017, 4:00 PM), https://fortune.com/2017/04/13/wells-fargo-report-earnings [https://perma.cc/SL7H-PZA9].

97. *The Wells Fargo Fake Account Scandal: A Timeline*, FORBES (Apr. 28, 2017, 11:46 AM), https://www.forbes.com/pictures/ejhj45fjij/two-million-phony-accoun/#30c2f9a76f24 [https://perma.cc/8JMF-UKW2]; *Wells Fargo: One Year Later: Hearing Before the U.S. S. Comm. on Banking, Hous. & Urb. Affs.*, 115th Cong. 4 (2017) (statement of Tim Sloan, Chief Executive Officer, Wells Fargo & Company) (promising a refund of $6 million to customers due to inappropriate fees and charges).

and bringing in more fees and revenue.[98] For example, in 2017, Wells Fargo issued an additional $3.3 million in refunds and credits to customers for improper fees and charges on top of the $2.8 million in refunds the bank had previously issued in connection with the scandal.[99]

The dollar costs of the scandal are very large. The company paid $185 million in settlements to government agencies in 2016 and $70 million to law firms investigating the scandal.[100] In the first quarter of 2017, it spent an additional $80 million in costs related to the situation.[101] Moreover, the company initially predicted that the level of 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.[102] Later predictions were even higher.[103] And, 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.[104]

Stumpf was not the only Wells Fargo CEO hit by the scandal. Tim Sloan, who succeeded Stumpf, was forced to step down in March 2019.[105] Sloan's attempts to clean up the bank's image were unsuccessful. After his departure, Wells Fargo stated that it would look for external candidates, a move supported by Warren Buffett, whose company, Berkshire Hathaway, was Wells Fargo's single largest shareholder at the time.[106] Buffett

98. Imani Moise, *Wells Fargo to Pay $575 Million in Settlement with U.S. States*, REUTERS (Dec. 28, 2018, 9:02 AM) https://www.reuters.com/article/us-wells-fargo-settlement/wells-fargo-to-pay-575-million-in-settlement-with-u-s-states-idUSKCN1OR19Q [https://perma.cc/HU59-4J8E]; Emily Flitter, Binyamin Appelbaum & Stacy Cowley, *Federal Reserve Shackles Wells Fargo After Fraud Scandal*, N.Y. TIMES (Feb. 2, 2018), https://www.nytimes.com/2018/02/02/business/wells-fargo-federal-reserve.html [https://perma.cc/R786-3KJH]; Frost & Giel, *supra* note 90.

99. *Wells Fargo: One Year Later: Hearing Before the U.S. S. Comm. on Banking, Hous. & Urb. Affs.*, 115th Cong. 4 (2017) (statement of Tim Sloan, Chief Executive Officer, Wells Fargo & Company).

100. Michael Hiltzik, *That Wells Fargo Accounts Scandal Was Even Worse than You Can Imagine*, L.A. TIMES (Jan. 27, 2020, 11:37 AM), https://www.latimes.com/business/story/2020-01-27/wells-fargo-scandal [https://perma.cc/P3HW-HXAT].

101. Shen, *supra* note 96. Apparently, the bank had projected that it would spend $40–$50 million. *Id*.

102. *Id*.

103. Tony Owusu, *Wells Fargo's Legal Bill Could Exceed Current Provisions by $2 Billion*, STREET (May 8, 2017, 9:45 AM), https://www.thestreet.com/story/14123498/1/estimated-cost-of-wells-fargo-account-scandal-now-stands-at-2-billion.html [https://perma.cc/C47B-XKQH].

104. 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 *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996). 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, 1107–09 (N.D. Cal. Oct. 4, 2017).

105. Rachel Louise Ensign, *Wells Fargo CEO Tim Sloan Steps Down*, WALL ST. J. (Mar. 28, 2019, 6:58 PM), https://www.wsj.com/articles/wells-fargo-said-ceo-timothy-sloan-will-step-down-11553804261 [https://perma.cc/7JTP-Z97D].

106. Emily Flitter, Stacy Cowley & David Enrich, *Wells Fargo C.E.O. Timothy Sloan Abruptly*

commented that although there are good candidates from Wall Street and the financial sector, "they are 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."[107] In September 2019, Wells Fargo appointed Charles Scharf, former Chief Executive of Bank of New York Mellon Corp. and Visa Inc., as President and CEO.[108]

The company also closed over four hundred branches[109] and announced plans to close eight hundred.[110] The Federal Reserve placed limits on the growth of the company, restricting the firm from increasing its total asset size beyond that listed as of the end of 2017. The bank was required to make "sufficient improvements" to prevent misconduct before the limitations would be lifted, and employees also filed lawsuits related to the sales goals and terminations.[111] Investigations abounded, with the SEC, Department of Justice, and other government agencies involved.[112] Further, each investigation carried an imbedded risk of uncovering new issues and additional publicness, like the auto-insurance fraud announced in July of 2017.[113] In 2018, the Consumer Financial Protection Bureau and Office of the Comptroller of the Currency fined Wells Fargo a total of $1 billion for the auto-insurance scandal.[114] Early estimates of the out-of-pocket costs in connection with the scandals were two billion dollars, but within a year,

Steps Down, N.Y. TIMES (Mar. 28, 2019), https://www.nytimes.com/2019/03/28/business/wells-fargo-timothy-sloan.html [https://perma.cc/R7GE-J7UE].

107. Spencer Kimball, *Warren Buffett Says Next Wells Fargo CEO 'Shouldn't Come From JP Morgan or Goldman Sachs,'* CNBC (Apr. 8, 2019, 7:25 AM), https://www.cnbc.com/2019/04/07/warren-buffet-calls-for-wells-fargo-to-look-beyond-wall-street-for-next-ceo.html [https://perma.cc/KPT4-BBWX].

108. Rachel Louise Ensign & Justin Baer, *Wells Fargo Names Charles Scharf CEO*, WALL ST. J. (Sept. 27, 2019), https://www.wsj.com/articles/wells-fargo-names-charles-scharf-president-ceo-11569583001 [https://perma.cc/Q4YF-AT3W].

109. Jen Wieczner, *Here's How Much Wells Fargo's Fake Accounts Scandal Is Hurting the Bank*, FORTUNE (Jan. 13, 2017, 2:48 PM), http://fortune.com/2017/01/13/wells-fargo-fake-accounts-scandal-closing-branches-earnings [https://perma.cc/9K93-EK3D].

110. Matt Egan, *Wells Fargo Plans to Close 800 More Branches by 2020*, CNN MONEY (Jan. 12, 2018, 1:48 PM), https://money.cnn.com/2018/01/12/investing/wells-fargo-shutting-branches/index.html [https://perma.cc/ZW8V-9PJ9].

111. Flitter et al., *supra* note 98.

112. Paul Blake, *Timeline of the Wells Fargo Accounts Scandal*, ABC NEWS (Nov. 3, 2016, 1:15 PM), http://abcnews.go.com/Business/timeline-wells-fargo-accounts-scandal/story?id=42231128 [https://perma.cc/88C8-REGZ].

113. Jonathan Stempel, *Lawsuit Says Wells Fargo Auto Insurance Charges Were a Fraud*, REUTERS (July 31, 2017, 9:40 AM), https://www.reuters.com/article/us-wells-fargo-insurance-idUSKBN1AG20Q [https://perma.cc/5QR9-VAUN].

114. Donna Borak, *Wells Fargo Fined $1 Billion for Insurance and Mortgage Abuses*, CNN MONEY (Apr. 20, 2018, 10:23 AM), https://money.cnn.com/2018/04/20/news/companies/wells-fargo-regulators-auto-lending-fine/index.html [https://perma.cc/ZFY3-TGE9]; *see infra* notes 352–55 and accompanying text.

those estimates increased to almost three billion.[115]

Fines and settlement costs, of course, do not include the opportunity costs of failing to account for publicness such as the time of employees, managers, and directors that could have been spent on real growth and technological advancements.[116] 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,[117] and members of the House Financial Services Committee demanded Stumpf's presence and resignation (which came to pass).[118] 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."[119] 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.[120] Still, others asked the Department of Labor to investigate whether the company's actions with respect to employees violated the Fair Labor Standards Act.[121] Senator Elizabeth Warren, D. Mass., called for Stumpf to face criminal charges.[122] Further, in March 2019, Tim Sloan testified before the House Committee on Financial Services.[123] Following 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 effective corporate governance and a successful risk management program."[124]

115. Press Release, Josh Shapiro, Att'y Gen., Pennsylvania, Announcement of $575 Million 50-State Settlement with Wells Fargo for Opening Unauthorized Accounts and Charging Consumers for Unnecessary Auto Insurance, Mortgage Fees (Dec. 28, 2018). Out-of-pocket estimates were $2 billion in 2017, rising to almost $3 billion by 2018. *Id.*

116. Social license theorists measure opportunity costs in the context of scandals and conflicts, connecting them to potential savings related to profitability and operational cost savings in effective social license settings. *See, e.g.*, Daniel M. Franks, Rachel Davis, Anthony J. Bebbington, Saleem H. Ali, Deanna Kemp & Martin Scurrah, *Conflict Translates Environmental and Social Risk into Business Costs*, 111 PROC. NAT'L ACAD. SCIS. U.S. AM. 7576, 7576–77 (2014).

117. Blake, *supra* note 112.

118. *Id.*

119. *Id.* (quoting Jeb Hensarling, Chairman, House Financial Service Committee).

120. *Id.*; *New Protections Against Mandatory Arbitration*, CONSUMER FIN. PROT. BUREAU (2017), https://www.consumerfinance.gov/arbitration-rule [https://perma.cc/748Z-6DH5].

121. Blake, *supra* note 112.

122. *Id.*

123. Hugh Son, *Watch Wells Fargo CEO Tim Sloan Testify Before Democrats in Congress*, CNBC (Mar. 12, 2019, 10:49 AM), https://www.cnbc.com/2019/03/12/watch-wells-fargo-ceo-tim-sloan-testify-before-democrats-in-congress.html [https://perma.cc/8FGN-M63N].

124. Rachel Louise Ensign & Andrew Ackerman, *Regulator Slams Wells Fargo After CEO Testifies to Congress*, WALL ST. J. (Mar. 12, 2019, 4:58 PM), https://www.wsj.com/articles/wells-fargo-ceo-faces-aggressive-questions-from-congress-11552408186 [https://perma.cc/8ZMM-8S44]. Sloan resigned

Indeed, the "understandability" or accessibility of the account scandal, in combination with the direct consumer impact, prompted Senator Jon Tester, D. Mont., to respond to Stumpf's congressional testimony with the following: "[Wells Fargo's practices have] done something I've never seen in [ten] years[;] . . . unite[] this committee—and not in a good way."[125] Although "the public expects international financial banks to lose billions in nefarious ways . . . . But 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."[126]

In fact, Wells Fargo risked its credibility in the community and diminished trust in the banking system at a time when the banks were already at a low point in terms of community support.[127] 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 incentive system and sales tactics, and the bank's social license. As a result, it suffered from the process of publicness and encountered considerable substantive publicness in the form of enforcement and pressure for governance changes.

B. UBER

The Uber scandals demonstrate that publicness does not occur only in publicly held companies. Instead, Uber's situation revealed that it, too, was a creature of the public even before its IPO and was also subject to substantive and process publicness when scandals erupted. Indeed, as a result of its scandals, Uber's CEO was ousted and replaced, board membership and governance practices were changed, and corporate choices were scrutinized by the government and media. Not surprisingly, lawsuits against the company piled up.[128]

shortly thereafter. *See* Ensign, *supra* note 105.

125. Aaron Klein, *Why the Wells Scandal Matters So Much*, BROOKINGS (Sept. 21, 2016), https://www.brookings.edu/blog/up-front/2016/09/21/why-the-wells-scandal-matters-so-much [https://perma.cc/S4KM-AMTA] (quoting Senator Tester).

126. McLean, *supra* note 86 (quoting Isaac Boltansky, Director of Policy Research at Compass Point).

127. Justin McCarthy, *Americans' Confidence in Banks Still Languishing Below 30%*, GALLUP (June 16, 2016), http://www.gallup.com/poll/192719/americans-confidence-banks-languishing-below.aspx [https://perma.cc/SB4C-AH43].

128. Megan Rose Dickey, *Uber Faces Another Lawsuit Due to a Lack of Wheelchair-Accessible Rides*, TECHCRUNCH (July 18, 2017, 9:21 AM), https://techcrunch.com/2017/07/18/uber-accessibility-lawsuit-new-york [https://perma.cc/GZ52-4LVC]; Ryan Lawler, *Judge Rules Anthony Levandowski Can Be Called to Testify in Uber/Waymo Trial*, TECHCRUNCH (July 26, 2017, 11:27 AM), https://techcrunch.com/2017/07/26/levandowski-will-be-called-uber-waymo-trial [https://perma.cc/K636-8C4W]; Aarian Marshall, *Uber and Waymo Abruptly Settle for $245 Million*, WIRED (Feb. 9, 2018, 12:17 PM), https://www.wired.com/story/uber-waymo-lawsuit-settlement [https://perma.cc/2AWQ-N86U]; Kayla Epstein, *These Women Say They Were Raped by Fake Uber Drivers. Now They're*

Uber connects drivers to riders through an app at rates usually less than those charged by taxi services.[129] Uber pursued an IPO aiming for a valuation of $120 billion, ultimately falling short.[130] Its growth was "remarkable,"[131] and yet, the company still had no "sustainable or profitable business model."[132] In fact, Uber burned through $8 billion in cash as of August 2017[133] and reported a net loss of $1.2 billion in the third quarter of 2019.[134]

How do we know the 2017 number? It is the result of the process of publicness. At the time some of these numbers were made public, Uber was a private company and, therefore, was not required to release its financials publicly. When faced with a series of scandals, however, Uber made its financials public to argue that "its revenue growth [was] outpacing losses . . . [and] the business [was] on a strong trajectory."[135] Nevertheless, as analysts pointed out, the company was a "cash-burning machine,"[136] facing a series of scandals and controversies, which, in turn, created pressure on the governance structure and business choices. In short, Uber was forced to reexamine its "private" status through the process of publicness and faced substantive publicness as well.

Suing the Company, WASH. POST (Apr. 10, 2019, 1:59 PM), https://www.washingtonpost.com/business/2019/04/10/these-women-say-they-were-raped-by-fake-uber-drivers-now-theyre-suing-company/?utm_term=.7b50cb7c9eae [https://perma.cc/ER82-WR28]; Dara Kerr, *Uber Discriminates Against People in Wheelchairs, Lawsuit Says*, CNET (Feb. 28, 2018, 2:59 PM), https://www.cnet.com/news/uber-discriminates-against-people-in-wheelchairs-lawsuit-says [https://perma.cc/2RMD-L94X]; Kate Conger, *Uber Settles Drivers' Lawsuit for $20 Million*, N.Y. TIMES (Mar. 12, 2019), https://www.nytimes.com/2019/03/12/technology/uber-drivers-lawsuit-settle.html [https://perma.cc/85UW-LC6C].

129. Dan Blystone, *The Story of Uber*, INVESTOPEDIA (Jan. 10, 2021), https://www.investopedia.com/articles/personal-finance/111015/story-uber.asp [https://perma.cc/8PEA-YX3E].

130. Mike Isaac, Michael J. de la Merced & Andrew Ross Sorkin, *How the Promise of a $120 Billion Uber I.P.O. Evaporated*, N.Y. TIMES (May 15, 2019), https://www.nytimes.com/2019/05/15/technology/uber-ipo-price.html [https://perma.cc/5NWN-L3YN] (noting that as of May 2019, Uber had a market capitalization at $69 billion, "officially crowning it as the stock market debut that lost more in dollar terms than any other American initial public offering since 1975").

131. Mark Rogowsky, *Caution Ahead: Uber's Financials Reveal Staggering Growth but Raise Many Questions*, FORBES (Apr. 15, 2017, 4:29 AM), https://www.forbes.com/sites/markrogowsky/2017/04/15/caution-ahead-ubers-financials-reveal-staggering-growth-but-raise-many-questions/#29c6d6b236e6 [https://perma.cc/R2W9-L93V].

132. *Id*.

133. Eric Newcomer, *Uber, Lifting Financial Veil, Says Sales Growth Outpaces Losses*, BLOOMBERG (Apr. 14, 2017, 12:03 PM), https://www.bloomberg.com/news/articles/2017-04-14/embattled-uber-reports-strong-sales-growth-as-losses-continue [https://perma.cc/HRV5-W97H]; Tyler Durden, *Uber Burned Through Almost as Much Money as NASA Last Quarter*, ZERO HEDGE (June 1, 2017, 3:50 PM), https://web.archive.org/web/20170601214045/http://www.zerohedge.com/news/2017-06-01/uber-burned-through-almost-much-money-nasa-last-quarter.

134. Shawn Knight, *Uber Is Still Burning Cash at an Alarming Rate*, TECHSPOT (Nov. 5, 2019, 12:44 PM), https://www.techspot.com/news/82635-uber-burning-cash-alarming-rate.html [https://perma.cc/E4XQ-EB2Q].

135. Newcomer, *supra* note 133.

136. *Id*.

Let us examine the scandals. In 2012, Uber invoked surge pricing in the wake of Hurricane Sandy, doubling fares while public transportation was unavailable.[137] This issue is cited repeatedly as an instance of Uber's social insensitivity and pursuit of its own ends, without regard to the impact on the public.[138] In 2013–2014, Uber was accused of booking fake rides and spamming Lyft drivers.[139] The people canceling rides were Uber employees, including employees paid to recruit drivers. Then, Uber attempted to keep its drivers from working for both Uber and Lyft by falsely claiming that it was illegal to do so.[140] When the truth was publicly revealed, the company backtracked.[141]

Next, an Uber executive suggested that the company hire opposition researchers and journalists to attack the personal lives and families of reporters who wrote "unflattering" stories about the company.[142] Apparently, the executive made this comment in response to an article by a female reporter accusing Uber of sexism and misogyny.[143] When the executive's suggestion was made public, it contributed to pressure on the company to step up its reaction to sexism and other cultural deficiencies.

Then, there was 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.[144] Uber was "spying on celebrities"

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137. Shara Tibken, *Storm Surge: Uber Just Doubled Car Service Pricing in NYC*, CNET (Nov. 1, 2012, 10:17 AM), https://www.cnet.com/news/storm-surge-uber-just-doubled-car-service-pricing-in-nyc [https://perma.cc/P6E5-KTUJ].

138. *See, e.g.*, Mike Isaac, *Uber's C.E.O. Plays with Fire*, N.Y. TIMES (Apr. 23, 2017), https://www.nytimes.com/2017/04/23/technology/travis-kalanick-pushes-uber-and-himself-to-the-precipice.html?mcubz=1 [https://perma.cc/A6BA-HVTR]; Tim Sullivan, *What Economists Don't Get About Uber's Surge Pricing*, HARV. BUS. REV. (Dec. 17, 2014), https://hbr.org/2014/12/what-economists-dont-get-about-ubers-surge-pricing [https://perma.cc/5GDG-T76N]; Roxanne Bauer, *The Things We Do: Why People Hate Uber's Surge Pricing So Much*, WORLD BANK (May 10, 2016), https://blogs.worldbank.org/publicsphere/ic4d/things-we-do-why-people-hate-uber-s-surge-pricing-so-much [https://perma.cc/T7RN-R2YZ].

139. Erica Fink, *Uber's Dirty Tricks Quantified: Rival Counts 5,560 Canceled Rides*, CNN MONEY (Aug. 12, 2014, 3:11 PM), http://money.cnn.com/2014/08/11/technology/uber-fake-ride-requests-lyft/index.html [https://perma.cc/Y24P-4BPV].

140. *Id.*

141. Erica Fink, *Uber Threatens Drivers: Do Not Work for Lyft*, CNN MONEY (Aug. 5, 2014, 4:26 PM), http://money.cnn.com/2014/08/04/technology/uber-lyft/index.html [https://perma.cc/U3SF-PY27].

142. Gail Sullivan, *Uber Exec Proposed Publishing Journalists' Personal Secrets to Fight Bad Press*, WASH. POST (Nov. 18, 2014, 5:13 AM), https://www.washingtonpost.com/news/morning-mix/wp/2014/11/18/uber-exec-proposed-publishing-journalists-personal-secrets-to-fight-bad-press/?utm_term=.c8be6753056e [https://perma.cc/RW58-YKYT].

143. The article was a response to Ubers' promotional deal in France that paired riders with "hot chick" drivers, with photos of women in lingerie. *Id.*

144. Kashmir Hill, *'God View': Uber Allegedly Stalked Users for Party-Goers' Viewing Pleasure*, FORBES (Oct. 3, 2014, 11:32 AM), https://www.forbes.com/sites/kashmirhill/2014/10/03/god-view-uber-allegedly-stalked-users-for-party-goers-viewing-pleasure/#5ae389963141 [https://perma.cc/833A-XZSA] (quoting entrepreneur Peter Sims).

and the media, including Beyoncé and reporters.[145] The spying incited outrage among users. Indeed, one entrepreneur tracked with God View described "the privacy violation as symptomatic of Uber's wider arrogance and dirty business practices."[146] In 2016, after revelations from a whistleblower, Uber 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 genera[l]."[147]

In 2017, many of the problems escalated and became public. Consider the launch of Uber's self-driving vehicle pilot program without permits (legal license). On the first day of the California program, vehicles ran red lights and created hazards in bike lanes.[148] The company's response was to blame human error, but *The New York Times* reported the mistakes were attributable to the self-driving technology.[149] Even though Uber was forced to remove the cars from the road in California,[150] it relaunched in Arizona with similar issues.[151]

Additionally, Waymo, a unit of Google parent Alphabet, sued Uber, accusing it and Anthony Levandowski, the engineer in charge of the self-driving program, of trade-secret theft.[152] The claim was that Levandowski stole confidential documents when he left Waymo for Uber.[153] The case settled abruptly in 2018 with Uber agreeing to refrain from using Waymo hardware or software in Uber's self-driving cars. Additionally, Waymo

145. Alex Hern, *Uber Employees 'Spied on Ex-Partners, Politicians and Beyoncé,'* GUARDIAN, (Dec. 13, 2016, 7:17 AM), https://www.theguardian.com/technology/2016/dec/13/uber-employees-spying-ex-partners-politicians-beyonce [https://perma.cc/3YA4-MKCS].

146. Hill, *supra* note 144.

147. Chris Welch, *Uber Will Pay $20,000 Fine in Settlement Over 'God View' Tracking*, VERGE (Jan. 6, 2016, 6:43 PM), https://www.theverge.com/2016/1/6/10726004/uber-god-mode-settlement-fine [https://perma.cc/3CNV-VS64]. It also paid a $20,000 fine. *Id*.

148. Sam Levin, *Uber's Scandals, Blunders and PR Disasters: The Full List*, GUARDIAN (June 27, 2017, 7:14 PM), https://www.theguardian.com/technology/2017/jun/18/uber-travis-kalanick-scandal-pr-disaster-timeline [https://perma.cc/755J-GLY5].

149. *Id*.; Mike Isaac & Daisuke Wakabayashi, *A Lawsuit Against Uber Highlights the Rush to Conquer Driverless Cars*, N.Y. TIMES (Feb. 24, 2017), https://www.nytimes.com/2017/02/24/technology/anthony-levandowski-waymo-uber-google-lawsuit.html [https://perma.cc/NCX6-XLNC].

150. Levin, *supra* note 148.

151. Andrew Liptak, *One of Uber's Self-Driving Cars Just Crashed in Arizona*, VERGE (Mar. 25, 2017, 9:20 AM), https://www.theverge.com/2017/3/25/15058978/uber-self-driving-car-crash-arizona [https://web.archive.org/web/20201112014943/http://www.theverge.com/2017/3/25/15058978/uber-self-driving-car-crash-arizona].

152. Tess Townsend, *Alphabet Says Uber Is Engaging in a Cover-Up*, VOX (June 28, 2017, 9:37 PM), https://www.vox.com/2017/6/28/15891136/alphabet-alleges-uber-engaging-in-coverup-levandowski-trade-secret-theft [https://web.archive.org/web/20201112030710/https://www.vox.com/2017/6/28/15891136/alphabet-alleges-uber-engaging-in-coverup-levandowski-trade-secret-theft].

153. *Id*.

received 0.34% equity in Uber as part of the settlement agreement.[154] In January 2020, Waymo secured a $128 million judgment against the employees who left Waymo for Uber,[155] and a jury indicted Levandowski "on theft of trade secret charges."[156]

Uber also settled a false advertising claim for $25 million in 2017.[157] Its customers claimed false advertising with respect to the customer safety policy and fees for tolls and airport drop-offs.[158] The company also paid $28.5 million to settle class actions with similar allegations.[159] Moreover, Uber faces close to $508 million in costs following the passage of California's Assembly Bill 5, requiring it to classify drivers as employees, as opposed to independent contractors.[160] This bill followed another class action by 160,000 drivers claiming employee status.[161] So far, the dollar value of the settlements is relatively small, but as the process of publicness unfolds, more cases and settlements will occur.

Greyball, which attracted government enforcement interest, is another example of investigations tied to Uber's choices. 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.[162] The program allowed Uber to identify law enforcement officials who were attempting to catch Uber's illegal operations in "markets where its service[s] [were] not permitted" by using the application to arrange rides.[163] When Uber thought it had identified enforcement officials hailing rides, it would provide them with a fake ghost-car version of the app, and no driver would be

154. Marshall, *supra* note 128.

155. Paresh Dave, *Waymo Secures Bigger Award Against Workers Who Went to Rival Uber*, REUTERS (Jan. 10, 2020, 1:35 AM), https://www.reuters.com/article/us-waymo-uber/waymo-secures-bigger-award-against-workers-who-went-to-rival-uber-idUSKBN1Z904D [https://perma.cc/3EM2-PSQ7?type=image].

156. Press Release, Dep't of Just., U.S. Atty's Off., N. Dist. of California, Former Uber Self-Driving Car Executive Indicted for Alleged Theft of Trade Secrets from Google (Aug. 27, 2019).

157. Tracey Lien, *Uber Agrees to Settlement of Up to $25 Million in Misleading-Advertising Suit*, L.A. TIMES (Apr. 7, 2016, 4:08 PM), http://www.latimes.com/business/technology/la-fi-tn-0408-uber-settlement-story.html [https://web.archive.org/web/20210207232421/https://www.latimes.com/business/technology/la-fi-tn-0408-uber-settlement-story.html].

158. *Id.*

159. *Id.*

160. Alison Griswold, *How Much It Would Cost Uber and Lyft if Drivers Were Employees*, QUARTZ (June 14, 2019), https://qz.com/1643263/the-cost-to-uber-and-lyft-if-drivers-were-employees [https://perma.cc/KXP5-HR4A].

161. Lien, *supra* note 157.

162. Mike Isaac, *How Uber Deceives the Authorities Worldwide*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html [https://perma.cc/6PLQ-UE7Q].

163. Mike Isaac, *Uber Faces Federal Inquiry Over Use of Greyball Tool to Evade Authorities*, N.Y. TIMES (May 4, 2017), https://www.nytimes.com/2017/05/04/technology/uber-federal-inquiry-software-greyball.html?mcubz=1 [https://perma.cc/3CCT-F6LE].

dispatched.[164] In doing so, it was able to evade both enforcement and the costs of enforcement, including payments for impounded cars and tickets issued to drivers operating illegally.[165] The result was a Department of Justice investigation into Uber's use of Greyball.[166]

Next, Travis Kalanick, Uber's CEO at the time, was caught on camera yelling at a driver.[167] Why? Because the driver asked him about decreased fares.[168] 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."[169] This sort of statement, unthinkable in a publicly held company, was 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.[170]

In September 2017, the company was featured in yet another highly publicized controversy. The city of London decided not to renew Uber's private hire vehicle license, and the new CEO, Dara Khosrowshahi, released a public apology letter in the *Evening Standard*, acknowledging that Uber needed to change its practices and run the business with "humility, integrity and passion."[171] This language represents a sharp change from Kalanick's brash, public flaunting of regulation—and an understanding that the company's legal license, and not just its social license, to operate was in jeopardy. Uber challenged the ban and was allowed to continue service, but

164. *Id*.

165. *Id.*

166. *Id*.

167. Eric Newcomer, *In Video, Uber CEO Argues with Driver Over Falling Fares*, BLOOMBERG (Mar. 1, 2017, 2:30 AM), https://www.bloomberg.com/news/articles/2017-02-28/in-video-uber-ceo-argues-with-driver-over-falling-fares [https://perma.cc/5AMT-NUD4?type=image]; Julia Carrie Wong, *Uber CEO Travis Kalanick Caught on Video Arguing with Driver About Fares*, GUARDIAN (Mar. 1, 2017, 2:29 AM), https://www.theguardian.com/technology/2017/feb/28/uber-ceo-travis-kalanick-driver-argument-video-fare-prices [https://perma.cc/X8R4-AXXB].

168. Steven Overly, *What Uber Drivers Think About CEO Travis Kalanick Yelling at One of Their Own*, WASH. POST (Mar. 1, 2017, 3:55 PM), https://www.washingtonpost.com/news/innovations/wp/2017/03/01/what-uber-drivers-think-about-ceo-travis-kalanick-yelling-at-one-of-their-own/?utm_term=.64f146ecfba6 [https://perma.cc/7P8C-QDTK].

169. Travis Kalanick, *A Profound Apology*, UBER (Mar. 1, 2017), https://newsroom.uber.com/a-profound-apology [https://perma.cc/2F3V-JFBG].

170. *See, e.g.*, Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 385–86 (2017).

171. Pippa Crerar, *Uber Boss Dara Khosrowshahi Says Sorry and Promises to 'Make Things Right' for Londoners…As He Pledges to Fight TfL Ban*, EVENING STANDARD (Sept. 25, 2017), https://www.standard.co.uk/news/transport/uber-boss-says-sorry-to-londoners-and-pledges-to-fight-tfl-licence-ban-a3642631.html [https://perma.cc/6CV5-QKQD] (quoting Dara Khosrowshahi).

was subjected to regular reporting requirements.[172]

One of the biggest hits to Uber occurred in 2017 when Susan Fowler, a former employee, published a blog with details of sexual harassment and gender bias at the company.[173] The blog included a description of messages from her manager about his open relationship and desire to find women with whom to have sex.[174] According to Fowler, Uber's Human Resources personnel responded to her report about the situation by stating that it was the high-performing manager's first offense, before focusing on Fowler's "option[s]," neither of which addressed the actions of her harasser.[175] According to the blog, Fowler later learned human resources knew the manager had pursued other women as well.[176] This blog was the catalyst for at least two internal investigations, eventual changes in the board structure, and Kalanick's resignation.[177]

Fowler's blog post prompted an investigation by Uber's board of directors.[178] The investigation involved over two hundred interviews, a review of over three million documents, and, in addition to the team of lawyers, a consulting firm to assist in collecting information from a broad group of employees.[179] In short, this investigation and the resulting report (the "Holder Report") were not cheap.

Although Uber was a private company at the time, the process of

172. Gwyn Topham, *Uber Loses London License After TfL Finds Drivers Faked Identity*, GUARDIAN (Nov. 25, 2019, 7:38 AM), https://www.theguardian.com/technology/2019/nov/25/uber-loses-licence-london-tfl [https://perma.cc/QG2H-6L4P]. Then, in 2019, it was suspended again, with authorities arguing that Uber's app allowed banned drivers to use valid driver accounts to continue working, thereby jeopardizing rider safety. *Id*.

173. Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN J. FOWLER (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber [https://perma.cc/WAN2-HXT8].

174. *Id*.

175. *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*.

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

177. *See* Mike Isaac, *Inside Travis Kalanick's Resignation as Uber's C.E.O.*, N.Y. TIMES (June 21, 2017), https://www.nytimes.com/2017/06/21/technology/uber-travis-kalanick-final-hours.html?mcubz=1 [https://perma.cc/6ENW-HVNH].

178. Kara Swisher, *Uber Has Hired HBS's Frances Frei as a Top Leadership and Strategy Exec to Fix Its Management Mess*, VOX (June 5, 2017, 4:21 PM), https://www.vox.com/2017/6/5/15741982/uber-hires-hbs-frances-frei-leadership-strategy-exec-fix-management-mess [https://web.archive.org/web/20210207232456/https://www.vox.com/2017/6/5/15741982/uber-hires-hbs-frances-frei-leadership-strategy-exec-fix-management-mess].

179. *See generally* ERIC HOLDER, COVINGTON RECOMMENDATIONS FOR UBER (2017), https://www.cnbc.com/2017/06/13/eric-holder-uber-report-full-text.html [https://perma.cc/4W2R-ZCB6].

publicness, the desire to launch an IPO, and the need to show it was open to change, forced it to make the Holder Report public.[180] The Holder Report contained a series of recommendations aimed at changing the company's culture and developing trust, transformation, and accountability.[181] These proposals included: 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.[182] A well-functioning company would already have 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, the Holder Report called for enhanced board oversight, with an independent chair, an oversight committee, an improved compensation program, and an increase in internal controls at the board level and beyond.[183] These are the same types of substantive publicness that Sarbanes-Oxley and Dodd-Frank imposed on publicly traded companies as part of the publicness inherent in the social control of and access to capital that the federal securities laws prescribe.[184] But, as a result of the process of publicness, they became part of Uber's governance—despite its "private" status at the time.

Uber's board was not atypical for a private, venture-backed company where the focus was capital raising and sustaining the business long enough to exit with a profit for the owners. 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. The process of publicness forced Uber to operate more like a publicly held company and acknowledge its failures and the need to attend to its social license. These are all forms of substantive publicness.

In addition, following the board's acceptance of the Holder Report,

180. *See* Meghann Farnsworth, *Read the Full Investigation into Uber's Troubled Culture and Management*, VOX (June 13, 2017, 2:41 PM), https://www.vox.com/2017/6/13/15794412/read-entire-investigation-uber-culture-management-ethics-eric-holder [https://web.archive.org/web/20210208003846/https://www.vox.com/2017/6/13/15794412/read-entire-investigation-uber-culture-management-ethics-eric-holder].

181. HOLDER, *supra* note 179, at 1.

182. *Id.* at 2.

183. *Id.* at 3.

184. *See generally* Thompson & Langevoort, *Redrawing*, *supra* note 12; Langevoort & Thompson, *"Publicness*,*" supra* note 12.

Kalanick stepped down as CEO[185]—after previously saying he would take only a leave of absence. Kalanick was not alone. Uber, like Wells Fargo, lost a string of its executives due to its scandals. Levandowski was fired.[186] Jeff Jones, President of Ridesharing, resigned after only a few months in his role.[187] Rachel Whetstone, SVP of Communications and Policy, resigned.[188] Brian McClendon, the head of mapping, also resigned, and so did Raffi Krikorian, one of the self-driving leaders.[189] Amit Singhal, SVP of Engineering, left.[190] Ed Baker, the VP of Product and Growth, left.[191] And, so did Gary Marcus, Head of Uber AI Labs;[192] Sherif Marakby, VP of Global Vehicle Programs;[193] Josh Mohrer, General Manager of New York City;[194] Gautam Gupta, Head of Finance;[195] Eric Alexander, Head of Asia

185. Greg Bensinger, *Uber CEO Travis Kalanick Quits as Investors Revolt*, WALL ST. J. (June 21, 2017, 4:39 PM), https://www.wsj.com/articles/uber-ceo-travis-kalanick-resigns-1498023559 [https://perma.cc/C82H-23V6].

186. Mike Isaac & Daisuke Wakabayashi, *Uber Fires Former Google Engineer at Heart of Self-Driving Dispute*, N.Y. TIMES (May 30, 2017), https://www.nytimes.com/2017/05/30/technology/uber-anthony-levandowski.html?mcubz=1 [https://perma.cc/B4K4-FWHP].

187. Kara Swisher & Johana Bhuiyan, *Uber President Jeff Jones Is Quitting, Citing Differences Over 'Beliefs and Approach to Leadership,'* VOX (Mar. 19, 2017, 4:33 PM), https://www.vox.com/2017/3/19/14976110/uber-president-jeff-jones-quits [https://perma.cc/5BTM-JKFM].

188. Kara Swisher, *Uber's Head of Communications, Rachel Whetstone, Is Leaving*, VOX (Apr. 11, 2017, 6:06 PM), https://www.vox.com/2017/4/11/15265176/uber-communications-head-rachel-whetstone-departs [https://web.archive.org/web/20210207232459/https://www.vox.com/2017/4/11/15265176/uber-communications-head-rachel-whetstone-departs].

189. Johana Bhuiyan, *Uber's Vice President of Mapping, Brian McClendon, Has Resigned*, VOX (Mar. 20, 2017, 12:45 PM), https://www.vox.com/2017/3/20/14982926/uber-mapping-brian-mcclendon-steps-down [https://web.archive.org/web/20210207232500/https://www.vox.com/2017/3/20/14982926/uber-mapping-brian-mcclendon-steps-down]; Johana Bhuiyan, *One of Uber's Top Self-Driving Engineers, Raffi Krikorian, Is Stepping Down*, VOX (Feb. 23, 2017, 7:41 PM), https://www.vox.com/2017/2/23/14708752/uber-self-driving-engineer-raffi-krikorian-leaving [https://web.archive.org/web/20210207232500/https://www.vox.com/2017/2/23/14708752/uber-self-driving-engineer-raffi-krikorian-leaving].

190. Kara Swisher, *Uber's SVP of Engineering Is Out After He Did Not Disclose He Left Google in a Dispute Over a Sexual Harassment Allegation*, VOX (Feb. 27, 2017, 2:32 PM), https://www.vox.com/2017/2/27/14745360/amit-singhal-google-uber [https://web.archive.org/web/20210207232459/https://www.vox.com/2017/2/27/14745360/amit-singhal-google-uber].

191. Kara Swisher & Johana Bhuiyan, *Uber's VP of Product and Growth Ed Baker Has Resigned*, VOX (Mar. 3, 2017, 5:09 PM), https://www.vox.com/2017/3/3/14805384/uber-ed-baker-resigns-travis-kalanick [https://perma.cc/X5LW-UH7S].

192. Johana Bhuiyan, *Uber's New Head of Its AI Labs Has Stepped Down from His Role*, VOX (Mar. 8, 2017, 7:48 PM), https://www.vox.com/2017/3/8/14863560/uber-ai-gary-marcus-geometric-intelligence [https://perma.cc/LJG2-RRDP].

193. Rob Price, *Uber's VP of Global Vehicle Programs Is the Latest Exec to Quit the Embattled Company*, BUS. INSIDER (Apr. 18, 2017, 4:10 AM), http://www.businessinsider.com/uber-vp-global-vehicles-programs-sherif-marakby-quits-executive-exodus-2017-4 [https://perma.cc/W4ZW-R5EA?type=image].

194. Biz Carson, *Uber's Controversial NYC Manager Is Leaving the Company*, BUS. INSIDER (May 30, 2017, 6:05 PM), http://www.businessinsider.com/uber-nyc-gm-josh-mohrer-leaves-for-tusk-ventures-2017-5 [https://perma.cc/K9Z8-E982].

195. Johana Bhuiyan, *Uber's Head of Finance Has Left the Company*, VOX (May 31, 2017, 8:05 PM), https://www.vox.com/2017/5/31/15722452/uber-finance-gautam-gupta-departure [https://w

Business;[196] Emil Michael, SVP of Business; and Sallie Yoo, General Counsel.[197]

In addition, the company announced it had fired twenty employees in response to a separate investigative report produced by the law firm Perkins Coie on harassment issues (the "Perkins Coie Report").[198] This Report was also initiated in response to Fowler's blog.[199] The Report stated 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.[200] As with the governance issues addressed in the Holder Report, Uber was forced to discuss its employment processes in an attempt to justify them to the public.[201]

Despite this intense scrutiny, in the midst of the Holder and Perkins Coie Reports and discussions, a member of the board made a sexist comment.[202] The statement occurred when the only female member of the board at the time, Arianna Huffington, noted that another woman was joining the board.[203] A male investor and board member responded, saying there would be "more talking" on the board as a result.[204] The comment was rapidly released to the press, the process of publicness ensued, and the board member who made the comment apologized and resigned.[205]

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eb.archive.org/web/20210207232530/https://www.vox.com/2017/5/31/15722452/uber-finance-gautam-gupta-departure].

196. Mike Isaac, *Uber Fires Executive Over Handling of Rape Investigation in India*, N.Y. TIMES (June 7, 2017), https://www.nytimes.com/2017/06/07/technology/uber-fires-executive.html [https://perma.cc/5H3D-LB6M].

197. Johana Bhuiyan, *Uber's SVP of Business Emil Michael Has Left the Company*, VOX (June 12, 2017, 12:27 PM), https://www.vox.com/2017/6/12/15783204/uber-emil-michael-step-down-resign [https://perma.cc/LHP3-SHXC]; Douglas MacMillan & Greg Bensinger, *Uber's Legal Chief Salle Yoo Is Resigning*, WALL ST. J. (Sept. 12, 2017, 9:54 PM), https://www.wsj.com/articles/ubers-legal-chief-salle-yoo-is-resigning-1505263862 [https://perma.cc/RV8R-WEW9].

198. Sara Ashley O'Brien, *Uber Fires 20 Employees Over Sexual Harassment Probe*, CNN MONEY (June 6, 2017, 9:36 PM), http://money.cnn.com/2017/06/06/technology/business/uber-fires-sexual-harassment/index.html?iid=EL [https://perma.cc/84VU-F3UA].

199. *Id.*

200. *Id.*

201. Megan Rose Dickey, *Inside Uber's New Approach to Employee Performance Reviews*, TECHCRUNCH (Aug. 1, 2017, 1:37 PM), https://techcrunch.com/2017/08/01/inside-ubers-new-approach-to-employee-performance-reviews [https://perma.cc/T28R-NRXG].

202. Biz Carson, *An Uber Board Member Made a Sexist Joke in the Middle of the Presentation on How to Fix Uber's Sexist Culture*, BUS. INSIDER (June 13, 2017, 8:48 PM), http://www.businessinsider.com/uber-david-bonderman-jokes-theres-more-talking-when-women-join-boards-2017-6 [https://perma.cc/46FQ-JWQY].

203. *Id.*

204. *Id.*

205. Heather Somerville, *Uber Director David Bonderman Resigns from Board Following Comment About Women*, REUTERS (June 13, 2017, 7:48 PM), https://www.reuters.com/article/us-uber-bonderman-idUSKBN195053 [https://web.archive.org/web/20201112015214/https://www.reuters.com/article/us-uber-bonderman-idUSKBN195053].

As these examples reveal, the publicness attendant to Uber's numerous scandals resulted in the loss of the privilege of keeping its decisions and processes "private." Instead, the employees and then the company made internal debates, employment matters, and financials public. Indeed, the aforementioned blog post also detailed wasted resources, withheld business-critical information, abandoned projects, and "unrelenting chaos."[206] The blog even related a story about Uber initially deciding to buy leather jackets for all of Uber's engineers, but then subsequently deciding to buy them only for the men.[207] The justification? There were so few women left in the department that the discount for women's jackets was no longer available.[208] This story seems like a parody in light of issues being raised about the company more broadly, but it was emblematic of the larger culture at Uber.

Importantly, from a process of publicness perspective, the point is that the leather-jacket story became public. The public learned about the depth of the cultural issues that human resources and others were ignoring, and it also learned that employees were willing to use the publicness process to expose Uber's issues. In the words of a column from *Vox*, the former employee's blog "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."[209] Two venture capitalists agreed and hand-delivered a letter to Travis Kalanick asking him to resign as CEO immediately.[210] The contents of that letter also became public.[211]

As a result of the scandals and the growing level of scrutiny of Uber, the company was 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.[212] Names of potential CEOs were vetted not only by the board, but also by the media.[213] The fractured nature

206. Fowler, *supra* note 173.
207. *Id.*
208. *Id.*
209. Kara Swisher, *With Her Blog Post About Toxic Bro-Culture at Uber, Susan Fowler Proved that One Person Can Make a Difference*, VOX (June 21, 2017, 7:37 PM), https://www.vox.com/2017/6/21/15844852/uber-toxic-bro-company-culture-susan-fowler-blog-post [https://web.archive.org/web/20201210193655/https://www.vox.com/2017/6/21/15844852/uber-toxic-bro-company-culture-susan-fowler-blog-post].
210. Bloomberg, *Read the Investor Letter that Gave Uber CEO Travis Kalanick a Kick Toward the Door*, FORTUNE (Jan. 28, 2019), http://fortune.com/2019/01/28/uber-ceo-travis-kalanick-lawsuit-dara-khosrowshahi-venture-capitalists-letter [https://perma.cc/9PWP-5W7R?type=image]. Kalanick stepped down from the board effective December 31, 2019. Eliot Brown, *Uber Co-Founder Travis Kalanick Departs Board, Sells All His Shares*, WALL ST. J. (Dec. 24, 2019, 1:10 PM), https://www.wsj.com/articles/uber-co-founder-travis-kalanick-to-depart-companys-board-11577196747 [https://perma.cc/XXZ3-Q5YY].
211. Bloomberg, *supra* note 210.
212. *See* Swisher, *supra* note 209.
213. *See id.*; Laurie Segall, Sara Ashley O'Brien & Kaya Yurieff, *Uber Taps Expedia's Dara*

of the board became a topic of conversation.[214] Indeed, one editorial compared the press leaks at Uber to those of the White House, concluding that the White House press relations were tighter than Uber's.[215] These leaks and the ensuing drama were bad for investors and for business. They revealed insiders using outsiders (the media) to make governance changes. In essence, insiders deployed 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 time.[216] The scandals and business model ("ask forgiveness, not permission") converged, and regulatory and other actions increased. Investigations blossomed internally, externally, and even abroad.[217] 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 some resulted in costly settlement agreements.[218] In short, Uber is a textbook example of how process publicness leads to substantive publicness.

In addition, Uber's competition gained traction in the process—no small matter, given Uber's burn rate.[219] Lyft is Uber's biggest competitor and, although Uber still has the largest percentage of travelers, Lyft's share has grown.[220] Further, even though the average Lyft ride was less expensive

Khosrowshahi as CEO, CNN MONEY (Aug. 28, 2017, 6:37 AM), http://money.cnn.com/2017/08/27/technology/new-uber-ceo [https://perma.cc/T56J-L3EM].

214. Swisher, *supra* note 209.

215. Kara Swisher, *After Meg Whitman's Exit, Uber's CEO Search Is Down to Only Male Candidates—as Its Board Struggles and Travis Kalanick Meddles*, VOX (July 30, 2017, 11:09 PM), https://www.vox.com/2017/7/30/16066332/uber-ceo-search-travis-kalanick-meg-whitman-steve-jobs-board [http://web.archive.org/web/20190430204411/https://www.vox.com/2017/7/30/16066332/uber-ceo-search-travis-kalanick-meg-whitman-steve-jobs-board].

216. *See, e.g.*, Pollman & Barry, *supra* note 170.

217. *See* Isaac, *supra* note 162; Isaac, *supra* note 163.

218. *See supra* note 100 and accompanying text.

219. *See supra* notes 133–34 and accompanying text.

220. In February of 2015, Uber captured 90% of the market. Michal Lev-Ram, *How Lyft Could Defeat Uber*, FORTUNE (July 19, 2017, 3:30 AM), http://fortune.com/2017/07/19/uber-vs-lyft-race [https://perma.cc/G5Z4-QB7N]; Rani Molla, *Lyft Has Eaten into Uber's U.S. Market Share, New Data Suggests*, VOX (Dec. 12, 2018, 11:36 AM), https://www.vox.com/2018/12/12/18134882/lyft-uber-ride-car-market-share [https://web.archive.org/web/20210208010700/https://www.vox.com/2018/12/12/18134882/lyft-uber-ride-car-market-share]. As of 2019, Lyft had 29.2% of the market, up 3% from 2017 and significantly from 2015. Liyin Yeo, *Uber vs. Lyft: Who's Tops in the Battle of U.S. Rideshare*

than the average Uber ride,[221] the companies were seen as competitive on pricing and reliability. Thus, the competition was largely in the zone of "brand and experience."[222] Lyft drivers made more money and reported being more satisfied than Uber drivers,[223] and at least one company announced that, in light of the ethical issues at Uber, it would not reimburse employees who used Uber for business travel.[224] Indeed, delete-the-app boycotts grew throughout 2017.[225] In cities in which both Lyft and Uber were well established, these boycotts were problematic for Uber.[226] In short, the scandals, failures, and chaos at Uber, in combination with the process of publicness, increased Lyft's business opportunities.[227]

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 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 was just one of many companies flouting regulations and the rule of law. In his view, Uber suffered from a failure of oversight from investors, directors, partners, and anyone else—in part because it was

Companies, SECOND MEASURE (Mar. 16, 2021), https://secondmeasure.com/datapoints/rideshare-industry-overview [https://web.archive.org/web/20210323231322/https://secondmeasure.com/datapoints/rideshare-industry-overview]. Lyft's growth outpaced Uber's, especially on the West Coast where Lyft's market shares are among its largest. *See* Lev-Ram, *supra* note 220.

221. Andrew Sheivachman, *Uber's Growth Is Stalling Among U.S. Business Travelers*, SKIFT (Apr. 20, 2017, 3:00 AM), https://skift.com/2017/04/20/ubers-growth-is-stalling-among-u-s-business-travelers [https://perma.cc/TYJ8-YS5Y].

222. Lev-Ram, *supra* note 220.

223. Matt McFarland, *As Uber Endures Scandals, Lyft Capitalizes on an Opportunity*, CNN MONEY (June 12, 2017, 5:11 PM), http://money.cnn.com/2017/06/12/technology/startups/lyft-uber-rivals/index.html?iid=EL [https://perma.cc/WE3Z-WTDR]. As a result, Uber is now attempting to make changes to retain its drivers. Sara Ashley O'Brien, *Uber Seeks to Butter Up Its Drivers*, CNN MONEY (July 25, 2017, 5:02 PM), http://money.cnn.com/2017/07/25/technology/business/uber-driver-support/index.html?iid=EL [https://perma.cc/874Z-6BRX].

224. Nico Grant, *Uber's Culture Led One Tech Company to Boycott It on Moral Grounds*, BLOOMBERG (June 13, 2017, 1:30 PM), https://www.bloomberg.com/news/articles/2017-06-13/uber-s-culture-led-tech-company-to-boycott-it-on-moral-grounds [https://perma.cc/FFK2-XVL2?type=image].

225. 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 [https://web.archive.org/web/20210217105310/https://www.theverge.com/2017/2/2/14493760/delete-uber-protest-donald-trump-accounts-deleted].

226. Alana Semuels, *Why #DeleteUber and Other Boycotts Matter*, ATLANTIC (Feb. 22, 2017), https://www.theatlantic.com/business/archive/2017/02/why-deleteuber-and-other-boycotts-matter/517416 [https://perma.cc/KGW6-RXXN]; Henry Grabar, *The Uber Boycott and Lyft's ACLU Donation Herald a New Era of Corporate Politics*, SLATE (Jan. 30, 2017, 5:46 PM), https://slate.com/business/2017/01/the-uber-boycott-and-lyfts-aclu-donation-herald-a-new-era-of-corporate-politics.html [https://perma.cc/Y5D6-JP4M]; *Plus-Size Model Tess Holliday Boycotting Uber After Their Driver Fat-Shamed Her*, FOX NEWS (Apr. 20, 2017), http://www.foxnews.com/lifestyle/2017/04/20/plus-size-model-tess-holliday-boycotting-uber-after-their-driver-fat-shamed-her.html [https://perma.cc/M9SN-V8M4].

227. Lev-Ram, *supra* note 220.

privately held and not subject to the *ex ante* regulatory, substantive form of publicness.[228] As this case study reveals, Uber's board lacked an understanding of both publicness and social license. As a result, it faced an array of enforcement actions and litigation, both of which are forms of *ex post* publicness.

III. THE THEORY OF SOCIAL LICENSE

The lessons to be learned from both the Wells Fargo and Uber scandals, as well as 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 strategy, 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 "fail[ed] to frame the issue appropriately."[229] Terminations were not assessed in the context of customer harm. Instead, the focus was only on false fees or charges and not on the associated misuse of personal information or reputational risk to the bank.[230] In short, the problems were viewed 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, rather than publicness, risk management, corporate sustainability, or relationships—the zone of social license. The same is true of Uber, its board, and its officers.

Social license theory 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, it is a tool for cost-benefit analysis that deepens appreciation of the nature of costs and promotes a bilateral approach to understanding a company's role and relationship with its communities and stakeholders.[231] Social license can also play a gap-filling role for fiduciary

228. Farhad Manjoo, *Uber's Lesson: Silicon Valley's Start-Up Machine Needs Fixing*, N.Y. TIMES (June 21, 2017), https://www.nytimes.com/2017/06/21/technology/uber-start-up-lessons.html [https://perma.cc/369G-NLMW].

229. 2017 INDEPENDENT REPORT, *supra* note 55, at 32.

230. *Id.*

231. Stakeholder theory has its origins in Professor Merrick Dodd's 1932 article. Dodd, Jr., *supra* note 18; *see also* Allen, *supra* note 18; Blair & Stout, *supra* note 18; Bone, *supra* note 14; Lee, *supra* note 18; Horrigan, *supra* note 18. *See generally* John M. Conley & Cynthia A. Williams, *Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1 (2005); STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 26–39 (2002) (discussing agents, costs, and theory of firm); Stephen M. Bainbridge, *In*

duties.

The term "social license to operate" is frequently used in extractive industries.[232] It is a term that is easier to define in the negative, how a company loses it, than in the positive, how a company earns it. But, as the use of the term and its implications have grown, so too have models for conceptualizing social license and understanding its value as an analytical tool.[233] 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.[234] As this part of 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 the greater community and outside stakeholders.[235] As noted in the BlackRock letter and Business Roundtable

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, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES (Sept. 13, 1970), https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html [https://perma.cc/CCS6-YCWE].

232. PHILIPPE HANNA, THE SOCIAL IMPACTS OF LARGE PROJECTS ON INDIGENOUS PEOPLES: PROCEDURES, PROCESSES, AND PROTESTS 10 (2016).

233. *See, e.g.*, BOUTILIER & THOMSON, *supra* note 16.

234. Demuijnck & Fasterling, *supra* note 16. 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, 623–24 (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 . . . [which] ordinary people can in some sense appropriate as their own, qua members of the public." Jeremy 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*, *in* FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA 79–89 (Ulrich Fastenrath et al. eds., 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. 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." Deborah E. Rupp & Cynthia A. Williams, *The Efficacy of Regulation as a Function of Psychological Fit: Reexamining the Hard Law/Soft Law Continuum*, 12 THEORETICAL INQUIRIES L. 581, 585 (2011).

235. 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

Statement, businesses are more than just economic institutions; they are also social institutions.[236] As a result, they are subject to more than just legal oversight. They face public accountability and, at times, public control and thus need to attend to social license.[237]

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. It 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, shutdowns, negative publicity, and the increases in regulation that are a hallmark of publicness.[238]

cultural spaces form this network of relationships, and interactions between parties within the network form the basis of its power. *See generally* Pierre Bourdieu, *The Forms of Capital*, *in* HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241–58 (J.G. Richardson ed., 1986); Janine Nahapiet & Sumantra Ghoshal, *Social Capital, Intellectual Capital, and the Organizational Advantage*, 23 ACAD. MGMT. REV. 242 (1998); James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOCIO. 95 (1988); Amitai Etzioni, *The Responsive Community: A Communitarian Perspective*, 61 AM. SOCIO. REV. 1 (1996).

236. *See supra* notes 2–10 and accompanying text. 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. BUS. ETHICS 189 (2010); *see also* Lianne M. Lefsrud & P. Devereaux Jennings, *Being Entrepreneurial in Your Storytelling: An Institutional Tale* (Ross Sch. of Bus. Working Paper Series, Paper No. 1207, 2013).

237. Melé & Armengou, *supra* note 14; *see also* Bone, *supra* note 14 (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 at least in part as resulting from the corporate social responsibility movement's pressure for companies to be responsible citizens. Cynthia A. Williams, *Corporate Social Responsibility and Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 634, 648 (Jeffrey N. Gordan & Wolf-Georg Ringe eds., 2018). 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. *But see* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99, 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 234.

238. Hanna et al., *supra* note 15. Front-end regulation, of course, has its costs. It can dampen the entrepreneurial spirit. However, 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, two million dollars less in fines during Foreign Corrupt Practices Act enforcements. *See* Harrison Hong & Inessa Liskovich, *Crime, Punishment and the Halo Effect of Corporate Social Responsibility* 1–2 (Nat'l

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. Social license "is a judgement by communities about whether a company is a proper and fitting entity that deserves to be part of [a] community."[239] In short, it's a judgment about the legitimacy of the company or operations.[240] Indeed, social license can "make" a business by contributing to its survival and success.[241] Conversely, the loss of it can have dramatic implications, including legal liability, reputational degradation, and even the risk of violence against employees and company assets.[242] Failure to consider and develop social license can result in business failures, increased levels of regulation, and publicness in the form of both substance and process. Thus, managing a company's social license is key to strategy and is valuable for risk management and as a tool for managing publicness.[243] Moreover, according to Witold Henisz at the Wharton School of Business, it can translate into billions of dollars.[244]

There are many companies and boards that currently use social license to examine company policies and business strategies.[245] Importantly, however, social license is not solely within a company's control, nor is it a *quid pro quo*. Instead, entities "earn" social license through organizational actions that are both justified in the "eyes of society" and not achieved

Bureau of Econ. Rsch., Working Paper No. 21215, 2015); *see also* Allen Ferrell, Hao Liang & Luc Renneboog, *Socially Responsible Firms* 16 (Eur. Corp. Governance Inst. Working Paper Series in Fin., Paper No. 432/2014, 2016) (noting that there is a positive relationship between corporate social responsibility efforts and firm value).

239. Letter from Prop. Council of Australia to Mavis Tan, ASX Corp. Governance Council 2 (July 27, 2018), https://www.asx.com.au/documents/regulation/property-council-of-australia.pdf [https://perma.cc/BM9Y-JFHU].

240. HANNA, *supra* note 232, at 18; *see also* Bone, *supra* note 14 (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).

241. Demuijnck & Fasterling, *supra* note 16, at 679–80.

242. *Id*. at 680.

243. *See supra* note 16 and accompanying text.

244. *See* Witold Henisz, Dhruv Malhotra & Robin Nuttall, *A New Measure to Assess Companies' External Engagement*, LONDON SCH. ECON. & POL. SCI.: BUS. REV. (Jan. 10, 2019), https://blogs.lse.ac.uk/businessreview/2019/01/10/a-new-measure-to-assess-companies-external-engagement [https://perma.cc/E4R5-4H9K]; Witold J. Henisz, Sinziana Dorobantu & Lite J. Nartey, *Spinning Gold: The Financial Returns to Stakeholder Engagement*, 35 STRATEGIC MGMT. J. 1727, 1727–28 (2014); *When Engaging with Your Stakeholders Is Worth Its Weight in Gold*, WHARTON: KNOWLEDGE@WHARTON (July 20, 2011), http://knowledge.wharton.upenn.edu/article/when-engaging-with-your-stakeholders-is-worth-its-weight-in-gold [https://perma.cc/B2EJ-6T9J].

245. *See, e.g.*, Kingson Elendu, *Social License to Operate: A Solution for Community Crises with Oil Companies*, LINKEDIN (Mar. 4, 2018), https://www.linkedin.com/pulse/social-licence-operate-solution-community-crises-oil-companies [https://perma.cc/LPU8-BDK8] (referencing Dev Sanyal, Chief Executive, Alternative Energy; Executive Vice-President, Regions, at British Petroleum).

through manipulation.[246] 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.[247] 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 multiple lenses, they tend to emphasize three key stages: legitimacy, credibility, and trust.[248] These stages correspond to the benefits of social license: acceptance, approval, and identity. 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.

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."[249] Legitimacy leads to the social acceptance of the entity.[250] It exists when the community and stakeholders give the company the benefit of the doubt, believing that the company is committed to working with the community and that concerns will be addressed. The legitimacy level of social license thus is often tacit, though not necessarily silent.[251] It requires a widespread perception of fairness and can be achieved through consistency and good procedures.[252] Legitimacy may also require fair distributions of benefits.[253]

Interestingly, once achieved, legitimacy tends to be "resilient to

246. Demuijnck & Fasterling, *supra* note 16, at 679.

247. *Id.*; *see also* Matten, *supra* note 17, at 110.

248. *See, e.g.*, Demuijnck & Fasterling, *supra* note 16; HANNA, *supra* note 232.

249. *See, e.g.*, Ian Thomson & Robert Boutilier, *Social License to Operate*, *in* SME MINING ENGINEERING HANDBOOK 1779, 1779–96 (Peter Darling ed., 3d ed. 2011) (arguing legitimacy is a "boundary criterion" between social license rejection and the minimal level of community acceptance for an operation to proceed).

250. David Jijelava & Frank Vanclay, *Assessing the Social Licence to Operate of Development Cooperation Organizations: A Case Study of Mercy Corps in Samtskhe-Javakheti, Georgia*, 28 SOC. EPISTEMOLOGY 297, 303 (2014); *see also* Bone, *supra* note 14.

251. Demuijnck & Fasterling, *supra* note 16.

252. Jijelava & Vanclay, *supra* note 250. In this sense it bears some connections to procedural justice. Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 1, 1–3 (2011).

253. David Jijelava & Frank Vanclay, *Legitimacy, Credibility, and Trust as the Key Components of a Social Licence to Operate: An Analysis of BP's Projects in Georgia*, 140 J. CLEANER PROD. 1077, 1082 (2017).

particular events."[254] If a company departs from accepted norms, it will risk its legitimacy; yet, as long as the history between the company and the stakeholders is stable, a single event is unlikely to be disruptive. Instead, stakeholders are likely to view the particular event as "unique."[255] Significant scandals and sustained, repeated questionable activities, however, can undermine legitimacy.[256]

Consider the example of BP and the Baku-Tbilisi-Ceyhan (BTC) pipeline in Georgia. The multi-year process of developing a social license for this project took commitment by BP and was required by lenders. At the time, the pipeline was the "largest cross-border infrastructure construction project in the world."[257] Scholars evaluating it concluded the project had both economic and socio-political legitimacy. They also noted that BP's strategy documents spoke directly of social license as important to its business.[258]

Recall that, in effect, legitimacy "boils down to fairness" both in terms of process and benefits.[259] To develop legitimacy, BP worked with the community in advance of choosing a location for the pipeline.[260] The company commissioned a regional review, which the International Finance Corporation, one of the lenders on the project, described as "ground breaking."[261] This review addressed a multitude of issues, including "human rights, revenue management, and security."[262] In addition, BP engaged in "an extensive public consultation and disclosure program" and committed to 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.[263]

For BP to achieve legitimacy, it had to build an understanding of the communities' cultures and then tailor its relationship and programs to those cultures.[264] The regional review was a significant contributor to earning legitimacy.[265] The review also provided BP with considerable information

254. Demuijnck & Fasterling, *supra* note 16, at 678.
255. *Id.*
256. *Id.*
257. Int'l Fin. Corp., *The Baku-Tbilisi-Ceyhan (BTC) Pipeline Project*, LESSONS EXPERIENCE, Oct. 2006, at 1, 1, http://www.ifc.org/wps/wcm/connect/d01d2180488556f0bb0cfb6a6515bb18/BTC_LOE_Final.pdf?MOD=AJPERES [https://perma.cc/X3AU-GYUY].
258. Jijelava & Vanclay, *supra* note 253.
259. *Id.* at 1082.
260. *Id.*
261. Int'l Fin. Corp., *supra* note 257, at 3.
262. *Id.*
263. *Id.*
264. Jijelava & Vanclay, *supra* note 253.
265. *Id.*

about various stakeholder groups and allowed it to provide more moderate proposals, built through consensus, which, in some cases, were less extensive than initial proposals by other groups.[266] In short, the review helped BP assess the best route for the pipeline, determine further actions critical to engaging with the citizens and groups to be impacted, and negotiate for different and, in some cases, less expensive outcomes.[267]

BP followed through on specific obligations related to labor supply and community investment.[268] Sharing the economic benefits of the project was central to the fairness perception legitimacy requires.[269] For example, BP committed its contractors and subcontractors to hiring local workers, which was important to the citizens and helped the company avoid the types of unrest and tension that can arise with outside workers.[270] BP also spent $30 million on programs that enriched communities, including programs for energy efficiency and school and civic buildings.[271] Additionally, people received relocation compensation and reported being generally satisfied with the compensation and the process.[272]

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 to establish its legitimacy. The scholars who reviewed the project several years after its completion concluded that as a result of the consultation process and follow-through, "there were some concerns about compensation and other issues, [but] there was no fundamental opposition to the idea of the pipelines."[273]

To be sure, neither the project nor the company is without controversy. Indeed, the pipeline and the process were scrutinized and criticized by various groups.[274] The sheer size of the pipeline, combined with the tragedy of the Deepwater Horizon deaths and oil spill,[275] ensure that human rights

266. Int'l Fin. Corp., *supra* note 257.

267. *Id.* at 15.

268. *Id.* at 27.

269. Jijelava & Vanclay, *supra* note 253.

270. *Id.* at 1082.

271. *Id.*

272. *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.*

273. *Id.*

274. *See, e.g.*, *Baku-Tbilisi-Ceyhan Oil Pipeline*, BANKTRACK (Nov. 1, 2015), https://www.banktrack.org/project/baku_tbilisi_ceyhan_oil_pipeline [https://perma.cc/5WK3-MWHW].

275. 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 [https://perma.cc/37BV-2UCZ]; *see also* Elendu, *supra* note

and other groups will continue to scrutinize and criticize the company.[276] That ongoing scrutiny is, however, part of social license. That is, social license is not a one-and-done phenomenon. Instead, as the next study makes clear, social license is bilateral and not just about "public relations" and attention.

2. Credibility

The second level of social license is "credibility." Credibility requires the prior existence of legitimacy.[277] Here, however, the focus is on the company working with stakeholders to achieve more than just tacit approval. Instead, the company builds a relationship that involves initial trust and stakeholder voice in operations.[278]

Credibility, like legitimacy, requires action and interaction above the legally required line.[279] For credibility to exist, the entity and the project must be "believable," and the entity's promises must be both realistic and achievable.[280] Put differently, before an entity can earn credibility, the stakeholders must perceive it to be honest.[281]

In addition to honest and open communication, credibility requires deliverables.[282] The company must have certain characteristics, and the community must believe it has them.[283] Those key qualities include a "high level of technical competence and a high level of skills, and a commitment to social performance."[284] The latter requires assessment of potential social and environmental issues in advance of the project, mitigation and monitoring programs throughout the project, and ongoing social programs and compliance commitments.[285]

Entities that lack credibility face an array of problems and business

245.

276. *See, e.g.*, Philip Mattera, *BP: Corporate Rap Sheet*, CORP. RSCH. PROJECT (Aug. 1, 2016), https://www.corp-research.org/BP [https://perma.cc/6CUL-V2EF].

277. BOUTILIER & THOMSON, *supra* note 16; Demuijnck & Fasterling, *supra* note 16; Kathleen M. Wilburn & Ralph Wilburn, *Achieving Social License to Operate Using Stakeholder Theory*, 4 J. INT'L BUS. ETHICS 3, 14 (2011).

278. *See, e.g.*, BOUTILIER & THOMSON, *supra* note 16; Robert G. Boutilier, *Frequently Asked Questions About the Social Licence to Operate*, 32 IMPACT ASSESSMENT & PROJECT APPRAISAL 263, 263–72 (2014); Demuijnck & Fasterling, *supra* note 16; Wilburn & Wilburn, *supra* note 277; Blair et al., *supra* note 16.

279. BOUTILIER & THOMSON, *supra* note 16; Boutilier, *supra* note 278; Demuijnck & Fasterling, *supra* note 16; Wilburn & Wilburn, *supra* note 277.

280. Jijelava & Vanclay, *supra* note 250.

281. *Id.*

282. *Id.*

283. BOUTILIER & THOMSON, *supra* note 16; Blair et al., *supra* note 16.

284. Jijelava & Vanclay, *supra* note 253, at 1078.

285. *Id.*; *see also* Blair et al., *supra* note 16.

threats. For example, they may face boycotts and other manifestations of social pushback.[286] When an entity establishes credibility, however, it moves beyond the legitimacy/acceptance line and into stakeholder approval.[287]

San Cristobal, a large mine located in two communities in Bolivia, provides an example of the evolution (and devolution) of credibility. Initially, a fully owned subsidiary of the Sumitomo Corporation operated the mine.[288] 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.[289] It developed legitimacy by communicating and providing local employment.[290]

After a few years of developing information about the land and minerals, it became apparent that the minerals were extensive, and the company wanted to expand its operations.[291] At this point, it increased discussions with the community and reached an agreement to relocate people away from the mining sites.[292] The company empowered the community to manage many aspects of the relocation, including selecting the new location and designing houses and infrastructure.[293] Community members began to feel like co-owners and partners in the project—a key component of credibility.[294]

Shortly after people relocated, however, women, who were not included in the decision-making process, expressed dissatisfaction with the housing.[295] In addition, for various reasons, including falling metal prices, the company's assessment of the project changed, and it laid off employees, "frustrat[ing]" the community and resulting in a loss of "trust" and "[c]redibility."[296] Community members no longer believed in the processes developed with the company. Why? Because the company backed away from commitments and, thereby, disrupted the credibility it had built.

The company did not want to close the mine altogether, but it needed to stabilize its relationship with the community.[297] To do so, the company

286. Demuijnck & Fasterling, *supra* note 16.
287. Jijelava & Vanclay, *supra* note 250.
288. *Social License in Action: Case History—Minera San Cristobal*, SOCIALICENSE.COM, https://socialicense.com/action.html [https://perma.cc/CVJ4-DRQF].
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*

initiated an employment program that extended beyond the mine into tourism and agriculture, providing the community with varied and stable employment opportunities not dependent only on mining activity.[298] It also engaged in other sustained actions to improve the community, and, according to the scholars evaluating the project, stakeholders again began to see the company as credible.[299]

A change in mine ownership, however, disrupted the developing social license. The new management lacked knowledge of the history or commitments between the prior company and the community.[300] Top management at the new company stopped meeting with community members.[301] Then, commitments on employment and training fell through, and the community stopped believing in its relationship with the company. Importantly, this loss of credibility occurred even though the community had almost full employment, and later the company again had to invest years in rebuilding that credibility.[302]

What happened? The company set out to develop a relationship, but at various points, it lost interest and focus. It failed to follow through on its commitments, which is crucial to the believability standard. Eventually, the company's erratic approach threatened the existence and profitability of the mine, and it worked to resolve the issues and reestablish its social license.[303] To do so, it reiterated its commitments and established a community-based program to assess and comply with all of the company's prior commitments.[304] Over time as the projects came to fruition, the community again began to view the company as credible;[305] yet, a better understanding of social license and its bilateral nature could have resulted in fewer disruptions and earlier and sustained traction for the business within the community.

3. Trust

The final level of social license is trust, a stronger, more durable form of credibility.[306] Like credibility, trust is cumulative and requires an entity to have achieved both legitimacy and credibility.[307] At the trust stage, the entity

298. *Id*.
299. *Id*.
300. *Id*.
301. *Id*.
302. *Id*.
303. *Id*.
304. *Id*.
305. *Id*.
306. Jijelava & Vanclay, *supra* note 253, at 1084.
307. *Id*.

moves from acceptance and approval to a state where the stakeholders identify with the entity.[308] Here, the stakeholders have confidence that the company's decisions will be at least neutral, if not always in the community's best interests.[309] This stage can be described as akin to psychological identification, in which the interests of the company and the community are aligned.[310]

At the trust stage, stakeholders may see their future as tied to that of the entity, and even feel responsible for the accompanying benefits and burdens.[311] As a result, trust can carry risks. A community that closely identifies with or comes to depend on an entity is at risk if the company decides to withdraw.[312] The entity is also at risk. Boycotts, demonstrations, or even violence on the part of community stakeholders can result when trust is violated.[313] Thus, arguably, trust may be the component of social license that has less traction—at least for some companies.

Nevertheless, trust can produce real, tangible benefits for a company that achieves it. Take, for example, Gap, Inc., an international retailer that faced human rights issues arising out of labor issues in its supply chain.[314] After experiencing considerable pressure over these issues, including child and bonded labor, Gap worked to build relationships with its stakeholders.[315] It developed a set of principles documented in a Social Responsibility Report.[316] This report was notable at the time because it admitted to prior issues, providing some transparency, and also stated an ongoing commitment to improving factory conditions.[317]

Gap continues to produce this report and has engaged NGOs and others in its monitoring efforts, thus increasing its believability among such groups.[318] In addition, the company committed itself to "forging sustainable

308. *Id*. at 1078.

309. *Id*. at 1079.

310. *Id*. at 1084; *see also* Bone, *supra* note 14, at 301.

311. *See, e.g.*, BOUTILIER & THOMSON, *supra* note 16; Boutilier, *supra* note 278; Demuijnck & Fasterling, *supra* note 16; Wilburn & Wilburn, *supra* note 277.

312. *Social License in Action: Case History—Minera San Cristobal*, *supra* note 288.

313. *See* Nelson D. Schwartz, *Trump Saved Carrier Jobs. These Workers Weren't as Lucky.*, N.Y. TIMES (Apr. 23, 2017), https://www.nytimes.com/2017/04/23/business/economy/indiana-united-technology-factory-layoffs.html?mcubz=0 [https://perma.cc/ZA8D-SCTA].

314. GAP INC., FACING CHALLENGES FINDING OPPORTUNITIES: SOCIAL RESPONSIBILITY REPORT (2004), http://www.gapincsustainability.com/sites/default/files/2004%20Report.pdf [https://perma.cc/UG4H-84XV].

315. John Morrison, *The Social Licence*, OUTLOOK INDIA (Oct. 27, 2014), https://www.outlookindia.com/website/story/the-social-licence/292389 [https://perma.cc/D9GA-PNWC].

316. *See generally* GAP INC., *supra* note 314.

317. *Id.* at 2–3; *see also* Morrison, s*upra* note 315; Blair et al., *supra* note 16, at 348.

318. Morrison, *supra* note 315. NGOs and other third-party assurance entities are increasing their roles in corporate monitoring efforts as corporations strive to achieve legitimacy in the wake

solutions" and "creating lasting change."[319] The principles it developed to achieve those goals are the type 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.[320]

The establishment of, and adherence to, these principles were significant, in part because many of the factors contributing to the human rights problems were outside of its control.[321] The principles and adherence to them were part of building credibility. Once Gap established its credibility and commitment to the long-term resolution of the issues, it even earned trust among stakeholders who had recently boycotted the company.[322] Interestingly, several years later, when information surfaced that a supplier in India was using bonded labor, that trust played a key role.[323] Stakeholders who had previously opposed and boycotted Gap rose to its defense.[324] Their defense of the company revealed trust in action and a strong level of identification between Gap and its stakeholders.[325] Through sustained, credible actions, Gap had earned belief and trust in its commitment to preventing human rights violations.

It is important to note, however, that not all company-stakeholder relationships require the full legitimacy-credibility-trust process of social license.[326] 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.[327] Indeed, for low-commitment, fluid transactions, legitimacy may be all that is necessary.[328] Then, as social capital in the relationship and the company's stake in the project grows, credibility and trust may become more important to the company and the

of social, environmental, and political pressures. *See also* Blair et al., *supra* note 16, at 348.

319. GAP INC., *supra* note 314, at 4, 8.

320. *Id.* at 12–13. 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 et al., *supra* note 16.

321. Morrison, *supra* note 315.

322. Felicity Lawrence, *Sweatshop Campaigners Demand Gap Boycott*, GUARDIAN (Nov. 21, 2002, 8:48 PM), https://www.theguardian.com/uk/2002/nov/22/clothes.globalisation [https://perma.cc/5MUM-PDMX].

323. Morrison, *supra* note 315.

324. *Id.*

325. *Id.*; *see also* Simon Zadek, *The Path to Corporate Responsibility*, HARV. BUS. REV. (Dec. 2004), https://hbr.org/2004/12/the-path-to-corporate-responsibility [https://perma.cc/EM8G-YKXK].

326. BOUTILIER & THOMSON, *supra* note 16; Boutilier, *supra* note 278.

327. BOUTILIER & THOMSON, *supra* note 16; Boutilier, *supra* note 278.

328. BOUTILIER & THOMSON, *supra* note 16.

overall success of the project.[329]

All three of these case studies exhibit social license in operation. They reveal how a board might deploy social license theory in its business strategy and risk management. Of course, this theory, like many others, is not a panacea. Nevertheless, the case studies explored here underscore how companies worked to achieve social license because it was both profitable and powerful.[330] The case studies also reveal that social license is not just about public relations campaigns, which are one-sided in nature. Rather, 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 an organization engaging in the type of forward-thinking suggested by Fink in his letters to CEOs.[331] This realm, of course, is the space in which boards perform some of their most important functions. Yet, as the Wells Fargo and Uber case studies detail, the process of publicness can engulf the board, preventing it from focusing on the long-run goals and strategy of the company and forcing it into continual reaction mode.[332] 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 use to oversee management. In this manner, social license can help boards 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 us begin with Wells Fargo. Its former CEO, Tim Sloan, stated that, to regain lost trust, the bank "must continue to be transparent with all . . . stakeholders and go beyond what has been asked . . . by our regulators."[333] This statement is at odds with the bank's prior vision of itself

329. *Id.*; Boutilier, *supra* note 278; Horrigan, *supra* note 18, at 517.
330. Henisz et al., *supra* note 244, at 1727–29.
331. Fink, *supra* note 1.
332. Horrigan, *supra* note 18, at 537–38.
333. Stacy Cowley, *Wells Fargo May Have Found More Fake Accounts Created by Employees*, N.Y. TIMES: DEALBOOK (Aug. 4, 2017), https://www.nytimes.com/2017/08/04/business/dealbook/wells-fargo-fraud-accounts.html?em_pos=small&emc=edit_my_20170807&nl=your-money&nl_art=5&nlid=21576551&ref=headline&te=1 [https://perma.cc/NM4N-UHMD] (quoting a public statement from Tim Sloan).

as a trusted community bank. Wells Fargo saw itself as a localized and connected bank. To succeed, of course, Wells Fargo, like all banks, needed to persuade people to give it their money. That, in itself, requires legitimacy, credibility, and trust—the fundamental components of a social license. Yet, after the initial account scandals were revealed, Wells Fargo was forced to close four hundred branch banks and had trouble persuading customers to maintain accounts.[334] 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,[335] it nevertheless goes to the heart of the prerequisites for a strong financial system: trust between customers and their banks.[336]

How did Wells Fargo lose its social license? Recall that it came out of the 2008–2009 financial crisis with its reputation intact and, seemingly, the strongest business of any of the banks.[337] It appeared to be unsullied by the issues plaguing its peers.[338] Nevertheless, as it pressed the cross-sell strategy, it fell victim to its own mythology, failing to consider the consequences of the strategy or to create systems to manage the risks of its business decisions.

From 2010–2015, Wells Fargo's assets grew by 46%, and its net income grew by over 85%.[339] Its stock price also increased, making it the most valuable bank in the world. Community Banking contributed more to that

334. Wieczner, *supra* note 109.

335. Matt Egan, *Wells Fargo Is Closing over 400 Bank Branches*, CNN MONEY (Jan. 13, 2017, 2:30 PM), http://money.cnn.com/2017/01/13/investing/wells-fargo-branch-closures/index.html [https://perma.cc/DP7C-MT4E].

336. This trust is required in capitalist systems where corporate managers are conferred with "immense private economic and political power." LANGEVOORT, *supra* note 32, at 28; *see also* Sale & Thompson, *supra* note 12, 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 pt.1, at 5 (1933).

337. 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, *J.P. Morgan*, *supra* note 12.

338. *See, e.g.*, Rachel Louise 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 [https://perma.cc/5P64-MX4V] (noting that Wells Fargo's cross-sell ratio was "more than six" while the average ratio of other banks was only 2.71); Dan Freed & Nikhil Subba, *Scandal-Hit Wells Fargo's Quarterly Profit Falls 3.7 Percent*, REUTERS (Oct. 14, 2016, 5:14 AM), https://www.reuters.com/article/us-wellsfargo-results/scandal-hit-wells-fargos-quarterly-profit-falls-3-7-percent-idUSKBN12E1A7 [https://perma.cc/GPQ2-3RYD] (noting that Wells Fargo's retail banking unit was "6.27 in the second quarter" of 2016).

339. *Wells Fargo Total Assets 2006-2020*, MACROTRENDS, https://www.macrotrends.net/stocks/charts/WFC/wells-fargo/total-assets [https://perma.cc/K59J-JG35] (reporting that Wells Fargo's reported assets on December 31, 2010, were $1,223.630 billion and were $1,787.632 billion on December 31, 2015, a difference of about 46%); *Net Income of Wells Fargo 2009 to 2019*, STATISTA (Nov. 9, 2020), https://www.statista.com/statistics/295398/wells-fargo-net-income [https://perma.cc/2XDT-HTCM] (reporting that Wells Fargo's reported income in 2010 was $12.36 billion and was $22.89 billion in 2015, a difference of about 85%).

growth than any other division at the bank, but the Community Bank's performance was directly connected to the cross-selling fraud.[340] Indeed, 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 both in the boardroom and by analysts.[341] This information was public and available to the board, but the board failed to ask questions about what accounted for the bank's unmatched success.[342] Those deliberations might well have created an opportunity to investigate the legitimacy of the success, the credibility of management's responses, the downside risks, and the potential for measuring and managing those risks.[343]

Moreover, those discussions might well have revealed that the cross-sells transpired in a world of incentives and coercion. There were quarterly bonuses for junior employees and annual bonuses for district managers.[344] 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 for a homeless woman with fees of $39 per month.[345] This example is salient in the context of legitimacy: it is impossible to give the benefit of the doubt to a bank whose employees engage in this sort of fraud.

The actual number of unauthorized accounts is 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 estimates increased to

340. *An Examination of Wells Fargo's Unauthorized Accounts and the Regulatory Response: Hearing Before the U.S. S. Subcomm. on Banking, Hous., and Urb. Affs.*, 114th Cong. 1–5 (2016) (statement of John G. Stumpf, Chairman and Chief Executive Officer of Wells Fargo & Company) (describing cross-sell growth over time).

341. *See* Ensign, *supra* note 338; Freed & Subba, *supra* note 338; WELLS FARGO & CO., 2Q16 QUARTERLY SUPPLEMENT 15 (2016), https://www08.wellsfargomedia.com/assets/pdf/about/investor-relations/earnings/second-quarter-2016-earnings-supplement.pdf [https://perma.cc/Y9T7-TBCB].

342. *Cf.* Hillary A. Sale, *Monitoring* Caremark*'s Good Faith*, 32 DEL. J. CORP. L. 719, 733–35 (2007) (discussing a Board's duty to investigate in good faith various "red flags").

343. *See* Sale & Thompson, *supra* note 12, at 528 (discussing how disclosure should reduce agency costs for directors' monitoring functions, but is only as useful as the questions they raise among the board).

344. Brian Tayan, *The Wells Fargo Cross-Selling Scandal*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 6, 2019), https://corpgov.law.harvard.edu/2019/02/06/the-wells-fargo-cross-selling-scandal-2 [https://perma.cc/U755-HUYX].

345. E. Scott Reckard, *Wells Fargo's Pressure-Cooker Sales Culture Comes at a Cost*, L.A. TIMES (Dec. 21, 2013, 12:00 PM), http://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html [https://web.archive.org/web/20210208014421/https://www.latimes.com/business/la-fi-wells-fargo-sale-pressure-20131222-story.html].

3.5 million.[346] Despite indications that the practices went back to 2002,[347] the bank investigated only the years 2009–2016.[348] Sloan resisted pressure to look for earlier violations.[349] This choice, and the media churn around it, made clear that neither Sloan, nor apparently the board, had a handle on the depth of the company's problems. Indeed, the ongoing account scandal and lack of a credible response steadily diminished credibility and led to Sloan's eventual resignation.[350]

Over time, the process of publicness exposed additional frauds.[351] Take for example, the car loan repossession scandal. Between 20,000 and 570,000[352] 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.[353] Even though Wells Fargo said it was "extremely sorry" and promised to refund customers and work with credit bureaus, its response lacked credibility.[354] Credibility requires believability, but as each new scandal forced the bank to deploy a new investigation and publicly admit to new problems, its credibility diminished.

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, "[t]his is a full-blown scandal—again. It's unbelievable, outrageous, sad, and yet quintessential Wells Fargo."[355] This comment points to the culture of the bank at the root of its issues. It also underscores the ongoing devolution of

346. Kartikay Mehrotra & Laura J. Keller, *Wells Fargo's Fake Accounts Grow to 3.5 Million in Suit*, BLOOMBERG (May 12, 2017, 4:22 PM), https://www.bloomberg.com/news/articles/2017-05-12/wells-fargo-bogus-account-estimate-in-suit-grows-to-3-5-million [https://perma.cc/76ZS-Y9GG].

347. Matt Egan, *Wells Fargo CEO Refuses to Dig Back to 2002, Despite Evidence*, CNN MONEY (Apr. 20, 2017, 9:17 AM), http://money.cnn.com/2017/04/20/investing/wells-fargo-ceo-fake-accounts-2002/index.html [https://perma.cc/DRR4-RKEH].

348. Laura J. Keller, *Wells Fargo Boosts Fake-Account Estimate 67% to 3.5 Million*, BLOOMBERG (Aug. 31, 2017, 1:05 PM), https://www.bloomberg.com/news/articles/2017-08-31/wells-fargo-increases-fake-account-estimate-67-to-3-5-million [https://perma.cc/WB9C-B35Y].

349. *Id.*

350. Flitter et al., *supra* note 106.

351. As noted, publicness has the tendency to snowball, continually increasing. Heminway, *supra* note 12, at 484 ("This theory of publicness is a dynamic, progressive, iterative one. Publicness leads to more publicness, which leads to more publicness, and so on.").

352. Matt Egan, *Wells Fargo May Have Forced 570,000 Customers into Unneeded Auto Insurance*, CNN MONEY (July 28, 2017, 1:22 PM), http://money.cnn.com/2017/07/28/investing/wells-fargo-auto-insurance-car-loans/index.html?iid=hp-toplead-dom [https://perma.cc/NNR8-DXP6].

353. Matt Egan, *Wells Fargo Customer: It Felt Like My Car Was Held as Extortion*, CNN MONEY (Aug. 8, 2017, 10:38 AM), https://money.cnn.com/2017/08/08/investing/wells-fargo-auto-insurance-scandal/index.html [https://perma.cc/42JC-6PZV].

354. Egan, *supra* note 352.

355. *Id.* (quoting a statement from Scott Stringer).

its social license, a problem with which the board continues to 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 and consent for all solutions or services, but incentives and pressure produced the opposite. The picture simply did not match the soundtrack.

Indeed, employees who pushed back suffered retaliation, including harassment and firings.[356] Consider this headline: *I Called the Wells Fargo Ethics Line and Was Fired*.[357] Evidence of employees raising issues through established bank procedures and then being terminated exists for many years before the scandal became public.[358] No wonder employee stakeholders did not trust the bank. Yet, the scandals point to something even 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."[359]

Recall that the perception of fairness is central to establishing legitimacy. According to the academics who studied the Georgia project, BP worked to build legitimacy by expending resources and 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 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.

Wells Fargo, like Sumitomo in the San Cristobal mine situation, also lacked 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 varied over time. The company's failure to follow through on commitments led to disbelief in its statements and promises. Then, when mineral prices increased, the company lacked the

356. Stacy Cowley, *Wells Fargo Workers Claim Retaliation for Playing by the Rules*, N.Y. TIMES: DEALBOOK (Sept. 26, 2016), https://www.nytimes.com/2016/09/27/business/dealbook/wells-fargo-workers-claim-retaliation-for-playing-by-the-rules.html [https://perma.cc/2ZYL-JTE5] (describing employee suits against the company).

357. Egan, *supra* note 75.

358. *Id.*

359. *Wells Fargo: What It Will Take to Clean Up the Mess*, WHARTON: KNOWLEDGE@WHARTON (Aug. 08, 2017), http://knowledge.wharton.upenn.edu/article/wells-fargo-scandals-will-take-clean-mess [https://perma.cc/3Z6U-22M7] (quoting Wharton finance professor Richard Herring).

support it needed and was forced to increase its local expenditures in order to rebuild its social license and, thereby, its business.

Although Wells Fargo was not planning to go out of business or even put growth on hold, it faced a situation similar to the one Sumitomo faced. The unrelenting process of publicness and the years of inattention by the board and management resulted in a bank unable to regain its footing. Here is where the board might have benefitted from engaging in and thinking about social license. Boards pay attention to company financials and hear regular reports about growth and challenges.[360] As noted above, most of Wells Fargo's growth was coming from the Community Bank. The account fraud was key to the bank's strategy, with cross-sell numbers significantly above those of other banks—yet no one pressure tested the strategy. Ironically, the premise of the cross-sell was to make customers sticky, a long-run strategy requiring legitimacy and credibility undercut by the fraud.

The role of the board is to oversee strategy development and set pillars against which management can execute. To execute, the board must ask questions and question answers, providing effective challenges and ensuring oversight. The questions appear to have been missing here.[361] A focus on legitimacy, credibility, and trust, with discussions about what was underpinning the remarkable eighteen-year growth in cross-sales, might have led to the discovery of the faulty execution of the strategy. In short, situations where the numbers are "too good to be true" are 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.[362]

The bank also squandered the trust it appeared to have achieved after successfully navigating the 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 Fargo might adopt this example by issuing a report of its own and outlining its failures in managing the cross-sell

360. The corporate governance scheme assigns the role of monitoring management to the directors. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141(a) (West 2020).

361. Hillary A. Sale, *Independent Directors as Securities Monitors*, 61 BUS. LAW. 1375, 1380 (2006).

362. 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. HOLDER, *supra* note 179, at 2–3. These types of situation can also be indicative of accounting fraud, like at Worldcom, and require the board's attention.

approach. Yet, a slew of scandals continued to come to light after the issuance of that report. Moreover, the bank's reluctance to investigate reports of pre-2008 cross-selling reveals that it was focused on accepting responsibility only for scandals that had already been publicly revealed—and not on executing a more comprehensive approach to reform and compliance.

Here is where attention to social license would 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 were subject to scrutiny and were targets for the media and the process of publicness. Indeed, it is fair to say that the industry as a whole was not in the zone of "benefit of the doubt." Management reports on strategy execution should have been followed by questions about potential pitfalls and challenges, and how those, in turn, might impact an already shaky position of legitimacy among stakeholders.[363]

Similarly, the board should have inquired about the incentive effects imbedded in strategy execution choices. These are the exact questions that, when executing on its oversight responsibility (and fulfilling its fiduciary duties of loyalty and good faith),[364] a board should pursue. Indeed, the oversight role requires the board to posit whether incentives might lead to unethical and illegal behavior. Incentives gone wrong 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.

Engagement of this sort would have enabled the board to monitor the company's strategy execution and to fulfill 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 companies. Boards also receive reports tracking changes in levels of internal and external complaints, as well as risky investments. 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. Moreover, as this Article makes clear, the failure to attend to it results in publicness and the loss of

363. A discussion of this sort might also have revealed that the Wells Fargo, community-based strategy had a shelf life in the era of mobile banking. It is now clear that other banks began closing their branches far earlier than Wells Fargo, but the unrelenting focus on cross-sells, propped up by fake accounts, appears to have prevented the board (and perhaps management) from focusing on the next era in banking. Egan, *supra* note 335.

364. *See* Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006) (describing the fiduciary duty of good faith as a subset of the duty of loyalty).

social license.

Although it is unclear what information the Wells Fargo board received, *ex post* investigations reveal that the company's decentralized nature and, perhaps, management evasion resulted in fragmented reporting, which in turn contributed to the sustained nature of the fraud. Yet, if the board had pressed with questions about management strategy and its downside risks, the board 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.[365] That type of engagement is consistent both with the board's fiduciary duties of loyalty and good faith and with its role in ensuring that management is on track with respect to understanding and vetting risks to the company.[366]

B. UBER'S SOCIAL LICENSE

Uber also struggled to maintain social license. Early on, it appeared 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. Demand for transportation of this sort was significant, 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 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."[367] Termed "regulatory entrepreneurship,"[368] Uber's rhetoric focused on its aspirations to change laws and regulations. Its behavior, however, seems to have gone well beyond simply eluding regulation through "ride-sharing," to building a business model premised on lawbreaking and lawlessness.

365. 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 36; Sale, *J.P. Morgan*, *supra* note 12; Sale & Thompson, *supra* note 12; Sale, *supra* note 361.

366. *See, e.g.*, *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 970 (Del. Ch. 1996) (developing board's risk oversight role); *Stone*, 911 A.2d at 364; *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 51–52 (Del. 2006); Lyondell Chemical Co. v. Ryan, 970 A.2d 235, 240 (Del. 2009); *see also* Sale, *supra* note 361; Sale & Langevoort, *supra* note 36; Heidi Mandanis Schooner, *Big Bank Boards: The Case for Heightened Administrative Enforcement*, 68 ALA. L. REV. 1011, 1016–18 (2017).

367. Lev-Ram, *supra* note 220.

368. *See, e.g.*, Pollman & Barry, *supra* note 170. This is a term that puts a very generous gloss on what was, in effect, operating outside the rule of law.

Name the stakeholder, and Uber appears to have had an argument with it. Its insistence on lawbreaking resulted in billables for its lawyers and also engendered a series of "high-profile spats and setbacks."[369] The company had "a succession of disputes . . . with city governments, taxi drivers, and its own workers."[370] It built software systems to evade law enforcement and to lobby regulators and legislatures, creating an approach of evasion and protection.[371] Uber also 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.[372]

These issues and the corporate culture became transparent only in the wake of a series of scandals exposed through the process of publicness, thus allowing Uber to push forward until halted by publicness. 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 eventually lost some of both. Without investors and riders, Uber would have nothing—no business license and no social license. Dara Khosrowshahi seems to have understood this issue embarking upon a "global apology tour" in an effort to clean up Uber's image with the public and enable it to go public.[373]

Uber's loss of its social license did not occur for want of opportunity to develop it. 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 opened dialogue, worked to treat local workers fairly, and invested in the communities,[374] 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;[375] its former CEO verbally abused a driver (at least once);[376] it operated without legal license;[377] it disregarded and displaced local taxi

369. Lev-Ram, *supra* note 220.

370. David Z. Morris, *Uber Responds to Rage Over Alleged 'Strikebreaking' During Immigration Protests*, FORTUNE (Jan. 29, 2017, 9:16 AM), http://fortune.com/2017/01/29/uber-immigration-protests [https://perma.cc/JR5Z-KXJS].

371. *See supra* text accompanying notes 162–66.

372. *See, e.g.*, Pollman & Barry, *supra* note 170, at 390–92.

373. Kate Conger & Mike Isaac, *Two Top Uber Executives Are Out as C.E.O. Consolidates Power*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/2019/06/07/technology/uber-chief-operating-marketing-officer.html [https://perma.cc/92FK-FQW4].

374. *See supra* pp. 825–27.

375. *See* Fink, *supra* note 141.

376. *See* Newcomer, *supra* note 167.

377. *See* Levin, *supra* note 148; Kalanick, *supra* note 169.

drivers;[378] and it charged surge prices during crises and disasters.[379] In short, Uber chose to reject the power of legitimacy.

Uber similarly failed to take advantage of opportunities to build credibility or trust; instead, it met community concerns with hostility and displayed an inability to reform its corporate culture of aggression, harassment, and exploitation. Recall how Sumitomo worked to rebuild its credibility by ensuring it followed through on its commitments to the community. Uber, in contrast, committed to addressing the pervasive culture of sexual harassment within the company and then continued to engage in conduct that exacerbated, rather than ameliorated, the problem. Trust requires that stakeholders have confidence that actions will be, at minimum, neutral. The process of publicness, however, revealed that Uber was unconcerned with stakeholder relationships and the believability of its statements.

The series of scandals eroded Uber's social license in other ways as well. Lyft attracted a larger share of the market and signed contracts with Waymo and General Motors.[380] The unrelenting negative process of publicness took a toll. From delete-the-app boycotts to companies choosing not to reimburse employees for Uber rides, Uber's business was under challenge—primarily because the company lost the trust of its stakeholders. Its investors knew this and were concerned, in part because Uber was overvalued, not profitable, and had a very high burn rate,[381] requiring new and repeated capital infusions to keep it afloat.[382]

Like Sumitomo in the San Cristobal mine case, Uber needed to reassure not just its investors, but also its stakeholders. The board's actions conveyed that it was aware of this need. It took steps to stabilize the company and rebuild trust with its stakeholders: venture capitalists left the board and were replaced by independent directors; board members elevated the status of the board with respect to management; Kalanick resigned;[383] personnel

378. *See* Morris, *supra* note 370.

379. *See* Tibkin, *supra* note 137.

380. *See* Yeo, *supra* note 220 and accompanying text.

381. *See supra* notes 130–36.

382. Blair Hanley Frank, *Uber Investors Reportedly Push CEO Travis Kalanick Out of Company*, VENTUREBEAT (June 20, 2017, 10:51 PM), https://venturebeat.com/2017/06/20/uber-investors-reportedly-push-ceo-travis-kalanick-out-of-company [https://perma.cc/GNN2-D27V].

383. Kalanick has not gone quietly, but the board has pushed back. Johana Bhuiyan, *Uber Board Member and Co-Founder Garrett Camp Says Travis Kalanick Is Not Coming Back as CEO*, VOX (Aug. 7, 2017, 3:00 PM), https://www.vox.com/2017/8/7/16108778/garrett-camp-uber-travis-kalanick-ceo [https://web.archive.org/web/20210208014459/https://www.vox.com/2017/8/7/16108778/garrett-camp-uber-travis-kalanick-ceo].

policies were revised;[384] and the board appointed a new CEO.[385] All of these were steps to save the company and prevent its market share from continuing to slip. They were also steps designed to reestablish aspects of the company's social license by treating publicness as part of the cost-benefit analysis.

Like Gap, Uber increased its transparency. It released information to the public even when not legally required, revealing an understanding that attention to legitimacy through transparency was key to its recovery and to sustaining relationships. The board expected management to build internal processes ensuring the company's strategy did not negatively impact efforts to rebuild the company's social license. The Holder Report was not binding in a legal sense, but what Uber learned the hard way is that the report was tied to legitimacy, credibility, and trust. Credibility requires transparency, consistency, and honesty. The board must model those traits. The business model and level of deterioration and distraction inside the company exacerbated the process.[386] Reestablishing social license requires implementing compliance, oversight, and risk management systems that result in transparent, legitimate, and credible behaviors—not the norm for Uber before its crises. Paying attention to those issues, however, was key to rebuilding the company and allowing it to go public. It was also a powerful way to manage both the substance and process of publicness.[387]

CONCLUSION

The BlackRock letter and the Business Roundtable Statement make clear 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 for boards to employ to manage those concerns. To this end, the Article develops social license theory in the context of both publicness and the board of directors' role in overseeing strategy and risk management. Social license theory adds to the

384. Kara Swisher, *Here's One of Uber CEO Dara Khosrowshahi's New Rules of the Road: 'We Do the Right Thing. Period.,'* VOX (Nov. 7, 2017, 1:45 PM), https://www.vox.com/2017/11/7/16617340/read-uber-dara-khosrowshahi-new-rule-values-meeting [https://web.archive.org/web/20210307215435/https://www.vox.com/2017/11/7/16617340/read-uber-dara-khosrowshahi-new-rule-values-meeting].

385. *Id.*

386. Benjamin Edelman, *Uber Can't Be Fixed—It's Time for Regulators to Shut It Down*, HARV. BUS. REV. (June 21, 2017), https://hbr.org/2017/06/uber-cant-be-fixed-its-time-for-regulators-to-shut-it-down [https://perma.cc/8AS3-URY6].

387. As Donald 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 36; *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.").

discussions in the literature about reputational capital, among other theories, and provides an additional tool for corporate governance scholars to leverage in analyzing governance gaps and publicness. At its core, social license incorporates concepts of sustainability and relationship building; it is about value creation, long-term focus, and sustained and systematic operations and governance. As the examples in Part III reveal, companies from the mining, oil, and textile industries have used social license to build and maintain their businesses and company reputations—underscoring the power of the theory in action.

When deployed by the board, social license may also empower compliance and other risk management personnel.[388] 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.[389] In addition, self-regulatory structures perform well only when third-party monitoring exists.[390] 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 fulfillment of the board's fiduciary duties.

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 duties of good faith and loyalty. Strategy execution is not risk free, and the failure to project and consider risks is 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, as at Wells Fargo, or lawbreaking, 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. Doing so will ensure that the company is able to execute on its strategy with an understanding of the stakeholder concerns that publicness makes apparent. Here is where social license theory has traction—it provides boards with a framework for executing fiduciary duties, engaging in forward-thinking cost-benefit analyses, weighing choices for legitimacy, credibility, and trust, and developing systems to build transparency and accountability. As a result,

388. Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361, 370 (2010).

389. Uri Gneezy & Aldo Rustichini, *A Fine Is a Price*, 29 J. LEGAL STUD. 1, 1–3 (2000); Short & Toffel, *supra* note 388, at 371–72.

390. Short & Toffel, *supra* note 388, at 371; Blair et al., *supra* note 16, at 346.

social license can help to protect companies from the process of publicness and thereby avoid the inevitable outcome of that process—additional substantive publicness.