2019 in Review.
A NOTE FROM OUR CHAIRMAN & CEO

Will Capitalists Ride to the Rescue?

“The past is never dead. It’s not even past.”
— William Faulkner

In 1790, George Washington referred to the new American government as “…the last great experiment in promoting human happiness.” Through nearly two and a half centuries it has been tested by every generation, sometimes more than others, though one would be hard-pressed to find too many threats to our democracy greater than today. The Civil War, the Great Depression, Pearl Harbor and World War II — this current period will surely find its way to that list in testing this “Great Experiment.”

The United States is the confluence of three great systems: democracy, capitalism and theology (or non-theology, as the case may be). The perfect imperfection of our government — for the longest-lived national constitution in the world — is how it struggles to keep these three systems in balance.

Our rose-colored rearview mirrors make history appear well ordered, while the present is almost always messy. Rather than genuflect daily, we take history for granted. Of course General Washington would surprise the British at Trenton; General Rommel would run out of oil in North Africa; Senator Joseph McCarthy would be undone; and President Johnson would pass the Civil Rights and Voting Rights Acts. History’s arc progresses in one direction, pointing ever-upward — or so the thinking goes. Yet as the Mayans learned almost 2,000 years ago, an Iron Age can, and often does, follow a Golden Age.

What happens when the federal government largely stops working, as it has in the United States for the past 30 years? When the federal government falters, business leaders historically have stepped in. In 1909, when a period of federal inaction occurred, J.P. Morgan and Wall Street literally created the Federal Reserve. Harriet Tubman rescued slaves; Cornelius Vanderbilt established shipping; Clara Barton founded the Red Cross; John D. Rockefeller built the oil business; Andrew Carnegie gave rise to the steel industry, and Henry Ford mass-produced cars, all changing America dramatically. Crisis abhors a vacuum; when the federal government is static for long enough periods of time, industry has stepped in. But what now? Who will be the great leaders to step up and provide the vision that the federal government no longer seems capable of supplying?
For our entire professional lives, businesses have largely stayed out of politics. The steadfast rule has been: *Focus on shareholders and customers.*

There were always exceptions and controversies, but the bright lines between business and government were, well, bright. No more. Nearly 40% of Americans — and two thirds of Millennials — expect their brands to be “woke.” They expect companies to stand for something beyond the product, to take just political positions, to be sensitive and diverse in advertising, to be minimalist in its carbon footprint and to engage in sophisticated corporate social responsibility. What’s a company to do?

Over the past year, the most common theme in our columns was “Mercantile Activism” — the new age of activist corporations. How do companies lead — or follow adroitly — in an age of heightened ESG (Environmental, Social, Governance) expectations and instantaneous and viral online judging?

How is it that Modelo can advertise its beer on television with a strong “hire an immigrant” message but Peloton is penalized $1.7 billion in value in a week over a television advertisement that online critics considered sexist?

How can Dick’s Sporting Goods execute a ban on handgun sales nationwide and quickly recover while WeWork — “Do what you love” — crumbles?

How does Uber go from cool to clueless and Lyft, sensing the void, markets “woke” but quickly appears unresponsive and hypocritical over female passenger safety?

Why do people largely forgive Chick-fil-A for their historical anti-LGBT stance while other companies are excoriated for not being diverse enough in a single advertisement?

There are rules and case studies, and we covered many of them in 2019 to help guide companies during this increasingly damning — and judgmental — time. With apologies to William Faulkner, the past may not be dead — but it can provide some prologue.

Good Reading.

*Richard S. Levick, Esq.*
Chairman & CEO
January 2020
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Criminalizing The Boardroom

by Richard Levick
This is the first in a three-part series that explores the impact of a disturbing trend: the increasing criminalization of American corporate conduct. The first column breaks down the magnitude of the problem and its repercussions for corporate America. The second column will examine fears that corporate criminalization, left unchecked, could undermine U.S. global competitiveness. The final column will outline steps that companies should take to protect themselves from unwarranted litigation.

There's no shortage of corporations in recent years that have committed abhorrent crimes and deserve whatever punishment they've gotten. If a company maliciously defrauds investors and clients (look no further than Bernard L. Madoff Investment Securities LLC), or deliberately lies about the dangers of its products (raise your hand, Takata and Volkswagen Group!), then crocodile tears need not be shed about the censure it receives.

But too many corporate officers, directors, and managers these days find themselves subject to jagged inquiries. "Normal" corporate behavior is being criminalized, a trend that could trigger unsettling consequences for the U.S. economy. "When corporate executives are being hounded by the belligerent enforcement of arcane regulations or obscure laws, it is bad for the rule of law and bad for capitalism," maintains Scott D. Marrs, the Regional Managing Partner of Akerman LLP's Texas offices and a corporate litigation specialist who serves on the board of directors of the Texas General Counsel Forum.

Government, especially the federal Department of Justice (DoJ), should “exercise extreme caution before exercising its power to initiate criminal proceedings,” warns an analysis from the American Enterprise Institute (AEI).

Why? Because "too many companies face unwarranted indictments, untenable fines, costly court appearances, and a stinging loss of reputation in the marketplace," Marrs points out.

In my experience, when a company is criminally charged, outsiders — including customers and shareholders — assume guilt. After all, by definition, a criminal charge is more lethal than a civil infraction. Indeed, the negative narrative is even more pronounced because it's the first most people have heard about the company. As a young man growing up and cutting my political eyeteeth in a caveat emptor marketplace, I assumed government stood for righteous oversight of business. Today, not so much.

Individual executives caught up in these allegations confront increasingly harsh prison sentences, not to mention fines and loss of livelihood. It all adds up to what Marrs calls a business environment beleaguered by "coercive regulatory enforcement."

Add to the mix state attorneys general, who often see high-profile charges against corporations as ways to raise their political profile. There's a reason people joke that "AG" stands for "aspiring governor."

I'm blessed to know several current and former state and federal AGs. Good persons all. But the formula for rising political fortunes on the wings of high-profile cases — often at the expense of business — is just too much of a professional booster to resist. Business and government should not be a zero-sum game.

The DoJ and other enforcers have become increasingly aggressive by expanding their definitions of criminal liability, diminishing the role of intent in white collar prosecutions while dismissing the utility of voluntary corporate compliance programs, Marrs notes.

Further, we are seeing greater application of what lawyers call the "FCPA (Foreign Corrupt Practices Act) standard." In other words, corporate executives are being held liable for their supply chain vendors and for "what they should have known." Factor in the lightning speed of business; the perfect record-keeping of emails, texts, and video that capture nearly every thought and utterance, no matter if out-of-context; online and employee activism; and the rise of activist investors who pressure companies to make ever-higher margins, and it leads to a dangerous climate.
Sadly, that climate has not improved since Shook, Hardy & Bacon analyzed it several years ago for the Association of Corporate Counsel (ACC). Their paper concluded that, “To more broadly regulate issues of corporate culture, criminal enforcement has been used to maximize the government’s leverage over companies and individuals alike.” Given these dramatic increases in liability exposure, business executives have little choice but to educate themselves and their employees on the risks.

U.S. prosecutors’ “formula,” as the Economist recently put it, “is simple: find a large company that may (or may not) have done something wrong; threaten its managers with commercial ruin, preferably with criminal charges; force them to use their shareholders’ money to pay an enormous fine to drop the charges in a secret settlement (so nobody can check the details). Then repeat with another large company.”

It’s the perfect dodge for cash-strapped states and a federal government loath to raise taxes.

Justice, as the Economist reminds us, “should not be based on extortion behind closed doors.”
Increasing Corporate Criminalization Threatens U.S. Economic Competitiveness

by Richard Levick
Increasing Corporate Criminalization Threatens U.S. Economic Competitiveness | January 14, 2019

This is the second in a three-part series that explores the impact of a disturbing trend: the increasing criminalization of American corporate conduct. This column examines fears that corporate criminalization, left unchecked, could hurt foreign investment, undercut growth, and undermine U.S. global competitiveness. The final column will outline steps that companies should take to protect themselves from unwarranted litigation.

When a company is guilty of willful negligence or gross misconduct, it deserves to be punished to the full extent of the law. Indeed, the ability of regulators and law enforcement officials to pursue criminal charges undergirds U.S. corporate law.

But when corporate executives are wrongly accused of committing criminal acts in the routine administration of their duties, the consequences can be devastating; they face the possibility of losing their livelihoods and reputations. Look no further than the unjustified prosecution of Todd Newman, a hedge fund manager at Diamondback Capital Management, whose conviction for insider trading based on dubious evidence was eventually overturned — but not before he suffered nightmarish losses.

Companies, moreover, confront the specter of extreme financial penalties and serious — if not irrevocable — danger to their brands. JPMorgan Chase & Co. and Perella Weinberg Partners both absorbed hits when executive Sean Stewart, who’d worked at both firms, was found guilty in a high-profile insider trading trial. His conviction was later dismissed over legal missteps.

What makes recent trends doubly frustrating is that they offer corporate CEOs, general counsels, and board members relatively few guideposts. Legal precedents on corporate criminalization tend not to get established because most cases, Newman’s and Stewart’s notwithstanding, get settled out of court. For many corporations, reaching a settlement is preferable to risking the public spectacle and potentially nasty recriminations of a trial.

The legal landscape is crowded: more than 300,000 regulatory statutes in this country carry potential criminal penalties, a figure that dwarfs any comparable metric in other industrialized countries. Compliance with still (relatively) new Dodd-Frank financial disclosure reforms alone requires thousands of pages of new rules.

“It’s becoming increasingly difficult for company executives, board members, and their counsel to keep track of all their areas of potential legal liability,” observes litigation specialist Scott D. Marrs, the regional managing partner of Akerman’s Texas offices.

“The old ‘scorecards’ don’t work anymore,” Marrs says. “The scope of regulatory and prosecutorial actions leveled against companies — and the fines and penalties they incur — continues to grow at an unsettling rate.”

No area is immune: the government has pursued criminal actions against companies across a wide spectrum, from antitrust, trade sanctions, and consumer lending requirements to bribery, environmental compliance, and the enforcement of food and drug safety laws.

Just as vexing, Marrs points out, are the nature of the monetary rewards that follow corporate criminalization settlements. Too many regulators and prosecutors have come to regard enforcement activities as something of a cash cow.

The office of Rhode Island’s attorney general funded a physical expansion of its workplace thanks to largesse received from a settlement with Google. New York State insinuated itself into snagging a tenth of BNP Paribas’ then-record $9 billion settlement with the federal government over the French company’s violations of U.S. sanctions against Iran and the Sudan. It’s not readily apparent why a state government — any state government — is entitled to a percentage of a federal fine imposed on a foreign company for violating U.S. trade provisions.

Economists worry that the trend toward criminalizing “normal” business conduct throws off corporate planning, retards growth, and discourages foreign entities from investing in the U.S., all of which undermine America’s global competitiveness.
Moreover, the federal Department of Justice (DoJ) and other enforcers have become ultra-aggressive in expanding their definitions of criminal liability, diminishing the role of intent in white collar prosecutions while dismissing the utility of voluntary corporate compliance programs.

“Left unchecked, this trend is bad for the rule of law and unhealthy for a business community that strains to compete in international markets,” says Marrs. “Board members in charge of mitigating risk increasingly find themselves at wit’s end.”

The consequences of unwarranted criminalization are profound: they run far deeper than just one prosecution. It’s tough enough for American corporations to compete with foreign companies that are often heavily subsidized by their national and local governments.

When U.S. companies start getting prosecuted for the conduct of regular business, it puts everyone at risk: executives, board members, workers, and shareholders.
January 26, 2019

Facebook's “Whistle-Stop” Strategy Has Been Derailed

by Richard Levick
Back in the 1930s and 1940s when President Franklin D. Roosevelt went whistle-stopping via train, he could count on one overriding communications reality: little of what he said along the way would crack “national” newspaper, wire service, or radio coverage. In other words, he could pound the podium while delivering a pro-labor stemwinder at the Wheeling, West Virginia, depot one morning and not worry about it undercutting the more restrained pro-business remarks he planned to deliver that evening in Bryn Mar, Pennsylvania.

FDR wasn’t the only politician back then who exploited the limitations of media coverage. “Whistle-stopping,” the modus operandi of saying one thing in one place and (essentially) contradicting it in another, was common for leaders of both parties. But that was then; this is now. Few people or institutions even attempt whistle-stopping anymore because the fallout – i.e., the damage to their brand – is too severe if they’re caught. In today’s global 24/7 media cycle, where, thanks to ubiquitous cell phones, everyone is an investigative reporter armed with a video camera, whistle-stopping has all but ended.

Memo to Facebook founder Mark Zuckerberg: You might want to catch up to the “new” communications reality — you know, since you helped to invent it.

Facebook’s “Whistle-Stop” Strategy Has Been Derailed

When Facebook gets into trouble, a non-stop phenomenon these days, it can’t say or do things in one corner of the globe — and not expect them to reverberate in another.

For years now, Facebook has sat idly by as Russia and other dangerous actors have used their platforms to foment unrest in fragile places like Myanmar and tried to upend democratic elections in Germany, India, and the Philippines — not to mention the U.S. — then pretend while testifying in Washington, D.C. or London that they’re “shocked, shocked!” — by the allegations. Facebook was apparently aware of Cambridge Analytica’s data mining for something like five years. And they promise for the umpteenth time to be determined to fix the problems right away — taking bows at every stop — hoping no one pays attention to their abysmal track record. Sheryl Sandberg’s memorized rehash earlier this week in Munich about shock, improvements, and promises was not well received.

As British Parliament member Damian Collins put it in a January 22nd New York Times op-ed that was sharply critical of Zuckerberg, Sandberg, and Facebook, “So much of our lives is organized through social media, and many people use social media platforms as the main source of information about the world around them. We cannot allow this public space to become a complete wild West.”

Look at the public space that has already been ransacked by bad guys manipulating social media. An estimated 43,000 Rohingyas have perished in Myanmar, a crackdown directed by a Myanmar military that used Facebook as its weapon of choice. Moreover, millions of voters on three continents (and one sub-continent) were fed mis- and disinformation that may have influenced the outcome of their elections. There’s little evidence that Russia and other bad actors are backing down from their shameful exploitation of social media. In fact, their interference is being copied by homegrown actors. “Out, out, brief candle.” We can only hope democracy survives.

Facebook can no longer whistle-stop or just brush off policymakers and regulators when they come. The cost includes the future of tens of thousands of children, many now immigrant orphans, the sanctity of democracies, and privacy.

Zuckerberg promised to fix Facebook and keeps telling us they are getting their house in order. But instead, with few exceptions, most of what we get from Facebook are insignificant changes and lots of denials.

It’s never easy, but as communications professionals our job is to help clients do the right thing, never more so than in a crisis. Facebook’s recent public posturing, on the other hand, is sadly reminiscent of the obstructionist tactics deployed a generation ago by the U.S. tobacco industry — deny and delay. Every time Facebook feigns surprise that their platform is being used for nefarious purposes, they undermine their own credibility.
If their gamesmanship before Congress and the British Parliament, et al., is any indication, Facebook believes that they’re smarter than we are—a blunder begging for more regulation globally.

Retaining an army of lobbyists and public relations specialists can only take Facebook so far. Consultants are not magicians. Instead of asking them to ‘put lipstick on a pig,’ Facebook should be arming them with solutions, and, dare I say it, visionary leadership for the information age.

Steve Jobs was irascible and difficult to work with, but he always lived in the mind of his customer. Mark Zuckerberg and Sheryl Sandberg have shown little inclination to think that way. So much for the Silicon Valley promise of a new form of capitalism: socially aware companies devoted to the well-being of customers, consumers, and employees.

For Facebook, their challenge has been to decide if we — the public writ large — are the customer or the product. By whistle-stopping their way around the world, they’ve let us know the answer. They are inviting their four greatest fears: being broken up into parts, ala Ma Bell; regulated into a utility; being sued ad infinitum by real victims; and being charged for our personal data. For Facebook’s sake — and our own — the company should read the flashing railways signs: “Future ahead, proceed at your own risk.”
Avoiding Unwarranted Prosecution

by Richard Levick
Avoiding Unwarranted Prosecution | January 31, 2019

**This is the final column in a three-part series** that explores the impact of a disturbing trend: the increasing criminalization of American corporate conduct. It outlines steps that companies should take to protect themselves from the dangers of unwarranted criminal litigation.

For someone who started his career in the Ralph Nader network, it is in some ways remarkable for me to write these words. The trend toward criminalizing normal business conduct not only hurts the executives and companies victimized by reckless prosecutors and regulators, it hamstrings the competitiveness of U.S. corporations in the global marketplace. Without doubt, certain individuals and companies (Travis Kalanick and Uber, come on down!), deserve the public humiliation they’ve received. They’ve betrayed shareholders, workers, consumers, and the public at large.

But others who have been put through the legal wringer, in many cases by overzealous prosecutors and officials? Not so much.

Many of the alleged crimes perpetrated by U.S. companies are, in the words of the *Economist*, “often obscure and the reasoning behind the punishments opaque.” The specter of public recrimination hangs over any potential trial, which is why so many corporations choose to settle.

“Even with respect to the most culpable companies, the system is a failure, as it allows the companies and their senior officials to evade the scrutiny and censure that would follow ‘an unequivocal criminal conviction,’” notes Kevin M. LaCroix, an attorney and the executive vice president of insurance intermediary RT ProExec.

Jacqueline Arango, the co-chief of Akerman’s white collar practice group argues that, “The convoluted web of rules and regulations to which businesses must comply means that even the most conscientious of companies encounters compliance issues. Maintaining compliance is an all-consuming job for a corporate general counsel’s office.”

What can U.S. companies do to inoculate themselves from potentially devastat- ing legal and regulatory probes? There are no sure-fire remedies, but smart corporations should consider:

- Establishing a Corporate **Compliance Framework** that is endorsed by the board and embraced by all senior-level executives and managers; ideally the framework should outline a corporate code of conduct, investigation protocols, clear punishment for violations of company policies, regulations, and the law, and a crisis mitigation plan

- Developing a **Communications Strategy** that captures the corporate commitment to good governance, embraces transparency, strengthens the company’s commitment to corporate social responsibility, cultivates prominent third parties, and encourages “authenticity” at the top

- Devising a **Crisis Mitigation Plan** including cross-functional participants, outside counsel and advisors, in preparation for any crisis that might arise

- Insisting on **Compliance Benchmarks** in annual performance reviews for all levels of employees, including managers and executives

- Requiring **Quarterly Reporting to the Board** regarding compliance and regulatory matters

- Establishing **Relationships with all Regulatory Bodies** with oversight responsibility for your company, including providing regular updates to regulators on key issues, and

- Retain **Outside Counsel specifically for the Board** in instances where a legal, regulatory or compliance matter involves a member of senior management, so as not to put the GC in an untenable position.

Even if a company takes these preventative steps, it’s still not easy for it to make decisions in the “gray area,” where an action may be technically legal, but can be interpreted in different ways, sometimes leading to prosecution. All companies must make decisions in this gray area, but executives tend to underestimate the risk associated with these decisions, sometimes naively believing that a legal or audit opinion will protect them.
Special software now exists that enables companies to proactively identify when seemingly benign risks become dangerous. Companies using KeenCorp software liken it to a “check engine” light for legal, accounting, and social media risk.

Akerman’s Arango advises that the instant you suspect that the company may be in the government’s crosshairs, you should be consulting with white collar counsel. Too many company executives say and do things that cannot be reversed or mitigated once counsel comes on board. Before executives speak with anyone — internal or external — legal and communications counsel should be retained.

It’s not getting any easier for companies. DoJ and other enforcers have become increasingly aggressive by expanding their definitions of criminal liability, diminishing the role of intent in white collar prosecutions while dismissing the utility of voluntary corporate compliance programs, notes Arango’s Akerman colleague Scott Marrs, who serves as regional managing partner of the firm’s Texas offices.

Even with the change in administrations, the trend toward corporate criminalization shows little sign of slowing down. All of which means companies need to speed up their contingency preparations for the day when a criminal prosecution — fair or unfair, warranted or unwarranted — could head their way.

A Year in Review: Forbes
February 7, 2019

Rusal Sanctions Policy: A Model For ‘Muscular Corporate Governance’

by Richard Levick
The debate surrounding the West’s economic sanctions against Russia is supercharged these days – and it should be.

Given President Trump’s alarmingly chummy relationship with Russian strongman Vladimir Putin, our bilateral trade relations with Russia, especially vis a vis companies run by billionaire oligarchs, should be examined under a magnifying glass. Putin and Russia, in my view, have yet to be adequately punished for their sinister efforts to undermine our democracy in the 2016 elections.

But that doesn’t mean U.S. sanctions cannot be relaxed if the U.S. Treasury Department’s Office of Foreign Assets Control (OFAC) determines that its longstanding criteria for the easing of sanctions have been fully satisfied and if such a move has been validated by trusted policymakers as advancing the enlightened self-interest of the U.S. and our allies.

In the case of major aluminum producer UC Rusal, formerly owned and operated by Putin intimate Oleg Deripaska, Rusal parent company En+ Group, and its affiliate EuroSibEnergo, an energy conglomerate, those conditions have been more than satisfied, despite hyperbolic charges to the contrary. The U.S., in sum, has now imposed an ongoing oversight mechanism on two Russian companies — one U.K.-listed and one Hong Kong-listed — to ensure that their governance processes are airtight and that their sanctioned oligarch no longer controls either company.

One of America’s leading exponents of international sanctions policy, Ambassador Daniel Fried of the Atlantic Council, volunteered this in a January 30 interview: “I understand the skepticism about Rusal and Deripaska. I am no fan of the Trump Administration’s approach to Putin. I was mortified by the president’s behavior in Helsinki. But this deal makes sense on the technical merits.”

Lost in all the sound and fury around Deripaska and Rusal are these stubborn facts:

- The Trump Administration’s action on En+ and Rusal is entirely in keeping with established bipartisan policy on sanctions enforcement. Indeed, Stefan Selig, a Democrat who served as President Obama’s Undersecretary of Commerce, argued that the move would create, for the first time, “independent corporate governance” for En+ and Rusal. The relaxation of the sanctions “is good for America and represents the effective use of U.S. sanctions policy,” Selig said.
- The U.S. Treasury Department is indeed seeking to mitigate sanctions against En+ and Rusal — companies that had been sanctioned due to their association with Deripaska — but has kept the onerous sanctions against the oligarch locked in place — and they’ll remain that way for the foreseeable future.
- Through these actions, Deripaska no longer has majority control over En+ (or Rusal for that matter since En+ has a majority ownership stake in it); constraints have been imposed to ensure that he never regains it. As a minority owner he’ll have some influence over the direction of En+, but, for as long as he remains on the sanctions list, he’ll never again have control. Instead, control will be asserted by an independent board committed to corporate good governance, every member of which has been thoroughly vetted by the U.S. Government. And the shares held by parties with any ties to Deripaska will be voted by independent American trustees also vetted by OFAC.
- En+’s new board with eight independent directors, and Rusal’s new board with a majority of independent directors, will be charged not only with ensuring compliance with the strict safeguards imposed by OFAC, but in going above and beyond to institute unprecedented standards of transparency and accountability. This should be seen, as Ambassador Fried points out, as an OFAC success story — a victory for fiduciary responsibility.
- The U.K. government, which has been extremely tough on Russia since Putin’s regime has been accused of carrying out terrorist attacks against British citizens, strongly supports the move.
- More than 100,000 jobs in 14 countries around the world depend on a viable Rusal. In Sweden, Ireland, Jamaica, and other countries, Rusal is a major employer, which helps explain why European countries are united in backing the plan.
“It is precisely because the plan is so rigorous and hard-hitting that it has enjoyed such a wide coalition of support from America’s traditional allies, including the European Union and, critically, Great Britain,” said Lord Gregory Barker in a late January interview. Lord Barker, a member of the House of Lords, serves as the independent chair of En+’s board.

“The direct removal of a Russian oligarch from control of his own business is simply unprecedented. This plan is a triumph for muscular corporate governance,” Lord Barker argues.

In January, the EU ambassadors signed a joint letter to the U.S. Congress urging them to soften the sanctions.

The bottom line is that this agreement averts what could have been a catastrophe in the global aluminum marketplace. If the sanctions had not been altered, one of these scenarios would likely have occurred: either Rusal would have filed for bankruptcy, been nationalized by the Russian Government, or sold to the Chinese — none of which would have been good for the U.S., our allies, or the interests of global trade. Moreover, any other outcome could have been disastrous for consumers around the world and exacted lasting damage on the U.S. auto industry.

Will the En+ and Rusal boards be up to the task? They’ve certainly assembled trustees steeped in business stewardship and transparency and devoted to the rule of law and reciprocal international trade. At this point, they include: Joan McNaughton, formerly the U.K.’s director general of energy; Nicholas Jordan, the former co-CEO of Goldman Sachs’s Russian interests; Carl Hughes, the ex-vice chairman of Deloitte’s global energy and resources division; and Christopher Burnham, the former CFO of the U.S. State Department and Under Secretary General of the United Nations.

“I am very pleased to have been recruited as an independent director and to represent small investors from around the world in an effort to instill in Rusal and En+ Group world-class governance, accountability, and transparency,” said Burnham in a February 5 interview.

Burnham and company are exactly the caliber of people you’d call on to rescue a company from its founder’s nefarious connections. None of them — and none of us — should trust Deripaska any more than we’d trust Putin. In Lord Barker’s words, “No one can accuse the U.K. of being a soft touch on sanctions, but we have lined up in support, alongside France, Germany and Ireland, plus real sanctions experts on both sides of the Atlantic, to support the actions of the U.S. Treasury.”

The appeal of these actions is that we don’t have to trust someone we shouldn’t trust: Deripaska is no longer in control. The good guys are. It passes the magnifying glass test.”
Why We Should All Avoid The Jussie Smollett-Style Rush To Judgment

by Richard Levick
We still don’t know all the facts surrounding Jussie Smollett — so let’s not rush to condemnation with the same fury his supporters rushed to judgment about his “attackers.” As troubled as he may be, he is entitled to due process.

The latest evidence presented by the Chicago police, however, points to disturbing pathological behavior. People who weave complex webs of deceit believe their own reality, sufficient to pass a lie detector test. If true, Smollett’s behavior is tragic and, as I articulated to Variety, may be unrecoverable.

Smollett may very well have done so much damage to victims of hate crimes that we will spend far more time debating the truth of future accusations than curing the disease. His own smoldering career is just an afterthought.

Richard Nixon’s career was anything but an afterthought. Nixon’s compulsive lying, anger, and anxiety were known to his close staff, but one could argue that from his perspective, holding onto power by any means necessary had a higher calling, even if it was unconstitutional. Nixon also clung to a legal argument, though flawed, that the president couldn’t violate the law. While you and I don’t accept those arguments, they have at least a thread of authenticity.

What does Smollett have? A desire to get paid more and, perhaps, to not be written out of a series? There is no higher calling here — just an actor trying to get another close up, Mr. DeMille. And the great irony is how talented Smollett is. He very quickly would have gotten other work — and likely even better parts.

This is fascinating because it is the quintessential example of the confusion between reality and digital fantasy. Other immediate examples are President Donald Trump, who, according to White House source, perceives the presidency as a daily reality series driven by ratings; and, tragically, teen suicides driven by misplaced anxiety over the “value” of their online persona.

To me, the larger issue — the rush to judgment — is the topic du jour. Politicians, TV talking heads, even the NAACP decided to interpret the sparse initial information to fit their pre-existing narrative. We are all doing that, experiencing a rush to judgment where the instantaneous need to embrace a symbol to prove our righteousness substantially outweighs the patience of fact-gathering — and the reflection that only time can grant. We may be a post-truth society, but it has morphed into a wisdom-less one where patience is no longer a virtue, but grandstanding is. If all we care about as a society is leveraging moments to justify our existence, then we are all Narcissus, too in love with our own reflection to look past the water to see life far beyond the reflecting pool.

For some of us, even before the artificial intelligence revolution takes hold, we no longer know what reality is. Therein lies the greatest danger. Time, distance, past, present, self, the digital self, the TV self. They are all melding.

The fantastic, though inaccurate, tale about George “Superman” Reeves’ being killed because he deluded himself that he could fly is believed to this day because he was another actor who appeared to have succumbed to the illusion of his profession. Smollett may be an extreme version of that fate, but for those who have come of age in the digital era, where virtual reality often wins out over real reality, it’s not a complete shocker. The fact that we have to use “real” as an adjective to “reality” says it all.

If Smollett did indeed orchestrate a fake attack and fabricate a story, then there really isn’t much to say from a reputational (and career) recovery point of view. First, stay out of jail; second, stay out of jail. Rinse and repeat.

Then volunteer a heartfelt admission and apology (without adding to legal exposure) before prosecutors force you to do it; include a plausible explanation (not to be confused with an excuse) that at least engenders some empathy; and then disappear for a while, ala Betty Ford. If he really wants a future platform, he can become a spokesperson (e.g., Rodney King) for the “I was very wrong and I’m sorry but look what my bad act uncovered — we should all stop rushing to judgment” chorus of which there are far too few singers. There is an old saying in the crisis business — “You can’t talk your way out of something you acted your way into.”
We live in a complex world, made more so by the avalanche of information rushing around us, literally more in a year than our grandparents had to deal with in a lifetime. We are to be forgiven if we don’t know how to deal with this new toxicity of over-information just yet. But our future depends on our getting this right.

We shouldn’t look past Jussie Smollett, Ralph Northam, Justin Fairfax, Nick Sandman, Al Franken and all the rest. They are signposts directing us to slow down and digest. My late father, fearful that as a child I ate too quickly, used to counsel, “chew, chew, swallow.” This remains terrifically good advice for all of us.
Are Military Officers The Missing Link In Your Risk Management Strategy?

by Richard Levick
It goes without saying that almost any boardroom would benefit from the experience and counsel of a retired military officer. I was over 50 before my father ever shared how he won the Bronze Star in Korea—even then, it was almost an afterthought. Most veterans I know seldom discuss their combat experiences, at least until they age and their experiences become part of their public legacy.

Given the breadth of challenges faced by the military, seasoned officers bring to the private sector a no-nonsense perspective on risk management and crisis mitigation that can help organizations weather any storm, no matter how severe.

The Value of Military Experience

Think of the issues facing businesses today. Workplace diversity? The U.S. military has been at the forefront of race and gender concerns for most of 70 years. Its own well-recorded mistakes ultimately served to help it work toward improvements.

High-tech advancement? When it comes to keeping abreast of emerging technology, few institutions can match the expertise and technical innovation of the armed forces.

Employee training and skill acquisition? It’s been a core mission of the military for decades.

Calm under siege? The opening moments of a crisis are critical for any company. And yet, an unfortunate number of CEOs and boards just aren’t experienced enough to use these moments wisely.

From Battlefield to Boardroom

The National Association of Corporate Directors (NACD) partners with military organizations to run From Battlefield to Boardroom, a special program to prepare retired officers for service on corporate boards. In NACD’s words, aspiring directors will “learn the ins and outs of the directorship profession and will be better equipped to position their military service to attract attention from executive recruiters and board directors.”

This week in Washington, D.C., NACD has been hosting a conference that covers everything from the rudiments of boardroom conduct to handling complicated issues of strategy, oversight, and stakeholder management for retired military. Retired U.S. Army Lt. Gen. Benjamin Freakley, now a special adviser on leadership initiatives to the president of Arizona State University, is a graduate of the NACD program and has since served on two corporate boards.

The Military Mindset

“Military officers bring three essential attributes to a corporate board,” Mr. Freakley says, “the capacity to think strategically, sizing up ‘big-picture’ considerations; the capacity to think critically, when the institution for whatever reason finds itself under siege; and a commitment to ethical conduct, no matter the circumstances. From their first day in the military, officers are put through rigorous ethical training. They can help organizations create and live up to such core values as integrity, respect, responsibility, and accountability.”

Retired Rear Admiral Thomas C. Lynch, now the executive chair of NewDay USA, a mortgage financing firm (represented by my firm) that helps veterans get the most out of their Veterans Administration home loan benefits, adds: “In my three decades in the Navy, I dealt with almost every conceivable crisis. The capacity to remain cool under pressure is in high demand in corporate America—especially on boards of companies that find themselves under siege from time to time. Retired military officers add real-world savvy to corporate boards.”

Outside the Military Experience

To be sure, corporate boards tackle challenges that fall outside the realm of most military officers’ experience.

Maintaining transparency—a key corporate attribute these days—is not viewed the same way by those who are trained to believe in operational security, restricting certain information to a need-to-know basis.

Military officers have to keep certain stakeholders and constituencies happy—Department of Defense officials and members of Congress come to mind—but there’s no dynamic that matches a corporate board’s relationship to its shareholders. Like it
or not, in today’s world, activists and sometimes belligerent shareholders, not to mention NGOs and environmentalists, require constant engagement—a reality that might throw someone who has spent a career in the military.

The same holds true in gleaning the truth about a company’s financial health from a quarterly report or a P&L statement. The first time or two might prove difficult for a career military officer.

**Handling Litigation**

But chances are the toughest issue for any new board member, military officers included, is figuring out how to mitigate the risk of unwarranted litigation—the increasing trend toward the criminalization of “normal” business behavior. New board members will wince at this statistic: More than 300,000 regulatory statutes in the U.S. carry potential criminal penalties, a figure that dwarfs any comparable metric in other industrialized countries.

Most military officers tend to be quick learners. “Though maybe just ‘avid learners’ at any point in time, once onboarded, retired flag and general officers can provide strength to the board to deal with adversity,” observes Greenberg Traurig’s Paul Ferrillo, a corporate governance specialist.

“They tend to be more rigorous in their analysis, yet strategic in their advice. They always look for solutions to problems; they normally don’t create problems on their own. Retired military tend to be strong yet overlooked candidates for board directorships.”

Mr. Ferrillo’s assessment is correct: No one really knows who has the courage and the clearest head until the first exchange takes place. Why head into the future without leadership that gets that?
Giving America’s Veterans The Job Opportunities They’ve Earned

by Richard Levick
My late father served as a U.S. Army infantryman in the Korean conflict. He almost never spoke of the combat experience that earned him a Bronze Star. It was too difficult for him to think of the friends who came home maimed for life — or didn’t come home at all.

Dad wasn’t alone back then — and he wouldn’t be alone today. Few members of society are as misunderstood as America’s military veterans. In many ways, they’re beloved, sometimes even venerated, as when we rise to applaud returning soldiers at a ballgame, waving our caps in humble — if distant — tribute.

At other times, we keep veterans and members of the armed services at arm’s length, too often out of misplaced pity.

“So how many tours have you, umm, done in Iraq and Afghanistan?” we ask our new acquaintance, the soldier standing in front of us in line at the coffee shop. When he answers, “Four,” we shudder on the inside, trying not to let it affect our smile. “The poor guy probably has PTSD,” we think to ourselves as we mumble, “Thank you for your service.” Then we pretend to look at our phone, breaking off the conversation because it’s too awkward.

Why the strange reaction? For those of us who never served, it’s more about us than them, isn’t it?

At the root of our awkwardness is guilt, coupled with a heavy dose of ignorance. Guilt because we know in our hearts that service members and their families have sacrificed way too much in recent years — and the rest of us haven’t done anywhere close to our fair share. And ignorance because we think we know something about post-traumatic stress and the other readjustment issues facing vets, when, in fact, most of us know next to nothing.

Let’s dispel certain myths that surround veterans trying to enter the civilian workforce. No, they don’t suffer from mental health challenges at a rate significantly greater than the rest of society. Yes, PTSD is a problem for vets. But difficult-to-manage stress is a problem for everyone, including members of your company’s workforce.

There’s also a common misperception that unemployment among vets is much higher than the national average. Actually, the opposite is true: vet unemployment is lower than the national average. The gnawing issue is quality: too many vets settle for lower-paying jobs when they’re more than qualified for better-paying ones.

Why? The tendency for too many vets is to sell themselves short and take the first job that’s offered — not a position that promises better wages and a more lucrative career path. Former Navy Judge Advocate General counselor Eric Eversole, now president of Hiring Our Heroes and vice president at the U.S. Chamber of Commerce, points out that data collected in 2016 showed that 38 percent of departing veterans spent, on average, four months unemployed, and 44 percent quit their job within a year. In other words, veterans appear to get nervous about being unemployed, take the first offer that comes along, and don’t seem to have a clear vocational objective in mind.

Eversole’s Hiring Our Heroes is an invaluable organization devoted to helping veterans recognize their worth, matching their talents to suitable employers. It counsels job seekers to think of their job transition in military terms. A soldier would never go into combat without smart intelligence or a fallback, so why would they approach a job search without a plan?

As retired Rear Admiral Thomas C. Lynch, the Executive Chairman of NewDay USA, a mortgage financing company (represented by my firm) that helps veterans get the most out of their Veterans Administration home loan benefits, puts it, “Veterans are highly motivated, hard-working, and loyal. Any workforce would be greatly strengthened by adding veterans and giving them chances to earn important responsibilities. Certain vets might need a little extra training at the outset — but it would be time and money well invested.”

What can private sector employers do to buttress their outreach to vets and bring more of them into their workforce? As Hiring Our Heroes preaches, it requires some adjustments in their methodology.
Think for a second about the cultural differences between the military and civilian worlds and why employers might need to give certain veterans a special nudge.

In the military, esprit de corps isn’t just a motto – it animates everything they do. Cultivating unit cohesion, asking a soldier to sacrifice for something larger, is the lifeblood of our armed services. From enlisted personnel all the way to the top of the command structure, a military member is taught from day one that they’re part of something transcendent. They are always training their replacement, always seeking greater unit efficiency, always looking to boost morale.

Cultivating camaraderie isn’t always at the heart of private sector organizations. Many private employees view mentoring as a threat to their own job security. It takes some vets a while to adjust to a different work environment.

With that in mind, companies looking to encourage departing vets to sign on with them would do well to appoint a veteran to serve as the company liaison to military bases. Would a company ever send a non-alum to recruit at a college campus? No — yet scores of companies send executives who’ve never served onto military installations to talk up the virtues of their companies.

It takes a veteran to understand what military people go through in transitioning to the private sector — the kinds of apprehensions they have about its impact on family life, on their kids’ schooling, their spouses’ well-being. Soldiers and sailors tend to be more comfortable in talking to a vet in the recruiting and training phases.

Smart organizations recognize that and not only appoint veterans to key liaison roles, but also go the extra mile to ensure that the special needs of veterans and their families are being met.

A good example of how best to onboard veterans is being done at Arizona State University. Thanks to the leadership of retired Lieutenant General Ben Freakley, now a professor and policy advisor at ASU and its McCain Institute, the university does a superb job meeting the needs of the veterans on its campus. ASU trains faculty members on the most effective way to interact with veterans, maintains a center to help veterans and their families get acclimated, and assists with all aspects of their transition, including housing, financing, and, ultimately, helping them find the right job.

Smart organizations also recognize that many of the skills that vets acquire in their years in the service are directly transferrable to the private sector. Think of the advanced technology mastered by many soldiers and sailors, or the way they can conquer thorny logistical challenges, or the way they’re taught to seize responsibility and fix problems on the fly, and it all adds up to a skill set that many private employers would find attractive — if those companies have the wherewithal to give vets a chance.

Want to do something that will benefit your company, your community, and your country? Hire a vet. Or better yet, hire more than a few.

To find out more about what you can do to give veterans the opportunities they’ve earned, visit Hiring Our Heroes and the Department of Labor’s Hire a Veteran resources. ■
Overzealous Prosecutors And The Risk Of Voluntary Disclosure

by Richard Levick
My series of columns on the overzealous prosecution of American companies and businesspeople was meant to be a three-parter. But there was such overwhelming interest in over-criminalization and its repercussions for Corporate America that it compelled a fourth installment.

There is a great irony to writing a column about overzealous prosecutors in the shadow of the first Paul Manafort sentence where it appears by any measure that he secured a remarkably lenient sentence. Yet my recent series in Forbes.com on the disquieting trend toward criminalizing “normal” American enterprise stirred more than a few pointed comments. The most common response? “Have I got a story for you!”

Genuine criminal misconduct is one thing. If a company or an executive knowingly, maliciously, and repeatedly violates the law, they deserve society’s censure, plus jail time if warranted.

But what if their “misdeed” is not the product of willful or malevolent behavior? What if their action would have passed legal muster until very recently? Even worse, what if their prosecution was triggered by an overly ambitious prosecutor looking for a headline and a healthy settlement?

It’s this apprehension that elicited the most comments. The National Association of Criminal Defense Lawyers (NACDL), as well as prominent attorneys, shared a litany of alarming stories. Indeed, NACDL’s analysis reveals that some 95% of all criminal convictions are now obtained through plea bargaining instead of jury trials. Prosecutors know that few companies can afford the expense and the jarring publicity generated by a high-profile trial.

Washington, D.C. attorney Paul D. Kamenar, a public policy lawyer who litigates, lectures, and lobbies on over-criminalization issues, emailed links to the Cato Institute, the Heritage Foundation, the Federalist Society, NACDL, and the U.S. Chamber of Commerce Institute for Legal Reform websites, all focusing on over-criminalization and prosecutorial misconduct.

Kamenar specifically cited the nightmare experiences of two corporate CEOs in the medical field. Todd Farha, a young Harvard MBA businessman and former CEO of WellCare Health Plans, was convicted and sentenced to prison in 2014 for Medicaid fraud, but not because the company provided faulty services. Instead, he was found guilty for not calculating what the government argued was the “proper” amount of Medicaid funds to rebate, which hinged on a vague and confusing regulatory accounting formula. Third-party experts agreed that the interpretation of the refund formula by the CEO, the CFO, and the General Counsel was reasonable. Moreover, there were ample administrative and civil remedies to correct any disputed overpayments, particularly where requisite criminal intent was lacking. The NACDL has a special link with nearly three dozen articles, op-eds, podcasts, and legal briefs devoted to this unfair prosecution. They’re worth a careful read.

Howard Root, the former CEO of Minnesota-based Vascular Solutions, Inc., and author of Cardiac Arrest: Five Heart-Stopping Years as a CEO on the Feds’ Hit-List, spent a half-decade and $25 million (!) in legal fees combating what proved to be a groundless Department of Justice (DoI) claim that his company was fraudulently marketing a vascular health device. An embittered ex-employee of Vascular had leveled the reckless charge — and DoI bought into it, ignoring the fact that the device in question had never harmed a patient and represented less than one percent of the company’s overall sales.

After being put through a legal labyrinth, he and Vascular were eventually acquitted of all wrongdoing. Not long ago he sold Vascular for a billion dollars, which must have been a gratifying moment.

“I wish my story was a lightning strike in the perfect storm — a few unscrupulous prosecutors conned by desperate whistleblowers,” Root says today. “But prosecutions like mine are exploding across the United States. When prosecutors can use false criminal charges to destroy everyone except the few wealthy and unbroken defendants like me, then virtually everyone is in danger — even if you’ve done nothing wrong.”

Have we entered a period where only the exceptionally wealthy can defend themselves against the state, regardless of the charge? And, worse still, are we reaching a tipping point where the very fear
of long-arm prosecution will deflate capitalism’s beating heart? I grew up professionally in the Ralph Nader consumer network and always trained to defend the citizen, not the corporate executive. If you have someone like me scratching their head, we may be well past the tipping point.

Among the businesspeople who find themselves caught in Root’s “perfect storm” of legal jeopardy are corporate executives like Farha who have adhered to the advice of in-house counsel. What was previously deemed “routine” or “innocuous” is, in today’s litigious climate, seen by overzealous prosecutors as unlawful — or grounds for a high-profile settlement. In other words, following the advice of counsel is no guarantee of liberty, even when good faith is never in question.

“With over 4,450 crimes scattered throughout the federal criminal code, and untold numbers of federal regulatory criminal provisions, our nation’s addiction to criminalization backlogs our judiciary, overflows our prisons, and forces innocent individuals to plead guilty not because they actually are, but because exercising their constitutional right to a trial is prohibitively expensive and too much of a risk,” maintains NACDL. “This inefficient and ineffective system is, of course, a tremendous taxpayer burden.”

The burden extends beyond taxpayers. As Scott D. Marrs, Akerman’s Regional Managing Partner — Texas and our collaborator on the overcriminalization series, puts it: “Not many clients have the unlimited resources and thickness of skin to get into a nasty trial climate. Often the percentage move is to agree to a settlement — even if the client hasn’t done anything unlawful. That’s not a healthy situation for anyone.”

It also may not be healthy that certain corporations have taken to hiring former prosecutors to help them avert unfair prosecutions. These former prosecutors appear to be preaching voluntary disclosure — urging companies to be as upfront and transparent as possible. The fewer corporate activities seen as furtive, the greater the likelihood that prosecutors will look elsewhere. Transparency always carries a degree of risk; but the risk associated with opacity is, in this instance, far greater.

“As far as deciding which firms to prosecute,” observes Professor Eugene Soltes, an Associate Professor of Business Administration at Harvard Business School and the author of Why They Do It: Inside the Mind of the White-Collar Criminal, “I think the biggest shift has been around voluntary disclosure — especially in the context of the Foreign Corrupt Practices Act (FCPA). Firms that bring such issues to prosecutors can qualify to not be charged if they are fully transparent. This is an important shift in policy and changes the calculus about how firms approach some of these issues.”

Achieving a level of voluntary disclosure that might dissuade a prosecutor from launching an investigation is easier said than done. What other steps can companies take to try and inoculate themselves?

First and foremost, companies shouldn’t go it alone. Retain expert legal and communications counsel, and engage all key senior leaders, beginning with the general counsel’s office, public affairs, communications, and marketing.

Second, the CEO and the GC need to dictate from day one that the fewer non-transparent activities, the better. Sure, there are proprietary initiatives and secret-sauce recipes that can’t be exposed to sunlight, but they should be few and far between.

Third, don’t wait until something unsavory happens: move now, during peacetime. Once the charge has gone public, it’s too late.

Fourth, and this requires some collective action, join with associations, law professors, former prosecutors, and think tanks such as those mentioned above, as well as others known for their free enterprise and judicial fairness views, and articulate the need for balance. Produce videos to help dominate the search engines so that the challenge of overzealous prosecution becomes a national cause more than the sound and fury of a single victim. The overregulation argument is an old saw that has lost a lot of its firepower because it was used for decades as an argument against all regulation. Show the negative impact on jurisprudence, business, the public trust or public policy, not just the potential negative impact on a single company or executive. The larger the risk to other audiences, the more likely the issue is to gain traction and sympathy.

Finally, collect and publicize the most egregious examples; rather than allowing selfish prosecutors to dominate headlines, try to engage the public square with capitalism’s reliance on fairness, not intimidation, as the lodestar. Applaud proper prosecutions and argue for some regulation while changing the national dialogue to address the discretion and intimidation that have become prosecutorial weapons rather than scales of justice. This strategy was adopted a few years ago by the FCPA defense bar, which substantially changed the national dialogue.
Amid the FCPA debate, DoJ and Securities and Exchange Commission (SEC) lawyers increasingly saw a "don't over-prosecute" message every time they searched the Internet. If you want to impact collective behavior, there is no more powerful way than to influence search results; videos do that faster than anything. But you need to coordinate this with other companies, former prosecutors, thought leaders, business executives, and law professors. No one company can do this alone.

Are unwarranted prosecutions the scourge that Kamenar, Farha, Root, Marrs, and others fear? Trends certainly appear to be heading in that direction. Before a nasty prosecution heads your way, you ought to take some constructive steps.
The Aberration Becomes The Norm

by Richard Levick
This week marks the 51st anniversary of the My Lai massacre, in which Charlie Company killed over 500 unarmed civilians in Vietnam, mostly women, children, and old men. I was ten years old, son of a Korean War veteran, when it occurred, but a teenager in high school before it became public due to the now well-known coverup, and, like the rest of America, struggled to understand what had happened and why. Honor and order not to mention lives had been lost. I can remember where I was, when I tried to make sense of something far bigger than me or my teenage years.

Here we are, over a half century later, reeling from a 28-year old white-supremacist terrorist who killed at least 50 people in a massacre in New Zealand designed for the Internet Age and an FAA which became the last — not the first — government aviation agency in the world to determine a pattern in the second crash of a Boeing 737 Max 8, which have collectively claimed over 300 lives.

And in the middle of this, an admissions scandal which has already arrested more than 50 people and is said to likely ensnare more than 700 when all is said and done. Stanford, Georgetown, Yale, the University of Texas, USC, Wake Forest, the list goes on. Brand names all.

If there was anything we could count on in a more innocent age, it was order. Fair was fair. Of course there were the aberrations to the norm — the Charles Van Doren $64,000 Quiz Show scandal, the murder of eight student nurses, and the shooting from the Texas Bell Tower — immediately come to mind, but we quickly returned to normal. That’s what all the outrage was for. Now the aberrations are the norm.

The most trite big story of the week now feels like the admissions scandal. No lives were lost, just dignity, fairness, and our faith in “The American Way,” which lies at the foundation of our voluntary systems known as capitalism and democracy. Without this faith in fundamental fairness we quickly pass a tipping point where we only think of the self and not the republic. Are we there yet?

When our phones and email lit up this week from reporters on the admissions scandal, it was mostly about ‘What can the parents who committed these sins do?’ For most of us in the crisis business, our answer can be reduced to a pretty simple one for the parents: ‘You cannot talk your way out of something you acted your way into.’ Go away, be quiet, and atone.

But then one reporter asked the far more difficult question: ‘What should the affected students do?’ Now that’s a far harder answer. After all, what parent willingly sews a Scarlet Letter on their child’s fleece?

I feel badly for these young adults, who will suffer the indignity of their parents’ greed for quite some time. The schools will weigh in next with expelling or re-evaluating most of them so many will have to start over. Even if the students took time off or dropped out, they would be risking college acceptance anywhere. Universities at any level will be taking a risk accepting them.

Recall that when Icarus flew too close to the sun, it was because he failed to heed his father — Daedalus’ — command to fly at a safe distance. This time, it is the parents who forced their children to fly into the sun.

They are, at the end of the day, children of privilege and will be fine. But for the rest of us, Horatio Alger is on life support.

We are left to wonder yet again, after a week when honor, order, and lives were lost, when will we return to the norm?
#MeToo Is Too Important To Let Devolve Into "Vigilantism"

by Richard Levick
“Those who are the hardest to love need it the most.”
— Socrates

I lost my mother when I was four and she was just 25. The tragedy set me on a path that among other things, includes a lifelong advocacy of women’s rights.

I was a teenage supporter of the Equal Rights Amendment, marched for women’s rights in my early 20s, served as the first male employee as a law student in the Women’s Rights division of the AFL-CIO’s largest union, and wrote a master’s thesis on pay equity. My commitment isn’t just about words or a trend. It is embedded in history and lived daily. Yet something about the #MeToo movement, both long overdue and deeply needed, has me unsettled.

All revolutions have their unintended casualties. Has #MeToo, which swept the country with such moral clarity two years ago, begun to devolve into something less clear?

Has #MeToo contributed to the pell-mell rush to judgment, the desertion of due process that’s become endemic on both sides of the political spectrum?

In the view of Deborah P. Kelly, a partner in Manatt’s Employment and Labor Practice, has an overreaction to #MeToo induced certain companies to adopt “sex-segregation” policies that preclude men from mentoring women, prohibit after-hours business events where liquor is served, discourage women from traveling with men, and dissuade males from meeting one-on-one with female co-workers?

It’s too early to say that #MeToo is undercutting its own integrity. Nor is it fair to blame #MeToo for these societal ills.

Yet as we approach year three, it’s a good time to assess its effectiveness — and ask some tough questions about its future.

Let me be clear: #MeToo has done much good for women who have suffered in silence for far too long. “Coming forward and being believed is the first step in recovery and moving past traumatic events,” observes Dr. Pamela Rutledge, who teaches in the Media Psychology Program at Fielding Graduate University and is an advisory board member for the University of California-Irvine’s social media marketing program.

“The fact that those voices could be heard en masse is due largely to social media,” Rutledge says. “The historical difficulty of a victim being believed or having any verifiable proof is inherent in the years of silence.”

“The #MeToo movement has courageously exposed the extent of sexual assault and harassment toward women, although there have been some unintended consequences,” adds social historian Andrew L. Yarrow, a senior fellow at the Progressive Policy Institute and the author of *Man Out: Men on the Sidelines of American Life*.

Yet for all these positive developments, what is there about #MeToo that leaves a disquieting feel? As Kelly puts it, “If the ‘solution’ to heterosexual sexual harassment is flat-out sex discrimination, we’re just trading off one unlawful practice for another.”

Why has addressing workplace discrimination proved so daunting?

“Sadly, we are in a climate of finger-pointing, frustration, and divisiveness about many things — not just #MeToo,” points out Dr. Rutledge. “This anger is at every level with people seeking justice, retribution, and some means of setting things right at a time when ‘Twitter-blaming’ is at an all-time high, increasing distrust and undermining the sense that there is some fair outcome.”

Cyberbullying is a revved-up version of Twitter-blaming; online belligerence has become an all-too-common weapon in #MeToo and other societal issues. Indeed, Yarrow argues that, “It has left many men fearful of being accused of innocent acts, casting a pall on relations between the sexes. In addition, it has reinforced the incorrect belief that only women are victims of assault, despite data indicating that about one in three men experience sexual or physical violence or stalking by an intimate partner, according to the Centers for Disease Control and Prevention.” The fact that men do not often come forward when they are victims of physical abuse by women only makes these statistics more formidable.

Among the organizations that have been hit with a tsunami of adverse coverage triggered by unwarranted allegations of sexual
abuse are Silicon Valley’s UploadVR and the University of Virginia. Both stories, initially offered as ‘proof’ of systemic problems — on college campuses and in Silicon Valley — have been roundly criticized for their conclusions-first, facts-second approach.

Digital media, notes Yarrow, has “made it sickeningly easy to accuse and attack others, spew hatred and bigotry toward any group, and threaten violence against public figures, ex-partners, journalists, and others.”

“There is a difference between evidence and legal procedures and vigilantism,” maintains Rutledge. “Vigilantism is the natural outcome when people feel their voices and concerns are not heard.”

Cyber vigilantism — now there’s a phrase for our time — cannot be allowed to puncture the presumption of innocence, the bedrock that undergirds our rule of law, let alone due process. Nor should it be used as a form of prior restraint. If we want to be true revolutionaries, then we should seek justice, not power.

“For many, #MeToo has become a litmus test of tribalism,” says Rutledge. “When this happens, it can be used irresponsibly as a weapon. When presumptions of guilt are acted upon through boycotts and social shaming, when questioning or asking for evidence becomes disloyalty, it runs the risk of undoing a lot of the good that has been achieved.”

As Yarrow puts it, “While initially aimed at exposing individual men and raising awareness of a critical problem, some #MeToo proponents have moved on to see men, in general, as evil — a simplistic and totalizing way of thinking all too much like racism, anti-Semitism, and — for that matter — sexism.”

Too many social movements end up boomeranging, hurting the very people they set out to protect. It would be a shame if #MeToo, which sought to achieve dignity and justice for victims of sexual harassment and discrimination, could be degraded into vigilantism.

#MeToo is a movement started by an African-American woman — Tarana Burke — for the double injustice that women of color face. Almost all of us are victims at one time or another — of race, religion, sex, sexual preference, age, and the list goes on. The path to justice requires understanding — not retaliation. As frustrating as the rules of due process, statute of limitations, and free speech (when we don’t care for the free speech of others) are, they combine to make the rule of law.

We cannot sing the clarion call for the rule of law when it benefits us but ignore it when it delays us. “Judge not, that ye be not judged.”
Amazon Goes To Virginia: How Long-Term Thinking Won The HQ2 Prize

by Richard Levick
In Albany, even the fleeting taste of victory was a little bitter. When, last November, Amazon announced that it would split its new headquarters (HQ2) between Long Island City in New York and Crystal City in Virginia, it was reported that New York was offering tax credits equal to $48,000 per new job while Virginia had agreed to workforce cash grants of $22,000 per job. No one likes to pay more than double what the other guy pays for the same prize. Given the subsequent grassroots revolt in New York and Amazon’s decision to seek friendlier environs, the point might seem academic. Yet it does offer a key to some larger lessons that, in retrospect, Virginia’s winning strategy underscores.

Lesson Number One is that tax credits and other dollar-specific incentives are often just the table stakes; that, for companies like Amazon, larger cultural dynamics are more important. If that’s true, Virginia was well-positioned as it’s always been a low-incentive state, as Stephen Moret, director of the Virginia Economic Development Partnership, told the press. “We wanted to win this in a Virginia way,” he said.

At the same time, Virginia’s win is bigger than Virginia. From the get-go, a potent message was being sent to the Amazon decision-makers: that the three separate contestants from the region — Washington, DC and Montgomery County, MD along with Virginia — were not playing a zero-sum game; that, by choosing one, Amazon would benefit from the resources, human and otherwise, available from all three.

In turn, all three contestants would benefit from the immense economic bounty that Amazon’s arrival anywhere in the region would provide. (The actual HQ2 winner, now dubbed “National Landing,” is a slice of Virginia that includes parts of the Crystal City and Pentagon City neighborhoods in Arlington County along with Potomac Yard in Alexandria.)

“In the past, the region competed fiercely over available opportunities, so much so that, often, the region would all lose out in the end,” says Jason Miller, CEO of the Greater Washington Partnership, a civic alliance of 27 leading employers and entrepreneurs representing businesses from Baltimore to Richmond. “This time, a greater collective political will prevailed.”

Such apparent political comity had to be music to Amazon’s ears as it offered a reassuring foretaste of what doing business here would be like.

Lesson Number Two: it’s not all about the Silicon Valley model. Yes, Amazon is a high-tech company but that doesn’t mean it will base its decision on how many VCs operate in the neighborhood or that the National Institute of Health is a stone’s-throw away. As Miller puts it, “it’s not just about having assets. It’s about being a hub” — and being a hub is all about having enough people who are readily employable and supported by a solid commitment to train upcoming generations for that employment.

To that end, Virginia’s government plans to spend over $1 billion on tech education with a projected 25,000-30,000 increase in the number of computer science and related degrees in the next two decades. Meanwhile, Virginia Tech is building a new graduate campus focused on innovation while George Mason University is also expanding its tech program.

Lesson Number Three: Your problems may be solutions in disguise. Paradoxically, MDVA may have had an advantage specifically because it is a relatively slow-growing region that has seen many of its most talented tech professionals — exactly the kind of people Amazon wants to hire — depart for other parts of the country, especially Northern California. Yet enough of that talent still resides in the region; they just need a reason to stay. By contributing to a long-term solution to the regional brain drain, Amazon thus enhances its own value to the community and confirms the likelihood of a stronger long-term partnership with local government and civic groups. The combination of the region’s significant need with its significant resolve to fill that need should make Amazon feel quite welcome.

By contrast, we saw what happened in New York once Amazon felt quite unwelcome. Not that there aren't similar gentrification-related concerns in Virginia, which has its own share of affordable housing activists complaining that the Crystal City package does not include housing earmarks.

But there’s nothing comparable here in terms of public hostility and grassroots resistance. People in Long Island City have deep
roots in, and close identification with, their community. Not so much Crystal City; indeed, “National Landing” seems a welcome rebrand, notwithstanding the bemusement expressed by some locals. As a brand, “National Landing” creates a new community identity even as it suggests vital connections to the overall DC power structure.

Crystal City has been a community on the downswing since 2005 when the Peace Dividend closed the adjacent military installations on which its economy fed. The 2008 economic crisis made matters worse and commercial vacancies now define the visible landscape. Amazon should feel quite welcome indeed.

Lesson Number Four: leverage the resources you have. As Jonathan Aberman points out, the local talent pool isn’t just made up of those tech-savvy professionals for whom Amazon’s arrival offers good reason to stay in the area. To the contrary, “our work force [also] includes deep, deep experience in politics and public policy, a managerial class that understands strategic growth,” says Aberman, founder and Managing Director of Amplifier Ventures, an investor and advisor to technology startups.

Aberman is one of the unsung heroes in this narrative. His report on the region’s innovation potential surprised a lot of people by highlighting its vibrant M&A market and entrepreneurial culture. As a result, the Washington, DC workforce could now be credibly depicted as innovative, not just bureaucratic — a transformation in perception without which the HQ2 campaign wouldn’t have gotten to first base. In countless speeches, in Washington Post and Washington Business Journal columns, and on his WFED radio program, he’s been a tireless promoter of area innovation. His vision, though, extends beyond technology.

As Aberman points out, Amazon’s very interest in the MDVA area proves the company wasn’t just interested in recruitable technology talent. If the company wanted HQ2 to replicate what it already has in its Seattle headquarters, it would have limited its search to more established tech corridors. Clearly, Amazon wants (and needs) a most diverse array of skills, including communications, law, government relations, etc.

Lesson Number Five: change the narrative. No contestant from the MDVA region could have won the beauty contest if Washington were still perceived as only a company town. The HQ2 victory may have confirmed MDVA as an innovation community but, Aberman reminds us, the perceptual transformation started long before efforts to attract Amazon. The ground had to be tilled first.

So, the story here is all about long-range thinking on both sides: Virginia, and area business leaders, with their significant investment in educating future generations — not just for Amazon, but to retain or attract businesses across the spectrum; and Amazon, with its keen sense of the future as a massively diverse and multidisciplinary place.
Amid Escalating Trade Tensions, Asian Companies Need Help Navigating U.S. Market

by Richard Levick
In the spring of 2017, I wrote a multi-part series in Forbes.com on the challenges facing foreign-based companies seeking to increase their business presence in the U.S. The advice that a coterie of experts offered back then could be distilled into a message in a bottle:


Little has changed in the ensuing two years to alter that dynamic. The Trump Administration has done more than just talk tough on trade: it has slapped tariffs and duties on some $200 billion worth of Chinese goods — so many items, in fact, that it takes 194 pages to list them all — exacerbating an already tense relationship. Moreover, complying with the muddled patchwork of federal, state, and local regulations that has long been the cost of doing business in the U.S. has not gotten any easier. U.S. trade controls, especially those relating to customs, immigration, and tax, continue to demand strict adherence. Foreign companies still find themselves the target of rugged regulatory and legal actions. The Foreign Corrupt Practices Act (FCPA), the CFIUS (Committee on Foreign Investment in the U.S.) process, export controls, antidumping, and countervailing measures, are a just few of the sometimes erratically imposed trade rules and sanctions that frustrate foreign companies. Asian-based companies, especially, often find themselves flummoxed trying to keep up with their uneven enforcement.

CFIUS, an arcane interagency process aimed at reviewing the risk of certain foreign investments in the U.S., was adopted in pre-Internet days. Now, CFIUS threatens to block or even derail multi-billion-dollar deals, many of them in the technology arena. It’s yet another issue that investors and corporate counsel need to consider when evaluating potential transactions.

Andrew C. Gratz, an Associate General Counsel at global plastics and chemicals giant LyondellBasell, points out that CFIUS recently directed Beijing Kunlun Tech Co. Ltd., a Chinese gaming company, to divest itself of Grindr, a popular dating app, because of concern that its user data could be weaponized to compromise military and intelligence personnel. CFIUS’s action against Beijing Kunlun is the latest in a series aimed at Chinese companies, Gratz points out. Indeed, confusion over CFIUS aggrandized the strain surrounding Shuanghui International’s acquisition of Smithfield Foods, although the transaction eventually went through.

“While Chinese and Russian companies appear to receive the greatest amount of scrutiny from CFIUS, companies located in other countries must also be aware of the risks and regulatory hurdles presented by CFIUS and other trade laws. Indeed, companies located in Europe and other ‘U.S.-friendly’ jurisdictions that seek to invest in U.S. companies are being impacted by CFIUS’s new prominence, whether due to the current backlog at the agency or other national security issues. For this reason, every non-U.S. company needs to evaluate how CFIUS may affect the timing and certainty of pursuing an investment in the United States,” Gratz says.

Now that global trade concerns have become flashpoints in American political discourse, board members and C-suite executives need to recognize the potential volatility of CFIUS reviews – and factor them into both short- and long-term planning, he advises.

Asian companies confront other formidable obstacles as they compete in the U.S. market, maintains Noah Brumfield, an antitrust and trade policy expert who heads White & Case’s Taiwan practice.

“The U.S. government is very focused on enforcement of the antitrust and trade secret laws extraterritorially, with particular attention given to product in the supply chain sourced from China under the Attorney General’s ‘China Initiative’,” Brumfield says. Brumfield recommends that Asian companies contemplating a greater U.S. presence institute a three-point program to mitigate risk when it comes to U.S. rules and regulations.

• First, companies should think strategically and organically about creating and implementing a regulatory compliance program that covers the key areas of risk today, most notably in the areas of antitrust, export control, trade secrets, anti-bribery/FCPA, and data privacy/cybersecurity.
• Second, companies should **educate their business teams** both in Asia and the U.S., with training on key compliance issues tailored separately for executives and for those on the company’s front lines.

• And finally, companies should **proactively assess and monitor** compliance effectiveness and risk, always assuming that more established competitors will be looking to exploit evidence of compliance failures.

He also warns Asian companies that the U.S. plaintiffs’ bar remains a wily adversary. “The antitrust laws incent plaintiffs to sue with treble (three-times) damages and attorneys’ fees. So, this means leading plaintiffs’ firms are always ready to jump in and sue at the announcement of an antitrust investigation,” he says.

The U.S. regulatory and legal systems are indeed challenging for foreign companies. But smart ones not only can overcome those challenges, they can excel in the marketplace.

Despite all these aggravations and hurdles, the U.S. remains, relatively speaking, an open and accessible market.
Helping Brands Rediscover The Meaning Of Memorial Day

by Richard Levick
Helping Brands Rediscover The Meaning Of Memorial Day | May 31, 2019

How common it is to know a friend or relative who seldom speaks of wartime acts, until old age takes its toll. Thus, is the power of heroism and sacrifice — acts so big they take a lifetime to process, let alone articulate.

The poem, “In Flanders Fields,” contains the seeds of remembrance. It’s the still quiet of a veteran, the eerie silence undone only by the sound of the tolling bell and clicking of boots at the Tomb of the Unknown Soldier, or the simple sight of someone wearing a paper poppy. By contrast, the blaring advertisements of the latest Memorial Day “final markdowns” seem more out of place than any other holiday — even Thanksgiving has now been sacrificed as the first official shopping day of Christmas.

The gap between what Memorial Day ought to be and what it has devolved into amounts to an annual ritual of good intentions gone awry.

Memorial Day should be a holiday devoted to solemn remembrance, a day when we pay graveside homage to those who made the ultimate sacrifice for the United States of America. It should be a day when as both individuals and as members of a larger organization, we rededicate ourselves to bettering the lives of service members, veterans, and their spouses and children.

Of course, Memorial Day weekend is also the traditional kickoff of summertime, a wonderful pretext for backyard barbeques, storewide discounts, and family getaways to beaches and mountains.

Remembrance and relaxation both play important roles in our lives, but they should occupy separate spheres. It’s imperative that companies and institutions keep them separate, a little like church and state.

When brands forget to respect that separation, and when executives who don’t understand or have forgotten the true meaning of Memorial Day are in control of a company’s marketing and social media outreach, insensitive — even offensive — things happen. Every Memorial Day weekend, certain companies and institutions commit the same gaffes that millions of Americans make at neighborhood get-togethers, when we click glasses and offer each other a tone-deaf “Happy Memorial Day.”

The difference, of course, is that there are no consequences for an awkward exchange on a patio. Companies that callously glom on to Memorial Day to market their products or services, however, could — and probably should — face unsettled customers and stakeholders.

Brands regularly run advertisements with the backdrop of a grieving soldier, or an image of a family gathered at a cemetery. Food sellers “commemorate” Memorial Day with pictures of pancakes or burgers and generic messages about “sacrifice.” We all know how car dealerships and mattress stores exploit Memorial Day. Even well-meaning people engage in off-putting behavior, confusing Memorial Day with Veterans Day and contributing yet another chorus of rote “thank you for your service” greetings.

These problems arise not from greed or malice, but from lack of familiarity. Still, such moments rankle service members, veterans, and their families — representing over 25 million Americans — and they should rankle all of us. A society so dependent on its military ought to be smarter about expressing its gratitude, especially on a day to honor the dead.

It’s not just Memorial Day slipups that cause harm, or damage brands, or derail marketing and advertising campaigns. Most military-related errors are avoidable, if a company or an institution would take the time to seek help from professionals who have devoted their lives to the service and its legacy.

An old friend of mine, Fred Wellman, is the Chief Executive Officer of ScoutComms, a communications, marketing and research firm that is focused on helping organizations understand, engage, and activate the veteran and military communities. As a leading Certified B Corporation, Wellman and ScoutComms specialize in forging resourceful private-public partnerships that respond to the needs of the veterans’ community, improving their access to resources and benefits, while at the same time generating goodwill for organizations that effectively serve the community.
“A lot of corporate leaders and organizational heads want to do the right thing by the U.S. military — but they go about it in ways that could hurt their credibility — or even backfire. Something as important as outreach to the military needs to go smoothly,” says Wellman, who graduated from West Point and spent two-plus decades in the U.S. Army, much of it leading combat helicopter units and serving in leadership capacities with the fabled 101st Airborne. Between tours of duty, he attended Harvard’s Kennedy School of Government.

Among ScoutComms’ past corporate clients are Prudential, BP, and The Home Depot. They helped these companies and many others develop and enhance programs to reach service members and their families. For the Elizabeth Dole Foundation (EDF), the leading advocate for millions of military caregivers, ScoutComms helped the non-profit get off the ground, tell its story, and enable the group and its allies to shape decision-making.

“Even as we honor those we lost, we have a continual obligation to the living. For example, too many Americans look at veterans’ record-low unemployment rate — currently 2.3 percent — and think, ‘problem solved,’” says Wellman. “Many vets still need help with job and skill training. They still need help in making the transition to civilian life, or perhaps mental health counseling. Their spouses and kids still need help in adjusting to a new community; finding employment; in affording and settling into a new home; in getting used to a new school and adapting to a whole new way of life and a whole new set of challenges and expectations.

“Businesses and organizations can play a huge role in making those adjustments easier and more manageable for veterans and their families,” he says.

“Our vision,” says EDF head Elizabeth Dole, the spouse of World War II hero Senator Robert Dole (R-KS), “is an America where military caregivers are empowered, appreciated, and recognized for their service to our nation.”

Retired Rear Admiral Thomas C. Lynch, the executive chairman of NewDay USA, a mortgage financing company that assists active duty military personnel and military veterans achieve the American dream of home ownership, points out that, “Service-trained personnel are loyal, highly motivated, and disciplined. They become excellent employees and have earned the opportunity for meaningful employment in the private sector.”

NewDay USA “cares deeply,” Wellman notes, about “getting it right.” His goal is to ensure that other organizations embody the same values and treat all service members, veterans, and their families with the dignity and respect they deserve.

Getting Memorial Day “right” is a good start. But what matters more than avoiding missteps on one day of the year is making a conscious commitment as a brand to understand and act in ways that are informed by and respectful of the veteran and military communities. And to do that, you need to look to advisors like ScoutComms, to non-profits like the Elizabeth Dole Foundation, and companies like NewDay USA, which understand how to walk the talk 365 days a year. 

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A Year in Review: Forbes
Litigation Financing: A Controversial Industry Does Well By Doing Good

by Richard Levick
Litigation Financing: A Controversial Industry Does Well By Doing Good | July 1, 2019

Just over twenty years ago, a few visionaries came up with the idea of independently providing capital to plaintiffs in litigation in return for a portion of the funds recovered from the lawsuit.

Well, you’d have thought Fidel Castro just landed in Miami. The Chamber of Commerce gathered its forces and struck back with the full force of its media and legislative muscle. For these business interests, such financing could only impose increasingly untenable burdens on a marketplace already beset by piratical litigation practices. The financiers had to be driven out of existence, period – especially since most of them were expanding their horizons beyond personal injury cases to feature highly complex disputes in areas like antitrust and intellectual property.

Yet over the past two decades, some litigation funders have gone public and grown large despite the resolute adversity. Diverse independent investors have likewise entered the fray, a sure sign that the very idea of litigation finance is both attractive and sustainable. Among these players, Alexander Chucri, founder and CEO of Pravati Capital, is a particularly illustrative case in point.

It’s usually good news for the legal industry as a whole — which is not typically bold or creative in its business thinking — when business leaders from other sectors introduce fresh energies. Chucri, for one, was a successful entrepreneur in the nascent internet industry before entering this space. (Full disclosure: my firm has a business relationship with Pravati Capital.) Like most litigation financiers, Pravati Capital often works directly with law firms, usually small to midsize ones that lack the resources for the wars of attrition that larger law firms typically mount in defense of their corporate clients.

It’s a David-and-Goliath dynamic, a way to win otherwise unwinnable wars. Not surprisingly, some of the better financiers are motivated by a sense of social commitment as well as return on investment. In 2003, for example, Chucri was personally involved in a lawsuit that had “a very big, very bad actor…I realized how hard it was to fight him.” But it was a shock of recognition that also spelled opportunity: the demand of legitimate claimants for a supply of innovative financing ideas.

The pursuit of social justice remains a sub-theme here, an important part of how the financiers see their role in the world. For Pravati Capital, that’s meant wrongful imprisonment cases, intellectual property theft cases, and pharma cases involving harmful drug products.

For Burford Capital, now the largest litigation funder, it’s meant cases like The Gillette Company v. Provost, et al. that assure fair play for smaller companies under siege. In 2015, Gillette sued startup ShaveLogic and former Gillette employees who had developed and patented technology to deliver a closer shave. The defendants were financially hard-pressed to defend themselves while still trying to build their business. Enter third-party financiers Gerchen Keller Capital (later acquired by Burford Capital). They underwrote both the defense and counter-claims, retaining the blue-chip law firm Bartlit Beck LLP. A favorable court ruling in April 2017 led to a quick settlement.

It’s not much of a stretch to see litigation finance, like the plaintiff’s bar itself, filling something of a regulatory function; of forcing businesses to greater accountability where the government has so far failed or declined to do so. That said, litigation finance is by no means anti-business or necessarily antagonistic to corporate interests.

If anything, the exact opposite is often true. In the context of actual practice, the financiers will not make their sizable investments unless cases have merit. “We evaluate merit — doing so is the essence of our business — and we fund only 1 of every 30 claims we see,” says Chucri.

“To portray litigation finance as a kind of piracy is disingenuous when its real impact is to help ensure what the public expects of every business transaction — namely, a level competitive playing field,” he adds.

Arguments against litigation finance further totter when we realize that, not just plaintiffs, business defendants also utilize litigation finance, as the aforementioned Gillette case certainly exemplifies. Here too, we see litigation finance as a corrective to abuse, not its cause. In fact, it is a funding mechanism that would seem to directly benefit core Chamber of Commerce stakeholders.
“All evidence points to dramatic increases in direct corporate use of litigation funding, so this is more evidence of the Chamber and [Chamber affiliate] Institute for Legal Reform [ILR] being woefully out of touch with the Chamber’s underlying membership,” says David Perla, Managing Director of Burford Finance. “Our sense is that the ILR is the captive of a few big players with their own unique agendas and not remotely representative of the average U.S. company, big or small.”

The current battlefield is Capitol Hill. In February, lawmakers reintroduced the Litigation Funding Transparency Act that would require plaintiffs to disclose when they’ve secured third-party funding. The bill only applies to funding for class actions and multidistrict litigation but the financiers take the challenge seriously, no doubt because they fear a slippery slope. Once disclosure is required in class actions, the fear is that it will inevitably apply to all their other cases as well.

As things now stand, the financiers’ only obligations are the ones stipulated in the contract with their clients. They needn’t report conflicts, not even conflicts between the parties they’re financing and their own shareholders. But transparency is a good sell in Congress these days and, given such a political dynamic, business interests can always find a convenient argument for curbing what they’ve depicted as a silent secretive party roiling the judicial waters.

A compromise solution would involve only letting the judge review key documents and disclosures. Judge Dan Polster, who is overseeing the 600-plus lawsuits filed by local governments in the multi-district litigation against opioid manufacturers, has already ruled that the details of litigation financing need only be disclosed to him in camera in order to assure there are no substantive conflicts on the plaintiffs’ side affecting how the cases are managed or settled.

Our collective preoccupation with transparency notwithstanding, neither a litigant’s financing arrangements, nor even possible conflicts on the part of the financier, really have much to do with the actual substance of the lawsuit at issue.

“There is no reason to expect this bill, which is virtually identical to the bill with the same name that failed last year, will fare differently,” says Perla.

Whatever strategies the Chamber or other business lobbyists pursue in the future, this whole saga now has the feel of historical inevitability. For legal industry insiders, it signals a new way of plying their trade. For those outside the legal industry, the relevance is also significant, for here, as Chucri puts it, “we have reassuring evidence that the marketplace can change for the better even when great powers are resolutely committed to enforcing the status quo.”
The Great Leap Forward? Tech’s Newfound Social Activism On Gun Control And Abortion

by Richard Levick
After years of relative detachment – who can forget Google’s ringing pronouncement: “Don’t be evil”? — U.S. technology and media companies have suddenly gone very public on divisive social matters. Two of those issues — abortion and gun control — have until recently been considered so hot-button as to be untouchable.

No more, apparently. What’s changed?

Why is software giant Salesforce refusing to do business with companies that sell military-style rifles — even if it costs them accounts with Camping World and other gun vendors?

Salesforce isn’t the only e-commerce provider who’s saying “no” to facilitating the sale of rapid-firing weaponry. Shopify, which powers more than 800,000 online shopping sites, amended its acceptable-use policy last year to bar customers from using its technology to market automatic and semiautomatic firearms.

The abortion debate playing out in Atlanta, Jefferson City, Montgomery, and other southern state capitals is also stirring corporate resistance in ways that might have been considered radical a few years ago. For example, Netflix, which has invested huge sums in Georgia, is vowing to “rethink” its presence if the state fails to overturn a restrictive abortion law — a move that may well be emulated by other big entertainment providers, among them AMC, NBCUniversal, Disney, and WarnerMedia.

Is this new-found corporate activism here to stay? And is it really that big a leap from traditional corporate social responsibility (CSR)?

The answers, respectively, are “Yes, probably,” and “Yes, definitely.”

CSR has historically revolved around mainstream community philanthropy — not hotly contested social issues. This new trend is an abrupt departure from previous corporate brand positioning.

Both abortion rights and a desire to impose gun control have experienced profound upticks in grassroots support in recent years. A strong majority of Americans — in some polls as much as three-quarters of the electorate — do not want to see Roe v. Wade overturned or a woman’s right to reproductive choice undermined. The extreme efforts to outlaw abortion — even in instances of rape or incest — in the Georgia, Alabama, and Missouri legislatures have impelled many Americans to action, including millions of consumers who rely on tech and entertainment products and want to see their providers champion women’s health.

The same holds true on gun control. The mass shootings that plague our society have persuaded most Americans — more than two-thirds in many polls — that gun laws need to be strengthened and the corporate gun lobby weakened. Frustrated by the federal government’s paralysis, tech companies have begun to follow the lead of Dick’s Sporting Goods, which curbed its gun sales two years ago, and Delta Air Lines, United Airlines, and Hertz, which have ended their corporate partnerships with the National Rifle Association (NRA).

Why has the milieu changed so much? Why are so many corporate stakeholders insisting that companies take a public stand?

“We are living in a time of extraordinary political intensity,” maintains Ira Shapiro, a longtime public policy exponent and the author of Broken: Can the Senate Save Itself and the Country? “Corporations are discovering the timeless wisdom of Dante: ‘The hottest place in hell is reserved for those who, in a period of moral crisis, remain neutral.’”

Today’s federal government appears inept and inconstant — a far cry from its vaunted role during FDR’s New Deal and the decades that followed. Corporate leaders today recognize there is both risk and reward in jumping into the void left by an absentee government.

Ironically, the vociferous criticism that the Internet has unleashed is also empowering many company executives. If you’re going to be criticized for doing nothing, the thinking goes, you might as well risk offending a definable audience and stand for something. It might be smart business, it might be personal, or it might be being authentic. Whatever it may be, it’s brand extension — with the brand standing for something more than a product or a service.

Companies are betting that they get the calculus right, thereby earning the admiration of more customers, employees, and influencers over time, less the lost customers. When the first grape boycott occurred to support farmworkers in 1965, it was news for
years. Today, there are daily calls for boycotts from influencers, newscasters, even the president of the United States. Consumers are now boycotting boycotts, further emboldening company executives.

Polonius’ declaration in Hamlet, “To thine own self be true,” is increasingly a marketing strategy. A recent study of the “new humanity” in global corporate engagement trends posits that the “value of purpose beyond profit remains high. However, stakeholders are increasingly seeking a tangible experience of that sense of purpose. . . It’s not enough for stakeholders to hear about a sense of purpose. They need to feel the difference.”

At their essence, women’s reproductive health and gun control are emotional issues. People want the institutions and brands on which they rely to feel that emotion, too. Neither issue is “50-50” or “40-40-20” anymore. Both command strong majorities who are demanding action. How ironic that as politics is increasingly driven by the fringes, business finds security in super majorities.

Does all this mean that, overnight, tech and media companies are going to become champions of every contentious social issue out there? No, they’ll have to pick and choose carefully — and in most instances wait for a majority consensus to coalesce before acting. In some ways, what we’re witnessing is well-timed followship.

Here are my recommendations on the key considerations that should animate socially aware companies.

**Authenticity:** Despite our highly critical society, customers and shareholders will forgive a different point of view if they think it’s authentic. Whether it’s the left accepting Dan Cathay’s anti-LGBTQ stance for religious reasons or the right forgiving Edward Stack of Dick’s Sporting Goods for his anti-rifle views. It’s not that there weren’t boycott calls and angry customers. But the companies have grown, despite setbacks; audiences appreciate heartfelt beliefs even if they aren’t their own.

**Transparency:** Authenticity’s first cousin is transparency. Once you take a position, overcommunicate. Dick’s position was unanimously approved by its board and approved by all management groups. It didn’t happen overnight, but it was viewed as the right thing to do, even if it exacted a cost.

**Sacrifice:** You cannot make what you view as an ethical decision based on profit alone. But as a fiduciary, it must be part of the decision-making. What business line are you willing to sacrifice? Dick’s knew they needed to replace gun sales with something else. And they knew they would be hurt for a quarter or more but were willing to make the sacrifice. When Cheerios went GMO-free, jumping into the anxiety about Genetically Modified Organisms, it seemed like the opposite. There are no GMO oats.

**Consistency of Values:** When the federal government threatened to open Zion and other national parks to commercial development, Patagonia took a stand. As an outdoor company, its position was consistent with its market purpose and company values.

**Materiality:** Airbnb’s opposition to the Brexit plan was viewed as material to its business interest. There is minimal risk to a company taking positions on matters that affect its bottom line. The challenge is to not do it too often, or too openly, if it is perceived as self-interest.

**Selectivity:** Make the news for your company’s political positions rarely. Once you take a political position you can no longer get a pass by arguing that future political sticky wickets are off-limits.

When WeWork announced it was going meat-free for its employees, it struck some critics as high-handed and judgmental. Regardless of what you eat, how is your employer dictating this to you? A few months later, when Jamal Khashoggi was murdered by the Saudis, a significant investor in SoftBank, which holds a substantial ownership interest in WeWork, WeWork went silent. The relationship, of course, is more complicated than that — and WeWork did not take money from SoftBank’s Saudi-funded Vision Fund during its second round of investment. But it found itself in the awkward position of boasting about forced employee vegetarianism, yet silent on a murder at the hands of one of its initial primary funders. No one would have expected comment on the late Jamil Khashoggi if they hadn’t recently taken such a bold position on meat.

Whatever you do, you must express it with sincerity, transparency and consistency with your corporate values.

**Leadership:** Leadership is a quality hard to define, but, as the Supreme Court defined obscenity, we know it when we see it. At its best, leadership exudes courage because it stands on values.

If we don’t stand for our values, what are values worth?
July 18, 2019

Should Companies Retaliate Against Hackers? Here’s What Experts Are Saying.

by Richard Levick
Reflecting on the past decade, this much should be obvious: Regulation cannot keep up with the pace of technological change. This makes cybersecurity — the thin wall that protects everything from our identity and intellectual property to our financial capital — a crucial protective barrier in our society and economy.

As a communications strategist who advises companies besieged by cybercrime, I can attest that those protective walls are getting violated far too often. Since 2017, the rate of identity breaches has increased more than 400%. On top of their often-disabling impact on brand reputation, data breaches exact painful financial costs. Breaches have been known to cause damages of as much as half a billion dollars. Cybersecurity costs financial services companies, on average, some $2,300 per employee, a number that has tripled over the last four years.

But can companies and their board members be too zealous in fighting cybercrime?

A recent bipartisan bill, the Active Cyber Defense Certainty Act (ACDCA), offers to “allow use of limited defensive measures that exceed the boundaries of one’s network,” giving authorized entities the legal authority to “retrieve and destroy stolen files,” “monitor the behavior of an attacker” and “disrupt cyberattacks without damaging others’ computers,” among other things. Is the ACDCA a realistic antidote to cyber fraud? Or, by empowering companies to retaliate against hackers, is ACDCA’s solution potentially as corrosive as the problem? A walkthrough of what the experts have been saying on this subject may prove instructive.

How Far Is Too Far?

The debate over how far to go in strengthening cybersecurity is likely to roil corporate boardrooms and legislative chambers.

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exponentially; it will be with us forever. Private leaders see the economic impact; they constantly need to increase their cyber defense spending. Public leaders increasingly hear the outcry from consumers who are harmed by digital breaches. They want private leaders to assume greater responsibility and accountability. It all adds up to an urgent moment for greater empowerment, as intended by ACDCA principles.”

Given the enormity of these risks, companies have an obligation to explore a range of aggressive options and contingencies as contemplated by the ACDCA, notes risk management expert Kenneth J. Peterson, the founder and CEO of Churchill & Harriman.

“All offensive tactics meant to collect actionable threat intelligence executed within the law and in accordance with regulations should be on the table and considered,” Mr. Peterson says. “Boards are frustrated that the investments they’ve made to improve their enterprise risk posture have not wholly protected them.”

Jon Frankel, a cybersecurity attorney and shareholder at the tech and privacy law firm ZwillGen, contends that the authority embodied in those ACDCA principles “is only as great as a company’s ability to accurately attribute an attack and avoid damaging other computers. Companies must understand that they cannot deploy active cyber defense measures without correctly attributing the attack.

It seems unlikely a company will know without any doubt who the perpetrator is, especially because hackers are good at concealing their identities by attacking through proxy servers or a series of compromised computers that belong to innocent third parties. Companies must ensure that they have accurately attributed an attack to avoid targeting innocent third parties and/or violating international law.”

Is ‘Cyber Vigor’ the Right Path Forward?

A muscular undertaking demands a paradigm shift in approach. Mr. de Urioste advocates cyber vigor, a commitment by companies to stay a step ahead of bad actors. This means worse-case scenario planning on the front end, and an equally aggressive range of tactics following an actual attack.

In a blog post outlining the tenets of cyber vigor, Mr. de Urioste offers a three-point prescription. First, know your adversary. What are your company’s digital “greatest hits,” and who would profit from pilfering them? “If you don’t know,” he writes, “you are flying blind.” Do your homework and don’t be afraid to let your imagination — and your crisis contingency scenarios — run wild. Second, determine your compromised data, including that which has been stolen or leaked from your suppliers and vendors. Third, establish the vulnerability of your employee attack surface. It’s the consumer data breaches that grab headlines and cause the most handwringing, but less-publicized employee password breaches often trigger the biggest headaches for companies. Company accounts hold the potential to “unlock valuable corporate data, leaving the door wide open for adversaries to walk out with whatever trade secrets they want,” Mr. de Urioste warns.

Preparing Your Audiences for Possible Cyber Breaches

In peacetime, the solutions are more mundane. Among the strategic communications elements that institutions should prepare in advance of any cyber breach or cybercrime are:

- Sophisticated holding statements approved by the counsel’s office
- A compelling protocol to respond to earned media inquiries
- A detailed social media response strategy, based on sample scenarios, “conversations,” and responses
- Talking points to address customers, employees, investors, media and other key constituencies
- A responsive email to general customers and business partners
- Comprehensive instructions for identity theft monitoring service enrollment
- A website FAQ page

In the future, a more proactive approach will likely become the norm — and legislative prescriptions are starting to move in that direction. Playing “whack-a-mole” in the wake of an attack won’t sufficiently protect the brand or business operations.
How Do Companies Lead In An Age Of Massacre And Politicization?

by Richard Levick
After a shocking weekend of domestic terrorism, where fatalities are listed like so many sports scores, and our collective sense of mourning is combined with a sense of tragic sameness, what does it take until we actually do something to change this perdition trajectory? We are left to mourn our dead, ponder solutions, and debate the politics of this divisive age.

Our job is not to join the exceptional columnists who have already written so beautifully and powerfully about the losses and choices ahead, but to help companies who increasingly face their own choices in an age of mercantile activism. How much communications is appropriate when everything is politicized?

Perhaps this morning or someday soon, your company is going to face the conundrum of when to speak and what to say about a controversial issue. Here is a brief summary of a few rules for these challenging times:

1. Transparency: Chick-Fil-A has made no secret of its position on LGBTQ issues, but it is largely forgiven because it has been transparent about its religious reasons and minimized its advocacy as it expanded. Customers and shareholders will forgive a different point of view if there is honesty and transparency.

2. Consistency: Patagonia’s support for national parks in the midst of a shutdown fight was viewed by the market as consistent with its corporate mission even though it was clearly a political position too.

3. Materiality: Airbnb’s opposition to Brexit was viewed by the market as consistent with its business objectives.

4. Sacrifice: When Dick’s Sporting Good’s banned the sale of guns, they understood that there would be a short-term sacrifice in profits and they were willing to take the financial hit. They planned for it and converted the shelf space previously dedicated to guns to other high-profit items, limiting the financial damage.

5. Unanimity: Dick’s decision was unanimously approved by its Board of Directors and executive teams. This left no daylight for critics to harm the company further by alleging a split decision. The company spoke with one voice.

6. Leadership: Uber’s failure to do more than “study” the President’s Business Council in the wake of the travel ban was seen as inconsistent with its disruption brand and further harmed the company’s industry leading position. Lyft, by contrast, immediately donated $1 million to the ACLU and was recognized as a quiet leader. Political actions must match brand positioning.

7. Selectivity: When WeWork banned employees from eating meat in its locations, it was trying to advocate a position its leadership saw as worthy, though when they sat silent after the Saudi assassination of Jamal Khashoggi it was viewed as hypocrisy (Saudi money is largely behind WeWork through its bank, SoftBank). Choose your issues carefully.

8. Authenticity: When General Mills announced that Cheerios was going “GMO-free” it was met with substantial condemnation, including from other companies. There are no GMO oats.

There is a precedence for companies taking leadership over government. It happened a century ago when J.P. Morgan and other bankers created the Federal Reserve, a move that held off the Great Depression for over a decade. Increasingly, companies can and do take political positions. But it is a minefield, and it has the potential to offend large numbers of consumers, shareholders, and activists. There are enough experiences in the last few years to help guide us through the timing, reasoning, and effective execution. Ducking is increasingly a risky strategy.

In these difficult times, I hope these thoughts help.
Your Company’s Surprising Supply Chain Exposure on Huawei

by Richard Levick
U.S. corporate leaders who believe that the firestorm surrounding Huawei won’t singe their companies might want to think again. Remember: the Trump Administration, articulating national security concerns, has imposed a trade blacklist on Huawei and all its subsidiaries, a maze of networks that spreads across 170 countries and reaches a third of the world’s population.

Your company may not be directly engaged with Huawei or its affiliates — but there’s a strong likelihood your supply chain is.

As they say (phonetically at least) in Mandarin, zhù nǐ hǎo yùn. It means “good luck.” If your subsidiaries and affiliates have Huawei entanglements, you may need it.

So will the rest of us. In its zeal to defend national security (and gain political leverage on the escalating trade war), the Administration has already inflamed global trade tensions and is potentially ceding American leadership in critical technologies. We can all appreciate both the political calculus and significant risks of trade wars, particularly this one with China, but even more serious is the acute and long-term concern of a critical technologies gap. The former risks recession and has already caused a draconian investment decline by Chinese companies in the U.S.; the latter risks a second-place or worse finish in the current technology race, on which hinges global hegemony, defense, and business leadership. We cannot even begin to imagine a world where America is not at the forefront of technological innovation.

Like it or not, U.S. companies and their supply chains are thoroughly dependent on Huawei and its leviathan supply chain — and vice versa. Motorola Solutions (which a decade ago contemplated acquiring Huawei) and its subsidiaries do an immense amount of business with Huawei and its subsidiaries. Those relationships cannot be ended overnight.

The Administration’s action puts Motorola and a host of other companies in an uncomfortable and potentially untenable position. What’s the current state of play for U.S. companies vis-à-vis Huawei? It’s a bit murky — and it’s not likely to get clearer anytime soon.

The Administration in May declared that U.S. companies were forbidden to supply hardware or software to the many devices manufactured or distributed by Huawei. In late spring, Google announced that it would comply with the White House’s decree — a move that was soon followed by a Commerce Department ruling that softened the prohibition against trade with Huawei.

Commerce determined that Google and other U.S. tech companies could offer software updates for current Huawei products but would be proscribed from engaging in similar trade with future Huawei products, including the Mate X, a foldable phone that the Chinese behemoth has been developing for years in direct competition with South Korea’s Samsung.

Confused? You’re not alone. And the confusion has gone global.

“The rules governing trade sanctions often are extremely confusing, and that can pose significant challenges for clients who are trying hard to comply,” contends Marcus Asner, a former assistant U.S. attorney in the Southern District of New York who co-chairs Arnold & Porter’s Anti-Corruption Practice Group.

“To add to the mix, we’re also seeing a ramped-up enforcement environment in the trade sanctions area, with a whole slew of regulators focused on these issues. All of this increases the risk and can lead to a great deal of anxiety among clients engaged in cross-border trade,” he says.

Certain foreign-based tech providers that rely on “U.S.-origin technology” for their products and services aren’t sure but suspect they could be affected by the Administration’s Huawei ban. British chip designer ARM is now owned by the Japanese telecom giant Softbank, which, not surprisingly, does considerable work with Huawei. Without divulging details, ARM announced this summer its desire to comply with “all of the latest regulations set forth by the U.S. government.”

At least ARM appears to have the semblance of a plan. Careful monitoring and contingency planning are precisely what companies seeking to reduce their exposure on Huawei need to embrace, argues Mark D. Cowan, a veteran of several White Houses and the CEO of Potomac International Partners.
“It is vital for companies to remain aware of the behind-the-scenes actions that Commerce is taking on Huawei, as well as the motivations behind them,” Cowan says. “Companies must understand how the government defines national security in such cases to effectively argue that there is not a national security threat in using Huawei in their supply chain. To avoid getting caught in the anti-Huawei web companies must show themselves to be cooperating with the government, being transparent about where Huawei does fall in their supply chains and communicating clearly about what kind of risk this might pose to U.S. national security.”

Sage advice, but companies also need to factor both the Administration’s political machinations and Huawei’s persistent tone-deafness into their calculus. William Plummer, a former vice president in Huawei’s Washington office, said that “when substantive and informed experts suggested something that should be done, it filtered way up into some Mandarin star chamber and came back as something we didn’t recognize.”

For Huawei, with its historical ties to the Chinese government and military, the breakdown in U.S.-Chinese relations, and the leaked documents of its potential involvement with North Korea in violation of U.S. export controls, the challenges are significant.

Huawei has strong cyber security, economic, legal, and political arguments to make, and they have many allies who would echo them, but so far, they aren’t making them or letting their American surrogates chime in. Economically, Huawei may not need the American market, but politically, it can’t run the risk of permitting one foreign government to undermine its global expansion.

zhù nǐ hǎo yùn. All the protagonists in this convoluted debate could use some good luck. And some careful thinking before they do something we’ll all regret. ☹️
Mitigating Corruption Risk: The Multinational Toothache That Won't Go Away

by Richard Levick
Given the dramatic upsurge in antibribery prosecutions worldwide, are multinational corporations doing enough to comply with the latest dictates on ethics and antibribery? That’s a question that bedevils CEOs and board members across the globe.

“There’s a good reason that C-suite executives are focusing more than ever on international bribery risks within their organizations,” observes George “Ren” McEachern, a former Acting Chief of the FBI’s International Corruption Unit who now helps multinational corporations address regulatory risk as a Managing Director at Exiger.

“It’s no longer just the U.S. Department of Justice and the FBI’s International Corruption Unit that under the Foreign Corruption Practices Act (FCPA) have ramped up their anticorruption investigations. In the last few years, the international enforcement landscape has profoundly changed, too,” McEachern points out.

“Through global exposure of the Panama and Paradise Papers exposés in 2015, and recent significant global resolutions like Odebrecht, countries around the world have begun to recognize the financial windfall that can be made from prosecuting culpable executives through cross-border government cooperation,” he argues.

The United Kingdom’s Serious Fraud Office (SFO), through parallel investigative efforts with the U.S., has continued to strengthen its foreign bribery capabilities. Its recent hiring of a former assistant U.S. attorney and U.K. barrister, Lisa Osofsky, as its director sends a strong message to multinational executives regarding liability and accountability. It also underscores the importance of building global and sustainable compliance programs. This new enforcement dynamic means that the U.S. and U.K. are now sharing intelligence on global corruption matters at levels not previously observed.

International business has never been more lucrative — or more potentially dangerous to corporate executives, board members, and their business partners and consultants — than it is now. Through dedicated organizations like the Office of Economic Cooperation and Development (OECD), countries where corruption has been endemic have suddenly adopted antibribery statutes and empowered prosecutors to enforce them.

Over the past five years, a significant majority of foreign bribery resolutions worldwide were a direct result of corporations not fully understating the risk attached to their organization’s third parties — a list that includes distributors, channel partners, retailers, and vendors. It’s a corporation’s consultants, venture partners, intermediaries, and subsidiaries who are most likely to get crosswise with regulatory enforcement, thus resulting in potential criminal and civil liability for the parent companies and their executives.

It’s imperative, therefore, that executives and consultants, especially those operating in high-risk industries and geographies, receive the best possible training. Executing a meaningful compliance regime carries stiff challenges, maintains Richard Bistrong, the founder and CEO of Front-Line Anti-Bribery LLC.

An organization’s messages need to be both “spoken and unspoken” to eliminate confusion at the field level about “what management really wants,” Bistrong says.

“Too often, bribery is seen by executives in the field as the ‘way things get done around here.’ I look to strengthen certain aspects of training, which if enhanced, might better provide field-level executives with a deeper understanding of why bribery is never a ‘win-win,’ which is an illusion too often embraced at the front lines of international business,” he says.

The temptation for a corporate executive tasked with growing business to accept or offer an illicit bribe remains great in high-risk areas, especially when they might observe the corrupt behavior of competitors and local officials. “Keeping those in such environments on the ethical ‘right side’ of conduct does not happen without engagement, understanding, and training,” says Bistrong.

In any business that’s committed to top-line growth, especially in emerging markets, there’s going to be tension between the pressure to succeed and the pressure to comply, he notes. “Both business and compliance leaders have an obligation to make sure that forward-based teams don’t think of ethical decision-making as
delegated to the front lines, where they are left alone to deconflict what might be competing corporate objectives,” he points out.

He also forewarns: “That tension is inherent, and growing a business is going to challenge values in any journey to meet corporate targets. Ignoring those conflicts doesn’t make them go away, whereas shining a light on them at least makes the difficult discussable.”

When a multinational’s senior leadership determines that it wants to establish a presence or introduce a new product or increase its market share in a high-risk business segment, it must conduct culture-specific risk and vulnerability assessments before jumping in with both feet, urges McEachern. An integral piece of that assessment revolves around third-party mitigation — in other words, taking a careful look at potential consultants, partners, and prospective interactions with government officials. If their track record isn’t clean, it could spell big trouble down the road.

Experts like McEachern and Bistrong argue that companies need to develop specially calibrated “tools” designed to combat the dark side of global business-making. Those tools, McEachern says, should include:

• Creating a risk-based approach to compliance;
• Implementing programs that hinge on detailed testing;
• Hiring qualified compliance professionals with the appropriate resources;
• Instituting a culture of compliance that includes incentives from the top to the bottom; and
• Shifting from good to great compliance — from reactive to proactive leveraging of technology and automation.

A proactive compliance program allows companies to pivot quickly into opportunities that would normally leave organizations exposed to criminal and civil liability. The best corporations, point out McEachern and Bistrong, know how to mitigate third-party risk efficiently, thus allowing them to enter emerging markets before the competition while gaining valuable market share faster.

Embracing such a proactive approach and culture just might help a multinational’s executives sleep through the night.
It’s Not Easy Being Green: Marketing In A Time Of Greenwashing And Brand Risk

by Richard Levick
It's Not Easy Being Green: Marketing In A Time Of Greenwashing And Brand Risk | September 2, 2019

One of the first environmental disasters I remember was the 1973 polybrominated biphenyl (or PBB) disaster in Michigan, when a toxic flame-retardant chemical was accidentally shipped to a livestock feed plant. In the year it took to realize the mistake, millions of Michiganders were exposed to contaminated beef, pork, milk and eggs.

The PBB disaster became ground zero for what was safe. How many parts-per-million (or -billion) of a chemical is safe to consume? As a young political organizer and graduate student, I had the opportunity to work on the political side of the remediation to ensure that it never happened again. For me, it was early and important work in America’s nascent environmental movement. But since then, the question of safety has only become more difficult to navigate. Today, determining what is safe and what is green is a far greater challenge than at the dawn of Earth Day.

The rewards for and pressure on companies to market green are increasing. Each year, consumers demand more “responsible” brands — from non-GMO to local to sustainable to mission-driven — even if consumers themselves know little about what being a responsible corporate actor entails.

How do companies that want to be green avoid the pitfalls of consumers who don’t trust them, a social media environment that pounces, regulators who don’t define terms (an admittedly daunting job), short sellers who see the chaos as an opportunity and a plaintiffs’ bar that sees it all as a pretext for full employment?

**Green Practices Must Support Green Marketing**

It is not exactly revelatory to warn companies about the perils of marketing themselves as pro-green or eco-friendly unless they’ve got a verifiably clean story to tell. The landscape is littered with corporations that have been accused of greenwashing: aligning themselves with pro-environment symbols and causes in television advertising while violating — sometimes accidentally, sometimes technically, sometimes brazenly — clean air, clean water and other environmental standards.

Two years ago, a greenwashing claim in California resulted in a million-dollar settlement. The state forbids the sale of plastics labeled as “biodegradable” or “compostable”; its environmental officials have ruled that such claims are disingenuous without an explanation as to how long it takes for the product to biodegrade.

**Company Transparency Can Add to Credibility**

In addition to trying to do the right thing for the environment, companies need to be forthright about the “brown” in their environmental footprints.

Longtime food industry counselor Sean McBride, the founder and principal of DSM Strategic Communications, maintains that, “Companies need a long-term plan for converting to a values-based operation. They need to do it right, track it and report progress. But it is critical that they do not over promise or spin failures as successes along the way. That’s a quick way to destroy consumer trust.”

In an age of mercantile activism, brands can be defined by far more than the products they sell. Brands can showcase their environmental footprints, advertising choices, sustainability legacies and fair labor practices, among a myriad of other issues.

The outdoor clothing and lifestyle company Patagonia appears to be taking Mr. McBride’s admonition to heart; it is providing something of a template in how to handle green positioning. Patagonia doesn’t pretend that all the ingredients that go into its product-making are environmentally innocuous. On its website, it lists the chemicals it uses and tries to pinpoint their environmental impact. Patagonia freely admits that it’s in an ongoing “struggle to become a responsible company.”

Mr. McBride also points out that, from his perspective, “Consumers are willing to pay premium prices for premium goods that are made responsibly. Done properly, values-based production that spotlights issues such as sustainability and child labor can be effective.”

**Less Risk in a Mission-Driven Approach**

Meanwhile, what should smart companies be doing to position themselves on green issues without greenwashing themselves?
First and foremost, rather than trumpeting vague messaging about being sustainable or eco-friendly, consider adopting a mission-driven approach. Companies that embrace specific philanthropic or community missions appear to be gaining traction in the marketplace. Some problems are intractable and some supply chains so convoluted that companies cannot be 100% certain of purity. A mission-driven approach doesn’t suffer the same complications.

**Gain Consumer Trust from Authenticity and Accountability**

What many executives miss about the information revolution is they think it is driven by technology — how people receive information — in other words, which hardware and which platform. It is not about how they receive information, but rather that they can share it. This means citizen-led campaigns can generate from the ground-up quickly and powerfully. Getting caught being inauthentic is no longer about a slap on the wrist from a regulator or some pesky class-action suit; instead, it is a mass movement comprised of short sellers, plaintiffs’ lawyers, NGOs, online activists, regulators and more, all working in concert. Why take the risk when authenticity buys you consumer trust and marketplace faith?

If pro-environment language doesn’t come naturally to your CEO, or if eco-friendly symbols seem like a stretch for your brand, don’t put the company in an awkward spot. Better to embrace your products and their environmental footprint in their entirety, warts and all.

One hopes that companies aren’t ham-handed enough these days to make extravagant claims about environmental purity. Better to forego misleading product labels and hyperbole. Instead, concentrate on modest goals and positioning that could help your company win over skeptical consumers and opinion leaders.
"Surveillance Capitalism": Monetizing Our Thoughts

by Richard Levick
We often misspeak when defining the present and near future as “Orwellian.” By invoking Orwell, we describe a world controlled by an evil and all-powerful government.

While shades of that are doubtless true today, our society increasingly resembles the dystopian future envisioned by Aldous Huxley in *Brave New World*. We are the ones who spy, shame, and tell on each another, more than any Big Brother. But “Huxleyian” lacks the chilling connotation of “Orwellian.”

While the Russians (and more and more the Chinese, North Koreans, and Iranians) use digital tools to dangerously disrupt our democracy, perhaps the greatest threat to our freedom comes from tech companies that recognize that we’re neither the product nor the customer. Instead, they see us as monetizable data, as beings whose behavior can be predicted, manipulated, and therefore, profited upon. Welcome to the world of “Surveillance Capitalism.”

We’re only at the cusp of technology dominating our lives. Soon, there will be a far more expansive “Internet of Things” — interconnected devices activated by our voices (and thoughts) — plus driverless vehicles, wearable technology, “smart” communities, genetically modified people, and a thousand other “breakthroughs.”

Google, Facebook, China’s Alibaba and Tencent, and other tech giants know what we’ve been up to and what we’re likely to do next. Amazon knows that and more.

These companies know our political views, our intellectual interests, our hobbies, our recent purchases, our travel destinations, our friends, our casual acquaintances, our rivals, our aspirations, our frustrations — and a whole lot more. They increasingly know our conversations via devices such as Nest and Alexa, which we purchased to listen to us, not the other way around. Nest can even tell when we’re not home by the decrease in room temperature.

A cynic might view Apple’s brand promise on privacy, which has stirred much commentary, as a hollow gesture. After all, any app that can be put on it can still gather information. Until Apple prevents that (and to be fair, it has made some movement in that direction), then it is a marketing ploy — not real reform. Almost every week we learn some other aspect of Apple’s behavior that does anything but encourage confidence in its privacy pronouncements.

Is Big Tech developing a whole new strain of capitalism predicated on modifying (read manipulating) consumer behavior?

Shoshana Zuboff, a professor emeritus at the Harvard Business School and author of *The Age of Surveillance Capitalism*, argues that a new economic order has emerged, one that revolves around predictive behavior that Big Tech can divine and sell. It’s not just the Silicon Valley behemoths that are exploiting this phenomenon, Zuboff says. A whole multitude of companies and brands — from pharmaceuticals and insurance providers to banks and carmakers — are angling to get in on data-driven money-making.

As Zuboff recently volunteered to Axios, “It’s all over the place, embedding in every industry.”

Adds sociologist Vincent Mosco, professor emeritus at Queen’s University, Canada, and author of *The Smart City in a Digital World*, “Big Tech and Big Government are aiming to use The Next Internet — the Internet of Things + Cloud Computing + Big Data Analytics — to gather valuable data from scanners embedded throughout the urban infrastructure. Google in Toronto, IBM in Rio de Janeiro, and Siemens in Singapore are the early sentinels of the Surveillance City, where business and government come together to reap big profits and deepen control.”

Mosco is hardly alone in that assessment. The Center for a New American Security monitors what it calls “High Tech Illiberalism,” the propensity of authoritarian countries like China and Russia to deploy technology to spy on and intimidate their people. British social scientist Nicholas Wright gives it an even more disquieting name: “Digital Authoritarianism.”

Data vacuuming works best when its victims are not aware that they’re being had. Which is why Big Tech tends to use euphemisms and embroidery to cover up its real purpose.

Zuboff worries that Big Tech’s ultimate goal “is to automate us.” In other words, to perfect the predictability model so that optimal behavior will equal optimal profits.

It’s all so chilling it’s downright Huxleyian.
September 13, 2019

Mercantile Activism Enters New Phase: Gun Violence 'Simply Unacceptable'

by Richard Levick
Mercantile Activism Enters New Phase: Gun Violence ‘Simply Unacceptable’ | September 13, 2019

“Mercantile activism,” the 21st century phenomenon of corporate leaders stepping into the gaping void left by elected officials unwilling (or unable) to lead on crucial issues, has now reached a new apogee. America’s gun violence epidemic is so gruesome, so urgent, so everywhere, that 145 chief executive officers across the country sent a September 12 letter to the U.S. Senate demanding action on stronger background checks on firearm sales and “red flag” laws designed to keep guns out of the hands of high-risk carriers.

Almost every sector of the U.S. economy — from technology (Twitter and Reddit) to retail (Levi Strauss and Dick’s Sporting Goods) to financial services (Bain Capital) and beyond — was represented in the letter, which did not mince words in its call for the Senate to take immediate action. When retailers and bankers are calling for change, it is a smart move for gun manufacturers to listen even if Congress won’t.

“Doing nothing about America’s gun violence crisis is simply unacceptable and it is time to stand with the American public on gun safety,” the CEOs inveighed, citing their “obligation to stand up for the safety of our employees, customers and all Americans.”

Until this latest spate of mass shootings, most corporations avoided taking a public stance on gun control measures, believing — with good reason — that the issue was too divisive and polarizing, not only among consumers but among shareholders and business partners, too. But all of that has changed in recent months, with poll after poll showing overwhelming public support — even among Republicans and NRA members! — for strengthening background checks and adopting red flag laws.

The same dynamic holds true on the restrictive abortion legislation that has proliferated throughout the Deep South in recent years. Corporations including Netflix, Disney, and AMC have all threatened to pull out of Georgia and other states if legislatures impose laws that would severely curtail a woman’s right to reproductive choice. Given how much the entertainment sector means to the state of Georgia — the industry is responsible for an estimated 92,000 jobs and, during fiscal year 2018 alone, generated a total economic impact of $9.5 billion — it’s not an idle threat. Since southern legislatures show little willingness to back down on abortion restrictions, America’s corporate activism is likely to grow, not recede.

On gun violence, here’s what corporate leaders see and feel in ways that, perhaps, members of Congress — fixated on threats from the NRA — don’t. Every day, on average, a hundred or more Americans are killed by guns. Hundreds more are wounded. More Americans die at the hands of gun violence in a given two- or three-day period than are killed by guns in Australia over a full year.

For CEOs, American gun victims are employees, customers, and prospective customers. For the retail CEOs, tragically, increasingly their stores and parking lots are becoming human target ranges. Victims are a part of each community that the CEO has pledged to serve and protect. Yes, elected officials take an oath to serve and protect – but the realities of today’s politics too often get in the way.

The letter is the most concerted effort that has been launched by the business community to shape the debate over gun control. It demonstrates the profound shift that has occurred in consumer expectations regarding corporate social responsibility.

There is a whole generation growing up that expects brands to have a social conscience. That is, a brand is more than the product or service. It is what it stands for, donates to, advertises on, and supports. The Business Roundtable letter stating that businesses have a higher purpose than just shareholders profits may be seen in some quarters as leadership, but really it is an acknowledgement of a new reality, one in which a whole generation of customers and shareholders now demand – a business must have a soul.

We have just passed a critical tipping point — given the emotional urgency of this issue and others, companies are realizing for the first time that there’s a greater risk to not engaging than engaging. Gun rights activists’ threats of massive consumer boycotts are not materializing. Dick’s Sporting Goods overall sales are up since they reduced gun sales. The risk is now found in standing still. It is fascinating to me that Uber signed the letter. Uber ducked during the Trump Advisory Council controversy two years ago. Notice that it didn’t make the same mistake of standing still this time.
Mercantile activism occurs in cycles, usually around once every century, when the federal government is repeatedly unwilling or incapable of fulfilling some important aspect of its responsibilities. This happened in 1907 when Wall Street, specifically J.P. Morgan, developed the Federal Reserve, the nation’s bank. It is happening again because the success of capitalism depends on progress, even if we all don’t agree with the CEOs’ vision on any specific issue. History and frustration have created cover for CEOs to take stands on controversial issues including now guns, abortion, and climate change. Don’t expect this to stop anytime soon. While Washington may turn every issue into politics (including the weather), Wall Street currently has the power to turn everything political into business.

Look no farther than Walmart, the nation’s largest retailer and employer. In early September, it wrote Congress to unveil its support for a reauthorization of the assault weapons ban. It also vowed to remove certain military-style ammunition and guns from its shelves and discourage “open carry” in its stores. Other retailers, including CVS, Walgreens, Wegmans, and Kroger, have followed Walmart’s lead.

When a company as steeped in rural America and “traditional” values as Walmart begins embracing gun control measures, it illustrates just how fundamentally the consumer environment has changed. “Red” companies safely taking “blue” positions with minimal blowback. Regardless of the issues, this feels an awful lot like hope.

Now comes news that earlier this summer, NASCAR rejected advertisements for its souvenir programs from a number of firearms companies, a decision that would have been seen as unfathomable a few short years ago. NASCAR’s move apparently shocked many stock car industry observers, who see a significant overlap between NASCAR enthusiasts and gun owners.

Walmart? NASCAR? When those brands move on anything resembling constraints on guns, a social earthquake is happening.

“Business leaders are not afraid to get engaged now,” Chip Bergh, president and chief executive officer of Levi Strauss, told The New York Times the day the letter was revealed. “CEOs are wired to take action on things that are going to impact their business and gun violence is impacting everybody’s business now.”

For gun companies, they should view this mercantile activism as a helpful warning. Gun companies might want to look at the positions the NRA took in the middle of the last century in support of responsible gun ownership and recognize opportunities to shape the future rather than risk adversaries dictating policy.

Mercantile activism doesn’t mean that companies are going to insinuate themselves in every issue. But the extraordinary events of the last few weeks demonstrates that the politics — and business economics — of gun control, climate change, and reproductive choice have taken a dramatic turn. There’s no going back. ■
Private Sector Must Step Up To Spur Puerto Rico’s Recovery And Growth

by Richard Levick
Puerto Rico’s political crisis — its third governor in a week’s time was inaugurated in early August — is dominating global headlines and gripping the American public’s attention. Governor Wanda Vázquez Garced’s leadership will hopefully bring a measure of stability to the island, but its ongoing unrest underscores an urgent imperative: now is the time for the private sector to step up and chart a course for Puerto Rico’s future.

Given its current political volatility and its historic boom-and-bust cycles, the private sector must become the catalyst for growth and a “new” Puerto Rico, asserts Rogelio Cardozo, the Managing Director of Italbank in San Juan. A reinvigorated and internationally oriented private sector is the only way for Puerto Rico to achieve recovery and spark sustainable economic diversification, he argues. Experts such as Gustavo Vélez, a Puerto Rican economist and media commentator, and economics professor Amaury Malavé of San Juan’s Ana G. Mendez University, share Cardozo’s assessment.

Step one, Cardozo believes, is to establish an environment conducive to investment in Puerto Rico, particularly foreign investment from institutions in Canada, South America, Europe, and Asia. The most effective way for Puerto Rico to facilitate foreign investment is to inject new life into its banking community and mitigate the up-then-down cycles that have traditionally plagued its financial services sector.

“Spurring foreign investment represents an opportunity to revive and revitalize the Puerto Rican economy and end the singular focus on the U.S. mainland,” says Cardozo.

Toward that end, Dr. Malavé is spearheading a range of entrepreneurial programs aimed at sparking innovation and generating growth by expediting the process for starting a business, as well as addressing the sluggishness that has plagued the island’s economy for more than a decade.

The latest economic data is disquieting: The Economic Bank for Puerto Rico reported this summer that the island’s economic activity index fell nearly a full percentage point.

Indeed, Puerto Rico’s capacity to encourage economic growth and entrepreneurship has long been constrained, not only by a lack of capital reserves and core funding but by a lack of strategic vision, a trend confirmed in the World Bank’s annual “Doing Business” survey, which ranked Puerto Rico 43rd out of 183 economies around the world. Moreover, according to the Global Entrepreneurship Monitor (GEM) Report, barely one in 10 Puerto Ricans seeking to start a business in 2017 succeeded. The others were hamstrung by a maze of thorny regulations and/or a lack of institutional funding to cover their startup costs.

Puerto Rico has also suffered a series of calamities that have exacerbated its economic woes. The Great Recession started sooner in Puerto Rico, cut deeper, and lasted longer, wreaking havoc with every sector of the economy, especially financial services. As Cardozo puts it, “Puerto Rico has too often been a forgotten stepchild, a place that has struggled to develop an economy that consistently generates jobs and growth.”

And that was before Hurricane Maria hit in 2017, leaving a decimated infrastructure and more than $10 billion in damage in its wake. Puerto Rico is still reeling from Maria, desperately seeking ways to finance its rebound that won’t disable its future.

“Puerto Rico is at a crossroads,” says Vélez. “Its economic future will be determined by the path it chooses in the coming months and years.”

Cardozo maintains that without a reinvigorated private sector, Puerto Rico will never adequately recover from Maria, forge an enduring bridge between the U.S. and the Caribbean, or develop the diversified economy and technologies it needs to be globally competitive. Moreover, an internationally focused private sector will spur the service economy that Puerto Rico sorely needs to create thousands of new jobs and, in turn, buttress the foreign companies that have not always felt welcomed in Puerto Rico, he notes.

For many new companies, the impediments to growth in Puerto Rico are deeply rooted. For example, it takes almost 200 days to obtain a construction permit and register property in Puerto Rico. Contrast that to the U.S. mainland, where construction and property authorizations can often be consummated in a matter of weeks.
Furthermore, Cardozo believes that the key to achieving long-term economic health for Puerto Rico lies in the island’s ability to attract private capital, from both U.S. and foreign companies. Such capital should stimulate not only the travel and leisure sector, but technology, biomedical, health care, financial services and other growing industries, he says.

Systemic regulatory changes are needed to encourage private investment. But just as important, they say, is a change in the mindset of Puerto Rico’s business community. The island’s business leaders need to recognize the capacity limitations of the Puerto Rican economy, take advantage of foreign investment and international growth strategies, and push for a public-private approach to economic development around that recognition.

“Recent events should be a wakeup call for business leaders and investors to evolve from a model where business growth is wholly dependent on federal aid or ‘political’ initiatives,” says Cardozo. “Puerto Rican business leaders need to step up and fill the leadership vacuum and push government and themselves to be proactive and creative to compete in the global economy.”
Austin Tice: The Captive American Journalist Who Needs Our Help

by Richard Levick
Good journalists don’t cover conflicts from the comfort of a desk. Correspondents understand that if their reporting is to be seen as credible, they must witness some measure of the danger experienced by both belligerents and innocent civilians in that perilous zone Shakespeare called “the cannon’s mouth.”

Austin Tice

Austin Bennett Tice, the oldest of seven kids, grew up in Houston, Texas, listening to NPR and reading about world affairs. He became an Eagle Scout and aspired to be a correspondent reporting on the world’s trouble spots. While a student at Georgetown University’s School of Foreign Service, Austin witnessed and was deeply affected by the attack on the Pentagon on September 11, 2001.

After graduating, he served as a U.S. Marine Corps infantry officer in both Iraq and Afghanistan. Following two years of study at Georgetown Law School, Austin decided to devote the summer of 2012 to covering — from the cannon’s mouth as a freelance photojournalist — the escalating conflict in Syria.

Austin went to Syria, telling his friends and parents he wanted Americans to know from firsthand accounts the effect of urban warfare on the Syrian people. His pictures, videos, and news accounts that summer appeared in the Washington Post, the McClatchy newspaper chain, CBS, the BBC, and other outlets.

In mid-August, three days after his 31st birthday, Austin was in Daraya, a suburb of Damascus, Syria’s capital, transmitting his last work before leaving for Lebanon to catch a plane home. Shortly after getting into a car, he was detained at a checkpoint and taken captive by persons unknown.

Five weeks later, a 46-second video entitled “Austin Tice is Alive” was posted on YouTube. It showed a blindfolded Austin being held by a group of unidentified armed men. No message or demand accompanied the video or has been issued since. No group or individual has ever claimed responsibility for his disappearance. Nor has anyone spelled out the conditions that might be required to secure his release.

U.S. government officials believe, and have stated publicly as recently as July 25, 2019, that Austin is alive. It is believed Austin is being held captive by people known to the Syrian government, the Syrian Arab Republic. It is also believed the Syrian government has the authority and capability to secure Austin’s safe release.

Friends, colleagues, and organizations from every stage of Austin’s life have rallied to his cause. Journalists from around the world, the National Press Club, Reporters without Borders, Georgetown University, fellow U.S. Marines, and many others have contributed to campaigns and events designed to keep Austin’s case in the public eye and a priority for the U.S. government. Since his detention, Austin has been awarded the George Polk Award for War Reporting, the McClatchy Newspapers President’s Award, the National Press Club’s John Aubuchon Freedom of the Press Award, and the Conscience in Media Award from the American Society of Journalists and Authors.

Is there anything the rest of us can do to help bring Austin back home? Austin’s parents, Debra and Marc, emphatically assure us the answer is “Yes!”

First and foremost is to contact our elected representatives in Congress and urge them to intensify the U.S. government’s bilateral diplomatic efforts with Syria on Austin’s behalf. Adding your signature to this online petition is an important start.

Following up with a personal email or letter to your House member and/or Senators would also be appreciated, especially since Marc and Debra will be joining a group of volunteers, friends, and family, led by the National Press Club, in canvassing Capitol Hill on Monday, September 23. Their Hill day is part of the “Ask About Austin” campaign, which is sponsored by the National Press Club’s Journalism Institute with support from Reporters Without Borders and other journalism advocates.

In addition, the Tice family wants us to urge the White House and the State Department to accelerate their diplomatic efforts. So please go to www.AskAboutAustinTice.org and send a message to Secretary of State Mike Pompeo or write a letter or email on your own.

If by chance you’re in Washington, D.C., on September 23, please volunteer to spend an hour or two in the morning to canvass Capitol Hill on “Ask About Austin” day.
On Friday, September 27 and Monday, September 30, Austin Tice: Children of Syria, an exhibit of photographs taken by Austin while reporting from Syria, will be on display in the foyer of the Rayburn House Office Building. This provides a great opportunity for us to amplify his cause via social media channels; you can use the hashtag #FreeAustinTice to highlight the exhibit and join the conversation on social media.

Austin is being detained, in secret and in silence, because of his outstanding reporting from Syria and his commitment to show the truth. As Representative Derek Kilmer (D-WA) said on the House floor, “There are things that transcend politics and diplomacy, bridge cultural divides, and need no translation across different languages. Those are things like love and hope, represented by a mother and father who wake up each day with unshakeable faith that today may be the day when they get the chance to hug their son again.”

Austin Bennett Tice, award-winning journalist, veteran Marine Corps captain, GU grad, big brother, and Eagle Scout, has now spent seven birthdays in captivity. Let’s do everything in our power to make sure he celebrates his 39th birthday back home.
For Smart Companies, There’s Business Life After Cyberattacks

by Richard Levick
It is, perhaps, a sobering sign of our times that cyberattacks — data breaches or ransomware assaults — don’t automatically undermine a company’s value as either a business or as a partner.

While studies suggest that, on balance, the share value of breached companies underperform the market, corporations with strong fundamentals have not only recovered from cyber muggings but flourished. JP Morgan Chase and Home Depot are just two examples of corporations that were victimized by lethal cybercrime and gone on to realize even greater success.

The market tends to discount high-profile cyberattacks, perhaps because the business community sees companies that have weathered such assaults as zealously determined not to let them happen again. In advising corporate CEOs and general counsels, I often point out there are only two kinds of companies: those that have been hacked — and those that are going to be hacked.

It’s not unlike the old saw about the brakemen that coupled and decoupled rail cars a century ago. It wasn’t hard to pick out the wizened veterans; they only had eight or nine fingers. Their (literal) hands-on experience may have left them permanently scarred — but also wise and cautious. They made for the best brakemen because they understood the cost. Their less experienced colleagues may have had all their fingers intact, but they weren’t trusted the way the seasoned men were.

No one who’s tried to plug a cyberbreach is missing fingers, but — take it from someone who’s counseled companies through hundreds of cyber assaults — they’ve probably missed a few nights’ sleep. Since cyberattacks often affect huge swaths of customers, vendors, suppliers, and other stakeholders (not to mention attract tough media coverage), they’re exhausting to quell. But the quelling must be done the right way — aggressively and forthrightly.

Ask Charles Kallenbach, an attorney who earned his cyber spurs as counsel to Heartland Payment Systems during HPS’ notorious 2009 hack, one of the most malevolent data breaches in history. If the TJX hack of 2005 compromising some 45 million records was the first significant cyberattack, then Heartland marked the start of Cyber 2.0.

“We felt we were well prepared for an attack, and we had a number of important defenses in place. But the hackers were able to exploit a very small weakness — and wreak havoc. Heartland’s stock price per share plummeted from the high teens to $3.50, and I was hyperventilating into a paper bag,” says Kallenbach.

Heartland was targeted a decade ago by sinister hackers who knew what they were doing and who infiltrated dozens of other publicly traded companies. After the attack, the company went on the offensive, instituting a range of safeguards to deter future assaults. Heartland was sold to a payments industry competitor in 2016 — for a healthy $100 per share.

“For companies that use and guard valuable personal data, best practices should include expanding information security capabilities, such as plugging their vulnerabilities, expanding their data loss prevention program, increasing their data breach insurance coverage, all while retaining crises communications experts, as well as attorneys who specialize in data security before being attacked. Companies can start with an audit by an information security firm that can point to the most obvious data security lapses. It’s also a good idea to make sure that outside counsel retains the data firm to protect attorney-client privilege for their report,” Kallenbach prescribes.

Adds Jonathan Armstrong, a data security expert at London-based Cordery, “Cybercrime, like war and taxes, is an inevitable fact of life. We need to prepare for when not if. That’s harder than it used to be as the attacks are more sophisticated but also since today’s corporations aren’t islands — they rely on vendors and partners to do what they do. You need to try and control your data — whether it’s on your systems or a third parties — but you also need to prepare for the inevitable. That means proper war gaming so you’re battle-ready when the next breach happens.”

Publicly traded companies (and their stock prices) naturally get the most attention during and after cyber assaults, but privately held companies that bounce back from attacks deserve credit, too. One of them is InsynQ, a Washington State-based cloud-hosting service that partners with accounting and other professional service firms.
InsynQ was hit by a withering ransomware attack from anonymous sources in July of this year. To contain the spread of malware, InsynQ essentially shut down its network, a move that precluded customers from accessing their accounting data for three days. It wasn’t an easy decision, but by taking down its network, InsynQ may well have stopped a contagion from destroying the company – and damaging its clients, too.

The cybercrime containment lessons that InsynQ learned on the fly, and the technology and business solutions it devised may stand them in good stead. In early September, the company announced it was adding a heavy hitter as chief information security officer, Michael Marrano, author of *The Human Firewall Builder: Weakest Link to Human Firewall in Seven Days*. Marrano’s addition could make them a safer and more reliable partner than, say, a competitor that has never experienced an attack.

No one wants to lose their fingers or be forced to hyperventilate into a paper bag to get through a crisis. Smart companies that get bruised in a cyber fight may end up being stronger for it. But only if they learn their lessons and take steps to minimize the prospects of it happening again. □
The Open Kimono: What Drives The Rising Success Of Midsize Firms?

by Richard Levick
In 2019, the economies of scale are all the more daunting, the demand for global “platform” all the more importunate. Presumably, to succeed today, midsize firms need fresh arguments to wean legal service buyers away from the brand-name behemoths.

Back in the 1980s, the “death of the midsize firm” was a constant refrain among consultants and other pundits. Of course, those reports were, like Mark Twain’s premature obituary, greatly exaggerated. By definition, the midsize firm cannot altogether die, since any firm on its way to join the AmLaw 250 has to at least pass through a stage when it is, by whatever numerical standards apply, “midsize.” Sure enough, 30 years later, the marketplace remains populated with many varied midsize firms, including both multi-office “regional” firms as well as single-office firms in major markets.

Yet—as most readers of this publication know too well—the relentless growth and consolidation of Big Law has underscored the challenges facing midsize firms. In 2019, the economies of scale are all the more daunting, the demand for global “platform” all the more importunate. Presumably, to succeed today, midsize firms need fresh arguments to wean legal service buyers away from the brand-name behemoths.

To get a sense of what those arguments are, I asked leaders at three midsize firms that seem to be thriving in the current environment to answer a simple but critical question: “If you were addressing a large audience of general counsel from diverse companies and industries, what one message regarding the legal marketplace would you want to send them?”

I was interested to see if any of their answers would include ideas that could not have been part of such answers three decades ago. Here’s what I got from John P. Langan, managing partner of Barclay Damon, which has grown via merger to become the dominant regional presence in upstate New York.

“Give us regional firms a shot. We know the pressure you’re under to reduce costs while assuring reliable legal services are delivered. Firms like ours are often nimbler in proposing alternative fee structures … We’re built from a cost structure that does not carry with it the national or global law firm expense tax you are paying to many of the AmLaw firms. We won’t be suited for all of your work but there is a lot more of it we can handle, with equal to better service and for a lot less money.”

For some corporate buyers, “alternative fee structures” are the key words in Langan’s response. They did not exist in their current form in the 1980s. Sure, there were fixed fees as well as premiums and discounts but there was not, as in recent years, a watershed trend such that alternatives to hourly rates are often beauty contest qualifiers. While midsize firms in the past would typically highlight lower rates, clients were often averse to overt rate-shopping as it had a bargain basement feel that made them uncomfortable. By contrast, AFAs are more strategic and show a firm’s inclination to partner with the client in broader ways that meet the needs of both buyer and seller.

Yet no one ingredient in the mix can account for what Reber (Mitch) Boult, an executive committee member at Adams and Reese, sees as conspicuously increased opportunity in the current market for midsize firms to successfully compete with AmLaw 50 firms. As an example, Boult says that Adams and Reese, originally a New Orleans firm that grew to be a regional force in the South, was just selected over “a raft of AmLaw 50 firms” to represent one of the world’s largest manufacturing concerns.

According to Boult, his firm’s success isn’t anomalous. Greater competitive viability among midsize firms in general constitutes “a recent trend … I’m not sure what’s behind it. Everyone says it’s the cost difference—if you accept that lawyers at midsize firms have the same talent as their big firm peers, while charging vastly lower fees, the value proposition is irresistible. But I’m not convinced that explains it. When we compete for work, we see the AmLaw 50 firms come down to our cost level or even below [emphasis added]. Maybe it’s demographic shifts out of New York and L.A., the ubiquity of information on firms of all sizes, or the initiatives of major corporations to become smarter consumers of legal services. Maybe midsize firms are hungrier and try harder.”
Boult would tell our audience of GCs:

“There’s a lot of sophistication in midsize firms that many large companies have not yet tapped into. There is objective evidence for this. AdvanceLaw’s Thought Leaders Experiment has taken an in-depth look into the performance of midsize firms compared to ‘top-tier’ firms, and found the work quality and client service are the same or a little better in midsize firms.”

It seems as if a certain transparency, more typical of midsize firms than Big Law, is often an important part of that client service. Here’s what Roger E. Barton, managing partner of the 37-lawyer Barton LLP in New York—which has attracted a number of Big Law alumni and actively markets the fact that it has—would tell our GCs:

“Just as GCs ask firms about their commitment to diversity and inclusion and assess these factors at the working group level, GC’s should ask their firms detailed questions about their internal financial organization and structure. A lot can be learned about a firm and whether its interests are aligned with their clients if items such as partner and associate compensation and performance metrics are understood [emphasis added]. Many Big Law firms are managing themselves in such a way as to outperform their peers on league tables rather than delivering value around conference room tables for their clients. As a prominent GC once said to me, ‘It takes a strong law firm partner to have more loyalty to the client than to their partners.’

At a time in our society when transparency is so highly valued, the level of disclosure that Barton advises—be it to formulate a practicable AFA or simply share information with clients as a matter of policy—can only serve the self-interest of midsize law firms.

To a greater extent than in the past, the tide has begun to turn in their favor—even if clients themselves aren’t necessarily aware of this sea change. Mitch Boult recalls sitting at a bar with a friend of his who works in-house in New York. “Your firm will never represent us,” his friend told Boult, and named three large New York firms that do.

“I said to him, ‘Carlos, your company paid us $2 million last year,’ which it did. He fell off his barstool. My message to him: The world is changing.”
FARA’s New ‘Sheriff’ Means Business

by Richard Levick
There’s a new sheriff in town — the Department of Justice’s (DoJ) Brandon L. Van Grack, a former member of Robert Mueller’s prosecution team — who’s vowing to crack down on violators of the Foreign Agents Registration Act (FARA). FARA is the long-forgotten lobbying disclosure law that disgraced Trump campaign chair Paul Manafort put back on the map. DoJ’s renewed focus on FARA enforcement won’t lead to hangings at sunrise — but it won’t be a game of beanbag, either.

As Joshua Ian Rosenstein, a FARA specialist at Sandler Reiff Lamb Rosenstein & Birkenstock, P.C., puts it, “DoJ’s new emphasis on FARA is a warning shot to foreign companies and their U.S. consultants, who are forced to grapple with a criminal law that is broad and complicated. Now is the time for foreign companies and their U.S. consultants to reexamine their FARA compliance.”

“Grapple” is right: FARA is not only convoluted, it’s creaky. It was enacted in FDR’s second administration, when there was great fear that European fascists were insinuating themselves into U.S. affairs without detection or consequence. It never anticipated the age of instantaneous communications from foreign capital to embassy outpost to lobbying firm to government agency to congressional office – and back again. Complying with the law’s arcane and archaic rules can be challenging for “foreign principals” and their “agents,” as FARA describes them.

“We need to do a better job defining the work that falls under FARA so there are no blurred lines,” says Paul Miller, the president of the National Institute for Lobbying & Ethics. “I’m not a fan of more regulations, but I am in favor of effective regulations. We need to work with lobbying professionals to close loopholes and create a system that’s not so burdensome and expensive that it forces people to take a chance — only to claim ignorance when they get caught.”

No matter how gifted, foreign law firms sometimes don’t fully appreciate the exigencies of FARA; unlike the Foreign Corrupt Practices Act (FCPA), which has been copied in some 40 other countries, FARA is distinct. It has its own peculiar folkways.

“FARA is a compacted statute to interpret and apply,” says Amy Jeffress, a partner at Arnold & Porter. “Many of its terms are not well defined, especially in the language of the exemptions to the statute. Companies whose interests are closely aligned with the foreign government need to seek advice in order to avoid operating outside the bounds of the exemptions without registering.”

Matthew T. Sanderson, a FARA expert at Caplin & Drysdale, notes, “We are at the dawn of a whole new era of FARA enforcement, with the DoJ not only actively policing the law but also going after high-profile individuals and firms. Those representing foreign governments, NGOs, companies, and individuals can no longer afford to ignore the law or rely on their prominence to save them. It will be vital in the months and years ahead for those working in this space to both understand FARA and institute a FARA compliance system, particularly as it relates to taking in new clients that are located abroad.”

Brian Fleming, a partner at Miller & Chevalier, adds that, “All signs point to more FARA prosecutions on the horizon. Any foreign activities touching upon the 2020 election will certainly get heightened scrutiny. I also expect DoJ to turn its attention to rooting out unregistered foreign influence in a wide variety of other contexts, including law firms and media companies, and to make far more aggressive prosecutorial decisions than it has in the past.”

Defying conventional wisdom, FARA’s definition of “foreign principals” encompasses not just governments but also institutions and individuals. As Rosenstein points out, “an ‘agent’ of a foreign principal does not require an actual contract — it merely requires that a consultant act at the direction or control of, or funded by, a foreign principal.”

That’s a big laundry list. FARA, moreover, covers more than “lobbying” for a foreign client. It imposes thorny regulations on a litany of “political” activities designed to influence the U.S. public, from conducting grassroots communications to pamphleteering and distributing “informational materials” to merely counseling a foreign-based client on a U.S. public affairs strategy. Too often, foreign entities fail to understand DoJ’s broad interpretation of FARA’s political activity statute.
The frustrations don’t end there. FARA makes no mention of email or social media, of course; both have become critical tools in interacting with the U.S. public.

Van Grack raised the temperature at a September 25 FARA compliance conference in which Miller, Fleming, Jeffress, and I also participated. Van Grack made news by announcing that he may very well be interpreting the statute to now require foreign public relations firms to register under FARA when representing companies, countries, and interests trying to influence policy in the U.S. This means that the DOJ FARA unit may soon go after foreign communications agencies whose activities are directed into the U.S., with an attempt to influence U.S. policy or the U.S. public, particularly via the Internet. This is a broad and unprecedented interpretation of the statute that may or may not survive a legal challenge.

Nevertheless, it demonstrates how the stakes on FARA have abruptly changed on both the civil and criminal fronts. Lobbying and public relations firms should seek U.S. FARA counsel to assist in anything considered a close question. Foreign-based firms can no longer assume that FARA is only a U.S. firm concern.

Even FARA’s exemptions for “humanitarian” and “commercial” activities are complex and narrow. If a foreign state-owned manufacturer hires a lobbyist to dilute U.S. trade sanctions, does that advance the interests of the foreign government and therefore trigger FARA? If a foreign corporation seeks to increase its market presence in the U.S. and brings along its ambassador to participate in meetings with potential investment partners, does that “directly promote” — as FARA puts it — the government’s interests? It’s unclear — but it’s better to be safe than sorry.

FARA prosecutions have been rare over the decades — but all that could be changing. DoJ has pledged to make FARA enforcement a top priority in its national security toolbox. Thanks to Manafort’s slipshod ethics, congressional investigators and the U.S. media are suddenly very aware of FARA.

Given the considerable pressure that DoJ is now under to deliver FARA convictions, it means that communications firms are likely to get caught in the dragnet. Public relations firms need to anticipate that they could be snared; from day one of their representation — whatever that means — of a foreign entity, they should take concerted steps to be transparent and fully compliant with FARA reporting and registration. Every account should have a designated FARA compliance coordinator working under the aegis of legal counsel.

Remember: FARA scrutiny from the media and non-government organizations (NGOs) is almost always going to be negative. Plan for that contingency so you’re not caught unaware. Citing First Amendment freedoms won’t do you much good if you’re perceived to be flacking on behalf of “illicit” or “secret” foreign interests.

FARA language may be outdated, nebulous, and unduly complicated, but that doesn’t mean the new sheriff won’t come calling. Indeed, if you’re engaged in a high-profile matter involving a foreign government or entity, the prospects of public “scandal” exponentially increase.

View FARA the way residents of Tombstone viewed Wyatt Earp — with a healthy dose of fear and trepidation. ❯
My father fought in the Korean War. It was quite deliberately the last foreign country he visited before he died. His love for the country, something he passed on to me, was so strong that he planned the visit knowing it was his last. It is with this heavy heart that I write my seven points below not as a criticism but as a warning. Change is coming.

After the Korean War the concept of Chaebols — a business conglomerate structure — was born. They are so successful that today five control nearly 60% of Korea’s GNP and two dozen are well known globally, including Samsung, LG Group and Hyundai. In the Internet Age, Chaebols, like all companies, face new challenges. But unlike many other global companies, their rarified standing and deferential culture make this risk existential.

Last week I had the honor of speaking at two events in Seoul on emerging risks. What is fascinating to me about Chaebols is that we can see ourselves in them. In this disrupted age, you don’t have to be a Korean company or looking to expand into Korea to see yourself in their challenges.

Like all generalities, there are exceptions to each of these points, but in my own experience as well as those of journalists and Korean crisis communications professionals, we all share the same experience:

1. While highly laudable, the respect for authority and “shame culture” results in bad news taking far too long to be communicated internally, meaning Chaebols are almost always running to catch up to the crisis.

2. Like so many foreign companies doing business globally, there is an understandable desire to run the crisis from HQ, but this almost always results in a full news cycle delay, making them appear uncooperative. Worse, there is often an absence of local knowledge in the headquarters, which significantly harms the strategic response.

3. Their love of brands means that Chaebols are seldom willing to consider non-brand strategies in a crisis (e.g., working with the local reporter first, rather than the New York Times) or considering a change in strategy due to new facts, which does not involve the respected brand.

4. If shame drives decisions, then sacrifice of a brand, division, product or person is seldom considered early enough in a crisis to have the desired benefits.

5. There is a strong belief that because Korean media will often write flattering features than global media will, too.

6. Chaebols will hire crisis communications counsel, but only the most heroic will follow their advice. Most estimate that counsel is taken less than 20% of the time.

7. Corporate communications is almost entirely relationship dependent — who are the journalists you know personally? In the Internet age, this approach has less relevance every day.

The Korea Herald, which sponsored one of my speeches, was kind enough to write a story. I hope you enjoy the read.
Have You Adapted Your Communications To Our New Forms Of Democracy?

by Richard Levick
Virtually every major policy debate now emanates from the grassroots, not Wall Street or K Street. #MeToo, fracking, global warming, sugar, GMOs, the Keystone pipeline. Go ahead: Name a major issue that hasn’t come from the grassroots.

The power of corporate (and nation-states’) communications to control the narrative is gone. No longer are the four horsemen of communications — PR, advertising, lobbying, and PAC funding — a formula for success. “We did what was in the best interest of our shareholders and our customers,” is no longer a viable holding statement. The change is extraordinary and swift.

This transformation has been near-instant and enormous. Yet, how many companies have overhauled their enterprise risk management (ERM), their decision-making hierarchy, their advertising and marketing, and their litigation communications and branding in a way that incorporates how our democracy and capitalism now works?

**You Need a 3D Personality**

At the very least, it is no longer the third rail for companies to take political or even religious positions. The marketplace expects companies to have a three-dimensional personality that is deeper than a promise and an advertisement.

In the wake of this profound transformation, what changes should corporations institute, not only to their communications operations, but to the duties of their CEOs and boards of directors?

It’s a big agenda that too many companies fail to appreciate. On the strategic front, it boils down to embracing four factors. Anything less is whack-a-mole.

**Speed:** It is no secret that everything moves much faster today. But therein lies the trap. You can’t move any faster. You must now be proactive, instead of reactive, as most corporate communications have tended to be.

Companies need to proactively remake their ERM so that social media trends are identified well in advance and reasonable critics are singled out and incorporated into strategy; risk trends need to be reported up through management and holistically discussed.

On the tactical front, corporate communications divisions need to consider such speed-driven changes as overhauling the capabilities of their social media and online marketing teams (you’ve got to stay on top of every new development in that perpetually evolving field) so that they see nascent patterns as they evolve and can make decisions about if and how to respond or reposition.

**Allies:** Companies need to understand the importance of enlisting allies and building relationships with potential reasonable critics (remember, the messenger is more important than the message). There is no better way to change minds than to have a reasonable critic make your own points. But you can’t do that unless you know them before you need them.

Engaging the CEO and other senior officers in concerted community outreach, corporate social responsibility (CSR) and smart thought leadership is also essential. CSR needs to be strategic, not just philanthropic. If things go sideways in a hurry — and that’s the only way things go sideways these days — you’ll need the goodwill that such outreach engenders.

**Transparency:** We all loved “transparency” until we didn’t. One hundred percent of our companies will be hacked, no matter where they’re located. It is not just corporate espionage and sloppy cyber hygiene, but now a nation-state phenomenon (see the Gerasimov Doctrine) and a monetizing phenomenon (see Facebook, Google, Amazon, et al.). Plan for a world where it is all (muckraker) Upton Sinclair all the time.

Tactically, CEOs and their boards need to fundamentally change their approach to internal dialogue and communications. Big-suite executives need to repeatedly invite discussions, as do board members.

It is not enough to say, “My door is always open.” Power intimidates, and most compromised companies have had someone aware of the emerging crisis who was too afraid to become its champion, thinking, “What if I’m wrong?”

**Understand what you’re selling:** Americans of my generation came of age in the last great diminution of trust, which took place
amid the despair of Vietnam. Where many Americans are right now is even worse; it’s beginning to look like the complete breakdown that took place in the pre-Civil War era of the 1850s. Anger is so profound that we operate in narrower and narrower tribes.

Use the wrong words and a portion of your audience immediately shuts down and stops listening. Some start attacking.

How well do you know your tribe? Apple does. They were the first computer company to put their logo on the outside of the laptop. They knew their buyers knew what they had bought. They also knew their buyers wanted others to know what “religion” — the Apple religion — they were.

It isn’t just the brand anymore. Michelin is selling safety; Apple is selling creativity and — at least compared to its peers — privacy (though how much remains to be seen), which in some ways has become the ultimate luxury; Starbucks is selling a lifestyle; Prius is selling environmental consciousness; Chevy trucks are selling rugged individualism. If you don’t know what you are selling and to which tribes you are selling, you will have no army of support in a crisis.

As Jeff Bezos of Amazon says, the disruptor will soon be the disrupted. If he is losing sleep over the revolution, what are you doing?
Data Security: An Even Tougher Problem For Midsize Law Firms

by Richard Levick
For midsize law firms, “security” is a multifaceted challenge. After all, the toughest part of the midsize sales pitch is convincing clients that, despite smaller sizes and lesser resources, they are a “secure” alternative to Big Law.

For midsize law firms, “security” is a multifaceted challenge. After all, the toughest part of the midsize sales pitch is convincing clients that, despite smaller sizes and lesser resources, they are a “secure” alternative to Big Law. The “safety sell” by which their large-firm competitors maintain a stranglehold on the market is very simple: bigger equals safer.

Concern about data breaches feeds right into that dynamic. A hacked system only encourages perceptions that midsize firms have less wherewithal when it matters most.

Not that the brand-name behemoths aren’t vulnerable. According to recent reports, data breaches are on the rise among law firms of all sizes, affecting such giants as Jenner & Block and Proskauer Rose. There are multiple causes, multiple security system vulnerabilities— ranging from firms’ relationships with third-party vendors and outright theft of hardware devices to ransomware attacks as well as direct assaults on files that law firms have failed to adequately encrypt.

Breaches are potentially a bigger problem for law firms in general than for most other businesses if only because of the strict confidentiality that governs lawyer/client relationships. Also, as the FBI has noted, law firms are a “one-stop shop” allowing hackers to steal both firm-related and client data. The ABA’s 2018 Cybersecurity Report shows a low incidence of client information stolen from firms that had experienced breaches—around 6%. But that’s still 5% higher than the year before.

Big firms can weather the storm if an incident occurs, or at least that’s the perception; less so midsize firms that cannot afford to exacerbate already unfavorable client anxieties about midsize resources in general. What then are these firms to do?

Obviously, there are two strategic prongs: adequate prophylaxis to prevent attacks, and response protocol to minimize reputational damage if and when breaches do occur. A sampling of prophylactic considerations includes:

- Somebody needs to be in charge … According to the aforementioned ABA report, primary responsibility for security resides with the lead attorney in 27% of firms with two to nine attorneys, and with external consultants/experts in 33% of those firms. At 41% of firms of 10 to 49 lawyers, it resides with the head of IT. Larger firms generally designate their chief information officers.

- An internal IT chief is best but small or midsize firms may need to designate outside consultants. When interviewing candidates, listen closely to the questions they ask. The best will focus on data retention policies and inquire about the nature of your client work in order to understand the sensitivity of the data and the requirements to certify its disposal. Good security consultants will talk about encrypting your data while stored on devices and even while in use. They should ask about your vendors’ systems too.

- Solicit certifications and reports from vendors that process or transmit information in order to confirm that strong risk-reduction controls are in place. “You want to make sure that the other companies you work with—your supply chain—also practice good security,” says Claire Umeda, head of marketing for 4iQ, an identity intelligence company that helps businesses protect themselves from the reuse of previously stolen identity data. “Great IT managers can secure your infrastructure, but the leak or breach can come from outside your domain. You just don’t have control, given that third-party breaches happen all the time.” (Full disclosure: my firm has a business relationship with 4iQ.)

- Security drills must be frequent and comprehensive. These drills include checking for phishing scams and sloppy storage practices that could compromise confidentiality.

- Maximize cybersecurity insurance coverage and assiduously comply with the insurer’s loss-prevention regimen. That regimen will likely include specific safeguards such as two-factor authentication, automatic encryption of email attachments, and centralized storage policies.
• Check your systems for “toxic data.” Ian Lipner, a senior vice
president in my firm who heads our cyber practice, points out
that that often includes the kind of unnecessary data that your
firm’s HR function might have failed to dispose of or your
marketing team might have gathered and stored. A rarely
used laptop in your office may contain an employee’s Social
Security number or even personal health information. A
long-departed employee may have once thought it would be
helpful to gather client birthdays for appreciation gifts. You
might still have the technical drawings related to an old
patent case on your network drive. In the world of cyber
insecurity, less is more.

• Encryption and similar prophylaxes are not expensive. But fully
turnkey systems are useless if lawyers and employees are
sloppy or malfeasant. Periodic training programs are therefore
mandatory. “You want to make sure you educate your
employees on phishing tactics, good password hygiene, and
have them go through security best practices training
regularly,” says Umeda. “IT managers may not be able to
control what every employee does but bringing awareness
and sharing the responsibility is critical.”

Given the fact that hackers adapt so quickly against even the most
innovative prevention technology, you need an emergency plan in
place to respond to a breach when it occurs. The key questions:
how soon will I know there’s been a breach? How much data was
exposed? How many people are affected?

At this point, an incident response specialist is probably advisable if
only because an internal IT person under pressure may have made
mistakes and will now try to hide them. Interview such specialists
ahead of need so you can have someone to immediately swing into
action when there is need.

If the worst has happened and key data was not encrypted, a
midsize law firm will face a potentially disastrous reputational crisis.
In the initial hours after a breach, there is often a bias in favor of
over-communicating information you do not yet know to be facts.
You cannot walk back underestimates or overestimates of a breach.
As much as you want to be transparent, you have to be judicious in
the information you provide publicly. Treat the situation as you
would treat a sensitive litigation and simply state that it is not your
policy to comment during an ongoing investigation. Eventually, if it
turns out that a careless mistake was made on your end, the best
bet is to just own up to it and focus on the specifics of your plans to
ensure better security in the future.

If, on the other hand, security best practices were followed and the
most up-to-date protections were in place, focus on your own
foresight and the strength of your systems. The more sophisticated
the attack, the stronger your messaging. People know how
formidable hackers are these days and they don’t expect
inulnerability. In fact, controllable losses after a highly
sophisticated attack represent an opportunity to turn disaster into
opportunity by sending a positive message about the overall
solidity and reliability of your firm—exactly the kind of message
midsize firms need to send.

Increasingly, audiences demand to know your prophylaxis. The
steps you’ve taken in peace time to prevent breaches enhance
brand-building post-crisis. ■
On the unseasonably warm morning of March 4, 1801, as Thomas Jefferson prepared for his first (and the nascent nation’s fourth) presidential inaugural, outgoing President John Adams chose to skip the swearing-in of his successor and rival. Instead, Adams was in a horse-drawn carriage on his way back home to Braintree, Massachusetts, to reunite with his wife Abigail, whom he had not seen in nearly a year.

Miss his wife though he might, it was Adams’ bitter differences with Jefferson that compelled him to leave Washington, D.C., before the most portentous of events took place in the young country — the peaceful passage of power, an event not taken for granted in 1801 and still not taken for granted two centuries later.

The reason these founding fathers could no longer abide one another was their dramatically different views of democracy. Adams, the Federalist, did not trust the masses and believed in a representative form of government. Jefferson, the Republican-Democrat, had more faith in “the people”; in the debate over the First Amendment, the Jeffersonian view carried the day. The cure for harmful speech, Jefferson and his adherents argued, was more speech and greater reliance on vox populi.

The Jeffersonians may have won that battle but the other side won the war.

What we learned in high school civics class was a whitewash. America was never a “democracy.” We lived in a “republic,” where our representatives ultimately made decisions for us. From the electoral college, which sought to buffer the voters’ choice for president, to indirect elections to the U.S. Senate (through 1913), we have operated in a republic. Even the power of party conventions over primaries was essentially the rule of the day until Jimmy Carter came along in 1976.

“E Pluribus Unum”? Not exactly.

The Internet has changed the norms of our politics, our society, and our businesses. Presidential campaigns are now entertainment (and the last election was won by a reality-TV star). Proxy season increasingly represents old House elections in terms of coverage and budgets. Internet shaming is replacing judges and juries.

We have misunderstood the communications revolution, focusing our attention on the latest technology — the hardware and the software — not what the technology means to capitalism and democracy. It is not about how we receive information; it is how we share it.

No longer limited to engaged dinner-party chatter and the mailing to friends and family of a favorite article, we now have the power to control the national or even global conversation. Virtually every major policy debate now emanates from the grassroots, not Wall Street or K Street. #MeToo, fracking, global warming, sugar, GMOs, the Keystone pipeline. Go ahead: name a major issue that hasn’t come from the grassroots.

The power of corporate (and nation-states’) communications to control the narrative is gone. No longer are the four horsemen of communications — PR, advertising, lobbying and PAC funding — a formula for success. “We did what is in the best interest of our shareholders and our customers,” is no longer a viable holding statement. The change has been extraordinary and swift.

This near-instant transformation from a republic to a democracy is almost as overwhelming as the transition from a monarchy to a republic. Yet how many companies have radically changed their enterprise risk management (ERM), decision-making hierarchy, advertising and marketing, litigation communications, and branding in a way that is forward-looking and incorporates a radical change in how our democracy and capitalism work? At the very least, no longer is it the third rail for companies to take political or even religious positions. The marketplace now expects companies to have a three-dimensional personality that is deeper than a promise and an advertisement.

In the wake of this profound transformation, what changes should corporations institute, not only to their communications operations, but to the duties of their CEOs and boards of directors?

It’s a big agenda that too many companies fail to appreciate. On the strategic front, it boils down to embracing three global factors. Anything less is whack-a-mole.

**Speed:** It is no secret that everything moves much faster today. But therein lies the trap. You can’t move any faster. You must now be **proactive**, instead of reactive, as most corporate communications have tended to be.
Companies need to proactively remake their ERM so that social media trends are identified well in advance and reasonable critics are singled out and incorporated into strategy; risk trends need to be reported up through management and holistically discussed.

On the tactical front, corporate communications divisions need to consider such speed-driven changes as:

- Overhauling the capabilities of their social media and online marketing teams (you’ve got to stay on top of every “new” development in that perpetually evolving field) so that you see nascent patterns as they evolve and can make decisions about if and how to respond or re-position. Lord Cornwallis saw the American troops merging on Yorktown for days. What he didn’t realize was that his escape route by the sea had been compromised and eliminated.

- Recognizing the importance of enlisting allies and building relationships with potential reasonable critics (remember, the messenger is more important than the message). There is no better way to change minds than to have a reasonable critic make your own points. But you can’t do that unless you know them before you need them; and,

- Engaging the CEO and other senior officers in concerted community outreach, corporate social responsibility (CSR), and smart thought leadership. CSR needs to be strategic, not just philanthropic.

If things go sideways in a hurry — and that’s the only way things go sideways these days — you’ll need the goodwill that such outreach engenders.

Moreover, CEOs and their boards need to fundamentally change their approach to internal dialogue and communications. Big suite executives need to repeatedly invite discussions — as do board members.

It is not enough to say, “My door is always open.” Power intimidates, and most companies had someone aware of the emerging crisis but were too afraid to become its champion.

If you haven’t altered your approach to ERM in the last couple of years and streamlined and safeguarded the upward mobility of communications, you are not prepared for the democratization of capitalism.

**Transparency:** We all loved “transparency” until we didn’t. One hundred percent of our companies will be hacked, no matter where they’re located. It is not just corporate espionage and sloppy cyber hygiene but now a nation-state phenomenon (see the Gerasimov Doctrine) and a monetizing phenomenon (see Facebook, Google, Amazon, et al.). Plan for a world where it is all (muckraker) Upton Sinclair all the time. Everyone is watching how the sausage is made — and all of your company’s critics stayed at a Holiday Inn last night; they’re overnight (and snarky) experts.

How have you radically changed the way you communicate internally when it is all external communications now?

**Trust:** Americans of my generation came of age in the last great diminution of trust, which took place amid the despair of Vietnam. Where many Americans are right now is even worse; it’s beginning to feel like the complete breakdown that took place in the pre-Civil War era of the 1850s. Anger is so profound that we operate in narrower and narrower tribes.

Use the wrong words and a portion of your audience immediately shuts down and stops listening. Some start attacking.

Do you know your tribes? Apple does. They were the first computer company to put their logo on the outside of the laptop. They knew their buyers knew what they bought. They also knew their buyers wanted others to know what “religion” — Apple religion — they were.

Do you know what you are really selling? It isn’t just the brand anymore. Michelin is selling safety; Apple is selling creativity and — at least compared to its peers — privacy (though how much remains to be seen), which in some ways has become the ultimate luxury; Starbucks is selling lifestyle; Prius is selling environmental consciousness; Chevy Trucks are selling rugged individualism. If you don’t know what you are selling and to which tribes you are selling, you will have no army of support in a crisis. Even Napoleon Bonaparte could not march on Moscow without an army.

As Jeff Bezos of Amazon says, “The disrupter will soon be the disrupted.” If he is losing sleep over the revolution, what should you be doing?
Guideposts For Aligning Your Legal Strategy And Crisis Response

by Richard Levick
When looking to find middle ground between legal safety and authentic messaging, apply these rules to organize your efforts.

When you’re managing a crisis, it’s important to include a communications strategy with your legal plan.

PR pros and legal experts often find themselves at loggerheads over what to disclose, what to address publicly and what to keep close to the vest. For PR pros looking to convince lawyers and leadership teams, it’s helpful to rely on certain guidelines.

Here are eight essential guideposts:

1. **Risk intelligence** is the new enterprise risk management. In order to respond ASAP, you must know ASAP what you’ll have to respond to. To that end, the legal and/or crisis team should have regular access to risk experts who deploy the most efficient technology in order to monitor digital and social media mentions and to develop risk maps.

2. **Teams.** When the phone rings at 4 a.m., it’s seldom good news. From the moment a company is alerted to a crisis through the moment it finally fades from view, decisions are required at the speed of the crisis, not at the speed of decisions based on fact-gathering or discussions of legal exposure. Yes, information is as crucial as we have suggested, yet you will still have to make decisions about issues that the public deems critical—even before you’ve gathered all the facts.

3. **Privilege.** Though the ultimate question of what is privileged is evolving and determined by jurisdiction, it is always wise to anticipate attempts to pierce the veil. By hiring a litigation and crisis communications firm early in the process, and integrating it as part of legal strategy development, you show credible intent to protect the privilege. It may not be a perfect defense, but it helps make the argument, should it later be needed, that any pursuit of information must be limited to a specific, narrow scope.

4. **Chronology, exposure and gating events.** Crises move quickly; teams need a written and drawn chronology to comprehend what is happening. Once the stars in the constellation are seen in order, many things come into focus: early warnings, fact patterns, legal exposures, credible responses, allies and adversaries. Such a chronology may seem too basic a tactic to justify mentioning in a larger discussion of strategy, but it is a kind of strategy itself. The very fact that teams engage in this exercise ensures that every crisis team member is on the same page (literally). We all know what the facts are and when they happened. We can now anticipate what’s likely to come next; just as important, we see our crisis the way our critics do, with its tsunami of information.

5. **Welcoming dissent.** Strong crisis teams must invite dissent, because that’s how ideas and strategies are fully vetted, and the failure to do so almost guarantees that the communications strategy will miss the mark. Once the team understands chronology, potential legal, brand, and investor liabilities, as well as an approximate timeline of near-future gating events, then it becomes easier to manage the various priorities and biases. If the potential legal liability is greatest, then legal priorities lead. If, on the other hand (and this is anathema to many lawyers), brand vulnerabilities are the most threatening, then brand leads. If it is share value, then investor relations leads. The lead disciplines do not dominate at others’ expense, but they are given priority consideration.

6. **Sacrifice.** When companies drill down on chronology, garner facts, measure liability, and identify adversaries and allies early in the high-profile litigation or crisis process, they enable their teams to assess the cost and value of assets, both real and goodwill. Although crisis teams have a strong sense of the cost in terms of dollars and cents, their newer audiences in a high-profile matter—that is, no longer just customers and shareholders but, now, regulators, NGOs, motivated citizens, plaintiffs’ lawyers, media, and others—have their own sense of justice. Nothing makes a story fade from view faster than a meaningful sacrifice to appease that sense. By sacrifice, we mean doing something that costs you in the short term and that this new, expanded audience will appreciate enough to stop seeing you as the villain.
7. **Culture.** Culture dictates outcomes. It has an unspoken yet outsized influence on almost all high-profile matters. The culture factor soon becomes obvious and essential during any Chinese, Japanese or Korean crisis that plays out on Western soil, even down to how information is shared internally. It’s likewise obvious when Middle East matters touch U.S. markets. Asians must defer to American culture if their challenge falls within the U.S. In turn, Americans must defer to Korean culture if their problem occurs in Seoul. Less obvious, but no less important, are the cultural differences between Wall Street and K Street and Main Street, or between legal cultures and brand marketing cultures. Everyone comes to the crisis/litigation table with their own views based on daily experience and expertise. But high-profile matters require us to be more holistic, to consider the world—or at least the crisis—from the viewpoint of others.

8. **Third parties.** There is an old saying on Capitol Hill: “Never kick a man while he’s up; it’s too much work.” Wait until he’s down, the wisdom goes, so you can pile on, without any cost to you. As bad as a crisis seems in the opening hours and days, it is never as bad as it can be once it spirals out of control.

When public audiences see a messenger they trust, they’ll defer or will at least be less inclined to pile on.
What Happens When Nonprofits Get Caught In The Klieg Lights?

by Richard Levick
What Happens When Nonprofits Get Caught In The Klieg Lights? | November 26, 2019

It’s one thing when a multinational corporation gets attacked or when a big company’s management gets accused of wrongdoing. Even when the charges lack merit, at least the company has been through the mill and has some resources to rebut its detractors. For big organizations, having to deal with barbed public criticism — ever-larger amounts of it unfair in the Internet Age — comes with the territory.

To wit: Recent allegations of financial mismanagement and marketplace impropriety have hardly deterred CEO Jeff Bezos and Amazon. The black eye inflicted on CBS by CEO Les Moonves’ harassment scandal had the potential to be severe, but a year later any damage to the CBS brand has all-but disappeared. The stakeholders of for-profit organizations — shareholders, vendors, suppliers, their entire supply chain — have a proprietary interest in seeing the organization recover and prosper.

That same dynamic is not necessarily true for charities. Nonprofit stakeholders are quicker to rush to judgment and perhaps less likely to “forgive.”

What happens when a nonprofit suddenly finds itself under siege, hit with allegations that may, in the end, prove misdirected or groundless? How does an organization that has relatively little hands-on experience and not much money deal with the onslaught of television klieg lights, unwarranted condemnations from community leaders and nasty social media, not to mention a rapid decline in donations?

It’s not easy — and, in some cases, it’s lethal. Ask Steven Nardizzi, the founder and former head of the Wounded Warrior Project (WWP), established in 2003 to help honor and empower veterans injured while serving in the military. Under Nardizzi’s leadership, WWP soon earned its place in the top tier of U.S. veterans’ organizations. Within a decade, it was helping to meet the human needs of nearly 100,000 veterans, plus generating some $400 million a year in donations from an American public indebted to the sacrifices endured by military families.

But all of that came crashing down in the winter of 2016 when the New York Times and CBS News both ran “exposés” disparaging the way WWP raised and spent money. While there is always room for improvement in any nonprofit organization, especially one on an accelerated growth trajectory, claims of lavish WWP partying, reckless spending and an out-of-control CEO were unfounded — as ultimately buttressed by a number of independent third parties, including the charity watchdog Better Business Bureau and nonprofit expert Doug White.

White, the former director of Columbia University’s Master of Science in Fundraising Management program, as well as the former academic director of New York University’s Heyman Center for Philanthropy and Fundraising, conducted a pro bono investigation of WWP that exonerated its leadership of wrongdoing. White was so appalled by the sloppy journalism that undercut the veterans’ group that he urged both CBS and the Times to issue apologies. The damage done, they didn’t. Apparently, these otherwise fine media enterprises got their 19th century journalism adage backwards — “The job of the newspaper is to comfort the afflicted and afflict the comfortable” — and instead decided to afflict the afflicted.

Before White’s demythologizing could take root, WWP became fodder for TMZ and other tabloid outlets; tragically, it was turned into a poster child for charities that run amok.

The experience shocked Nardizzi, who remembers feeling powerless to change the damaging narrative being built. “We knew the picture being painted couldn’t be more wrong,” he says today, “and if this could happen to us it could happen to any charity.”

Nardizzi and other WWP executives were dismissed; nine WWP offices around the country were shuttered after its donations fell off by 50%, undermining its capacity to help wounded veterans in need. WWP’s Transition Training Academy, which assisted returning veterans prepare for IT certification, was cancelled. Soldier Ride, which taught veterans how to use cycling to heal physical and emotional wounds, was drastically curtailed.

Eventually, the truth surrounding WWP finally broke through the surface. Most of the allegations against WWP were spurious, leveled by disgruntled former employees and people pushing their own narrow agenda.
Nardizzi is now a nonprofit consultant at Paragon Strategic Insights, where he uses his experience to help other charities grow. "When scandal hits, everyone thinks the fallout is on an individual, but in reality, the damage is done to the whole organization, like WWP which has already lost over half a billion dollars in resources to serve its constituency."

Steve Nardizzi and I will be the keynote speakers at the Direct Marketing Association of Washington (DMAW) Annual Meeting on January 16. Here are some of the "rules" for nonprofit crisis communications that we’ll be addressing:

- **Message development and discipline are key**: Nonprofits need to stand for something powerful enough to move people and something simple enough to go on a bumper sticker. Use every opportunity to be proactive. Leverage your core messages with your core constituencies and stakeholders.

- **Ally development counts double**: In peacetime, make outreach to community leaders, elected officials, local and regional business leaders, and other key third parties a huge priority. You’ll need their immediate support if a crisis hits. You need some people of unimpeachable character to immediately hold the "yield" sign up to careless reporters and overly zealous critics who ride roughshod over the facts.

- **Local media matters**: The editorial board of your local newspaper, the producers and anchors at your local broadcast outlets, the people who run the most influential online community blogs, are all key constituents. Ignore them at your own peril.

- **Your board of directors has a big job**: Board members are indispensable to a nonprofit before, during, and after a crisis. The stature and sense of trust they engender in the community will keep you from coming unglued in a crisis.

- **Crisis planning is crucial**: Even if it’s just a yearly tabletop drill with your senior management, run through potential crisis scenarios, the chain of command that would be put in place, the stakeholders and third parties that would be immediately notified and who would be responsible for what. What you need is not a plan but people with the DNA that don’t panic under fire.

Nonprofits don’t get the “do-overs” or the benefit of the doubt that many for-profits get. Nardizzi will tell you today that he wishes he would have been more assertive in striking down misinformed brickbats that came WWP’s way three years ago. “In our case, the board really tied our hands by muzzling any response to the allegations – a common mistake by boards thinking it will “blow over.” I would caution any charity to not let their fear of getting involved in secondary stories curl them into a fetal position where they just absorb the blows,” Nardizzi says.

When a crisis does occur, and a nonprofit finds itself with TV crews camped outside its front door, don’t make the mistake of thinking, “We can gut this out without help.”

Maybe you’ll get lucky – but you can’t take that chance. Get professional crisis counsel and take their recommendations to heart.

In an era when many people question the efficacy of government programs, the role of nonprofits in our society has grown even more indispensable. Smart nonprofits, therefore, have an obligation to prepare themselves for that almost-inevitable moment when the klieg lights show up in the lobby.
Peloton Finds Twitter The Meanest Place On Earth

by Richard Levick
I’ve always considered myself a feminist, from the day I celebrated Title IX’s passage in 1972 when I was a high school student, to my choice of Master’s thesis topic (pay equity), to being the first man ever to work in the Women’s Rights Division of AFSCME. Today? I’m not so sure. The “sexism” allegations against Peloton’s latest advertisement — which caused the company to lose $1.5 billion in value over the course of one week — feel much more like gratuitously harsh judgment than feminism.

I don’t own a Peloton bike and likely never will. I watched the advertisement fully prepared to be outraged, and I was, but not by the advertisement… but by its critics. Some said actress Monica Ruiz appeared to be suffering from “Stockholm Syndrome.” She is, though I’m not sure how one judges that from a 30-second television advertisement. Stockholm Syndrome is what actors — particularly commercial actors and actresses — are supposed to suffer from. It’s called believing in the product. The unwanted attention has been good for her, resulting in another advertisement, this time for Aviator Gin gently mocking the Peloton criticism. Meanwhile, her TV husband — aspiring actor Sean Hunter, who teaches elementary school in Vancouver — hasn’t fared so well, as he suffers the slings and arrows of harsh barbs and insults, while he worries of career ruination. What did he do wrong? Read his lines well?

It seems civility has been the first casualty of our Internet Age, where providing megaphones to the masses via social media has resulted not in a million Shakespeares, but the endless sound of fingernails on a blackboard.

Title IX gave equal opportunity to generations of women to compete and perform in ways that have rewarded millions of participants and billions of fans, from the Women’s World Cup to Simone Biles (quick, name a top American male gymnast!). Would the blowback have existed if it was a wife giving the bike to her husband or a wife for her wife? How is that OK, but a husband apparently listening to his TV-wife about what she wants and getting it right is sexism? Here’s a rule, hard as it may be to look in the mirror: If you impugn motive and criticize one group (white male husbands) of motives that you wouldn’t of other groups (wives and LGBTQ spouses) then you suffer from as much unintended bias as those you accuse.

This is an advertisement, which, by definition, aims for its target audience, those wealthy enough to be able to afford nearly $3,000 stationary bicycles and $500 per year online subscriptions. That means by definition the product is targeting wealthier consumers. Elitism?

Fifty-four percent of Americans do not celebrate Christmas. This doesn’t make the critics antisemitic, Islamophobic, Hinduphobic or any of the other real and painful prejudices. It does mean that in their race to outrage they didn’t even consider that these advertisements were leaving a lot of people out. That doesn’t make Peloton wrong, either. It makes them smart advertisers, because you cannot target everyone, you target your most likely buyers.

Peloton has long hired and advertised women and minorities as online trainers and posted them prominently in their advertisements and online. Their brand is directly associated with strong, powerful women (often coaching and seemingly out-performing men).

We live in an age of increased Mercantile Activism, where we expect companies to be diverse and have sound and visionary corporate social, energy and environmental responsibility. It’s incredibly hard to get it right. Let us criticize companies when they get it wrong, by judging them on their body of work, not a single commercial. That kind of abrupt judgment is something we would wish on no one. Let us not make it the standard of our town square.

Twitter, apparently, is what happens before wisdom prevails.

Rodney King was right. Can’t we all just get along?
December 18, 2019

The New “Rules” Of Corporate Social Activism

by Richard Levick
The sudden and hard-to-understand criticism of Peloton for alleged sexism in one of its Christmas commercials has board members and executives all over the world scratching their heads. How should companies handle hyper-viral criticism, especially when it triggers a rapid decline in stock price? (Peloton lost over $1.5 billion in value in less than a week, though the stock price is slowly climbing back towards pre-commercial norms.) The exercise company smartly stood by its advertisement, following Adlai Stevenson’s oft-quoted advice, “Don’t just do something, stand there!”

When does a company need to do something — or nothing — after they become the focus of controversy? Grappling with the new exigencies of corporate social activism isn’t easy these days. Given the divisiveness of today’s climate, companies find themselves under increasing pressure to Do Something, Dammit! — even when the value of that “something” isn’t always evident.

While in Park City, Utah, keynoting the annual Summit D&O Conference, I was interviewed by the Associated Press (AP) on Lyft’s struggle to live up to its safety marketing, the AP again on Hallmark’s on-again, off-again, on-again same sex advertisement and by The Holmes Report on the latest iteration of Walmart’s social responsibility.

The common question amounts to this: In an age of acute transparency, social shaming and heightened expectations, how do companies position their brands beyond the product? It’s no longer just about the brand, but about the social footprint. The acid test today has become: What does the brand and company stand for?

Not so long ago, when crisis struck a company, it could release a statement that essentially said, “We are doing what is in the best interest of our customers and shareholders.” Creativity meant reversing the order. Today, it’s like threading a needle during turbulence.

Eight in ten consumers say they want their brands to have a social purpose; most millennials expect it as a point-of-entry before they even consider a brand. Balance this with the fact that even the most ardent supporters of a cause have price limitations: “I want organics, sustainable products or responsibly harvested cocoa,” many consumers vow these days, “but I’m not willing to pay $5 for a tomato or candy bar.”

Kermit the Frog was right, “It’s not easy being green.” The same can be said in today’s world of being socially responsible or holiday-agnostic or 360-degrees diverse and everything else that is demanded of companies, their brands and their advertisements, without offending someone or leaving something out.

The new rules on corporate social activism are complicated and not always clear, but here are a few lessons to make it easier:

1. **Sacrifice:** When Dick’s banned gun sales, it was thoroughly planned. The board and executive committees were unanimous; the company planned for criticism and a short-term (up to a year) decline in sales and share price. The clarity and expectation of a short-term sacrifice to do what they perceived was right has been rewarded with increases in both sales and stock price. Taking a position is about the long term, not the short term. Leadership and courage have a price, usually paid up front.

   **Do it, Don’t Tell It:** Walmart decided two decades ago that it didn’t like its position as the Big Box disrupter, so it repositioned itself to be among the best corporate citizens. But rather than make it a marketing campaign (see Lyft below), the retail giant made it part of its business strategy. Walmart “productized” its good citizenship — selling only low-carbon footprint CFL light bulbs, introducing $4 generic drugs and becoming one of the largest sellers of organic produce. But making organics widely available wasn’t the whole strategy; doing so at an affordable price was the mantra, thus requiring its suppliers to be more efficient. It wasn’t about the marketing; it was about change. In other words, Walmart didn’t just talk: It acted. Walmart has, remarkably, done more to make organics an affordable choice than just about any other “green” company. The lesson? You cannot adopt a woke, mercantile activist position and not mean it.
2. **Be Transparent:** Chick-fil-A has long had an unpopular anti-LGBTQ position – one it has toned down over the years. But Chick-fil-A made this position transparent, pointing out that it was rooted in the religious beliefs of its founders, whose tenets were at the heart of the company. By doing this, it was saying “You may not agree with us, but it comes from deeply held religious beliefs.” Consumers are sophisticated enough to respect a different point of view. Transparency, as initially painful as it might be, has its rewards.

**Courage & Leadership:** After President Trump announced his Travel Ban at the end of his first week in office, Lyft instantly announced a $1 million donation to the ACLU to combat it. A few months later, when controversy arose over the President’s Business Councils, Silicon Valley rule breaker and market leader Uber cowered and announced they would “study the issue.” Lyft used its differences with Uber to position itself as woke — a strategy that worked for two years.

In 2018, Lyft rolled out what it referred to as an unprecedented safety training program to emphasize passenger safety, including prominent real estate on its home page and serious web optimization to control search. The problem is that the program is mostly talk, not action. Late implementation of a panic button, forced arbitration, including for sexual assault accusations (recently reversed), and a hard to navigate system make harassment complaints cumbersome at best. Worse, Lyft had made it a policy to refuse to provide investigators with information when women passengers go to the police. Positioning is supposed to be a spotlight on a corner of reality, not a marketing fiction.

If there is one overriding lesson in the age of brand activism, it is that companies must operate and market with integrity. In the last two decades, Walmart has gone from community disrupter to the town center.

Lyft, by contrast, has gone from woke to tone-deaf in under two years. They can fix it by moving beyond compliance and leading the industry with policies that make rider safety — particularly women’s safety — paramount, but that must be a business decision, not a marketing one.

Lyft’s issues are symptomatic of Silicon Valley’s problems. Valley companies have been resting on their laurels. They’re no longer the cool kids who don’t have to take criticisms seriously. Many see them as the robber barons of this generation — companies that have gotten way too big way too quickly. People used to take the word of Silicon Valley companies. We used to believe everything Mark Zuckerberg said. Now his every utterance is viewed with suspicion.

Marketing without integrity is like the hole without the donut. You’ll buy one hole once on the promise of sugar glazed fried dough later. The promise is the easy part. It’s what happens after we believed you that matters.

As companies deal with the pressure to Do Something, Dammit! they need to think through their social activism — and create a commitment that’s deeply rooted and an authentic reflection of their corporate values.
9 Corporate Communications Changes To Anticipate For 2020

by Richard Levick
"The future always comes too fast and in the wrong order," the late futurist Alvin Toffler once wrote. Mr. Toffler’s prophecy continues to vex corporations battling to manage risk and compete in today’s hyper-charged marketplace.

What will the communications challenges of 2020 bring? No doubt there will be some surprises, but I’m willing to bet my old copy of Mr. Toffler’s Future Shock that a lot of general counsels and communications EVPs will be grappling with the following:

• **Precedent-shattering cyber breaches** and other cybersecurity calamities will not only jeopardize your bottom line, but threaten to permanently damage your brand. Cyber breaches have increased 54% over the pace of a year ago. If your organization hasn’t yet been hacked, it will be, if not in 2020, then soon. Plan on it. Soon, free credit reporting will no longer be ameliorative. Customers are going to demand more, putting far more attention on what your company did to prevent the breach.

• **Radical revisions to enterprise risk management (ERM)** will become imperative as corporate challenges — from global warming and the sugar industry to #MeToo and cocoa farming — come from the grassroots, not from shareholders or institutional investors. If you haven’t rebuilt your ERM based on this, then you are looking in the rearview mirror, not to mention subjecting yourself to activists’ investors, who will soon argue that the failure to do this is malpractice. The number of companies being targeted by grassroots mobilizers has skyrocketed. Issues and movements now emanate from the ground up, not from the top down. Do you track the fundraising letters of NGOs who cover your industry? Do you know the high-authority bloggers or other social commentators that criticize your company or industry? If you can’t identify these sources, you cannot measure risk and reward.

• **There will be a public relations backlash to the #MeToo movement.** Meritorious #MeToo litigation will proceed apace, but men will also file litigation over a perceived absence of equity. LGBTQ employees will be filing more charges against executives for bias. Companies will find that they are in a compromised position in what previously appeared equitable. Now is the time to review your policies and procedures so they are fair for all parties.

• **Litigation funding will continue its rapid growth**, providing more funds for the defense while also equalizing the playing field for the plaintiffs’ bar. The age-old strategy of papering a plaintiff to death is an increasingly expensive and fruitless approach when plaintiffs have access to large amounts of liquid capital.

• **A new generation will expect companies to stand for something political**, with an assertive environmental, social and corporate governance footprint, beyond the brand. This is an extraordinary change, when, for the past 70 years, companies were expected to be apolitical. For companies to navigate this new expectation, they must understand the rules, which include being transparent, consistent, selective and truthful.

• **The Department of Justice will crack down on perceived abuses of the Foreign Agents Registration Act (FARA)**, including going after foreign communications and public affairs firms, even though they are specifically not written into this pre-World War II statute. Our interpretation is that new FARA senior enforcement director and Mueller investigation veteran Brandon Van Grack is using this statute to crack down on Russian election interference via social media. Don’t be caught up in the dragnet as an experimental case on how far he can use the long arm of this statute. Paul Manafort is serving jail time for violating FARA rules.

• **The criminalization of the boardroom** will continue, meaning that your CEO, senior executives and board members will be subject to legal scrutiny, quite possibly changing everything from brand value to succession. Many of today’s convictions, settlements and investigations would have been unimaginable a few short years ago.

• **New unions will take two forms**: First, traditional unions are targeting Big Tech, while companies like Google and Facebook fumble their once-esteemed brand positions.
Second are the nonunion “wildcat actions,” those spontaneous employee-organizing efforts that lead to walkouts and company embarrassment. Google, Disney, Dick’s Sporting Goods, and Delta represent only a handful of the companies grappling with First-Amendment-in-the-workplace issues.

- **Faith in democracy will decline further.** Today, in virtually every democracy, including the United Kingdom, Australia and the United States, our children are two-thirds less likely than our parents to believe in democracy as essential. This will have a profound effect on outreach toward millennial consumers and workers moving forward.

“You’ve got to think about big things while you’re doing small things, so that all the small things go in the right direction,” Mr. Toffler once opined. That’s not a bad sentiment to scribble on the whiteboard as you size up your 2020 communications challenges.
Corporate Social Responsibility In The Age Of Shaming

by Richard Levick
Recently, I had the honor of keynoting the annual Summit D&O Conference in Park City, Utah, being interviewed by the AP on Lyft’s failure to live up to its safety marketing and by The Holmes Report on Walmart’s social responsibility. The common question, it seems, in an age of transparency, social shaming and heightened expectations is, how do companies position their brands beyond the product? It’s no longer just about the brand, but about the social footprint. What does the brand and company stand for?

Not so long ago, when crisis struck a company, they could release a statement that said, “We are doing what is in the best interest of our customers and shareholders.” Creativity meant reversing the order. Today, it’s like threading a needle during turbulence.

Over eighty percent of consumers say they want their brands to have a social purpose; and most millennials expect it as a point of entry before they even consider a brand. Balance this with the fact that even the most ardent supporters of a cause have price sensitivity. “I want organics, sustainable products or responsibly harvested cocoa, but I’m not willing to pay $5 for a tomato or candy bar.” Kermit was right, “It’s not easy being green” or socially responsible or holiday agnostic or 360-degrees diverse and everything else that is demanded of companies, their brands and their advertisements, without offending someone or leaving something out. The new rules on corporate social activism aren’t always clear and they are complicated, but here are a few lessons to make it easier:

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2. **Do it, don’t tell it:** Walmart decided two decades ago that it didn’t like its position as the Big Box disrupter, so it repositioned itself to be among the best corporate citizens. But rather than make it a marketing campaign (see Lyft below), they made it part of their business strategy. They “productized” their good citizenship — selling only low-carbon footprint CFL light bulbs, introducing $4 generic drugs and becoming one of the largest sellers of organic produce. But making organics widely available wasn’t the whole strategy; doing so at a price that allowed the middle class to afford them was their mantra, thus requiring their suppliers to be more efficient. It wasn’t about the marketing, it was about change. Walmart has, remarkably, done more to make organics an affordable choice than just about any other “green” company.

3. **Be transparent:** Chick-fil-A has long had an unpopular anti-LGBTQ position, one they have toned down over the years. But they made this position transparent and shared that it was centered on the religious beliefs of their founders, who made those tenets a central part of the company. By doing this they were saying, “You may not agree with us, but it comes from deeply held religious beliefs.” Consumers are sophisticated enough to respect a different point of view. Transparency, as initially painful as it might be, has its rewards.

4. **Courage & leadership:** After President Trump announced his “Travel Ban” at the end of his first week in office, Lyft instantly announced a $1 million donation to the ACLU. A few months later, when controversy arose over the President’s Business Councils, Silicon Valley rule breaker and market leader Uber cowered and announced they would “study the issue.” Lyft used its differences with Uber to position itself as woke. A positioning that worked for two years. Last year Lyft rolled out what they referred to as an unprecedented safety training program to emphasize passenger safety, including prominent real estate on its home page and serious web optimization to control search. The only problem is that the program is mostly talk, not action. Late implementation of a panic button, forced arbitration, including for sexual assault accusations (recently reversed), and a hard to navigate system making harassment complaints cumbersome at best. Worse, Lyft had made it a policy to refuse to provide investigators with information when women passengers went to the police. Positioning is supposed to be a spotlight on a corner of reality, not a marketing fiction.
If there is one overriding lesson in the age of brand activism, it is that companies must operate and market with integrity. In 20 years Walmart has gone from community disrupter to the town center. Lyft, by contrast, has gone from woke to tone deaf in under two years. They can fix it by moving beyond compliance and leading the industry with policies that make rider safety, particularly women’s safety, paramount, but that has to be a business decision, not a marketing one.

Marketing without integrity is like love without commitment. The words are the easy part. And eventually, the partner always figures it out.
LEVICK is well connected around the globe with dozens of long-term strategic relationships with sophisticated communications agencies in over 50 cities worldwide. We are the exclusive US member of the Crisis & Litigation Communications Alliance (CLCA), an invitation-only global alliance of the world’s leading litigation and crisis communications agencies. Wherever and whenever you need us, we are always there and always on.

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