



Out of Crisis Comes Opportunity

Colleges should strongly consider commissioning external reviews of their responses to campus protests, Timothy J. Heaphy writes.

By: **Timothy J. Heaphy**



In 1888, the German philosopher Friedrich Nietzsche wrote “Out of life’s school of war—what doesn’t kill me, makes me stronger.” His simple message resonates today in the wake of the incredibly difficult spring of protest activity on college campuses across the country. As difficult as these protests have been, they offer the potential for learning, growth and stronger relationships in the days ahead.

One way to make the university stronger is the willingness to candidly evaluate the institutional response to these events and derive lessons learned. Any college or university that struggled with its response to student activism this spring would be wise to consider a credible, independent “after-action” review, one that looks back at the facts and circumstances of what happened and looks forward to ways to avoid or manage protest activity in the days ahead.

I have seen the benefits of these after-action reports, as I led investigations of the August 2017 racist violence in Charlottesville, Virginia and the January 6, 2021 attack on the U.S. Capitol. In Charlottesville, I supervised a team of lawyers and other professionals who conducted an independent review of how the city and state governments managed the Unite the Right rally that led to the deaths of three individuals and countless physical and emotional injuries. We prepared a thorough report detailing a chronology of events, cataloguing

what went right and what went wrong and issuing a set of recommendations for improved handling of mass demonstration events.

Several years later, I served as chief investigative counsel to the House of Representatives’ Select Committee to Investigate the January 6 Attack on the U.S. Capitol. In that role, I managed an 18-month long investigation of the root causes and real-time consequences of the events at the Capitol. We held 10 public hearings and issued a comprehensive report detailing our findings, which included criminal referrals to the U.S. Department of Justice. In both investigations, we followed the facts where they led and tried to derive lessons to inform policy and practice.

These experiences have shown me that an independent review of a traumatic event has several tangible benefits. As a threshold matter, initiating a review starts the process of restoring trust and confidence among various stakeholders impacted by the crisis. A university’s willingness to look critically at how the student protests were managed and consider improvements reassures the community that its leadership is mindful of the trauma these events have caused for so many people. Good leaders are willing to evaluate their own decisions in an effort to inform future institutional response. This is particularly important at a university, as critical thinking and the pursuit of knowledge are endemic to the culture of higher education.

The independence of a review helps maximize the reputational benefit and restoration of confidence described above. A college’s willingness to bring in outside experts steeped in the issues of both free speech and public safety will give the investigation credibility and impartiality, as opposed to an internal review conducted by university officials. The promise to share key findings with the community can further reassure various stakeholders that the university will honestly reckon with the complex issues at hand.

An independent review may reveal practical impediments to success and help remove them going forward. Asking whether decision makers had accurate information to inform

decisions, appropriately balanced conflicting interests, communicated effectively with stakeholders and followed applicable law and policy can help inform future actions. There may be university policies that do not contemplate particular situations and therefore stop short of offering clear guidance to both students and administrators.

Independent reviews can evaluate the efficacy of university policies, compare them to best practices, and provide practical solutions for potential modifications designed to prevent future uncertainty. For example, I served as university counsel at the University of Virginia for several years before leaving to lead the January 6 investigation. In the wake of a torch-lit march by white supremacists on the campus in 2017, the university modified its time, place and manner restrictions on speech and its open flame policy to better protect both free speech and public safety.

Response to the student protests has typically required the involvement of other agencies, particularly state and local law enforcement. An independent review may reveal issues that hamper interagency coordination—lack of clarity as to command and control, differing standards regarding use of force and community engagement, or unfamiliarity of personnel. Reviews identify these gaps and facilitate improved coordination, often through mutual aid agreements and joint trainings. Incorporating student and faculty perspectives in a review process may enhance relationships with student groups engaged in protest activity and faculty who mentor these students. After-action reviews can improve both internal and external relationships, which has benefits beyond the crisis.

Finally, an independent review provides an opportunity to reaffirm core values. All university leaders express a strong commitment to the protection of speech, academic freedom, respect for all members of a community, and transparency. The decision to conduct a thorough, objective review of difficult events and the subsequent disclosure of lessons learned are manifestations of that commitment. These steps affirm that the university protects these values in deed, not just in word. These reviews set a tone that has ripple effects beyond the current crisis, as these values pervade university life in a wide array of situations.

There are numerous examples of successful reviews that have followed student protests. In 1970, President Nixon established a Commission on Campus Unrest in the wake of the shootings of students at Kent State University and Jackson State College. In the wake of student protests in 1968, officials at Columbia University formed a commission to “establish a chronology of events leading up to and including the Columbia crisis, and to inquire into the underlying causes of those events.” More recently, the University of California, Los Angeles, hired law enforcement experts to review the police response to violence that occurred at an encampment in April of this year. The fact that so many colleges have wisely chosen to conduct these reviews creates an expectation that a review will be undertaken and of reputational risk if a college chooses not to launch some kind of after-action process.

Individual college responses to student protests this spring have varied across the country, motivated by the facts and circumstances unique to each institution. Similarly, no two of these after-action reviews will be precisely the same, as they must be tailored to consider and address the specific issues raised by events at that institution. It is imperative that a college not simply launch an open-ended review but define its scope with as much specificity as possible. Will this be a policy review, a consideration of law enforcement coordination and response, an evaluation of communications with various stakeholders, or something else specific to that university? Successful reviews have both a clearly defined focus that guides the investigative process and the flexibility to respond and pursue new issues that emerge during the review. Throughout the process, the investigator and the university must have an aligned understanding of the scope of the review, which requires frequent communication.

Any university that chooses to pursue a review should take several immediate steps to maximize these potential benefits. Hiring outside lawyers with investigative experience to gather relevant facts and assess compliance with law and policy is not only essential for external credibility of the review, but also provides the potential to claim the protection of attorney-client privilege over the materials gathered during the review. Subject matter experts in law enforcement, crisis management or communications may have relevant experience and could be retained directly by the university or by counsel supervising the overall investigation. It is imperative that the university maintain all relevant information, issuing a document hold and ensuring the availability of stakeholders with pertinent information. The announcement of a review will create expectations of potential public release, so colleges also need to consider intentional messaging about the timeframe and ultimate availability of the review’s findings and recommendations.

External reviews will not solve all the problems that stem from student protests like those we’ve seen this spring around the country. While Charlottesville is still suffering from the trauma caused by the Unite the Right rally, our report helped lay a foundation of facts and accountability that have been an important step toward healing. The January 6 investigation I led did not heal the division that afflicts our democracy, though it did help enhance understanding of the facts and circumstances that led to the attack on the Capitol and recommend some changes in law designed to prevent future episodes of political violence. This experience shows that independent reviews provide a starting point to begin to understand issues that may not have been obvious in the real-time management of events. They can also point the way forward—to a better, smarter, more aware university community that protects the rights of all.

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