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# A Practical Guide to the Use of the Commissioned Public Report as an Effective Crisis-Management Tool

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## **Cover Page Footnote**

\* F. Joseph Warin is a partner at Gibson, Dunn & Crutcher LLP and is chair of the Washington, D.C. Office's Litigation Department, which consists of over 125 attorneys. Mr. Warin also serves as co-chair of the firm's White Collar Defense and Investigations Practice Group. He served as Assistant United States Attorney in Washington, D.C. from 1976-83. Mr. Warin graduated in 1975 from the Georgetown University Law Center, where he was Editor of Law and Policy in International Business. He received his Bachelor of Arts degree cum laude from Creighton University in 1972, where he was student body president. \*\* Oleh Vretsona is an associate in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP. He currently practices in the Firm's Litigation Department, where he focuses on white collar criminal defense, internal investigations, regulatory inquiries, antitrust, and corporate compliance. Mr. Vretsona received his law degree, magna cum laude, from The University of Minnesota Law School, where he was elected to the Order of the Coif, and served as an editor of the University of Minnesota Law School Journal of Law and Inequality. † Lora MacDonald is an associate in the Washington, D.C. office of Gibson, Dunn & Crutcher LLP. She currently practices in the Firm's Litigation Department, where she focuses on white collar criminal defense, internal investigations, regulatory inquiries, and corporate compliance. Ms. MacDonald received her law degree, cum laude, from The University of Michigan Law School, where she was an Articles Editor for The Michigan Journal of International Law. \*The authors would like to thank Henry C. Phillips for his invaluable contributions to this Article.

# A PRACTICAL GUIDE TO THE USE OF THE COMMISSIONED PUBLIC REPORT AS AN EFFECTIVE CRISIS-MANAGEMENT TOOL

F. JOSEPH WARIN,\* OLEH VRETSONA\*\* & LORA E. MACDONALD†

## ABSTRACT

*When terrorists attack an energy installation, disaster strikes a nuclear power plant, or a hurricane tears through wide swathes of a city, immediate concern is for the persons affected by the disaster. Close on the heels of this concern is often criticism of how the organization responsible for those persons' safety has handled the catastrophic event, and an inept response—or one perceived as inept—can spell the organization's demise. Institutional cracks are laid bare for the world to see, the public narrative turns it from victim to villain, reputational damage mounts, and a wave of public scrutiny and litigation looms.*

*If prepared properly and timely, a commissioned public report on the handling of a crisis can be an enormously powerful tool not only to manage the blowback from disaster, but also to enhance organizational reputation and generate positive public sentiment by evaluating institutional crisis-management capabilities and taking proactive steps to address any shortcomings without substantially damaging the organization's legal positioning.*

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The authors would like to thank Henry C. Phillips for his invaluable contributions to this Article.

*Though scholars have discussed the promise of the effectively commissioned public report, they have yet to provide a comprehensive guide to its creation. This Article, written by practitioners, provides such guidance from a more pragmatic perspective. We explain that an effective public post-crisis report must have an eye on the three crises that are inherent in every disaster: the institutional crisis, the legal crisis, and the public relations crisis. We emphasize that to the extent that these crises are in tension, reports should primarily focus upon improving the institution, rather than upon waging a public relations campaign or upon avoiding potential legal liability at all costs. Of course, we recognize that in each specific situation, organizations' internal and external advisers will guide their clients on the appropriate balance among these three important considerations.*

*Drawing upon a diverse set of commissioned public reports, we provide a framework for structuring such reports to achieve multi-dimensional goals. An effective report begins with a well-composed commission and a well-run investigation. The report itself should provide a definitive narrative of the events, identify organizational capabilities and potential shortcomings, and provide recommendations that will address the identified shortcomings. This Article addresses each of these issues, concluding with a set of recommendations, drawn from professional experience and the collective wisdom of various post-crisis reports, for improving organizational capabilities before the next crisis hits.*

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I. INTRODUCTION: THE THREE CRISES—INSTITUTIONAL, LEGAL, AND PUBLIC RELATIONS

On January 16, 2013, terrorists with ties to al-Qaeda attacked the Tigantourine natural gas facility near In Amenas, Algeria, with over 800 people inside. After taking over the facility, the terrorists searched for expatriate workers, who, they announced, would be put inside the plant before it was blown up. Although the Algerian army was ultimately able to prevent the terrorists from achieving their grisly goal, at least 39 foreigners and an Algerian security guard were killed in the four-day siege, as were 29 militants.

The Tigantourine installation is a joint venture between the Norwegian majority-state-owned Statoil,<sup>1</sup> the U.K. multinational BP, and Sonatrach, the Algerian state oil company. Five Statoil employees were killed in the attack, and four BP employees. Following the terrorist attack, Statoil decided to commission an independent report to investigate the incident. The report was pursued to address the serious security threats that are inherent in conducting operations in similar politically-unstable areas;<sup>2</sup> its stated objectives were “to clarify the chain of events and to facilitate learning and further improvements within

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1. One of the co-authors of this Article, F. Joseph Warin, served as compliance monitor for Statoil from 2006 to November 2009 in a monitorship arising out of a resolution with the U.S. Department of Justice and the U.S. Securities and Exchange Commission.

2. See, e.g., Francis Ghilès, *Algerian Gas’ Challenges After the Attack on In Amenas*, 70 NOTES INTERNACIONALS CIDOB 1 (2013), available at [http://www.cidob.org/es/publicaciones/notas\\_internacionales/n1\\_70/algerian\\_gas\\_challenges\\_after\\_the\\_attack\\_on\\_in\\_amenas](http://www.cidob.org/es/publicaciones/notas_internacionales/n1_70/algerian_gas_challenges_after_the_attack_on_in_amenas).

risk assessment, security, and emergency preparedness.”<sup>3</sup> Notably, the report was initiated proactively by Statoil, and was not created reactively in response to a governmental or other external command.

The investigation that formed the basis of the Statoil report was conducted by prominent outside experts and was released on September 12, 2013, approximately eight months following the attack.<sup>4</sup> The decision to commission the report—which entailed a significant assignment of control over the message to an outside entity—reflected a belief that doing so would be the best way to manage what was a significant crisis for Statoil. This was perceived as an effective response for Statoil as an institution that relies on production in highly unstable areas, and as a public company whose success depends on maintaining a good reputation in the eyes of investors, politicians, and the public at large. In many respects, Statoil is unique because the government of Norway (through the Norwegian Ministry of Petroleum and Energy) owns 67% of the company.<sup>5</sup>

The Statoil report is notable in many ways, not least for the dramatic events that prompted its creation, and because commissioned public reports are becoming more frequently utilized as an effective tool to manage and shape the narratives that follow crises. Although the commission of public reports has historically been primarily a government practice,<sup>6</sup> other public institutions are growing increasingly familiar with their use.<sup>7</sup> Commercial entities, too, are finding commissioned public reports highly suitable to address the various crises they encounter. Statoil’s response to the In Amenas incident is especially probative of this trend, but the examples of Enron, GM, and others are also indicative of the wide range of contexts in which companies perceive the use of a commissioned public report as an effective response.

3. STATOIL, *THE IN AMENAS ATTACK: REPORT OF THE INVESTIGATION INTO THE TERRORIST ATTACK ON IN AMENAS* (2013), available at [http://www.statoil.com/en/NewsAndMedia/News/2013/Pages/12Sep\\_InAmenas\\_report.aspx](http://www.statoil.com/en/NewsAndMedia/News/2013/Pages/12Sep_InAmenas_report.aspx) [hereinafter *IN AMENAS REPORT*].

4. *Id.*

5. See *Top 20 Shareholders*, STATOIL, <http://www.statoil.com/en/investorcentre/share/shareholders/top20/pages/default.aspx> (last updated Feb. 2, 2014, 11:56 AM) (as of Dec. 31, 2013).

6. See, e.g., WARREN COMMISSION, *REPORT OF THE PRESIDENT’S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY* (1964) [hereinafter *WARREN COMMISSION REPORT*]; Steven R. Ross et al., *The Rise and Permanence of Quasi-Legislative Independent Commissions*, 27 *J.L. & POL.* 415 (2012) (discussing progression of government commissions from executive commissions to legislative commissions, beginning with the Roberts report, to quasi-legislative independent commissions, such as the 9/11 Report). The United States government has long commissioned public reports, though the form’s prominence—the rise of the high-anticipated public report—truly began with the Congressionally-commissioned response to Pearl Harbor. See *Hearings Before the Joint Committee on the Investigation of the Pearl Harbor Attack*, 79th Cong. (1946) [hereinafter *Roberts Commission Report*].

7. See *infra* note 43 for the response of Pennsylvania State University to a sexual abuse scandal.

### A. *Public Reports and Crisis Management: The Three Crises*

To understand the value of a commissioned public report, it is necessary to understand what it is, and why its unique characteristics make it more suited in many situations to the task of crisis management than other forms. What makes this type of report a more powerful response in certain circumstances than, for example, an internal investigation and subsequent internal report without further public review? What role should it occupy among the tools available to companies in crisis situations? The first step in analyzing the benefits promised by an effective commissioned public report is to understand the evolution of a crisis and its management.

For every catastrophe confronting an organization, there are three primary crises: an institutional crisis, a public relations crisis, and a legal crisis. Though the traditional and instinctive reactions to these crises are in tension, a correctly deployed commissioned public report has significant potential to mitigate or resolve that tension. This Article seeks to provide a template for a report meeting these objectives.

#### 1. What Is a Crisis?

At its most basic, a crisis is “a time of intense difficulty, trouble, or danger; a time when a difficult or important decision must be made.”<sup>8</sup> The crisis management academy defines crisis more specifically, as “an unpredictable, major threat that can have a negative effect on the organization, industry, or stakeholders *if handled improperly*.”<sup>9</sup> By its terms, this definition broadly encompasses all types of crises, whether natural or man-made. The scope of this Article is far narrower, and will focus on how to manage the response to crises that arise as a result of intentional human actions or human negligence.

It is useful to view a crisis as being composed of two chronological parts: the actual event, itself a “time of intense difficulty, trouble, or danger,” and the shadow-crisis that threatens to occur subsequent to the event. Failure to appropriately handle a crisis in the first instance has the potential to plunge the entity perceived as responsible for such failure into a deeper, and potentially worse, state of crisis. Whereas an entity may not be blamed for the direct consequences of a crisis caused by actions and intentions external to it, it will be held responsible for the quality of its response. For example, a terrorist organization will be considered culpable for deaths resulting from an attack perpetrated by its members; the corporation operating the facility subject to terrorist attack likely will not be blamed for the attack and its consequences. Nevertheless, that corporation *may* be blamed for any perceived failure to respond effectively to the crisis in its immediate aftermath and in the weeks and months ahead. It may also be condemned for a failure to implement the lessons learned from previous crises. The immediate

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8. THE NEW OXFORD AMERICAN DICTIONARY 401 (2d ed. 2005).

9. W. TIMOTHY COOMBS, CODE RED IN THE BOARDROOM: CRISIS MANAGEMENT AS ORGANIZATIONAL DNA 2 (2006) (emphasis added).

event that manifests the initial “crisis” is often indistinguishable from the follow-up threat of the shadow crisis, and they are together best understood to form the institutional, public relations, and legal crises mentioned earlier. These “three crises” will be explored in greater detail below.

## 2. The Institutional Crisis

The institutional crisis is that directly resulting from the disastrous event. This is the immediate impact, both in terms of actual, tangible damage and the revelation of the organization’s potential shortcomings flowing from the fact that the damage occurred at all. For Statoil, then, the institutional crisis created by the terrorist assault was the present threat to the safety of its field workers and northern African operations. It was also its lost profit during the period of the attack on and rehabilitation of its facility, and the stakeholder confidence in the viability and security of the operation.

On September 11, 2001, the United States lost its sense of security when the national intelligence system failed to prevent hijacked planes from crashing into buildings in downtown New York City. Apart from the tangible damage, the attack created an institutional crisis by revealing potential vulnerabilities in existing intelligence networks. The scandal at Pennsylvania State University threw its sports program into crisis not only by uncovering the ongoing sex abuse within its walls, but also by suggesting that the football program might harbor a child molester or other illegal activity. By revealing previously-unknown or unconsidered institutional issues, a crisis can affect both those within it and those external to it.

## 3. The Public Relations Crisis

The public relations crisis is perhaps the aspect of crisis with which we are all most familiar because it can directly harm the institution’s reputation. For Statoil, it was the implication that the company might not be able to maintain the safety of its operations in politically troubled areas (an implication which, for a company with global operations, had the potential for worldwide impact). This suggestion had significant power to endanger the company’s continued profitability, and even its institutional integrity. In the case of September 11th, the institutional crisis of a major terrorist attack led to a subsequent public relations crisis as between the government and its citizens. Previous confidence—or perhaps, complacent belief—in the robustness of the national security program was rocked by a confirmed fear that our intelligence system might be incapable of recognizing and protecting us from external threats. The occurrence of this terrorist attack opened us wide to the reality of the threat of future ones. It forced us to ask certain difficult questions, and the compromised institution to answer them, including: Do we and/or should we, trust our government to protect us from external threat?



The public relations crisis carries with it a question of blame. Who should we blame for the events that occurred; is the affected institution victim or villain? Do we sympathize with the football program whose wholesome aspect has been compromised by infiltration by a child molester, or do we fault it for providing him with a safe harbor? Do we feel for the Department of State's losses in Benghazi or do we rather ask how it could have allowed such a thing to occur?<sup>10</sup> Although the public relations crisis often takes center stage, particularly in post-crisis public reports, this Article perceives a far larger role for such reports. True, the public relations crisis is the most obvious, but it is not the most important—a more holistic approach, one that both acknowledges and addresses the three primary crises inherent in a catastrophic event, is a far more worthwhile endeavor.<sup>11</sup>

#### 4. The Legal Crisis

Crisis management experts and lawyers do not work together closely enough. Few crisis management texts are written by lawyers, and thus few can give real attention to the legal consequences of catastrophe. In addressing the legal crisis, this paper attempts to start to build a bridge over that gap.

Disasters are sparks for litigation. This is a simple fact: if your institution becomes embroiled in crisis, it will almost certainly find itself defending against lawsuits. Recent examples lend credence to this truth for instance, Penn State has been sued dozens of times over the Sandusky scandal,<sup>12</sup> and litigation against a myriad of airlines and other commercial defendants spawning from 9/11 is still ongoing.<sup>13</sup> Corporate crises are also notorious for creating lawsuits; the securities litigation stemming from the Enron scandal is a prime example.<sup>14</sup>

When deciding whether, and how, to address the crisis with a commissioned public report, it is crucial to consider the impact of such a report on pending or threatened litigation. Will the report impact such litigation in a negative or positive way, or will it have no effect? What implications does the publication of such a report have on an organization's long-term legal outlook?

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10. See IAN I. MITROFF & GUS ANAGNOS, *MANAGING CRISES BEFORE THEY HAPPEN: WHAT EVERY EXECUTIVE AND MANAGER NEEDS TO KNOW ABOUT CRISIS MANAGEMENT* 20 (2001) (“[A]s many organizations have sadly found out, it is not only comparatively easy to handle a situation when one is the victim, but it is also extremely easy to go quickly from being a victim to being a villain.”).

11. See, e.g., R. William Ide III & Douglas H. Yarn, *Public Independent Fact-Finding: A Trust-Generating Institution for an Age of Corporate Illegitimacy and Public Mistrust*, 56 VAND. L. REV. 1113, 1147 (2003) (discussing the role of public independent fact finding in regaining public trust).

12. See Andrew Zajac, *Penn State Settles First of Sandusky Sex Abuse Lawsuits*, BLOOMBERG (Aug. 18, 2013), <http://www.bloomberg.com/news/2013-08-18/penn-state-settles-first-of-sandusky-sex-abuse-lawsuits.html>.

13. See generally *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 659 (2d Cir. 2013).

14. See *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 258 F. Supp. 2d 576 (S.D. Tex. 2003).

## 5. Tension Between the Three Crises

One of the most difficult truths one must confront in making the decision whether or not to address a particular crisis via a commissioned public report is that an ineffective or poorly-executed report may mitigate one crisis while exacerbating another. It is natural for certain stakeholders to privilege the resolution of one crisis over another as per their individual priorities or experience, but doing so may only worsen the institution's preexisting problem. In order to create an effective report, all three crises must be addressed; the tension between them must be assuaged by ensuring that the importance of each is recognized by those with influence over the institutional response.

The decision to respond to a crisis with a commissioned public report necessitates agreement among those at the institution who are responsible for managing operational, public relations, and legal issues. It is crucial that each of these sectors agree not only to include a commissioned public report in their response, but also that the report adequately addresses each of the three crises. This consensus is often difficult to achieve. Norman Augustine wryly observed that:

Crisis situations tend to be accompanied by conflicting advice—with the legal department warning, “Tell ‘em nothing and tell ‘em slow,” the public relations department appealing for an immediate press conference, the shareholder relations department terrified of doing anything, and the engineers all wanting to disappear into their labs for a few years to conduct confirmatory experiments.<sup>15</sup>

Carefully addressing all three fronts is critical to a successful organizational response, as may be illustrated by GM's handling of the recent recall crisis. A mid-level engineer in charge of the ignition switch on certain GM vehicles allegedly approved a sub-standard switch and then quietly replaced it without disclosing the change after the company received complaints from customers and other engineers. The potentially defective ignition switches installed in the vehicles led to GM recalling over 15 million cars. The company hired former U.S. Attorney Anton Valukas, of law firm Jenner & Block, LLP, to evaluate the reasons for the company's failure to notice and fix the defect. The report, which was made public in June 2014, “led to the dismissal of 15 GM employees, including a vice president for regulatory affairs and a senior lawyer responsible for product liability cases, and forced broad changes in how the company handles vehicle safety.”<sup>16</sup> The report found no evidence of deliberate wrongdoing, nor of an upper-level cover-up.

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15. Norman R. Augustine, *Managing the Crisis You Tried To Prevent*, 73 HARV. BUS. REV. 6, 21 (1995), available at <https://hbr.org/1995/11/managing-the-crisis-you-tried-to-prevent>.

16. Bill Vlasic, *G.M. Inquiry Cites Years of Neglect Over Fatal Defect*, N.Y. TIMES (June 5, 2014), available at <http://www.nytimes.com/2014/06/06/business/gm-ignition-switch-internal-recall-investigation-report.html>.

Perhaps the most common iteration of an asymmetrical approach to addressing the three main elements of a crisis is the oft-occurring failure of an organization to address its public relations crisis due to legal concerns. Managing a public relations crisis requires that the organization make a meaningful statement about what has occurred, which often necessitates conceding that a crisis has in fact occurred. Legal counsel often express fears that such concessions could be perceived as liability-inducing apology or other fodder for follow-up litigation. As Keith Michael Hearit articulates it, “some companies choose not to take a public relations stance to the charges of criticism due to the fact that significant legal issues inhere in the criticism—and thus avoid participating in the public drama that surrounds the allegations of their wrongdoing.”<sup>17</sup> Nevertheless, it is unlikely that failure to participate in the public dialogue that follows a crisis will give the affected organization the absolution it seeks—rather, the public may view silence as an indication of guilt. Moreover, where an organization does focus on its PR crisis, or its legal crisis, or both, but does not address the institutional issues, it is far more likely than not that the actual crisis will never be resolved.

In discussing what makes an effective commissioned public report, this Article canvasses a number of such reports. Our criticism of many is that, while they acknowledge the concerns of the public or their own legal exposure, they do little to improve institutional capacities.<sup>18</sup> The academic literature has likewise shortchanged the extent to which crisis response should, first and foremost, improve organizational prevention and response systems.<sup>19</sup> It is our position that a well-run investigation and a well-written public report can help resolve the three crises, so that the institutional and public relations crises are addressed while the legal crisis is not exacerbated. To that end, such a report must be written with an eye on all three crises. This paper aims to set out how to achieve this.<sup>20</sup>

### B. *Purpose of Article*

This Article aspires to be a resource for organizations considering the use of a commissioned public report in their crisis management response. It aims to provide a comprehensive framework for creating effective public post-crisis reports that respond to the institutional, legal, and public relations crises that every organization faces in the wake of catastrophe.

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17. KEITH MICHAEL HEARIT, *CRISIS MANAGEMENT BY APOLOGY: CORPORATE RESPONSES TO ALLEGATIONS OF WRONGDOING* 17 (2006).

18. See *infra* Parts II.A, III.B.6.

19. See, e.g., Ide & Yarn, *supra* note 11, at 1147.

20. See Edwin G. Schallert & Natalie R. Williams, *Report of the Investigation*, in *INTERNAL CORPORATE INVESTIGATIONS* 301, 302 (Barry F. McNeil & Brad D. Brian eds., 2007) (discussing benefits and risks of the internal investigative report, including the present facts and aid in management decision-making, aid in litigation with government); Ide & Yarn, *supra* note 11, at 1146–47, 1153 (discussing role of public fact-finding in rebuilding trust and social legitimacy after a crisis).

This Article also emphasizes the importance of an appropriate investigation strategy as a necessary prerequisite to the creation of an effective commissioned public report. As attorneys focused on defending corporations in legal crisis, we know that it is essential to get to the bottom of potential wrongdoing in order to minimize legal and reputational damage. Any lawyer knows that it is impossible to help a client before first knowing the facts.<sup>21</sup> Accordingly, this Article seeks to underscore the way in which organizations can take advantage of the forced self-reflection inherent in crisis management to make themselves stronger and more sustainable not only in the immediate aftermath of a crisis, but also with regard to long-term institutional integrity.

Self-reflection is a valuable skill for organizations facing a wide range of legal issues. Self-reporting in the wake of a crisis can engender goodwill and credibility among the public audience.<sup>22</sup> Even in civil litigation following a crisis, the extent to which an organization has visibly sought to discover facts and make amends can be beneficial, if for no other reason than its potential to change the dialogue. Seeing an organization take responsibility for the aspects of its structure that may have contributed to or enabled a crisis to occur is likely to endow with greater credibility its asserted willingness to change to prevent future crises. In turn, this self-reflection strengthens the organization against future crisis. In responding to crises, however, it is of course necessary that a company first discover the extent of the wrongdoing or institu-

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21. Neil Hodge, *In Case of Emergency*, 7 IN-HOUSE PERSP. 23, 27 (2011) (“Lawyers need to be proactive: they need to understand what has happened, what caused it and what is going to be done.”). This point is a key one. If one does not acknowledge the need to deal with the realities that the organization faces at the outset of a crisis, any strategy to address or remediate the issue will be short-sighted and ineffective. It is important to acknowledge at the outset that the facts are the facts and that the facts cannot be changed (*i.e.*, it is important to accept the facts). It is also important to be as transparent as is reasonably possible regarding the facts (as it is much better that they are identified by the organization than by another, external, source which is not vigilant to organizational interests).

22. As we often counsel clients on the complex analysis required to determine whether or not to voluntarily disclose potential misconduct, we would be remiss in failing to note something of that highly nuanced calculus here, and to make a further note on this Article’s scope. We deal here with crises of the sort which are by their nature inevitably public—the stuff of headlines. The commissioned public reports of which we speak, then, are a public response to public catastrophe. Though the decision would necessarily be fact-dependent, it may not be advisable to commission a public report on events that are not yet public. When the events are public, the circumstances may swing the pendulum in the direction of commissioning a public report and there is little opportunity to maintain ownership of the decision to disclose their occurrence. When the crisis is not public—the events of the disaster are not already known to the outside world—there are strong legal considerations which may advise against publication and disclosure. In such a situation, based on appropriate legal advice, it is likely better to protect confidentiality and remediate internally than it would be to enlist a public commission to investigate.

tional deficiency and then consult with counsel<sup>23</sup> to determine the correct course of action.<sup>24</sup>

## II. THE PUBLIC POST-CRISIS REPORT: AN OVERVIEW

Even a cursory review of historical crises reveals that organizations have frequently addressed them by conducting internal investigations and issuing internal investigation reports. Although these reports are undoubtedly instrumental in determining the extent of an organization's legal liability, they may be insufficient to address a public relations crisis and, without more, to respond to the institutional crisis. Similarly, compelled reports, such as those generated in the course of an FCPA monitorship,<sup>25</sup> may address the institutional crisis, but are unlikely to serve as an effective public relations tool. In contrast, historical experience reveals that the voluntarily-commissioned public reports that are the subject of this Article may in some situations be crucial to the resolution of the public relations crisis and trigger the necessary institutional change.

### A. *From Pearl Harbor to Private Initiative: A Brief History of the Use of the Public Commissioned Report*

The United States government has long commissioned independent public reports. Indeed, their use dates back to the nation's founding. Both executive and legislative commissions have long been a part of government practice to manage the political milieu. Lance Cole writes of executive reports that:

They have been used in this country since President George Washington sent a special commission of three members to investigate the Whiskey Rebellion in western Pennsylvania, and Washington's use of a special commission was probably inspired by the long-standing practice in England of employing royal commissions to address national problems. Since Washington's presidency, the use of special commissions has waxed and waned; their use was limited in the nineteenth century and steadily increased beginning with the Administration of President Theodore Roosevelt and continuing throughout the twentieth century. Special commissions are now a fixture of our national government, and some

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23. We should stress that it is also very important that the organization work with counsel who have a deep understanding of the organizational culture, and that counsel and management work together to develop a sound approach to the crisis response with which both are comfortable. Without a relationship of trust and confidence between organization and counsel, it will be difficult for this dialogue to be productive. In-house counsel stress that it is important for the organization to first thoroughly consider the issues itself, such that it knows what it wishes to accomplish and how to do so, before turning to external advisors for assistance and advice.

24. See Robert W. Tarun & Peter P. Tomczak, *A Proposal for A United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 156 (2010) (discussing the benefits of self-reporting as well as the dilemma of whether to self-report).

25. See generally F. Joseph Warin et al., *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. BUS. L. 321 (2011).

categorization is necessary to organize the many variations that exist.<sup>26</sup>

Indeed, executive and legislative commissions have often been at odds, as each branch attempts to use the vehicle of the commissioned public report to its own advantage:

It took Congress a mere three years after ratifying the Constitution to initiate its first investigation. In 1792, the House of Representatives passed a resolution directing a committee of seven members to investigate the failed military expedition by Major General St. Clair. The House rejected an executive inquiry into the matter and instead ‘empowered an investigatory committee . . . to summon witnesses, inspect records, and report back findings.’ . . . Congress continued to establish committees to conduct investigations. During the early 1800s, Congress established joint committees to investigate, among other things, the burning of Washington, D.C. and Andrew Jackson’s invasion of Florida . . . By the mid-nineteenth century, investigations had become a significant portion of congressional activity.<sup>27</sup>

### 1. Pearl Harbor: The Roberts Commission

The modern independent commission gained in stature during the fallout from Pearl Harbor. In the wake of that attack, President Roosevelt established the Roberts Commission, headed by Supreme Court Justice Owen Roberts, to investigate and report on the facts related to the assault and the American military response to it.<sup>28</sup> The report was highly criticized and spawned further congressional investigations and reports.<sup>29</sup> Primary criticisms levied against the Roberts Commission and its report included the following assertions: it was assembled too hastily; its mandate was too narrow in scope; the independence of the members of the Commission from the executive branch was open to doubt; the fact-collection process was compromised by questionable methodology (due to the fact that interviews were taken “off the record,” were unsworn, and came largely from military officers without considering the perspectives of other stakeholders); and the final result was too short and too vague (especially as regarded

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26. Lance Cole, *Special National Investigative Commissions: Essential Powers and Procedures (Some Lessons from the Pearl Harbor, Warren Commission, and 9/11 Commission Investigations)*, 41 McGEORGE L. REV. 1, 4–5 (2009).

27. Ross et al., *supra* note 6, at 420–21.

28. See generally Roberts Commission Report, *supra* note 6.

29. Cole, *supra* note 26, at 4–5; Ross et al., *supra* note 6, at 428 (“Additionally, Congress created the Joint Committee on the Investigation of the Pearl Harbor Attack after it was dissatisfied with the investigation into Pearl Harbor by the Roberts Commission, an Executive Branch entity chaired by Chief Justice Owen Roberts. Because the Roberts Commission had taken just over one month to conduct an investigation that was criticized for its narrow scope, off-the-record and unsworn interviews, and reliance on military officers, the Joint Committee’s members were directed to ‘make a full and complete investigation’ of the attack. Ultimately, the Joint Committee reviewed the findings of the Roberts Commission and others, conducted six months of hearings, and returned with a bipartisan majority report.”).

the section on the possible involvement of Japanese spies). Notably, it was also criticized for being overly focused on the public relations aspect, to the exclusion of addressing systemic issues, such as scapegoating, without delving deep into the reasons why the attack had not been anticipated by military defense in the first place.<sup>30</sup> President Roosevelt himself was reportedly dissatisfied with the result; he supposedly handed it to his secretary after he read it with the quip that she ought to “[g]ive that in full to the papers for their Sunday editions.”<sup>31</sup>

## 2. Warren Commission Report

Perhaps the most (in)famous commissioned report is the Warren Commission Report.<sup>32</sup> Informally known as the Warren Report, the President’s Commission on the Assassination of President Kennedy was formed by Lyndon B. Johnson following the public shock of JFK’s assassination. Totalling 889 pages, it came to the simple—yet, in some quarters, controversial—conclusion that Lee Harvey Oswald had acted alone in killing the president. Criticism of the Report, like the document itself, has filled volumes. While much of the criticism was inevitable given the circumstances, and its findings have never been discredited,<sup>33</sup> the Warren Commission certainly failed to fully manage the public relations crisis that stemmed from the assassination. Indeed, certain aspects of the report only exacerbated that crisis. Characteristics of the Commission’s process included its perceived lack of independence (it relied heavily on investigative reports produced by the FBI), its composition (the Commission’s membership was mostly lawyers),<sup>34</sup> the time constraints imposed on its creation,<sup>35</sup> and its alleged confirmation bias.<sup>36</sup> However, the findings of the Commission did prompt the Secret Service to make a number of changes to the way it conducted its security procedures.<sup>37</sup>

## 3. 9/11 Commission Report

The most remarkable government-commissioned report in recent history is likely the 9/11 Commission Report, which has been called a “game changer” in this space.<sup>38</sup> Released nearly two and a half years after September 11, 2001, and providing a comprehensive report on the attacks on that date, the report was met with widespread approba-

30. See Cole, *supra* note 26, at 13; Ross et al., *supra* note 6, at 428.

31. James Perloff, *Pearl Harbor: Scapegoating Kimmel and Short*, NEW AMERICAN (June 4, 2001), available at <http://www.thenewamerican.com/culture/history/item/4742-pearl-harbor-scapegoating-kimmel-and-short>.

32. WARREN COMMISSION REPORT, *supra* note 6.

33. Cole, *supra* note 26, at 16.

34. *Id.* at 20–21, 37–38; see also GERALD D. MCKNIGHT, BREACH OF TRUST: HOW THE WARREN COMMISSION FAILED THE NATION AND WHY 89, 107 (2005).

35. Cole, *supra* note 26, at 44.

36. *Id.* at 15; see also MCKNIGHT, *supra* note 34, at 89, 109, 213.

37. Anthony Lewis, *Warren Commission Finds Oswald Guilty and Says Assassin and Ruby Acted Alone; Rebukes Secret Service, Asks Revamping*, N.Y. TIMES, Sept. 28, 1964, at 1.

38. U.S. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, 9/11 COMMISSION REPORT (2004) (hereinafter 9/11 COMMISSION REPORT).

tion. Totalling 585 pages, the report has been praised for its engrossing narrative of that day's events.<sup>39</sup> The recommendations contained in that report, however, have not been as well-received.<sup>40</sup>

#### 4. Post-9/11 Government Reports

Since 2004, government release of public reports has become a common response to crisis situations. Examples include the following: Virginia Tech Report in 2007,<sup>41</sup> which was released by the Governor of Virginia; the Freeh Report,<sup>42</sup> which was commissioned by the Board of Trustees of Penn State University; the Fort Hood Report, released in 2010;<sup>43</sup> the federal Accountability Review Board's 2012 unclassified report on the incidents in Benghazi;<sup>44</sup> and the report commissioned by the Governor of Connecticut on the Sandy Hook shootings.<sup>45</sup> It is not only organizations in the United States that utilize these reports. A notable international example of a commissioned public report is the Gjørv Report, which was ordered by the Norwegian parliament and concluded that both the bombing in Oslo in 2011 and the subsequent massacre on Utøya Island could have been prevented by the more efficient utilization of security protocols.<sup>46</sup>

The use of the commissioned public report spans different types of crises. Although this article will largely focus on how to respond to crises that originated outside of the organization mainly affected by it, commissioned public reports can also be used to answer crises for

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39. See, e.g., Mark Fenster, *Designing Transparency: The 9/11 Commission and Institutional Form*, 65 WASH. & LEE L. REV. 1239, 1296 (2008) ("Viewed this way, the Commission enjoyed enormous—if not complete—bureaucratic success as an administrative institution by organizing public examination of the event and galvanizing official and public opinion around remedial action. A catalyst at a moment of crisis that forced Congress to seize the opportunity afforded by catastrophic intelligence failure, the Commission managed its conditions of existence in order to contribute to a period of significant organizational transformation. By any objective measure, the Commission influenced public opinion, law, and government policy far beyond what could have been expected based on the past performance of other advisory commissions."); Richard A. Posner, *The 9/11 Report: A Dissent*, N.Y. TIMES (Aug. 29, 2004), available at <http://www.nytimes.com/2004/08/29/books/the-9-11-report-a-dissent.html>.

40. See, e.g., RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11 6 (2005) (criticizing the decision to include recommendations, as their inclusion might alter the findings to match the recommendations); Richard A. Falkenrath, *The 9/11 Commission Report: A Review Essay*, 29 INT'L SEC. 170, 182–83 (Winter 2004-2005); Posner, *supra* note 39.

41. VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH (2007) (presented to Va. Governor Timothy M. Kaine) (hereinafter VIRGINIA TECH REPORT).

42. FREEH SPORKIN & SULLIVAN, LLP, REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (2012) [hereinafter FREEH REPORT].

43. DEP'T OF DEF., PROTECTING THE FORCE: LESSONS FROM FORT HOOD (2010).

44. ACCOUNTABILITY REVIEW BOARD, UNCLASSIFIED REPORT (2012), available at <http://www.state.gov/documents/organization/202446.pdf> [hereinafter ACCOUNTABILITY REVIEW BOARD'S BENGHAZI REPORT].

45. SANDY HOOK ADVISORY COMMITTEE, FINAL REPORT (forthcoming Feb. 2015).

46. RAPPORT FRA 22. JULI-KOMMISSJONEN: PRELIMINARY ENGLISH VERSION OF SELECT CHAPTERS (2012) [hereinafter GJØRV REPORT].



which internal institutional factors bear primary responsibility. These include the report on the prisoner abuse at Abu Ghraib, released in August 2004,<sup>47</sup> the Financial Crisis Inquiry Report, which investigated the systemic causes of the 2008 financial and economic crisis,<sup>48</sup> and the report critiquing the federal response to the devastation wreaked by Hurricane Katrina.<sup>49</sup>

## 5. Other Government Reports

Government commissions continue to issue reports on occasion, though recent years have seen the increased prominence of the public commissioned report. This shift may largely be attributable to the increased realization by public and private institutions of the potential utilities that such reports promise in crisis management. Illustrative public government fact-finding reports, issued from both the federal and state levels, include the Oklahoma City Bombing Report (a state-commissioned report released in 1995, which was criticized for being overly technical in nature and narrow in scope)<sup>50</sup> and the Columbine Report (a state report released in 2001 which is more typical of recent reports in its comprehensiveness and detail).<sup>51</sup>

## 6. Corporate Reports

Private institutions have also begun to realize the benefits offered by the commissioned public report. Like the public reports commissioned by government institutions, those initiated by private organizations address a broad variety of crises. They range from the discovery of internal misconduct (the Enron, Shell, Mitchell, and Freeh Reports are typical examples), to accidents (such as nuclear plant incidents),<sup>52</sup> to the more traditionally human-catalyzed crises (Statoil).

The revelation of pervasive and systemic accounting fraud at Enron Corporation was a significant factor in the promulgation of the Sarbanes-Oxley Act, which, among other things, requires chief executive officers and chief financial officers to personally attest to the accuracy of their organizations' accounts and records. Following the discovery of the fraud and the resulting fallout, the corporation's new board of directors created a special investigative committee to examine transactions between Enron and investment partnerships created and

47. INDEP. PANEL TO REVIEW DEP'T OF DEF. DETENTION OPERATIONS, FINAL REPORT OF THE INDEPENDENT PANEL TO REVIEW DEPARTMENT OF DEFENSE DETENTION OPERATIONS, FINAL REPORT (2004) [hereinafter ABU GHRAIB REPORT].

48. U.S. FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES (2011).

49. FRANCIS TOWNSEND, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED (2006).

50. OKLA. DEP'T OF CIVIL EMERGENCY MGMT., AFTER ACTION REPORT: ALFRED P. MURRAH FEDERAL BUILDING BOMBING, 19 APRIL 1995 IN OKLAHOMA CITY, OKLAHOMA [hereinafter OKLAHOMA CITY BOMBING AFTER ACTION REPORT].

51. WILLIAM H. ERICKSON, GOVERNOR BILL OWENS' COLUMBINE REVIEW COMMISSION, REPORT (2001) [hereinafter COLUMBINE REPORT].

52. See, e.g., discussion of the Fukushima nuclear meltdown, *infra*.

managed by Enron's former CFO, Andrew Fastow, who reportedly bore much of the responsibility for the fraud. The investigative committee's report examined the failure of institutional capacity to sense and prevent the conduct that led to the collapse, and stressed the importance of a truly independent auditing function.<sup>53</sup>

An internal review conducted by Shell's management in January of 2004 discovered that the company had misstated its reported oil reserves. The Shell Group Audit Committee accordingly engaged Davis Polk & Wardell to:

[A]ct as independent counsel and lead an investigation into the facts and circumstances of the re-categorization . . . . Broadly speaking, Davis Polk's mandate was to investigate, thoroughly and expeditiously, the conduct of Shell's involved management and to determine whether remedial actions were warranted, both in terms of personnel changes and broader control measures.<sup>54</sup>

Although the report was not released in full at the time, it included reference to correspondence suggesting that top executives were aware of the inaccuracies in the reporting of their oil reserves and that their efforts to bring such concerns to the attention of other individuals at the senior management level were insufficient.<sup>55</sup> The examination and its findings led to the company's public acknowledgement of the need to address structural deficiencies and its decision to institute reforms to the corporate structure.<sup>56</sup> Though the entire report was not made public, Davis Polk did release a 52-page "Executive Summary"—a document that comports with the traditional understanding of a commissioned public report in all material respects.

The 2007 Mitchell Report, formally known as the Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball, reflected former Senator George J. Mitchell's (D-ME) investigation into the use of performance-enhancing drugs in Major League Baseball.<sup>57</sup> The Commissioner of Baseball initiated Mitchell's investigation following the publication of allegations that human growth hormone and anabolic steroids were used in the league; the report is notable and highly instructive due to its self-reflective and highly public nature.

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53. SPECIAL INVESTIGATIVE COMM. OF THE BD. OF DIRS. OF ENRON CORP., REPORT OF INVESTIGATION (2002) [hereinafter POWERS REPORT].

54. DAVIS POLK & WARDWELL, REPORT TO THE SHELL GROUP AUDIT COMMITTEE 3 (2004).

55. *Another Head Rolls in the Boardroom*, THE ECONOMIST (Apr. 22, 2004), <http://www.economist.com/node/2608070>. Shell released a summary of the report's final version that made reference to key correspondence between high-level company executives.

56. Among these structural reforms was the decision to institute the practice of using external experts to conduct an annual verification review of its stated reserves. *Id.*

57. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL (2007) [hereinafter MITCHELL REPORT].

The Freeh Report was commissioned in 2012 by a task force operating on behalf of The Pennsylvania State University's Board of Trustees to "perform an independent, full and complete investigation of: [t]he alleged failure of Pennsylvania State University personnel to respond to, and report to the appropriate authorities, the sexual abuse of children by former University football coach Gerald A. Sandusky," and "[t]he circumstances under which such abuse could occur in University facilities or under the auspices of University programs for youth."<sup>58</sup> Written by the law firm of Freeh, Sporkin & Sullivan LLP, the mandate of the report also included providing "recommendations regarding University governance, oversight, and administrative policies and procedures [to] better enable the University to prevent and more effectively respond to incidents of sexual abuse of minors in the future."<sup>59</sup> Following the discovery of the abuse, the Middle States Association of Colleges and Schools' Commission on Higher Education, the University's accreditor, had given the University a warning over its handling of the scandal and asked that it submit a report documenting the compliance of its finances and governance controls with applicable accreditation standards. Following the issuance of the report, the accreditation team reaffirmed the University's accreditation and noted that it was "impressed by the degree to which Penn State has risen, as a strong campus community, to recognize and respond to the sad events" of the scandal.<sup>60</sup>

In the wake of the terrorist attack on its In Amenas facility mentioned earlier in this Article Statoil took the rather atypical step of issuing a commissioned public report "to determine the relevant chain of events . . . and to enable Statoil to further improve in the areas of security, risk assessment, and emergency preparedness."<sup>61</sup> The report was fairly critical of the security measures that Statoil and its joint venture partners had put into place, especially relative to the risks. It ultimately gave 19 recommendations on how to strengthen the company's security measures in areas including "organization and capabilities, security risk management systems, emergency preparedness and response, and cooperation and networks." The overarching conclusion of the report was that "Statoil has established a security risk management system, but the company's overall capabilities and culture must be strengthened to respond to the security risks associated with operations in volatile and complex environments."<sup>62</sup>

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58. FREEH REPORT, *supra* note 42, at 8.

59. *Id.*

60. Nick DeSantis, *Accreditor Lifts Warning Placed on Penn State for Handling of Sex-Abuse Scandal*, CHRONICLE OF HIGHER EDUC. (Nov. 16, 2012), <http://chronicle.com/blogs/ticker/accreditor-lifts-warning-placed-on-penn-state-for-handling-of-sex-abuse-scandal/51926>.

61. IN AMENAS REPORT, *supra* note 3, at 1.

62. *Publication of the Investigation Report on the In Amenas Terrorist Attack*, STATOIL, (Sept. 12, 2013, 12:00 PM), [http://www.statoil.com/en/NewsAndMedia/News/2013/Pages/12Sep\\_InAmenas\\_report.aspx](http://www.statoil.com/en/NewsAndMedia/News/2013/Pages/12Sep_InAmenas_report.aspx).

### B. *Deciding Whether to Publish: Strategic Considerations*

The key characteristic shared by all of the commissioned public reports discussed so far in this Article is very simple—they exist. In each case, those responsible for crisis management in their respective affected organizations made the decision that the advantages of commissioning a public report outweighed the disadvantages of doing so, and that such a report would be a critical part of the crisis management response.

Deciding whether or not to publish requires that the decision-maker balance the various associated advantages and disadvantages of doing so. The position of this Article is that it may often be to an organization's advantage to publish, if the end result is properly constructed, although there will naturally be circumstances in which this position will not hold true, i.e., under which publication may not be the best course. As in any case, the specific facts and legal considerations of the situation will determine the advisability of pursuing publication. Here, we set forth the factors that one should consider as part of that decision-making process.

#### *Advantages*

The primary reason to publish the report is to provide the organization that is the subject of the report and of the associated external coverage with a meaningful opportunity to control the narrative surrounding the catastrophic event. A commissioned public report allows the affected organization to set the stage for the management of the three crises discussed earlier in the Article on its own terms (insofar as the independence of the report's authors remains assured). The report is perhaps the best way in which an organization can maintain control over the agenda without simultaneously becoming subject to accusations of biased self-evaluation. Although independent persons will author the report, the commissioning organization can set its scope, thus cabining the extent to which it is put under the microscope and narrowing exposure (without compromising the objectivity of the report)—legal and otherwise. A timely capture of the narrative is especially pertinent given the increasing influence of social media on determining the public response to crisis. We term this the “race to the narrative” and note that timeliness is especially important under these circumstances.

Several companies have suffered in recent years due to their failure to control the narrative. Following a 2010 pipeline explosion in San Bruno, California, Pacific Gas & Electric (“PG&E”) opted not to commission a report to investigate what went wrong.<sup>63</sup> A subsequent report ordered by the California Public Utilities Commission thus controlled the narrative, and presented the public with a version of events casting PG&E in a sharply negative light.<sup>64</sup> The report chastised PG&E for an

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63. See Maria L. LaGanga & Marc Lifsher, *Independent Panel Criticizes PG&E for Lapses that Led to San Bruno Pipeline Blast*, L.A. TIMES (June 10, 2011), available at <http://articles.latimes.com/2011/jun/10/local/la-me-san-bruno-20110610>.

64. See *id.*

“insular mindset” and a “corporate myopia,” focusing public scrutiny onto the firm’s culture and leadership.<sup>65</sup> Similarly, Tokyo Electric Power Company (“TEPCO”) faced acute criticism in the official report issued by the Japanese government following the nuclear meltdown at Fukushima in 2011.<sup>66</sup> A well-crafted narrative commissioned by TEPCO might have mitigated the brunt of the blame, which was exacerbated by charges in the government report that “TEPCO’s management mindset of ‘obedience to authority’ hindered their response.”<sup>67</sup>

As this Article emphasizes, the publication of a public report holds great promise for the strengthening of institutional capabilities both in terms of crisis management and crisis prevention. An independent review of an institution’s strengths and weaknesses may avoid the self-serving bias and fear of confronting the status quo that could threaten self-evaluations. The publication of public report findings, moreover, may serve as a mechanism to ensure that needed reforms are implemented, as the organization will thus be accountable to an external task-master: the public.

An institution which commissions a public report may also gain credibility with the public, thus countering the potential for external criticisms of corporate malaise. This vehicle indicates that an institution is appropriately appreciative of the severity of the traumatic event and acknowledges its responsibility—if not for the incident, for its response thereto, and for preventing recurrence. (Though, frequently, organizations may have no responsibility for the event, they are consistently perceived to be responsible for addressing its aftermath). The commissioning of a public report is arguably an expression of corporate morality, indicating the seriousness of an organization’s commitment to mounting an appropriate response. Olympus Corporation benefited greatly in the wake of its 2011 accounting fraud scandal from what was seen as an open and transparent effort to rectify its wrongs. The company presented its commissioned report as an apology to its shareholders and the public at large, making the report available on the front page of its website below a large masthead reading: “Taking this opportunity, we once again extend (sic) our deepest apologies to Olympus shareholders, customers, business partners, and all stakeholders, for the significant trouble we have caused them.”<sup>68</sup>

Following from the increased credibility that accrues to an organization that has chosen to manage its crisis through the vehicle of a commissioned public report, there may be a corresponding psychological effect on the volume of lawsuits that follow. Although it is almost inevitable that, where there is disaster, there will be legal action, credible efforts of a company to effectively respond to and prevent catastrophe

65. *Id.*

66. NAT’L DIET OF JAPAN, OFFICIAL REPORT OF THE FUKUSHIMA NUCLEAR ACCIDENT INDEPENDENT INVESTIGATION COMMISSION (2012).

67. *Id.* at 33.

68. Eleanor Bloxham, *What U.S. Companies Can Learn From Olympus*, FORTUNE (Jan. 26, 2012, 3:48 PM), <http://fortune.com/2012/01/26/what-u-s-companies-can-learn-from-olympus/>.

may disincline certain demographics to turn to the justice system. Litigation is, after all, costly, and good-faith efforts to mitigate disaster may both erode the legal basis for suit and temper putative plaintiffs' desire to pursue it. In those lawsuits that are brought, the institution may point to its strong response as a factor that mitigates subsequent penalties in sentencing.

#### *Disadvantages*

One of the greatest disadvantages of publication is the likelihood that the audience to which the report is directed does not fully appreciate the import of the decision to release a report of this nature. The public may expect an institution to respond in this manner as a matter of course. The reality, of course, is that commissioning a public report is a very bold move. Doing so exposes the corporation to widespread criticism, provides a "company statement" that can be used as admission in legal proceedings, and may even provide an advantage to corporate competitors, as the case may be. Moreover, turning the process over to a panel of independent authors entails a certain loss of control over information: what is disclosed, and how it is disclosed. This binds the corporation to taking certain next steps that may not always be in its best interest. At the same time, failure to proceed transparently where such is expected may plunge the institution deeper into crisis.

### III. IDENTIFYING A FRAMEWORK THAT RESPONDS TO THE THREE CRISES

The overarching aim of this Article is to provide a framework for the writing of an effective report, the success of which is dependent on the extent to which it adequately addresses the primary three crises identified in Section I.A, *supra*. With those three crises firmly in mind, then, we turn to specific recommendations for achieving that end.

#### A. *Initial Steps*

##### 1. Composition: Experts or Insiders?

The critical first step in formulating a commissioned public report is determining its composition. Although it may be tempting to populate the investigative team with insiders, doing so is a pitfall that should be assiduously avoided. The commission responsible for investigating the crisis and coming up with the findings that will form the basis for the report should be led by experts whose independence from the subject of investigation is both visible and assured. A team whose independence is doubtful may not only nullify the hoped-for effects of the report (restoring faith in the institution, mitigating the PR crisis, dampening potential for legal exposure, and ultimately strengthening the institutional structure in order to make it better able to withstand future assaults), it may worsen the crisis. If an entity appears to be commissioning a public report in a self-serving way, to bolster its own image at the expense of the truth, the public may turn hostile. Just as importantly, lack of independence on the part of the evaluating team may render it unable or unwilling to critically assess the institutional weak-

nesses that contributed to the occurrence of the crisis in the first place. With that in mind, it is also important to look beyond the traditional consideration of independence from the subject institution in constituting the team. Fidelity to political bias or personal agenda could be similarly fatal both to the effectiveness of a report and the mitigation of a crisis.

As Ide and Yarn note, independence ensures thoroughness, accuracy, and the validity of the fact-finding enterprise:

Independence may result in a more thorough investigation because people who might otherwise fear retaliation from other corporate constituents will be more willing to talk to someone who does not answer to those corporate constituents and who can assure them some degree of confidentiality.<sup>69</sup>

An investigation, and the report that summarizes it, cannot address and remedy institutional weaknesses without this independence. Results may be skewed, lacking in critical analysis, and tethered to the agenda of the status quo and those hoping to avoid personal responsibility for the events occurring during their tenure. Additionally, independence is essential for addressing the public relations crisis. Ide and Yarn note that the effectiveness of public independent fact-finding, from a public relations perspective, “rests almost solely on the public reputation of the fact finder.”<sup>70</sup> The success of the 9/11 Commission,<sup>71</sup> noted earlier, lends credence to this assertion; commentators noted that, “[F]rom a public relations standpoint, [the Commission’s] losing battles [to get access to information] burnished [its] public reputation, legitimating its investigation.” At the same time, lessons learned from that Commission add nuance to our understanding of “independence” and the promises it holds out. Richard Posner, while generally appreciative of the Report’s quality and contributions, criticized its bipartisan, rather than nonpartisan, composition, suggesting that compromise between the competing ideologies resulted in a report that achieved unanimity at the expense of candor. “Independence” is not achieved by creating a balance between ideologues, but through a group of non-partisans—people whose main objective is not to prove a point, but to find the truth.<sup>72</sup> It is, however, essential that a report not oversell its own independence. This is also an issue that is related to scope (discussed *infra*). A report should sufficiently modulate assertions about the extent to which it will be released free from internal intervention.

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69. See Ide & Yarn, *supra* note 11, at 1146.

70. *Id.* at 1153.

71. See POSNER, *supra* note 40, at 3 (“The idea of a politically balanced, generously funded committee of experienced people who would investigate the nation’s failure to prevent the 9/11 attacks struck me as sound; had the investigation been left to the government, the administration would have concealed its own mistakes, and blamed its predecessors.”); Fenster, *supra* note 39, at 1243 (“The Commission declared and attempted to maintain—and, equally importantly, *appeared* to maintain—independence from the political, military, intelligence, and regulatory institutions and actors it studied. The news media and public followed the Commission’s operations, and its final report was widely read. Congress and the Executive Branch adopted many of its recommendations.”).

72. POSNER, *supra* note 40, at 7–8.

The primary motivation for such a consideration is legal. Although a report should be able to satisfactorily address the public concerns arising in the wake of a crisis, it should not also trigger significant legal exposure for the commissioning entity. The company's rights should also be maintained, within reason. To that end, the publicity surrounding the report should reserve, though not emphasize, the right for the company's lawyers to review it prior to release. This is important to maintain a company's legal rights and shield any privileged issues from public exposure; it need not be inconsistent with being able to offer the public a comprehensive narrative of what has occurred and how the company aims to prevent recurrence.

A well-written report constructs a narrative that softens the public towards the affected entity, relieving it of some portion of the blame for the crisis. Hearit calls this narrative an apologia, and notes that a "successful" one "gets the organization off the front page" even when it amounts to an admission of wrongdoing.<sup>73</sup> The term is apt—a successful apologia is one which mends broken relationships,<sup>74</sup> here one between the organization and its public—constituents or otherwise. But a report that lacks adequate independence can have the opposite effect. The Roberts Report discussed previously is illustrative of this possibility.<sup>75</sup> The Mitchell Report<sup>76</sup> and Accountability Review Board's Benghazi Report were also attacked on lack of independence grounds,<sup>77</sup> and their effectiveness suffered as a result. "Independent," however, should not be understood to mean "adversarial." A team that can work with the insiders, without itself being considered one of them, is likely to produce the most meaningful work, insofar as it can achieve access without being consequently challenged as having been coopted.<sup>78</sup> Antagonism towards the subject institution will only shut

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73. HEARIT, *supra* note 17, at 36.

74. See AARON LAZARE, ON APOLOGY (2005).

75. Cole, *supra* note 26, at 12–13.

76. See, e.g., Howard Bryant, *Friction and Fractures Erode Faith in Mitchell's Investigation*, ESPN (Dec. 11, 2007), <http://sports.espn.go.com/mlb/news/story?id=3142651> (discussing the potential lack of independence of Mitchell and others writing the Mitchell Report on steroids in baseball); Murray Chass, *Mitchell and His Team Have Some Noteworthy Ties*, N.Y. TIMES, (Apr. 1, 2006), <http://www.nytimes.com/2006/04/01/sports/baseball/01chass.html> (discussing the same); see also Ilya Somin, *The Mitchell Report, the Red Sox and Conflicts of Interest*, VOLOKH CONSPIRACY, (Dec. 13, 2007), <http://www.volokh.com/posts/1197608171.shtml>.

77. See, e.g., COMM. ON OVERSIGHT AND GOV'T REFORM, BENGHAZI ATTACKS: INVESTIGATIVE UPDATE: INTERIM REPORT ON THE ACCOUNTABILITY REVIEW Bd. 23 (2013) ("There are Weaknesses in the ARB's Independence.").

78. See, e.g., IN AMENAS REPORT, *supra* note 3, at 3 (mandate creating an internal resource group of Statoil employees to aid the commission in research). Three members of the company's Corporate Audit group were party to the investigation team. They were able to share their knowledge of the Statoil organization and its systems and the investigation's methodology with the commission. We suggest that an organization which has commissioned a public report might consider providing the commission a link to such a resource—organization personnel who provide insight into the organization upon consultation—while, of course, maintaining full responsibility and control over the report with the independent commission. See also Fenster, *supra* note 39, at 1281 ("Paradoxically, the [9/11] Commission's insider nature enabled it to procure records and inter-



doors to communication and thus to valid and comprehensive fact-finding results. In other words, independence needs to achieve a balance between objectivity and fair treatment of, or respect for, the institution that is the subject of a public report.

Although independence should remain the primary consideration in determining the composition of the investigative commission, it is also important to take account of less intuitively obvious factors that nonetheless possess the potential to aid or hinder the report's usefulness for the organization. One such consideration is a warning—be wary of the “big name.” Well-known, public personalities are often also polarizing, and their involvement in the endeavor can be both a distraction and a detriment. The reader of the report may focus not so much on its content as on its author, and may be more or less likely to accept its conclusions based on preexisting perceptions of the same. Early candidates nominated to lead the 9/11 Commission, for example, were a significant distraction from the main task.<sup>79</sup> Both the Roberts and Warren Commissions were led by Supreme Court Justices; though their participation was perhaps symbolically indicative of their independence, it nonetheless may have weakened their reports because of their public stature and legal positions on key issues.<sup>80</sup> Moreover, the allegiances of well-known personalities are often public; where their impartiality is not assured, or, worse, their partiality is confirmed—by fact or by rumor—their involvement may doom the report's success from the start. Such was the case with the Mitchell Report, which was criticized for its leader's noted fan fidelities:

[I]t was a mistake for baseball Commissioner Bud Selig to appoint Mitchell to head this inquiry. Even if there wasn't any bias in Mitchell's investigation, there was certainly a conflict of interest—a conflict exacerbated by the longstanding Yankees-Red Sox rivalry and the prominence of Yankees players among those accused of steroids use. Surely Selig could have found some other elder statesman to take on this job, one with no affiliations with any major league team.<sup>81</sup>

Notwithstanding the above, of course, Senator Mitchell's reputation for integrity is beyond reproach, and he has overseen much more challenging international inquiries, including efforts to forge peace in Northern Ireland.<sup>82</sup> It is important that the team include figures with respectable

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views while retaining its nominal independence. Its greatest successes in hard-fought battles with the White House over information resulted in part from many of the commissioners' reputations as trustworthy Washingtonians, at once above the political fray and respectful of political propriety.”)

79. Cole, *supra* note 26, at 38 (discussing the thwarted selections of Kissinger and Mitchell to lead 9/11 Commissions); Falkenrath, *supra* note 40, at 173.

80. See Cole, *supra* note 26, at 18.

81. Somin, *supra* note 76.

82. See, e.g., Nicholas Watt, *George Mitchell's Patient Diplomacy Shepherded Northern Ireland to Peace. Now for the Middle East*, THE GUARDIAN (Jan. 23, 2009). See also, George Mitchell: Building Peace in Northern Ireland, UNITED STATES INSTITUTE OF PEACE GLOBAL PEACEBUILDING CENTER, available at <http://www.buildingpeace.org/teach-visit-us-and>

public reputations.<sup>83</sup> A report written entirely by a cohort of unknowns may be unlikely to command the respect, or even attention, of the public it hopes to influence.

Including lawyers and experts in the investigative team is wise to ensure that an eye is kept on potential legal issues that arise during the course of the fact-finding and as the report goes to press. Even if no issues of liability are uncovered, any post-crisis report has the potential to negatively impact pending litigation, or even initiate new suits. Including a lawyer on the team means keeping constant watch on whether the report has a negative, positive, or no impact on pending litigation, and, more importantly, the long-term outlook for the organization. Knowing the potential issues, a lawyer can address them in real time and thus prevent greater damage to the organization down the road. As legal consequences are all but inevitable, and the question therefore becomes only the degree of exposure, lawyers should play a central role in crafting the post-crisis report, because they are instrumental in navigating the consequences to civil and criminal litigation, and the long-term legal outlook for the organization.<sup>84</sup>

Legal advice on the privilege issues that are doubtless to arise during fact-finding, and the propriety and legality of their publication to the public, is also crucial to any successful report.<sup>85</sup> Regardless of the

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learn/exhibits/witnesses-peacebuilding/george-mitchell-building-peace-northern-ir (last visited Mar. 22, 2015).

83. See Ide & Yarn, *supra* note 11, at 1146–47, 1153 (“PIFF’s effectiveness rests almost solely on the public reputation of the fact finder.”).

84. See Jay G. Martin, *Developing an Effective Crisis Management Plan for a Corporation*, 65 TEX. B.J. 232, 237 (2002) (“Lawyers should play a key role in the design of every crisis management plan and every company’s response to a crisis. As mentioned earlier, in virtually every crisis, in addition to negative press coverage, there are regulatory actions, civil litigation, and possible criminal investigations which fall within the lawyer’s areas of responsibility. A lawyer needs to make sure that as managers gather facts on an expedited basis in a super-charged environment and disclose information to the media and its constituencies, these actions do not unduly compromise the company’s legal position in future litigation and regulatory actions.”).

85. See, e.g., Kevin Feeney & Jay W. Brown, *Assisting Your Company in Times of Crisis*, 36 ADVOC. TEX. 30, 32–33 (2006) (“In Texas, the attorney-client privilege protects the company from disclosure of certain communications related to professional legal services it receives. The privilege generally extends to the following communications: those between the company or a representative of the company and the company’s lawyer or a representative of the lawyer; those between the lawyer and the lawyer’s representative; those by the company or a representative of the company, or the company’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; those between representatives of the company or between the company and a representative of the company; and those among lawyers and their representatives representing the same company.” (citation omitted)). See also Ide & Yarn, *supra* note 11, at 1162–64 (“In general, the representational role has distinct advantages for the process. If an attorney-client relationship is formed, the fact finder’s notes, certain communications between client and fact finder, and other information gained in the course of the representation are protected by the work-product doctrine, the attorney-client privilege, and the lawyer’s duty of confidentiality. From our experience, corporate decisionmakers are increasingly concerned with the costs and liability of litigation and would be reluctant to engage in the fact-finding process, much less to share information, without some guarantees of confidentiality. Also, employees need to feel that they can speak in confidence. To the extent

extent to which certain communications and discrete pieces of information are privileged, any team must address the degree to which the investigation itself or portions of it are privileged, especially where outsiders participate in examining sensitive legal issues. This is a complicated and fact-specific issue that will require a lawyer's input.<sup>86</sup>

Including experts is also essential to any effective report.<sup>87</sup> The participation of individuals with the capacity, skills, and education to recognize what precisely has gone wrong in various situations is essential not only to ensure that the report's findings are accurate and comprehensively investigated, but also that the report will bear indicia of credibility both in the specialized community and among the public at large. An investigation of a technological catastrophe without an engineer, for example, would likely produce a report of severely diminished credibility. At the same time, it is best that the technical aspects of an investigation that fall under expert purview do not end up dominating the report. A report that is inaccessible to laypersons and the general public, that is more "jargon" than narrative, will not only be ineffective in changing the narrative, but may be accused of being a cover-up—made indecipherable to obfuscate dark truths about organizational responsibility.

## 2. Disciplining the Scope of an Investigation and Report

Most tragedies are large and complex, with many actors playing many roles. Unraveling what precisely occurred, and who precisely is responsible, is a significant undertaking which may become unnecessarily unwieldy if its scope is not firmly controlled. In order to ensure that the scope of the investigation is commensurate with the goals it is meant to achieve, it is therefore crucial that scope be defined at the outset. "Scoping" an investigation requires first that the relevant decision-makers come to a consensus about what they aim to achieve through an investigation and the publication of its results. In identifying the goal of an investigation, it is important to consider the three crises, with a paramount focus remaining on the institutional crisis. Addressing the crisis in this way should be set out as a mandate that guides the entire subsequent process.

Defining a scope at the outset has practical advantages that cannot be underemphasized. Maintaining privilege is one such benefit—the agreement between counsel and management to scope the investiga-

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confidentiality improves the thoroughness of the investigation by helping the fact finder gain access to information that otherwise would not be shared, it improves the process and the accuracy of the report. Additionally, other confidential matters such as trade secrets may be involved."); Schallert & Williams, *supra* note 20, at 302 (discussing legal risks of writing a public investigative report). For more on legal issues, see generally Schallert & Williams, *supra* note 20.

86. See generally Dennis J. Block & Nancy E. Barton, *Implications of the Attorney-Client Privilege and Work-Product Doctrine*, in INTERNAL CORPORATE INVESTIGATIONS, *supra* note 20, at 17 (discussing the multiple factors and split in authority as to whether publishing a report after an internal investigation waives attorney-client privilege).

87. See POSNER, *supra* note 40, at 9–10 (criticizing the lack of intelligence experts on the 9/11 Commission).

tion to particular parameters, and to strictly conform all services thereto, will help to protect its results from unwanted disclosure.<sup>88</sup> Another benefit is in efficiency: foregoing unnecessary expense and disclosure. For example, the Oklahoma City Bombing Report, commissioned by the Oklahoma Department of Civil Emergency Management, focused its investigation on the response to that crisis.<sup>89</sup> As the quality and nature of that response was the specialty of the commissioning unit, this was exactly what the report needed to focus on—what went wrong, and how to shore up institutional response processes and procedures against similar future crises. This was the appropriate way to deal with the institutional crisis: veering into other areas would have given little return to the institution.

The focused inquiry of the Oklahoma City Bombing Report stands in contrast to the broad mandate of the 9/11 Commission. Given the scope of the federal government, and the breadth of implicated sub-institutions, stating a sweeping mandate may have been a necessary evil;<sup>90</sup> however, the resulting lack of specific and directed recommendations suggests that it may have yet been too broad.<sup>91</sup> Vague suggestions for improvement are ultimately difficult, if not impossible, to implement. When this is the case, the result, if not the intent, of such a report may be to address the PR crisis at the expense of the arguably more important institutional one.

Practical limitations may discipline the scope of an investigation and report to practical boundaries. The federal government had both the will and the resources to implement a wide-ranging investigation following the events of 9/11 and likely thought that a more restricted scope would be self-defeating in the face of mass public outcry. Statoil, like most companies, did not have the capacity to address such a wealth of resources to the investigation of a singular event. Accordingly, it prefaced its report-creation process by instituting a two-part mandate: (1) to clarify the chain of events; and (2) to “facilitate learning and further improvements within risk assessment, security, and emergency preparedness.”<sup>92</sup> In this case, achieving the first goal was a necessary precondition to achieving the second. Statoil’s publication of the mandate of its report reflected the company’s desire to manage public expectations as to its content and thus the backlash that would likely have occurred had it, to the contrary, oversold its future results. Though some degree of limitation is necessary to discipline the process and avoid waste, one should beware of overly limiting the mandate at the outset. The Mitchell Report, for example, which had as one of its

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88. See Barry F. McNeil & Brad D. Brian, *in* INTERNAL CORPORATE INVESTIGATIONS, *supra* note 20, at 9–10 (Barry F. McNeil & Brad D. Brian, eds., 3d ed. 2007).

89. See OKLAHOMA CITY BOMBING AFTER ACTION REPORT, *supra* note 50, at 15 (“This report is limited to an emergency management perspective.”).

90. See 9/11 COMMISSION REPORT, *supra* note 38, at xv.

91. See Cole, *supra* note 26, at 30.

92. *Publication of the Investigation Report on the In Amenas Terrorist Attack*, *supra* note 62; see IN AMENAS REPORT, *supra* note 3, at 1 (“This Report aims to answer two main questions: What happened at In Amenas between 16 and 19 January 2013? What can Statoil learn to improve security and emergency preparedness for the future?”).

stated aims the identification of players in violation of the steroid policy, thus restricted the inquiry to looking at the trees at the expense of the forest—at individual wrongdoers, as opposed to at the environment that made such abuse possible.<sup>93</sup> The Wells Report, which limited its scope to a factual determination of whether bullying had occurred in the Miami Dolphins locker room, was widely praised for meeting its stated goal; however, as a consequence, the report is believed to have failed to address the institutional lapses that created such a pervasively hostile environment.<sup>94</sup>

Once a mandate has been set, the focus of the investigation should be further clarified by the creation of a list of topics to address. A mandate is inherently aspirational and abstract; choosing concrete topics and tasks focuses that mandate and sets forth a work plan for its accomplishment.<sup>95</sup> This step poses a potential pitfall—the inclination, in assigning discrete topics for investigation, is too narrow. Smaller tasks, more specifically defined, are easier to accomplish. However, it is important that practicality not be the enemy of the good—that is, the overall mandate. The tension between broad and narrow should be resolved in favor of achieving the overall objective. This is conceptually similar to the deficiency identified in the Mitchell Report, and was likewise believed to be a flaw in the Freeh Report—focusing on assigning individual blame rather than addressing institutional shortcomings. The task of identifying the particular deficiencies of individuals in the Penn State scandal, while easier to manage than a wide-ranging critique of the more intangible environment at issue in the sports program, also partially defeated the report’s mandate. Scapegoating is a distraction from the overall issue of how moral abuses came to be tolerated.<sup>96</sup> Reports perceived to focus too narrowly on the technical issues of a disaster may detract from their ability to assist the corporation with dealing with its PR crisis.

The question, then, is how to manage this tension; how broad or narrow should the scope of the investigation be? Ultimately, it is preferable to err on the side of a broader, as opposed to a more restricted, focus. The next crisis will not be identical to the one analyzed; accordingly, to have the greatest effect, the goal of the report should be to help the institution improve with its crisis management *generally*. Although the extent to which any one report based on a specific incident can achieve this is, of course, limited—and such limitations should be acknowledged—having this as the goal will make the report more meaningful and effective in mitigating not only the current crisis, but future ones as well. This is, of course, easier said than done. Achieving

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93. See MITCHELL REPORT, *supra* note 57, at 2 (defining one aspect of mandate as identifying individuals in violation of MLB drug policy).

94. See THEODORE V. WELLS, JR. ET AL., REPORT TO THE NATIONAL FOOTBALL LEAGUE CONCERNING ISSUES OF WORKPLACE CONDUCT AT THE MIAMI DOLPHINS (2014).

95. See, e.g., IN AMENAS REPORT, *supra* note 3, at 1 (setting out a specific set of topics for investigation); VIRGINIA TECH REPORT, *supra* note 41, at 5 (specifying six main tasks at the outset).

96. See FREEH REPORT, *supra* note 42, at 9.

the proper scope is a delicate balancing act in which many factors must be taken into account.

A commissioned public report that is properly scoped, and thus effective in achieving its goal of addressing the three crises described by this Article, must be both narrow enough to provide specific recommendations and broad enough that the investigation can allow and adapt to the discovery of unexpected facts. The aim is to create parameters that will facilitate the formation of creative solutions to specific problems. Paradoxically, it is essential to avoid making the scope of the investigation so broad that it becomes narrow. The 9/11 Commission Report is illustrative of this peril. That report, which addressed a wide range of topics—from the threat of terrorism to the vulnerability of air travel to the safety of buildings—concluded with a set of recommendations on how to prevent terrorists from using airplanes to bomb buildings. As the mandate broadens, the report's conclusions necessarily become more and more limited to the facts of the catalyzing crisis. With the 9/11 Commission Report, the focus of the investigation on so many topics meant that, to make it manageable, investigators had to focus on a specific set of circumstances within each broader topic. Accordingly, no single area was thoroughly assessed on its own merits. The report therefore had far less general application than it might otherwise have had.<sup>97</sup>

The first attempts made to produce a comprehensive report on 9/11 were also too narrow, but in a different way. Like the Roberts Commission report on the attack on Pearl Harbor, the review was conducted by one sector of government on the topics relevant to that sector, and it failed to address the more comprehensive systemic failures that enabled the terrorist assault to occur: “[b]ecause it was conducted by congressional intelligence committees . . . the Inquiry narrowly focused only on issues related to intelligence failures and, therefore, did not study the failures of counter-terrorism policies in the Clinton and Bush administrations on federal and local responses to the attacks.”<sup>98</sup>

Moreover, the restrictions placed on its members' access to documents frustrated the effort in a way that exacerbated the crisis rather than mitigated it. Commission members,

[T]ried, but failed, to obtain sensitive information from the Executive Branch, which refused some congressional requests for documents. Worse, the White House refused to declassify some documents it did disclose, which resulted in a heavily redacted final report that failed to satisfy public demand for an open investigation into the attacks.<sup>99</sup>

Failure to manage the PR crisis led to greater criticism by the public of an effort that was meant to provide comfort in a time of great uncertainty regarding the national vulnerability to future acts of aggres-

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97. See generally Posner, *supra* note 39 (criticizing the 9/11 Report for making recommendations limited to a replay of 9/11).

98. Fenster, *supra* note 39, at 1270.

99. *Id.*

sion. Lack of transparency led to criticisms that the administration did not trust the public and may in fact have been trying to insulate itself from backlash for its own role in having allowed the attack to occur. Indeed, the report “itself acknowledged the limitations of the Joint Inquiry’s investigation and viewed an independent commission as a necessary corrective measure.”<sup>100</sup>

In light of these negative examples—illustrations of what not to do—the Gjørv report presents a model to emulate. That report clearly stated its parameters and acknowledged its own limitations with forthrightness and humility:

We have foregone issues related to the perpetrator’s motive, childhood[,] and state of health, and we have not explored the measures society puts in place for the early prevention of radicalization [sic]. The limitations do not imply that these questions are not important. Quite to the contrary. They are important and they deserve more attention than what this Commission could manage to devote to them.<sup>101</sup>

In so doing, it both avoided the hazards of taking on too much and garnered credibility with its audience.

### 3. Timely or Comprehensive?

Another factor to mark in the initial stages of planning a report is whether to issue the report quickly, thus providing an as-near-to-immediate response to the crisis as is practically possible, or to wait and produce a more considered and comprehensive reply. A focus on institutional crisis advises that we err on the side of comprehension. While timeliness is important, and some public statements may of course be necessary as the crisis unfolds and in its immediate aftermath, rushing to publication can compromise the narrative in a way that has significant potential to make the report unhelpful or even damaging.

The Freeh Report is instructive in this regard; it was subject to criticism from observers,<sup>102</sup> Paterno family lawyers,<sup>103</sup> and independent arbitrators<sup>104</sup> due to its perceived haste in drawing factual conclusions from incomplete evidence. Some of the report’s factual findings were found to be demonstrably false, while others remain unsubstantiated by verifiable records or testimony. The seven month timeline between Paterno’s removal as head football coach and the release of the report amplified the criticism, as exemplified by the title of the Paterno fam-

100. *Id.*

101. GJØRV REPORT, *supra* note 45, at 9.

102. See Cindy Boren, *Nike’s Phil Knight Reverses Stance on Joe Paterno After Family’s Report Is Released*, WASH. POST (Feb. 11, 2013), <http://www.washingtonpost.com/blogs/early-lead/wp/2013/02/11/nikes-phil-knight-reverses-stance-on-joe-paterno-after-familys-report-is-released/>.

103. KING & SPALDING, CRITIQUE OF THE FREEH REPORT: THE RUSH TO INJUSTICE REGARDING JOE PATERNO 13 (2013).

104. See Matt Caitoll, *Arbiter Rules Sandusky’s Penn State Pension Should Be Reinstated*, CENTRE DAILY TIMES (June 23, 2014), <http://www.centredaily.com/2014/06/23/4237043/arbiter-rules-sanduskys-penn-state.html>.

ily's report response: "Critique of the Freeh Report: The Rush to Injustice Regarding Joe Paterno."<sup>105</sup>

An emphasis in the commissioned public report to address the institutional crisis as its primary focus explains that the report's main virtue is to help prevent the future, as-yet-unforeseen crisis. It takes time to see the forest through the trees. Publishing a report when all of the relevant facts remain undiscovered may lead the publishing institution to make statements that further inquiry will reveal to be untrue; retractions are never helpful to the PR effort. Moreover, an incomplete factual basis means that the narrative on which it is premised may be inaccurate and thus unable either to educate its audience or provide meaningful recommendations for institutional improvement. A report that is rushed may be seen more as PR puffery than as credible self-reflection, which might alienate the public and make the effort appear disingenuous.

The 9/11 Commission Report, which took some twenty months to compile and was delivered nearly three years after the attacks, demonstrates the value of a comprehensive approach. By giving itself enough time to authoritatively deliver a compelling and accurate narrative of the day's events, the 9/11 Commission enhanced the credibility and impact of its report. Conversely, the Roberts Commission delivered its report less than two months after Pearl Harbor; consequently, its conclusions were deemed "hasty, inconclusive, and incomplete" by Congress's Joint Committee on the Investigation of the Pearl Harbor Attack.<sup>106</sup>

That being said, an investigative and reporting process that takes too long might likewise be self-defeating. A prolonged period of silence following an event may be perceived as lack of concern with regard to institutional responsibility for the crisis and its consequences; it may also create a space for entities potentially adverse to the institution to take control of the narrative for their own purposes.<sup>107</sup> Advice from Warren Buffett is instructive in this space: "First, state clearly that you do *not* know all the facts. Then promptly state the facts you *do* know. One's objective should be to get it right, get it quick, get it out, and get it over. You see, your problem won't improve with age."<sup>108</sup>

Rutgers University experienced this problem firsthand with the report it commissioned to evaluate the university's response to Hurri-

105. *Id.*; see also KING & SPALDING, *supra* note 103.

106. INVESTIGATION OF THE PEARL HARBOR ATTACK – REPORT OF THE JOINT COMMITTEE ON THE INVESTIGATION OF THE PEARL HARBOR ATTACK,, U.S. Congress (1946) at 3 ("It is extremely unfortunate that the Roberts Commission report was so hasty, inconclusive, and incomplete. Some witnesses were examined under oath; others were not. Much testimony was not even recorded.").

107. Excessive delay might also cause consternation for the families of those affected by the crisis who wish to find closure. A report, even though it may not address all of the questions that persons affected by the crisis might have, may at least help to address some. It is likely that those affected—including, depending on the facts, the public and employees—will appreciate the organization's effort to publish a report to answer these open questions.

108. Augustine, *supra* note 15, at 21.



cane Sandy.<sup>109</sup> Although Rutgers eventually released a redacted version of the report to the general public, administration officials stalled for six months in what many media outlets condemned as an attempt to keep the report secret.<sup>110</sup> As a result, the report faced an uphill battle from inception for credibility in the community.<sup>111</sup> Community members assumed that, because Rutgers was reluctant to release the report, they must have had something to hide.<sup>112</sup>

#### 4. How Much Access?

The question of how much access to accord a commissioned investigative team is also one that is fraught with tension. Too much access may compromise the institutional position both in terms of the immediate crisis and in areas that are arguably beyond its scope (which makes consideration of this factor often coextensive with considerations of the appropriate parameters of an investigation). On the other hand, too little access may weaken the report, leaving it vulnerable to criticisms that the institution is unwilling to share crucial facts and thus address the crisis in a meaningful way, that the results are misleading by omission, and that the final product is unable to effect vital institutional change.

Ultimately, the tension should typically be resolved in favor of according greater access, provided there are no compelling legal considerations for limiting external team members' access to what is necessary for evaluating the situation at hand. The historical record demonstrates ways in which lack of access can leave a report significantly weakened and open to attack. The Columbine Report, for example, was limited in its ability to clarify events and prevent future similar recurrences by investigators' lack of access to information from the sheriff's office.<sup>113</sup> The reliability of the Freeh Report was undermined by the fact that critical witnesses were never interviewed.<sup>114</sup> As discussed, the initial attempt to create an effective response to the events of 9/11 was similarly compromised by lack of access to classified documents, resulting in a report that was unable to withstand popular criticism and made the entire endeavor worse than useless.<sup>115</sup>

109. RUTGERS UNIVERSITY, EMERGENCY PREPAREDNESS TASK FORCE REPORT: HURRICANE SANDY (2012).

110. See Chase Brush, *Rutgers Finally Releases Its Hurricane Sandy Task Force Report*, MUCKGERS (Nov. 26, 2013), <http://www.muckgers.com/2013/11/rutgers-finally-releases-its-hurricane-sandy-task-force-report/>.

111. See *id.* (referring to the six-request process of obtaining the report as "pulling teeth").

112. *Id.*

113. See COLUMBINE REPORT, *supra* note 51, at ix.

114. See KING & SPALDING, *supra* note 103, at 14 (quoting former Attorney General Thornburgh: "Although the Freeh Report's description of its interview process sounds impressive . . . [it] fails to acknowledge that, as a result of the above-described limitations, it lacked access to the most critical witnesses, which severely limits the reliability and usefulness of the Report.")

115. Fenster, *supra* note 39, at 1270 ("It tried, but failed, to obtain sensitive information from the Executive Branch, which refused some congressional requests for documents. Worse, the White House refused to declassify some documents it did disclose,

The question of access is inextricably intertwined with the question of investigative independence discussed earlier in Section III.A.1 of this Article. Lack of access may indicate either that the investigative team has been co-opted by the commissioning institution or that the latter is unwilling to follow through on the commitment to truth-finding implied by the decision to pursue the mechanism in the first place. An institution wants to avoid charges of conflicts and the appearance that it is somehow attempting to thwart efforts to uncover the truth. The experience of the second 9/11 Commission is instructive of both this danger and its accompanying potential to strengthen the process. The commission's reported attempts and initial failures to gain access to sensitive documents threatened the Bush administration with accusations of intractability. However, the administration's subsequent decision to deal with the situation by providing the commission with the contested information both illustrated its commitment to public access and truth and emphasized the independence of the commission from the administration.<sup>116</sup>

Despite the ideal of broad, wide-ranging access, it is more likely than not that access will be limited. Addressing such limitations is essential to maintain the credibility of the report. Where access is limited, the report should admit the limited access and approach its fact-finding and conclusions with humility.<sup>117</sup> It is also best to explain the reasons behind the restrictions. Providing the public with a clear understanding of why access was limited and explaining the legitimacy of such limitation may preempt alternate narratives by adverse parties to the effect that access was limited due to the recalcitrance of the institution, a conclusion which, if widely accepted, has the potential to compromise the entire effect of the report. For example, it may be beyond the institution's power to compel certain individuals to cooperate with the work of the investigative team. The extent to which employees and affiliated individuals are required to cooperate will vary depending on the facts, the state, and the employer. Ensuring that the public audience of the final report understands this will both illuminate the inherent parameters of the report and protect the commissioning institution from accusations of hobbling the team's truth-finding efforts.

While pragmatic considerations counsel limited access in some instances, legal considerations are often primary. The need to understand how the law limits certain disclosures, and why, re-emphasizes the importance of including a lawyer on the team. Privacy and confidenti-

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which resulted in a heavily redacted final report that failed to satisfy public demand for an open investigation into the attacks. The report itself acknowledged the limitations of the Joint Inquiry's investigation and viewed an independent corrective commission as a necessary corrective measure.”).

116. See Falkenrath, *supra* note 40, at 173–75.

117. See POWERS REPORT, *supra* note 53, at 2 (“We have had only limited access to certain workpapers of Arthur Andersen LLP (‘Andersen’), Enron’s outside auditors, and no access to materials in the possession of the Fastow partnerships or their limited partners. Information from these sources could affect our conclusions.”).

ality issues are often codified by statute, and their violation may expose the commissioning entity to further legal liability.

More prominent in the mind of most institutions is the extent to which allowing greater access can undermine their legal positioning vis-à-vis the inevitable lawsuits that follow a crisis by providing more evidentiary fodder to plaintiffs' lawyers. A lawyer will be aware of the way in which disclosing certain information will impact pending and threatened litigation. But here, as in other areas, it is necessary that one not let the legal crisis consume the (typically more important) institutional and public relations crises. The company should be mindful that a strategy that over-privileges its legal positioning at the expense of the public relations and institutional crises could lead to greater grief. The experience of experts familiar with this dilemma has been, as stated by one expert, that "it is preferable to err on the side of over-disclosure, even at the risk of harming one's legal position."<sup>118</sup> Feeney and Brown articulate why this is true:

[A] company's desire to assert privileges in subsequent proceedings must be balanced against any public statements the company has made regarding its investigation. For example, if the company has publicly accepted responsibility for an accident and has promised to conduct a transparent investigation, it generally should not later try to prevent the disclosure of its investigation's finding by invoking privilege. Such an attempt may appear inconsistent, which could have negative ramifications for the company in the public and courtroom arenas.<sup>119</sup>

A stated commitment to wide access and transparency, and continued fidelity to that position, is often met with public approbation and makes it more likely that the final report will be positively received. The report published by Shell following its crisis, for example, was greeted with commendation for its pledge to make broad disclosures despite the possible consequences to the company of doing so.<sup>120</sup>

### B. *Best Practices for Framing a Written Report*

The overarching goal of this Article is to provide practical guidance to those institutions considering the use of a commissioned public report in their crisis management strategy. Accordingly, this Section will offer aid in that area, gleaned from years of experience in the field and close analysis of the efficacy of existing sample reports as crisis response tools. The written report is significant because it encompasses the conclusions of the investigative commission's findings in tangible form, and what the public will use to formulate an opinion about corporate responsibility for, and adequacy of response to, the crisis. It is

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118. Augustine, *supra* note 15, at 21.

119. Feeney & Brown, *supra* note 85, at 32.

120. Diana Bentley, *Crisis Management*, 4 IN-HOUSE PERSP. 9, 10 (2008) (discussing the Shell Crisis and praising the decision to make full disclosure, despite the consequences).

therefore important that the issuing commission construct a narrative in accord with the following recommendations.

### 1. Provide a Detailed and Accurate Description of the Facts

The facts are the starting point of any commissioned public report. Understanding exactly what the crisis *was* is key, as a report which does not understand its subject cannot hope to make any sort of meaningful contribution to an understanding of what went wrong and what ought to be done in the future to prevent its recurrence. This was one of the greatest strengths of the 9/11 Commission Report<sup>121</sup>—it presented a comprehensive account of the attacks in a way that was accessible to the public, such that its recommendations, when they were presented, were put in context. Without understanding the facts, it is impossible to critically evaluate the ability of proposed changes to remedy institutional weaknesses—understanding the facts is crucial to solving problems and preventing future crisis.<sup>122</sup> Even if the recommendations of the report's authors are not embraced, a well-written fact section can provide the basis for others to make positive recommendations.<sup>123</sup>

In terms of legal positioning, providing a thorough account of the events leading up to the subject crisis also indicates openness and self-reflection. This may make affected parties less likely to sue, depending on their motives for doing so, and could lead a jury to be more amenable to the defendant's version of events. The Tylenol recall remains the paradigm of a corporation's response to a complicated consumer product problem. Johnson & Johnson was plagued in October 1982 by the contamination of Tylenol, a core headache medicine of the company, by "malevolent person or persons" unknown.<sup>124</sup> Commentators noted the company's complete candor during the crisis and credited that openness for helping to resolve its PR crisis and save its public image.<sup>125</sup> Consideration of this factor also counsels attention to narrative style. The facts section should be straight-forward and easy to understand:

[O]ne should never—repeat never!—give technical explanations or impersonal statistics to assuage the fears of consumers. Technical information is more likely than not to be perceived as gobbledygook, a sure sign that one is engaged in hiding the truth, and

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121. 9/11 COMMISSION REPORT, *supra* note 38, at 35–46.

122. Feeney & Brown, *supra* note 85, at 32 ("Investigation facilitates prevention; that is, many crises are investigated so the company can determine their root causes and prevent a recurrence. The company may also need to determine the cause of an incident or crisis to defend the company against potential civil and criminal litigation.").

123. See, e.g., POSNER, *supra* note 40, at 25–29 (providing his own recommendations based off the 9/11 Commission Report's factual narrative).

124. U.S. DEPARTMENT OF DEFENSE, *Case Study: The Johnson & Johnson Tylenol Crisis*, available at <http://www.ou.edu/deptcomm/dodjcc/groups/02C2/Johnson%20&%20Johnson.htm> (last visited Mar. 22, 2015).

125. MITROFF & ANAGNOS, *supra* note 10, at 17, 20 ("[A]s many organizations have sadly found out, it is not only comparatively easy to handle a situation when one is the victim, but it is also extremely easy to go quickly from being a victim to being a villain.").

indeed has truth to hide. Thus it serves only to further the crisis.<sup>126</sup>

However, issues of privilege and the other issues that a company could face as a result of the publication of such narratives means that lawyers should always be consulted to assist in determining the risks of publication and balancing them against the corresponding benefits. Of course, skilled lawyers will likely be able to aid the commissioning entity in publishing a narrative that successfully achieves that balance.

Providing an authoritative narrative of the certain set of circumstances that constitute the crisis is also important *per se*. An effectively-constructed facts section may retake control of the story from those who have adopted it for their own uses—the media, to sell newspapers; competitors, to gain leverage vis-à-vis the affected entity, for example. A comprehensive narrative in which people can place their faith as the official account of the crisis chronology may also provide the opportunity for public catharsis. Indeed, the narrative may be the *raison d'être* of the report. The 9/11 Commission Report, for example, was born out of the public need to understand what had occurred on September 11, 2001.<sup>127</sup>

## 2. Focus on Lines of Communication in Place During Crisis

Crucial to the construction of an effective narrative is the identification of who knew what and when. In other words, the narrative should describe the extent and the nature of the lines of communication that were in place during the crisis. This should not be a finger-pointing exercise;<sup>128</sup> rather, the point is to make an inquiry into the lines of communication and access to information.<sup>129</sup> Such a recommendation is deserving of its own section because improving communication will almost always also be a recommendation of any crisis report. Breakdowns in communication are not only often largely to blame for a crisis being allowed to occur in the first place, but also for inadequacies in the post-crisis response that serve to exacerbate, and are properly considered part of, the overall crisis.

Properly handling the communication inquiry is a delicate matter, as it can quickly devolve into a scapegoating exercise. The Freeh Report, for example, focused on specific individuals who knew of the

126. *Id.* at 86.

127. See Falkenrath, *supra* note 40, at 171–72; Fenster, *supra* note 39, at 1270–71 (“By September 2002, after the Joint Inquiry had completed its hearings but before it had issued its final report, key Republican senators expressed their frustration with the Executive Branch’s interference in the Joint Inquiry and publicly announced their support for an independent commission. At the same time, the President himself began to signal his willingness to allow one to go forward. Victims’ families in particular acted as an effective public voice and lobby in favor of a more thorough investigation.”).

128. MITROFF & ANAGNOS, *supra* note 10, at 42 (calling for “no-fault learning” in crisis management). For more on the topic of identifying individual failings, see *infra* Part III.B.5.

129. See, e.g., 9/11 COMMISSION REPORT, *supra* note 38, at 35–46 (describing lines of communication on 9/11).

abuse, without delving deeper to discuss where the lines of communication had broken down, and why. That is, rather than focusing on the structural limitations that allowed the abuse to occur, the report appears to have been content to blame the lack of communication on individual failings.<sup>130</sup>

In contrast, the Columbine Report addressed problems of communication at the institutional level, noting that emergency response departments used radios that operated on different signals: “the resulting inability to communicate . . . proved a major problem at Columbine.”<sup>131</sup> Rather than lay the blame with individual officers or dispatchers for the communication disconnect that marred the Columbine response effort, the Report highlighted a systemic deficiency which enabled the failure.<sup>132</sup> Similarly, the Virginia Tech Report outlined steps by which communication between administrators and counseling centers might be facilitated.<sup>133</sup> While the Report noted that misconceptions by various school and police officials about federal and state privacy laws were in part to blame, the Report addressed these misconceptions by offering institutional solutions to prevent similar future mistakes.<sup>134</sup>

### 3. Evaluate Control Mechanisms

A well-written report will focus on when various control mechanisms could have been enacted and identify how the incident could have been prevented with existing systems and protocols. The purpose of this section is not to make conclusions or recommendations, but to determine which mechanisms could have, if properly enacted, prevented the incident. That is, did the boat float away because the rope was too weak? Or did it float away because there was no rope at all? Often, the institutional breakdowns that allow a crisis to occur are due not to the lack of forethought surrounding their prevention, but rather to a lack of enforcement.

The 9/11 Commission Report’s analysis of the events it considered illustrated that there were operational opportunities to prevent the attacks which were simply not utilized. Although protocols were in place, they were not functioning at the level which hindsight revealed to be optimal—for example, the commission was able to identify a missed opportunity by the CIA to watch-list one of the attackers in January 2000, more than a year before the assault.<sup>135</sup> The Gjørv Report, too, explained that the attack on the government complex on “22 July could have been prevented through effective implementation of already adopted security measures.”<sup>136</sup> Such examples are numerous,

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130. See FREEH REPORT *supra* note 42, at 52, 67–69.

131. COLUMBINE REPORT, *supra* note 51, at 10–13, 46.

132. See *id.*

133. VIRGINIA TECH REPORT, *supra* note 41, at 2, 21, 25 (discussion of barriers to communication).

134. See *id.*

135. 9/11 COMMISSION REPORT, *supra* note 38, at 35–56, 266.

136. GJØRV REPORT, *supra* note 45, at 11.

confirming the importance of ensuring that control mechanisms are not only considered, but also adequately implemented. The In Amenas Report's description of security capabilities prior to the attack and of performance during the attack,<sup>137</sup> the Freeh Report's account of the police listening in on a conversation between Sandusky and a victim's mother,<sup>138</sup> and the Columbine Report's account of the warning signs all demonstrate this point.<sup>139</sup>

#### 4. Identify Areas of Weakness

One of the greatest benefits promised by a commissioned public report is to elucidate the fundamental institutional weaknesses that allowed the crisis to take place, thus to prevent recurrence. How could the tragedy have been prevented, beyond the more effective implementation of mechanisms already in place? What does that say about more fundamental weaknesses?<sup>140</sup> While it is often the case that ineffective implementation of control mechanisms allows the circumstances for crisis to converge, a lack of such controls in the first place may also contribute primarily to the incident's occurrence. At Columbine, for example, the relevant players had followed their training; it was thus a different type of weakness that the report recommended the institution address.<sup>141</sup>

The 9/11 Commission identified four general areas of institutional weakness in the federal systems it analyzed which are broad enough to be generally applicable. First, it pointed out a weakness in imagination, recommending that stakeholders recognize that future crises will not mimic those of the past, and, therefore, that a flexible and imaginative approach to risk-assessment must be instituted ("institutionalizing imagination").<sup>142</sup> Falkenrath rightly points out that this is "more of a slogan than an argument: it sounds good but is an almost indecipherable muddle."<sup>143</sup> As difficult as it may be to implement in a concrete and meaningful way, however, it is nonetheless helpful in counseling a more flexible approach to crisis planning and management. The Commission also recommended strengthening institutional policy, noting the importance of clearly-defined and disseminated policies in guiding organizational actors' priorities,<sup>144</sup> strengthening capabilities by assess-

137. IN AMENAS REPORT, *supra* note 3, at 55, 61.

138. FREEH REPORT, *supra* note 42, at 45–46.

139. COLUMBINE REPORT, *supra* note 51, at 19–22.

140. *See, e.g.*, GJØRV REPORT, *supra* note 45, at 15–16 (gathering identified errors and articulating areas of weakness such as "[t]he ability to acknowledge risk and learn from exercises"); OKLAHOMA CITY BOMBING AFTER ACTION REPORT, *supra* note 50, at 38 (identifying issues, discussing them, and proposing recommendations).

141. COLUMBINE REPORT, *supra* note 51, at 60.

142. *Id.* at xiii (discussing, as a weakness, an inability to conceive of children committing such atrocities); *id.* at 96 (recommending regular planning sessions that will discuss "worst-case scenarios"); GJØRV REPORT, *supra* note 46, at 16 (identifying, as a weakness, the inability to acknowledge the risk of various worst case scenarios).

143. Falkenrath, *supra* note 40, at 178.

144. *See, e.g.*, 9/11 COMMISSION REPORT, *supra* note 38, at 349 ("Al Qaeda and terrorism was just one more priority added to already-crowded agendas . . ."); COLUMBINE

ing the limitations existing structure creates;<sup>145</sup> and management—organizations need to ensure that those on the ground have correct instructions and that there is proper oversight, communication, and understanding of roles within the organizations.<sup>146</sup> Inadequate communication was the area of weakness most cited by the commission in the “management” category, particularly the lack of communication among various self-contained entities.<sup>147</sup>

## 5. Identify the Institutional Failure Behind the Individual Failures

An effective report will address the institutional crisis in a way that offers guidance to strengthen the institution as a whole going forward. This recognizes that structural weaknesses, more than individual moral failings, are the most productive area of focus in post-crisis management. Finger-pointing and moral judgment may be a distraction from the main purpose—that is, remediating and strengthening the institution with the structural capacity to make meaningful change. In this regard the 9/11 Commission Report provides us with a positive example to emulate. By focusing on institutional structure and capabilities, it allowed for a more candid assessment of where things went wrong. Likewise, the Abu Ghraib report, where the circumstances lent themselves to finger-pointing perhaps more than most, also recognized that

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REPORT, *supra* note 51, at x (“Law enforcement policy and training should emphasize that the highest priority of law enforcement officers, after arriving at the scene of a crisis, is to stop any ongoing assault.”).

145. See, e.g., ABU GHRAIB REPORT, *supra* note 47, at 56 (“[T]he current force structure for the [Military Police] is neither flexible enough to support the developing mission nor can it provide for the sustained detainee operations envisioned for the future.”); ACCOUNTABILITY REVIEW BOARD’S BENGHAZI REPORT, *supra* note 44, at 4–5 (describing security difficulties resulting from unclear shared responsibilities); COLUMBINE REPORT, *supra* note 51, at x, xiii (noting that all law enforcement officers, whether designated as SWAT or not, and all school employees should receive crisis training); IN AMENAS REPORT, *supra* note 3, at 69–70 (discussing limited capabilities of private security to address threat of terrorism, limited capabilities of Algerian military to address terrorism, and limited capabilities of coordination due to lack of shared information.); VIRGINIA TECH REPORT, *supra* note 41, at 31, 39, 74 (describing inability of school officials, mental health officials, and police officials to assess dangers due to uncertainty in disclosure rules between school officials, mental health officials, police officials, and gun sellers).

146. See e.g., 9/11 COMMISSION REPORT, *supra* note 38, at 355–56 (explaining the difficulties in piecing together all the information from the myriad sources of intelligence without an oversight body); ABU GHRAIB REPORT, *supra* note 47, at 45 (pointing to the unclear chain of command as a primary cause of the Abu Ghraib abuses); ACCOUNTABILITY REVIEW BOARD’S BENGHAZI REPORT, *supra* note 44, at 6 (noting the importance of identifying “who, ultimately, [is] responsible and empowered to make decisions based on policy and security considerations”); COLUMBINE REPORT, *supra* note 51, at 13 (difficulties arising from it being unclear who was in charge); POSNER, *supra* note 40, at 9 (suggesting that the 9/11 Commission’s findings suggest a weakness in management, rather than capabilities).

147. See ACCOUNTABILITY REVIEW BOARD’S BENGHAZI REPORT, *supra* note 44, at 5–6, 29, 35; see also COLUMBINE REPORT, *supra* note 51, at xi, 13, 62–63 (describing communication difficulties, including that the responders from different organizations were literally operating on different bandwidths); FREEH REPORT, *supra* note 42, at 135–36; DEP’T OF DEF., *supra* note 43, at 3 (“[A] gap exists in providing information to the right people.”); VIRGINIA TECH REPORT, *supra* note 41, at 23, 53 (discussing difficulties in sharing mental health and disciplinary data with authorities and before gun purchase).



systemic issues, more than simply individual failures, allowed the crisis to occur.<sup>148</sup>

As noted before, however, the Freeh Report is most instructive as an example of what to avoid. Though the report listed institutional weaknesses, its focus on the individual moral failings of the actors at the center of the scandal<sup>149</sup> ultimately dominated both the focus of the report and the focus of the media coverage of the report. As a result, the report (and, therefore, the crisis) remains a point of controversy;<sup>150</sup> the report was not only ineffective in mitigating the crisis, but made it worse.<sup>151</sup> The lingering infamy of the Roberts Commission, which “has been criticized for . . . placing too much blame on the field commanders in Hawaii; failing to adequately investigate intelligence regarding secret signals that might have prompted greater readiness had it been shared with the Pearl Harbor commanders,”<sup>152</sup> likewise failed in its objectives by focusing on individual failings at the expense of larger systemic issues. While the Mitchell Report tried to limit the controversy by arguing against penalties for named players,<sup>153</sup> such focus ultimately

148. See ABU GHRAIB REPORT, *supra* note 47, at 45 (pointing to an unclear chain of command as a central weakness leading to the Abu Ghraib abuses: “[t]hese arrangements had the damaging result that no single individual was responsible for overseeing operations at the prison”).

149. FREEH REPORT, *supra* note 42, at 52 (describing how the Penn State athletic director never declared Sandusky, later revealed to be a child molester, a “persona non grata” on campus, as he had a sports agent). This paragraph belies the scapegoating of the report. The paragraph contrasts Spanier’s response to a sports agent on campus with his response to Sandusky without exploring the institutional and structural pressures that led to the reported moral failings of Spanier.

150. See generally KING & SPALDING, *supra* note 103.

151. The recent report stemming from the FIFA investigation into possible misconduct connected with the bid process to host the 2018 and 2022 World Cups is illustrative of the way in which a report, if mishandled, can aggravate the institutional crisis. FIFA’s chief investigator, Michael J. Garcia (a former U.S. Attorney), published his findings to the soccer organization’s governing body in a 430-page report. The organization’s judge decided that it would be best not to publish the report in its entirety, choosing rather to publish a 42-page summary of the same which Mr. Garcia stated “contains numerous materially-incomplete and erroneous representations of the facts and conclusions detailed in the Investigatory Chamber’s Report.” Citing frustration with the way in which the findings of the report were treated, Mr. Garcia then resigned in protest. It is understood that the report revealed institutional weaknesses within the FIFA executive committee, including a “culture of entitlement,” an “attitude that the rules don’t apply to the executive committee,” and “a failure to properly consider their obligations to the organization.” Following Mr. Garcia’s resignation, FIFA agreed to a limited publication of the report. See Joshua Robinson & Matthew Futterman, *FIFA World Cup Investigation Sparks Dispute*, WALL ST. J. (Nov. 13, 2014, 9:22 PM), <http://www.wsj.com/articles/fifa-world-cup-investigation-sparks-internal-dispute-1415873984>; Joshua Robinson, *FIFA Investigator Michael Garcia Resigns in Protest*, WALL ST. J. (Dec. 17, 2014, 3:48 PM), <http://www.wsj.com/articles/fifa-investigator-michael-garcia-resigns-in-protest-1418832459>; Joshua Robinson, *FIFA Agrees to a Limited Publication of Hosting Rights Report*, WALL ST. J. (Dec. 19, 2014, 3:07 PM), <http://www.wsj.com/articles/fifa-agrees-to-limited-publication-of-hosting-rights-report-1419001271>.

152. See Cole, *supra* note 26, at 12–13.

153. MITCHELL REPORT, *supra* note 57, at 33 (arguing against penalties on named players).

meant that the names were the story, rather than the more generally applicable conclusions and recommendations of the report.

Perhaps another way to conceptualize the same point is to keep in mind that no crisis ever has a single cause.<sup>154</sup> Focusing on individuals as the source of crisis makes the final product ineffective in achieving its goal of resolving the three crises because it paints an overly-specific picture of the situation, a picture that is inaccurate by its exclusion of equal or more viable elements. Focusing on the institutional crisis, however, necessarily requires taking a birds' eye view of the situation and putting each circumstance in its proper place in the narrative.

## 6. Make Reasonable and Proportional Recommendations

Arguably the most important part of a report is the recommendations section, which identifies institutional weaknesses in order to advise ways in which to make the entity stronger in the future. These recommendations should be tied to specific areas of weakness and, if possible, to the existing organizational controls structure to make their implementation more manageable and accordingly more likely. Vague or poorly-defined recommendations obviously compromise the possibility of their implementation. The 9/11 Commission Report is illustrative in this regard—its failure to give adequate attention to the realities of post-9/11 intelligence and to specifically describe the problems its reorganization proposal sought to solve arguably compromised its effectiveness.<sup>155</sup>

Recommendations must also confront the tension between offering practical or ideal recommendations. Ideal recommendations tend to be vague. Moreover, while it is tempting to recommend vast and sweeping changes, such changes are more costly and less likely to be implemented by the subject institution. This is a variant on the familiar maxim that “the perfect is the enemy of the good”—go too far, and one might not get anywhere at all. Therefore, it is important that recommendations be written with an acknowledgment of practical limitations. The Benghazi Report, for example, pragmatically observed that the “total elimination of risk is a non-starter for U.S. Diplomacy.”<sup>156</sup> The 9/11 Commission Report was criticized for its failure to similarly understand the actualities of the intelligence landscape.<sup>157</sup> According to critics, this lack of adequate comprehension by its authors made the

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154. See MITROFF & ANAGNOS, *supra* note 10, at 133 (stressing the importance of “treating the big picture”).

155. See 9/11 COMMISSION REPORT, *supra* note 38, at 344; see also Falkenrath, *supra* note 40, at 176, 182–83, 187.

156. ACCOUNTABILITY REVIEW BOARD'S BENGHAZI REPORT, *supra* note 44, at 2; see also COLUMBINE REPORT, *supra* note 51, at 118–21 (deciding against recommending technology-based security devices for all schools, noting “these technologies can be very expensive to implement” and are not particularly effective).

157. See Falkenrath, *supra* note 40, at 176 (criticizing the 9/11 Report for inadequately addressing the pressures and realities of intelligence and for not considering post-9/11 reforms).

recommendations of the 9/11 Commission Report both vague and idealistic:

Anybody who bothers to read them, which tends to be a remarkably few people who are commenting on the report, realizes that you can't solve problems when you don't know what you are saying in terms of staff, costs, operating systems, and other details. This is critical because, among other things, when you look through that report, you see vague recommendations about getting rid of the causes of terrorism or about dealing with issues like Islamic extremism or improving the quality of the CIA, which are among the most important recommendations you could make. And then you suddenly realize that this is a paragraph of generalities or clichés with absolutely no operating content at all.<sup>158</sup>

In order to avoid these pitfalls, we suggest that a hallmark of an effective commissioned public report is one that makes concrete and practical recommendations that focus on flexibility and institutional competence in the face of a crisis.<sup>159</sup> A focus on implementation should maintain this focus—ensuring that the recommendation is framed to address a specific weakness and is practical and concrete enough to allow for feasible implementation will make such implementation, and thus positive institutional changes, more likely to occur.<sup>160</sup> The report on the exposure of NSA spying practices by the President's Review Group on Intelligence and Communications Technologies is noteworthy in this regard. The report laid out forty-six clear, thoughtful recommendations for the future of American intelligence gathering,<sup>161</sup> but it drew some criticism from commentators who found that the report valued realistic goals above substantive, meaningful reform.<sup>162</sup>

#### IV. BUILDING THE ARK BEFORE THE FLOOD

An effective commissioned public report that can adequately address the institutional crisis, which should be its top priority, will recommend structural changes that may prevent the recurrence of the weaknesses that led to the crisis spurring the report. Reports should therefore range beyond consideration of the specific facts that gener-

158. Brad D. Gwertzman, *Cordesman: 9/11 Commission Report Lacks Specifics*, COUNCIL ON FOREIGN RELATIONS (Aug. 3, 2004), <http://www.cfr.org/911-impact/cordesman-911-commission-report-lacks-specifics/p7229>.

159. See, e.g., 9/11 COMMISSION REPORT, *supra* note 38, at 369; Gjørv REPORT, *supra* note 45, at 24.

160. See, e.g., 9/11 COMMISSION REPORT, *supra* note 38, at 423.

161. PRESIDENT'S REVIEW GRP. ON INTELLIGENCE AND COMM'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD 86–258 (2013).

162. See John Cassidy, *Inside the White House N.S.A. Report: The Good and the Bad*, NEW YORKER (Dec. 19, 2013), <http://www.newyorker.com/online/blogs/johncassidy/2013/12/nsa-report-white-house-the-good-and-the-bad.html> (“I have some doubts about whether the report is as radical as these reactions might suggest. Ultimately, it is more about preserving the essentials of the current system, and making them more palatable rather than knocking them down.”).

ated the immediate crisis in order to focus on common areas of crisis management in need of improvement.

#### A. “Institutionalizing Imagination”

A commissioned public report that focuses only on how the immediately-past catastrophe could have been prevented in a parallel universe may be ineffective in preventing future crises, thus failing to address in large part the paramount institutional crisis. Although the criticism<sup>163</sup> of 9/11 recommendations in this area is fair—how, exactly, is imagination “institutionalized?”—recognition thereof should not lead to dismissiveness of the importance of imagination in crisis management. The Statoil Report, for example, recognized that part of the reason the facility’s security was inadequate to repel the attack was that neither the company nor its joint venture partners “conceived of a scenario where a large force of armed attackers reached the facility.”<sup>164</sup>

So as not to fall into the same pitfalls earlier identified in this Article and vaguely suggest an idealistic change without also proposing methods for its implementation—how, precisely, does one go about “institutionalizing imagination?”—we recommend that an institution implement a risk assessment and identification system that can be sensitive to certain warning signs that indicate potential trouble. Red team analysis has been used to some effect, and may be employed by various entities to gauge particular areas of institutional weakness.<sup>165</sup> Organizations can identify past indicators of future trouble and train personnel to recognize warning signs that indicate the potential for both imagined and imaginable crisis.<sup>166</sup> They can implement systems to monitor these identified telltale indicators—the proverbial death of a canary in a coal mine—so that new threats can be quickly recognized and addressed.<sup>167</sup>

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163. Falkenrath, *supra* note 40, at 178 (claiming that institutionalizing imagination is “more of a slogan than an argument: it sounds good but is an almost indecipherable muddle”).

164. *Publication of the Investigation Report on the In Amenas Terrorist Attack*, *supra* note 62.

165. An article on U.S. Marine Corps red teams explains the concept, “A red team may play the devil’s advocate or Napoleon’s corporal . . . . The general idea of red teaming can be described as a bright light we shine on ourselves to expose areas where we can improve effectiveness. This light starts out white for everyone under the banner of red teaming, but it goes through the prism of the particular organization and takes many different forms in its application. . . . Sandia National Laboratories uses teams that attempt malicious entry in both the physical and cyber world, while the intelligence community has teams that speculate about alternative futures and write articles as if they were despotic world leaders.” Lt. Col. Brendan Mulvaney, *Red Teams: Strengthening Through Challenge*, MARINE CORPS GAZETTE, July 2012, at 63, available at <http://www.hqmc.marines.mil/Portals/138/Docs/PL/PLU/Mulvaney.pdf>. See also 9/11 COMMISSION REPORT, *supra* note 38, at 347.

166. *Id.*; DEP’T OF DEF., *supra* note 43, at 26–28 (describing the need for training programs so that the warning signs are recognizable).

167. See, e.g., 9/11 COMMISSION REPORT, *supra* note 38, at 347; ACCOUNTABILITY REVIEW BOARD’S BENGHAZI REPORT, *supra* note 44, at 9 (noting that “tripwires” should be treated as “essential trigger mechanisms for serious risk management decisions and actions”).

## B. *Improving Management and Structure: Communication Is the Key*

Over and again, failures in communication have been identified both as a cause and an aggravating structure of crisis. In order to confront the manifold issues that may result from a breakdown in communication, structure—lines of communication—should be clearly defined and familiar.<sup>168</sup> It is crucial that there be interoperability between various systems and organizations, and that all relevant entities have access to—and use—a centralized data pool.<sup>169</sup>

The proper establishment of a communication system adequate to the task of responding and preventing crisis requires that a balance be struck between centralization and independence. Centralized data is more efficient but also more subject to spreading error—flawed data used by all respondents means that all act based on flawed information. At the same time, too much independence in terms of the acquisition of data makes it more likely that different persons will operate on parallel tracks and fail to communicate with each other to resolve a situation through common efforts. We propose that an effective communication structure will centralize the data and information, and establish the central command structure, but will keep independence in the analysis of the data.<sup>170</sup> It is important in this regard not to conflate the need

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168. See, e.g., COLUMBINE REPORT, *supra* note 51, at 86–89 (discussing the unclear role of School Resource Officers as a major weakness and recommending the position's role be clarified); VIRGINIA TECH REPORT, *supra* note 41, at 131 (discussing the lack of clarity regarding the management of the Family Assistance Center as a weakness, and recommending that the structure be clarified).

169. See, e.g., COLUMBINE REPORT, *supra* note 51, at xvi, 69, 73–74, 90, 108 (discussing the weakness of poor communication interoperability and recommending improved interoperability) (discussing the problem of the lack of a centralized pool of data and the lack of sharing and recommending the creation of such a data pool and the sharing of information); FREEH REPORT, *supra* note 42, at 135–36 (recommending that the board be briefed about a number of issues, including “triggers” such as unusual severance packages); VIRGINIA TECH REPORT, *supra* note 41, at 54 (recommending required reporting so as to create a centralized, accessible pool of data). Interoperability has been defined as “the extent to which systems and devices can exchange data, and interpret that shared data. For two systems to be interoperable, they must be able to exchange data and subsequently present that data such that it can be understood by a user.” *What is Interoperability?*, HEALTHCARE INFO. & MGMT. Sys. Soc’y, <http://www.himss.org/library/interoperability-standards/what-is> (last visited Feb. 28, 2015). See also 9/11 COMMISSION REPORT, *supra* note 38, at 387, 416–19 (recommending a comprehensive screening system across U.S. Borders, transportation systems, and other vital facilities; describing the importance of information sharing generally); COLUMBINE REPORT, *supra* note 51, at 82, 108–09 (describing the need for communications systems among emergency responders to be “interoperable”; calling for the sharing of information about potentially violent individuals across school districts); GJØRV REPORT, *supra* note 45, at 21 (recommending “more sophisticated use” of the information and communications technology to check threats against a centralized database and coordinate security actions); DEP’T OF DEF., *supra* note 43, at 30 (recommending the creation of a common force protection threat reporting system across the Department of Defense).

170. See RICHARD A. POSNER, UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM 60–62 (2006) (calling for competition and decentralization among intelligence agencies); POSNER, *supra* note 40 (criticizing the recommendations of the 9/11 Commission that would reorganize the intelligence community under a national intelligence director).

for centralized data with the centralization of various properly-independent functions.<sup>171</sup> Coordination among multiple entities requires a unified framework of command, but this need not go as far as centralization.<sup>172</sup>

In determining the most effective communication structure, the architect must consider the relative benefits and costs of unification and independence. As one scholar has articulated this balance,

Unification may encourage coordination across agencies and committees and reduce resources devoted to maintaining duplicative structures, among other benefits. Unification can, however, have costs as well: for example, destroying needed safeguards and eliminating beneficial agency or committee competition. Finding a desirable and politically feasible balance between unification and redundancy is a difficult task, and a pressing one.<sup>173</sup>

Each and every system, however, requires the establishment of proper priorities and their dissemination through clear and defined policies and procedures.<sup>174</sup>

### C. *Improving Institutional Culture*

As a general matter, setting the right organizational tone will go far in mitigating the risk of crisis. A culture in which operatives are unable or unwilling to question superiors, raise concerns through proper channels, and understand risk-prevention as an individual responsibility will likely lead to an organization unable to perceive, let alone address, risks before a crisis hits. An institution's leaders are expected to establish

171. See POSNER, *supra* note 40, at 43 ("Efforts to centralize the intelligence function are less likely to improve data sharing than to lengthen the time that it takes for intelligence analysts to reach the President, reduce diversity and competition in the gathering and analyses of intelligence data, limit the spectrum of threats given serious consideration, and deprive the President of a range of alternative interpretations of ambiguous and incomplete data to consider[.]"); *id.* at 152–53 ("The 9/11 Commission blamed the failure to anticipate the 9/11 attacks mainly on inadequate sharing of intelligence among the different intelligence agencies and thought a more centralized intelligence structure an indispensable part of the cure. But the cure may not fit the disease.").

172. See, e.g., RICHARD A. POSNER, COUNTERING TERRORISM: BLURRED FOCUS, HALTING STEPS 36 (2007) (calling for the Director of National Intelligence to serve as a coordinator and overall supervisor, rather than as the senior intelligence adviser); POSNER, *supra* note 40, at 148 ("Coordination of intelligence agencies is an imperative; centralization may not be."); 9/11 COMMISSION REPORT, *supra* note 38, at 397 (recommending a nationwide adoption of the Incident Command System, which unifies command procedures across multiple jurisdictions); COLUMBINE REPORT, *supra* note 51, at 79 (describing the need for the advance establishment of an incident command system to coordinate diverse public parties in the event of a crisis).

173. Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1657 (2006). See also, COLUMBINE REPORT, *supra* note 51, at 114 (discussing the need for a district-wide plan that is also uniquely tailored to each school); FREEH REPORT, *supra* note 42, at 37, 131 (recommending increased centralization of oversight but also recommending splitting human resources department from finance and business departments).

174. See ABU GHRAIB REPORT, *supra* note 47, at 92 (stressing the importance defining policy and priorities); COLUMBINE REPORT, *supra* note 51, at 12, 73–78.

and maintain an integrated culture of safety,<sup>175</sup> an inclusive and trust-based organizational culture where risks are addressed as warning signs arise. Training<sup>176</sup> and the awareness of potential threats is essential to maintain the flexibility that is crucial to address previously-unimagined risks.<sup>177</sup> “Crisis management is not an extra to be *added on*. It needs to be something that an organization *is*.”<sup>178</sup>

## V. CONCLUSION

This Article has spent considerable time discussing the three-in-one paradigm of every crisis, and inevitable inherent tension between them. Are these three micro-crises created equal? Where it seems that a choice must be made, does an effectively commissioned public report respond to the institutional, legal, or public relations crisis?

We suggest that an effectively commissioned public report will err on the side of the institutional crisis. Focusing on the institutional crisis will often address the legal and public relations crises as well, while focusing on the legal and public relations crises often comes at the expense of the institutional crisis—the crisis most crucial for preventing catastrophic recurrence.

A brief survey of the most successful commissioned public reports emphasizes a focus on a few core components. These include a detailed description of the facts to help assess the complexities of the situation, give the relevant decision-makers the tools needed to address the instant crisis and prevent future ones, provide the public the answers they seek, and help to demonstrate an institutional commitment to honesty and openness. Additionally, effective reports that focus on institutional weaknesses rather than on individual scapegoats are better for the institution; though the public may bay for blood, taking the high road and declining to put all the blame on specific persons is ultimately beneficial to the resolution of the public relations crisis. This has the added benefit of mitigating potential legal crises by decreasing the instance of specific admissions and thus the imposition of vicarious liability in some instances.

By focusing on command structure, communication, culture, and imagination, a successful report addresses the institutional issues as its main priority, which facilitates flexibility and more effective responses to future crises. This has obvious benefits for an institution, but also

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175. See FREEH REPORT, *supra* note 42, at 129, 135 (recommending incorporating the athletics program into the broader Penn State community) (recommending the board members receive ethics training); VIRGINIA TECH REPORT, *supra* note 41, at 18–20 (recommending universal training with all parties discussing risk assessment).

176. See FREEH REPORT, *supra* note 42, at 135 (recommending ethics training for members of the board); *id.* at 78 (discussing the need to practice and rehearse emergency response); VIRGINIA TECH REPORT, *supra* note 41, at 18–20 (recommending universal training).

177. See, e.g., *id.* at xvi, 95 (discussing the “culture of silence” problem at Columbine, whereby students felt pressure to stay silent about bullying) (recommending anonymous tip lines, as well as a campaign to counter bullying).

178. COOMBS, *supra* note 9, at 1.

publicly demonstrates meaningful commitment to adapt to changed circumstances to prevent recurrence.

This Article has demonstrated that sole focus on the public relations crisis is doomed to fail and will only aggravate the initiating catastrophe. The same situation may result from an exclusive focus on the legal crisis. Maintaining a primary focus on the resolution of the institutional crisis, however, will be much more likely to organically resolve the other two to the benefit of the affected institution.