

PRE- OR POST-MORTEM?

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Do you know what a *pre-mortem* is? I've known what a post-mortem is for a long time: "an exam of a dead body to determine the cause of death." I'm still alive so I haven't had one yet. "Pre-mortem" is a newer term. I learned it recently from Dr. Daniel Levitin, a neuroscientist and author of *The Organized Mind: Thinking Straight in the Age of Information Overload*. He spoke about it on the TED Radio Hour podcast.¹

According to Dr. Levitin, in a pre-mortem, "[Y]ou look ahead and you try to figure out all the things that could go wrong, and then you try to figure out what you can do to prevent those things from happening, or to minimize the damage."² He tells one funny story about a stressful evening causing him to forget to bring his passport to the airport the following morning. From that he learned the pre-mortem lesson: designate a place for things that are easily lost and always put them there, then you won't lose or forget them.³

Dr. Levitin also applied pre-mortem to doctors' appointments. Instead of reacting to them out of stress, he advises, plan in advance what conversation you will have with your doctor. If he or she recommends a drug, ask him or her the percentage of people who benefit from taking the drug. Then ask her or him about the percentage of people who get side effects from using the drug. Surprisingly to me, the odds of side effects may be much higher than the odds of a cure.

Unlike a post-mortem, a pre-mortem means to plan your questions ahead of time. Because "rational, logical thinking" disappears during stress, "we need to train ourselves to think ahead to these kinds of situations."⁴

Post-2016, pre-mortem reasoning sounds like it might be a good idea for people like me—and for my students who are training to become effective lawyers. I wish I had used it more in 2016.

My 2016 started as a productive and apparently stress-free year. I finished the fourth edition of *Law and Religion: Cases and Materials*, my Foundation Press textbook. Moreover, at the end of 2015 I had completed the first edition

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¹ Daniel Levitin, *How to Stay Calm When You Know You'll Be Stressed*, TED (Sept. 2015), https://www.ted.com/talks/daniel_levitin_how_to_stay_calm_when_you_know_you_ll_be_stressed [<https://perma.cc/9575-ZJG2>].

² *Id.*

³ *Id.*

⁴ *Id.*

of my new bioethics textbook, *Practicing Bioethics Law*. Joan Krause, who was my classmate at Stanford Law School and then a colleague at the University of Houston Law Center, is my coauthor. She is a health lawyer who keeps her eyes on the practical dimensions of law. In contrast, I am usually a straight theorist. Constitutional law is my strongest subject.

The year had also given me a chance to write some articles and briefs. My colleague Linda Berger edited a book of feminist approaches to famous Supreme Court cases. My chapter on *Harris v. McRae*, the abortion funding case, looked at the topic from a feminist perspective, in stark contrast to what the Court had done. My rewrite required abortion funding for everyone.⁵ I also wrote two essays on LGBT rights. Those writings identified the recurring problems that conscience clauses cause for civil rights. Conscience clauses frequently give employers and business owners an excuse to violate women's and LGBT rights by refusing them service whenever they feel like it.

My briefs took up an issue of special concern to me, namely the Court's so-called ministerial exception. To my dismay, in 2012 a *unanimous* Supreme Court concluded that courts lack jurisdiction over many cases involving "ministerial" employees. That sounds like a pro-religion ruling, and most religion writers praise it. In practice, however, it actually harms religious employees. Even though no Catholic women can be ordained priests, for example, most of their cases have been dismissed. Their employers magically label them ministers the day they file a case alleging gender discrimination or any other illegal basis for firing.

In 2016, I wrote a Second Circuit amicus brief on behalf of a female Catholic high school principal. The district court had declared her a minister and dismissed her case. The Second Circuit agreed she was a minister and affirmed.⁶

I also wrote a cert. petition for a Lutheran minister who refused to accept trust fund money for a cemetery that his church no longer owned. He too was fired. All the courts had dismissed his suit because he is a minister.⁷

In contrast, my briefs argued that most ministers and non-ministers should have their day in court. They wound up losing their cases. In the long run, I would like to change things so their cases are heard in court instead of dismissed on an affirmative defense.

During fall semester 2016, I was teaching Constitutional Law II to most of the students who had just taken my Constitutional Law I class. I was also using my new *Practicing Bioethics* book to teach a seminar on the Law of Bioethics.

⁵ Leslie C. Griffin, *Harris v. McRae*, 448 U.S. 297 (1980), in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* (Kathryn M. Stanchi, et al., eds., 2016).

⁶ *Fratello v. Archdiocese of N.Y.*, 863 F.3d 190, 192 (2017).

⁷ *Melhorn v. Balt. Wash. Conference of United Methodist Church*, No. 2065, 2016 WL 1065884, at *2 (Md. Ct. Spec. App. Mar. 16, 2016), *cert denied*, 137 S. Ct. 377 (2016).

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As always, I was asking my students to work a little harder every day. I was also looking forward to a rare event: a sabbatical for spring semester 2017.

Then my life—and some of yours—was thrown upside down. On Friday, October 7, a young man attacked me while I was out for a relaxing walk. The next paragraphs don't come from my memory. I read about the attack in the Vegas newspapers. More importantly, I learned the details from the numerous people—family, friends, colleagues, students, medical staff, and complete strangers—who worked together to pull me back to life and good health.

On the day of the attack, two different men who were out walking their dogs saw a man pick me up, throw me to the ground, and kick me in the head. From a distance, they weren't sure if I was a person or a bag of laundry. When they got closer the harm to me was obvious.

Three different women who were driving through the neighborhood pulled over because they saw me lying on the ground. The attacker was still with me, so for a while they thought he was my friend. They called the police. They stopped the heavy bleeding from my head and nose. One of them followed my attacker simply to get his name so he could later tell the police about my fall. Suddenly the attacker tried to pull her out of her car. She successfully resisted—I have no idea how. Soon after that second attack, one of the dog walkers was able to persuade the attacker to return to me.

The paramedics took me to the hospital and the police took my attacker to jail. I started out at the hospital labeled “Trauma Bambi.” I'm told the hospital staff had a piece of paper with my name on it, but didn't use my name officially until my next-of-kin brother got my health card from a wallet in my house.

During those two days, numerous people contacted the police. I had plans to meet Professor Ruben Garcia and his wife, Victoria (Tori) Carreón, for dinner and a show on Saturday night. Fortunately, I've always semi-jokingly told friends that if I don't show up, call the police. Tori and Ruben did just that. They knew something was wrong when I didn't show up at their house at 5 to drive to dinner. Of course, I didn't answer my phone or e-mail anyone that day or for many days to come.

Ruben and Tori kept calling the police and other colleagues, especially Thom Main. Finally, on Sunday the police contacted Thom, and Ruben and Tori went to the hospital to identify me. At first hospital staff said I wasn't there. Indeed, they wouldn't confirm that I was present until they had contact information for my next-of-kin. Tori was able to text my brother, who quickly answered her text. She told him about my attack and he got on a plane to arrive from New York on Sunday evening.

Fortunately, when I had a minor surgery in June 2015, I had updated all my legal documents in a very lawyerly manner. I had a will and a durable power of attorney, all legal in Nevada. My brother Joe Griffin was my health decision maker. He arrived in Vegas Sunday night. My co-author Joan Krause was in charge of my financial decisions.

Other people also pitched in. Colleague Stacey Tovino is a talented health care lawyer, and she took over all the negotiations with my insurance company. I realized many months later that her devotion and relentlessness saved me a lot of money.

Numerous people went to work on my behalf. I have heard countless stories about them but still have *no* recollection of their generous actions. Brother Joe asked Dean Dan Hamilton to sit in on an early meeting with hospital staff so he could get a neutral opinion. I've been told that, in the first days, several doctors thought I would die or, at best, live brain-damaged in an institution with need of permanent assistance.

Apparently hospital personnel had to do numerous things to keep me alive. I'm told they attached one tube to my head to monitor my blood pressure. My brain was too weak to let me breathe, so they attached a trach to my throat. Nor could I eat, so they attached a big feeding tube to my stomach. The feeding tube stayed with me for *seven weeks*, even after I was able to feed myself.

The people in Las Vegas constantly rallied. Thom Main, Ruben and Tori, Rebecca Scharf, Ann McGinley, Jeff Stempel, Linda Berger and others spent countless hours watching the equipment, encouraging the medical staff, and hoping I was getting better. They did their best to help my brother. Stacey, who among things was fielding dozens of telephone calls from judges, friends, and colleagues from around the country, even tracked down my former Santa Clara student, Nadine Matta. Nadine and her mother quickly flew to Vegas to see me. My sister Deborah Griffin flew in from New York to lend her support.

Two current research assistants, Stephanie Glantz and Paige Foley, and two former research assistants, Erica Smit and Whitney Short, kept visiting me. Erica and Whitney filled my room with pictures of us running 5Ks. Incredibly, one of my last chores on Thursday, October 6, the day before the attack, had been to finish a reply brief for the Supreme Court. Somehow Stephanie and Paige found my brief at the printer's, and managed to get it filed, with no assistance from me. Everything was filed on time and in the right manner.

Everyone just waited. My brother knew if I were brain damaged he would let me go. But he was shrewd and gave me time to recover. As I eventually did.

I still have *no* recollection of the attack or any of my time at Sunrise Hospital in Las Vegas. My family flew me to Houston on October 27. I eventually woke up there. To me the remarkable Vegas stories are how persistent I was in trying to get out of the hospital. I'm told that I would try to pull out my medical equipment while people were in the room with me. As I grew stronger, I became more determined and tenacious. Tori reports they had to hold my hand to try to keep me calm and busy doing other things, and that I became more verbal against the equipment once my breathing tube was out. Rebecca says I would smile at the nurses and act like I was an angel. The minute they left the room, however, I would pull out all my medical equipment and start trying to go out for another walk. I am the only one who, in retrospect, approves of my disobe-

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dience. It shows I had one goal only: to get out of the hospital. That's the goal that keeps some sick patients alive.

Houston has an excellent brain trauma center. I don't remember the flight or waking up there. But I did wake up and consistently got better. Elsewhere I've written about the difficulties of being a Houston patient. In this essay, however, I want to give thanks to the Nevada people who saw me through so much pain and effort. I beat the odds and the time schedule there, and Houston doctors sent me back to Vegas on December 23. I flew home alone and made it back in what I considered to be good health.

Once I was home, people weren't as worried as they were when I was unconscious or unable to talk. My own worries developed in a new way. I've figured out that they reflect some of my old post- but not pre-mortem way of approaching problems without enough advance planning. *Fear* and *caution* motivated me much more than they should have if I were a shrewder pre-mortem type of person.

Fear influenced me at first. It is surprising how strong the conscious and subconscious legacy of an attack can be. First, I learned that other Nevada people, especially my friends and rescuers, were more scared of walking or running in public than they were pre-attack. Second, I slowly recognized that I was even more scared than they were.

I still lived and walked in the same neighborhood where I was attacked. I kept my eyes wide open when I walked both far from and near to the site. I was suspicious of every person I hadn't met before. I paid more attention to people for a while than I did to my surroundings. Yet even my surroundings weren't the same. I was more afraid at home than I was before the attack. The New Year's Eve fireworks even gave me some discomfort! Everything sounded a little dangerous.

Caution also showed its hand. I was confident within myself that my current work would be as good as I had done pre-attack. Yet, inside, I was also worried about how I would be perceived. Two talks—one in Toronto, another in Chicago—had been planned pre-attack. I went on those two trips, one in March and the second in April. I got a warm response from both the Toronto audience of law students and professors and the Chicago audience of theologians and church workers. No one thought I had suffered brain damage—not me or them!

Then I somewhat stubbornly—and bravely, in retrospect—did some work to get myself invited to a new conference, the BioLawLapalooza at Stanford Law School. This meeting had almost all the top legal bioethics people in the country, with most of us speaking for 15 minutes.

For that conference, I volunteered to talk about being a patient in the context of studying bioethics. I was one of the last speakers to speak, and (I confess to you) was a little nervous pre-speech. What would it be like to talk about my brain injury to a crowd of brilliant scholars?

Then my fifteen minutes arrived. Although I had notes, I didn't use them. Post-talk, many guests expressed their joy that I was healthy and their delight that I was able to speak coherently about being a brain patient.

My students then gave me the highest honor. They asked me to speak at their graduation. There I spoke, not only about the October attack, but also about a surprising episode from my past. In April 1993, I was hit by a car as a pedestrian while I was clerking for Judge Mary Schroeder on the Ninth Circuit Court of Appeals. I had two brain surgeries. I took almost a full week to wake up.

I recovered from that injury. Judge Schroeder was so moved by it that she traveled to Houston in 2016 to make sure I was okay. TWO brain injuries are a lot to withstand. Her former clerks also contacted me because they remembered the horrors of 1993.

On UNLV's graduation day, my audience was completely surprised that I had already withstood a major brain injury with no apparent intellectual effect. Once that message was out, I felt freer to leave behind some difficult emotions, especially fear and caution. I was getting ready to share the effects of being a patient in a more healthy way. Those 2016-style papers were awaiting a 2017 version.

Then—as a treat to myself—I went to Paris for three bioethics conferences spread over almost three weeks in June and July 2017. I didn't give a paper. The conferences were planned long before I ever heard about them. I just wanted to participate in another bioethical conference environment as I think about what work I want to do next. Moreover, it was only three days of conference at a time—followed by four days off! That meant I had plenty of time to visit and tour the area. Years ago, I had spent my sophomore year in France. This trip provided a good revisit to my youth as well as a new look at my older age.

Being away from Vegas gave me some final insight on my situation. Only two people in Paris knew about the attack or my possible brain injury. No one was worried about my mental situation or my health. I was more fearless walking the streets of Paris than I was back home in Henderson. The trip gave me an introductory idea of what Dr. Levitin meant when he talked about “pre-mortem” reasoning and an organized brain. Prepare, in advance, even for life- and health-threatening traumas. If you organize, beforehand, how you react, even to large and unexpected crises, you will be much more capable of dealing with them once they occur.

I got on the plane back to the U.S. more ready to live fully at home. Unfortunately, while I was in Paris, I was subpoenaed to my attacker's trial, which was supposed to begin on July 10. At the last minute, however, prosecutors told me he had pled guilty to attempted murder. I was relieved to hear that, because juries don't always convict guilty criminals.

The opening week of the fall 2017 semester, however, gave me one more round of a crime victim's responsibilities. I had Constitutional Law II on Tuesday and Thursday afternoons. By pure coincidence, on the first Thursday of the

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semester, I was asked to testify at my attacker's sentencing hearing during the morning before class. I was invited to speak at his sentencing hearing. Or not. The decision was up to me.

Fortunately, as a good lawyer, I know that it is always better to have a victim present. There was no question in my mind about speaking. From the beginning, there were unfounded suggestions from his lawyer that my attacker had merely had a bad day. He made the same point at the sentencing hearing! Fortunately, after the prosecutor, defense lawyer, and attacker all spoke, I was given the last word. I used my time to tell the judge just how difficult my recovery had been for me, my family, my friends, and my school's colleagues and students. I knew I had completely beaten the odds by even surviving. I wanted the court to have that fact explicit in its records.

I spoke as a victim and not as a lawyer. Most of the time, I look at my attack from the best perspective I can find, just to make my life less difficult. But I had only one goal at the hearing. I told the judge just how many things I had undergone, and how my life, my family's life, and the school's life had been affected by my attacker's "bad day." It was hard to do, but I knew I had to keep the record honest.

The judge opted to give my attacker the maximum available sentence of 6-15 years, following the prosecutor's and ignoring the defense attorney's requests.

I am glad to have that hearing behind me. I look forward to a productive 2017, with enough projects to surpass 2016. I enjoy being back in the classroom with my Constitutional Law II students.

I hope learning with me will make them very rigorous about constitutional law. I also hope that taking my class will make them a little more prepared for their future careers. In their jobs, plenty of possible clients will need their lawyers' pre-mortem help to get through the difficulties that arise on a very bad day. I recommend that they develop those pre-mortem skills now, so that they're ready to practice law when their careers begin.

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