IN MEMORIAM: DAVID CHARNY

The editors of the Harvard Law Review respectfully dedicate this issue to David Charny.

Richard H. Pildes*

The pure ecstatic experience of thought — thought that has no end beyond itself, thought for the sheer exhilaration of the intimacy between beauty and understanding — was David Charny’s defining quality. From the time we met, as students on this journal, David would cast his head at a slight angle when urging himself deeper into the bottoms of his own knowledge; his otherwise vibrant eyes would become distant as he withdrew from the material world; and you would stand, watching mind folding inward upon mind, startled to discover that thinking could be represented by action in so physical a form. When David rejoined you, it was with an explosion of intellectual energy I can best describe as incandescent. As if ideas were molecules — made up of atoms of history, and culture, and literature, and economics, and law, and theory in various forms — and David had discovered the essential crystalline structure of this entire mass and converted it into energy itself. Thinking was a fusion reaction for David. Everyone I knew was enraptured to witness this process, once they had come to look for that characteristic turn of the head and the immersion into some private world of thought thinking itself pure. And even in that young, competitive environment, it gradually dawned on you: this is the physical form that genius takes.

I wish I could offer you a corpus of writing and let you directly experience traces of this brilliance. But those traces are not fully captured in his published work. Even with a lifetime, I doubt they would have been. Partly, David had to be experienced in all his passionate immediacy; print does not convey the excitement with which David would leap from his chair to a blackboard to rapid-fire off five or six

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points, always in nearly illegible scrawl. But partly, David simply did not care all that much about publication and the accompanying benefits (or risks?). Manuscripts had to be wrenched out of him by friends, whether in his days as a student, on the eve of his tenure, or in the years that followed. Several dazzling and essentially finished essays have been awaiting publication for years. The reason is not that David was a perfectionist who tinkered endlessly with the fine details; he wasn’t. The reason is that David was motivated by the ecstatic intensity of thought itself, by thought for its own sake, and by little else. He was not out to change the world, or even a few judges, with his writing — though in the last few years, his writing began to express increasing social and political anger. He did not think in order to write; he wrote only in order to think. And he thought insistently about a staggering range of things: math theory, music theory, comparative corporate governance and comparative labor policy, contracting as a social practice, the economics of employment discrimination, the theorists he had long revered, Heidegger and Arendt, or had re-discovered more recently, such as Leo Strauss, or the history of theories of ideology, of sexuality, of commercial trading practices — any effort to draw up a list is only embarrassing to him. All this came as naturally as breathing to David: an elementary school friend of David’s, who had decided to run for a school office when he and David were eleven or so, told me that David had crafted a memo, based on Machiavelli’s The Prince, on how to win the election. But when a set of ideas had exhausted itself for David, he moved to the next one, heedless of whether he had a nearly finished text in hand.

Yet if you want to know David, there is really only one text with which to begin, and that is his haunting, nearly perfect essay, Economics of Death. In this essay, David explored two concerns that figured prominently in much of his work: the nature of rationality and — particularly in his later works — the notion of freedom. Perhaps David was struggling to make sense of these concerns in his own life, as is so often the case with what we write. No one thought more analytically than David; his mind was drawn toward understanding complex legal regulatory structures (the more complex, the better) and the behaviors these incentive structures induced. To that extent, David loved the systematization and clarity of economics. But David was too steeped in culture, in history, in literature, in life, to think that behavior in vast arenas of choice could be understood or predicted in material terms, or

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2 As an example, see David Charny, The Employee Welfare State in Transition, 74 Tex. L. Rev. 1601 (1996).
in the constrained materialism of much economic theory. To that extent, David loved the richness and the complexity of the humanities. Early in his career, David sought to blend these disciplines by exploring in an abstract vein how formal law and social norms might interact to regulate behavior; the result was theoretical work that framed much of the applied scholarship on these issues that followed.\(^3\) But in later years, David’s writing drew more directly on his personal experience — despite his own intensely private nature — and now the result was a more profound, and more bleak, view of law and culture. Invoking the example of same-sex marriage, David came to see the culture underwriting law as so riven with irresolvable conflict that, he pessimistically confessed, “[o]ur situation is very much that of the ‘war of all against all’ in the Hobbesian” sense.\(^4\) An exquisitely sensitive person, David concluded that shared reasons could only be grounded upon empathetic understandings across cultural groups; yet he believed such understandings did not exist in our circumstances and could not be reasoned into existence. An exceptional rationalist, he had lost his faith in the power of pure reason. And thus he distilled his view of law — and of life, I think — into the following, utterly arresting thought: “Modern legal thought and practice require both an unthought reverence for what is, and an equally unthought, but quite ruthless, determination to destroy everything that threatens the practices to which one is committed.”\(^5\)

David’s essay, *Economics of Death*, draws its power from precisely that determination. At one level, the essay is among the most effective, concise methodological exemplars I know of the critique of economic approaches to public policy, at least as economics is deployed in certain prominent strands of contemporary legal scholarship. It is a review of yet another Richard Posner book that applies to yet another social problem the methodology of narrow rational-choice behavioral prediction to reach yet another familiar conclusion about why government action — even public education efforts — will only make the problem worse. Here the problem is AIDS, and public policy analysis must come to terms with the behavioral logic underlying conduct that spreads the disease. David’s complaint is not the more familiar one about applying the rhetoric of calculative choice to issues of this sort. What makes the review so powerful is its demonstration, from **within** the tenets of economic theory, that the book — and the genre it exem-


\(^5\) *Id.* at 33.
plies — is a "sterile exercise" in economics precisely because the theory cannot yield determinate predictions and because its self-referential understanding of behavior is inattentive to what less shallow academic scholarship, and even popular writing, have taught about "the complex moral psychology" and actual patterns of behavior involving sex, desire, and the risk of AIDS. Nearly every sentence is withering, because each is so analytically pointed or so exquisitely learned; to the conventions of polite preliminary praise, David Charny conceded not an inch.

The Economics of Death is thus itself an act of expressive freedom (as are many of David's last essays, in my view). But at another level, it is also a meditation on the meaning of freedom in the face of despair. Reflecting on the behavior of at-risk men, David wondered aloud in this essay what behavior was rational, and what behavior was to be expected, in the face of "fatigue and depression," "the continuous anxieties of precaution, [and] the sense of despair and worthlessness that naturally follows the death of most of one's close friends." Might the meaning of freedom for such a person not be changed, if his "utility from living" were diminished by despondency at the death of his friends, by "the extinction of the social bonds that give value to life," and by "the contempt of society for his suffering and his 'lifestyle'?"

And how much does freedom depend upon culture? If the stigma on AIDS and same-sex relationships were reduced, David asked, how much would increased quality of life change "rational" behavior, including by making individuals more willing to act in self-preserving ways? Hardly a stranger to complexity and contradiction himself, David pressed us to struggle to understand behavior, in this setting and others, along all its relevant psychological and cultural dimensions.

David would have resisted the effort to impose any single meaning on his life or his ungodly early death. The living bury the dead, and David, more resolutely than anyone, would have insisted that we make our meanings for ourselves. To me, David was a source of relentless honesty in a world full of compromise, a purist for freedom of mind and word against too-ready efforts to constrict and constrain, and most of all, a friend full of beauty in a world that offered him much to despair.

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6 Charny, supra note 1, at 2058.
7 Id. at 2063.
8 Id. at 2060.
9 Id. at 2068.
10 Id.
The following tributes were given at the memorial service for Professor David Charny at Harvard Law School on October 26, 2000.

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Robert C. Clark*

David Charny was an extraordinarily valuable contributor to the health and vibrancy of the Harvard Law School. He was much loved by students, faculty, and staff alike.

The faculty members of the Law School are all different. When we remember those we have lost and wish to note their virtues, we stress different things for each one. I know how I will characterize David in general terms. As a professor he was a genius, a brilliant intellectual, a man of incredibly wide and deep learning, and a well-liked, fantastically successful teacher. In personal terms he was complicated — very complicated — but nevertheless delightful to know. As someone who knew David for a very long time, I am crowded by memories that illustrate these abstractions, and ask forgiveness for sharing a few.

He was a star student in my 1980 class in Corporations. The next year he appeared in my office and said he wanted me to supervise his 3L paper on norms of fairness in parent-subsidiary mergers. The experience of reading his drafts — there were many — and talking with him was an eye-opening one for me. Here was a student who was not only extraordinarily smart, I thought, but someone who had a breadth of learning that was rarely observed in even the very best law students. Frankly, it was more fun to talk with David about philosophy, neurobiology, literary criticism, and the world religions than about parent-subsidiary mergers. Most stimulating of all were our talks about music theory. David and I had a long discussion about whether it made sense to read Arnold Schönberg's *Theory of Harmony*. We both concluded that it did. He was the only other human being I had then met who knew that Arnold Schönberg had written a textbook on the theory of harmony.

When David eventually went on to the teaching market, it was very easy for me to join the small group — led by Phil Areeda and Paul Bator, among others — that was pushing his candidacy. He joined the faculty in 1984 and quickly made his mark as a superstar teacher. I have to admit he quickly went beyond the sponsoring ABC group — Areeda, Bator, Clark — and all the other faculty members who taught him. And as an assistant professor, David was always a

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delight to have at workshops. No one gave more astute and insightful comments on papers.

Soon after I became dean in 1989, I had a heart-to-heart talk with David. The focus was on his then-chief projects and working papers on nonlegal sanctions in commercial relationships and on hypothetical bargains as a supposed guide to legal policy — topics in which I also had a very intense interest. The gist of my remarks was that these papers seemed to me to be brilliant, but if he didn’t finish them up and publish them, he was not going to get tenure.

David’s reactions to this conversation both then and later on, or at least the reactions he expressed to me, struck me as amazing. He asked questions, he completed the papers, he suppressed his strong perfectionist side (which was so very large in one so smart and widely learned) enough to let go of them, and he was promoted amid great acclaim in 1991. Later on in our conversations, there were even occasions when he actually seemed grateful for the nudge.

You may ask, “Why did this seem so amazing?” There are two reasons. First, most assistant professors find an injustice, procedural or otherwise, when given such a message. And second, David Charny was never afraid to get mad and say so to his dean or anyone else. Indeed, one of David’s most memorable and endearing characteristics springs from this trait. In the nineties, David served on the entry-level appointments committee and in general devoted great energy to appointments. Not infrequently, he would read memos on candidates by colleagues or committee members and find them outrageously, indeed fatally, flawed.

Marie Douglas, a wonderful staffer who then ran the Academic Affairs Office, developed a code for David. She would call me up at the oddest times of the day or night and say, “Hello Bob, a weather alert: Hurricane David has just been here and is now moving north to the dean’s office.” Fortunately, David was usually reasonable and always instructive when we finally met. Later on, David became a quite trusted advisor to me on appointments matters precisely because he was so incredibly widely read, so diligent in actually reading and critiquing in depth the work of other scholars, and so fiercely independent of factional influences and party lines. I always wanted David to tell me what he thought of someone, even if I eventually disagreed. In his last years on the faculty, he played an extremely critical role in this dimension.

And there were side benefits to our conversations. One day, for example, David came in to talk about his teaching plans for the future. He saw on my desk a paperback collection of Buddhist scriptures and said, “Oh, do you still find time to read about the world religions?” I
said, "Yes, a little." He picked up this particular book and went ballistic. "Oh Bob, this is awful. You can't possibly read this translation of the Dhammapada!" Look, forget this trash. I'll bring in a copy of the only good translation by Carter and Palihawadana." And so he did; I still have the book. I treasure it greatly, in large part because it always reminds me of David.

Walking in the Arnold Arboretum on a beautiful morning this past fall, I was struck, as I sometimes am, by the amazing array of colors that we have here in New England. Just looking at the staggering diversity in the collection of trees — the yellows, the browns, the reds, the oranges, the greens, the grays, the thousands of different shades of each of them — made me think a lot about David and about the Harvard Law School faculty and student body. What a mosaic of types of people! And David was, in my mind anyway, identified with the brilliant, red sassafras tree. It just made the whole scene worth savoring, and at the same time I felt the force of an old poem by Gerard Manley Hopkins² that has always fascinated me, but now moves me when I apply it to David. It begins like this:

Glory be to God for dappled things —
   For skies of couple-colour as a brinded cow;
   For rose-moles all in stipple upon trout that swim;

And, with David in mind, I imagine the conclusion like this:

All things counter, original, spare, strange;
Whatever is fickle, freckled (who knows how?)
With swift, slow; sweet, sour; adazzle, dim;
He teaches us now whose genius is still in our midst.
Praise him.

Let us praise David Charny.

Gerald E. Frug*  

Immediately after David Charny died, people struggled to find words to describe him. "Genius," some said. "Brilliant," others of-

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¹ A text in the Buddhist canon.
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ffered. I sympathize with those making these efforts to describe David. I've tried to think of descriptions like that myself. But I also have a reaction against them. These words do not adequately capture for me what David was like. The reason for this is that one can't put David into some category — even a category of brilliant people or of geniuses — and suggest he was like other people with those qualities. David was unlike anybody anybody has ever met. He was an individual in a world in which individuality is hard to come by. These days people who want to react against conventional ways of living do so in a conventional way. They grow a Mohawk and dye it red; they select a style of body piercing; they wear their sweater half-on, half-off. David was not unconventional in a conventional way. When he wanted to read books originally published in Czech, he learned Czech to read them. There isn't some category of people who learn Czech — not German, not French, not Spanish, but Czech — to read a book. David did lots of things like that.

Being with David was always an unpredictable experience. One reason for this unpredictability was that, at least for the fifteen years that he and I were friends, David seemed to be living with an enormous amount of anxiety. I had no idea why he had this anxiety. I thought it was none of my business. But the anxiety was always present as a background to our conversations. Another reason David was unpredictable was that he seemed to have read and fully understood absolutely everything. I don't just mean that he was comfortable with Heidegger, Hegel, Foucault, and guys like that. He also seemed to have read the entire legal literature. David's breadth of knowledge and reading meant that his ideas could come from anywhere — he had it all at his command. A final source for David's unpredictability was that, more than anyone I have ever met, he demonstrated what a postmodern sensibility was like. David saw multiple sides of everything. Often he made a point — and then made the opposite point — in the same sentence. Last September some of us were discussing what music to play at his memorial service the following month, and I emailed his friend, Ahmad Tabari, for his suggestions. One thing he said in his reply was "not Janáček." I immediately thought: not Janáček? No one I know loved Janáček's operas more than David did. But then I realized that Ahmad was right too. I remembered David's positive reactions to Janáček; Ahmad remembered his negative reactions. Both were there at every moment.

The topics that David and I talked about most were music and art. David and I both loved twentieth-century classical music, particularly the classical music written in the last fifty years. He and I also both loved avant-garde art, the more avant-garde the better. But there was a big difference between David's reaction to this music and art and mine. David knew an astounding amount about all of it, and I know very little about any of it. Talking to David about music and art was
therefore an exciting, enriching experience. I learned so much from everything he said. Often, when we’d have lunch, he’d bring sheet music written for the piano in the last decade or two. We both played the piano. He’d open the music with great glee to show me the parts of the score he liked. I don’t know whether the reader has ever seen any of this kind of sheet music. A great deal of it is not written in notes; there is no conventional musical notation at all. I looked at the score and thought: where would you put your hands on the keyboard? When I asked David this question, he’d say: “Yeah, isn’t it great?”

The same cutting-edge sensibility, along with his unpredictability and his breadth of knowledge, made David the ideal colleague for more people at the Harvard Law School than anyone else on the faculty. Whatever you were working on — law and economics, post-structuralism, corporate law, gender studies, contract law, democratic theory — David had penetrating advice and suggestions for books to read. In fact, it was not just members of the faculty who profited from David’s breadth and intelligence. David was also a thoughtful reader of work written by his students, by teachers from other law schools, even by young people applying for teaching jobs. As a member of the law school’s entry level appointments committee, I regularly asked David to read a draft article by a job applicant. More often than not he had already read the article — and given his comments to the author.

It’s hard to know how to combine my memory of David with the word “happiness.” But I do have a very strong feeling that David was never happier than in the last few years of his life. There’s no doubt in my mind that the reason for this was Ahmad. David talked about his trips with Ahmad — and the other times they spent together — with an enthusiasm I had never seen in him. Just two weeks before his death, David and I had lunch, and he told me about the most recent trip he and Ahmad had taken to Europe. He described the things he loved: music festivals, art exhibits. But he was equally effusive about the hotels and restaurants that Ahmad had selected. David looked forward to more such trips. He should have been able to enjoy them. When he called me the morning he died, he sounded terrible — very short of breath. But he also sounded optimistic. “I’m getting better,” he told me. It’s unbearable that he didn’t. He lost too many of his happiest years. We’ve all lost too many insights into the topics we’re interested in — whatever they are.
Janet E. Halley*

As some of you know, I just joined this law faculty. I left another law faculty, abandoned a purposive, engaged, even delicious life there, to come here. I still marvel that I could give all that up. But it helps to remember the moment when I realized that I could have a purposive, engaged, even delicious life here; when I decided — not that I could give up my other job — that came later — but that I could want this one. It was a classic David Charny moment. He was responding to a paper by the Harvard philosopher Anthony Appiah, in which Appiah turned away from Hegel back into liberalism. Charny hunched himself down over the table, reached out his arms as if to caress the divide he was creating between himself and Appiah, smiled and almost sang as if he were delivering a love song while winding Hegel’s master/slave dialectic so tight that any possibility for liberalism — indeed, any desire for it — seemed utterly out of reach. It was a moment of intense, sensual pleasure in the reversal of a reassuring idea. I gave the whole institution credit for making it possible.

I hope you will forgive me if I insist that this performance was perverse. Now that word is typically used to condemn — and I’ve wondered why, every time I wanted to praise David, the word “perverse” came to mind entirely in the mode of eulogy. And so I went to the dictionary. Nothing helpful in the Oxford English Dictionary: from the very beginning of its life in English, the word has signified the mere negation of everything that “is right or good; [—] perverted; [that is to say] wicked.” But when I went back to the verb pervert in Latin, my confidence that David’s perversity was affirmative found some supports. To pervert, in Latin, meant “to overturn, upset, knock down; ... to turn about; reverse” — and how many times have we watched while Charny’s wicked intelligence did just that? For a wrestler or boxer to pervert was “to throw down, knock down” — and how many times have we beheld the fierce aggression of Charny’s engagement with an idea or an opponent he meant to vanquish? “To pervert” seems to take its Latin meaning from the idea of verto or vorto — to turn, spin, rotate, reverse — intensified by the adverb per

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1 THE OXFORD ENGLISH DICTIONARY 618 (2d ed. 1989).
3 A NEW LATIN DICTIONARY 1361 (Charton T. Lewis & Charles Short eds., 1907). There seems to be only one normatively loaded sense of the term pervert in Latin: “[a] to put out of shape, distort; [b] to misrepresent, distort, falsify ... [c] to divert to an improper use; to cause (persons) to deviate from the right opinion, corrupt, lead astray.” THE OXFORD LATIN DICTIONARY, supra note 2, at 1364. Wickenedness in the sense of evil doesn’t come into the Latin use of the word until Jerome’s Vulgate Bible, it seems, A NEW LATIN DICTIONARY, supra, at 1361 — a late, Christian perversion of perversation.
— thoroughly — an idea of intense activity, engaged opposition; not negation but assertion; not against life, but for vitality.

Having said that, I want to wrestle with one especially painful part of our situation as David's survivors: the possibility that he died of the effects of a virus that he did not know he had. Many of us have felt anguish over the apparent avoidability of his death; in this we protest his decision not to know. But his paper *Economics of Death* suggests that he had a *practice of not knowing* that was, perhaps, for him, affirmative, perverse in the affirmative sense of the word I have excavated for him.

That paper rebukes an economics professor and a federal judge — I'll call them P&P — for purporting to give an account of risky sex and AIDS policy based in *rational* assessments of personal and social *utility*. David criticized their exclusive grounding in rationality. And in the process he provided a footnote that we must now find utterly arresting. There he found fault with P&P's reduction of decisions *not to be tested* to rational utility calculations. "Those who decline to take the test generally cite four factors," David reported from the epidemiological literature: "fear that the test taking will not be anonymous; a belief that one is not infected; a perception that there is no benefit to the test (because there is no effective treatment for seropositives); and 'denial' — a wish not to know whether one is infected or not." The first three motives David merely reports. But he *rewrote* (he over-turned) the fourth motive, and thus provided a trace of his own investment in it. David put the term *denial* in scare quotes and then flipped it: the fourth motive is turned from an obdurate failure to face reality into a positive wish, a "wish not to know."

It was this *wish not to know* that David pursued in his engagement with Anthony Appiah, and in every one of the many intense discussions about ideas that he and I shared in the short year that I knew him. I left wonderful friends and colleagues at Stanford to come here, in part, so that I could have more and more of David's affirmative practice of not knowing.

That it may well have ended his life instead poses a terrible problem for my adoration of his perversity. But David's paper warns me not to underestimate the vitality — the turn, the reversal, the overthrow — involved in a wish not to know. Though he conceded P&P's point that one might rationally decide that one's sexual welfare would be maximized if one did not know one's HIV status, David insisted that "a host of other[]... hypotheses" can provide the terms of such a wish. And we find those hypotheses in the terms he used to mock

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5 Id. at 2069 n.38.
P&P for their *reductio* of sex generally to rationality and utility. Try if you can as you read from his paper to substitute every use of the term "sex" with the term "life":

[P&P suppose that s]ex is for pleasure, and people rationally make choices about sex to maximize that pleasure. . . . Rage, obsession, brutality, and jealousy make no appearance in the book’s numerous graphs. P[&P], in developing their argument, have no use for the West’s rich and moving meditations — from Euripides, Plato and Catullus to Freud — on the darkness and irrationality of sexual passion, on sex as a blinding, captivating, force — "Vénus toute entière à sa proie attachée," in Racine’s image.6

David mocked P&P for hewing to Benjamin Franklin’s maxim — "Rarely use Venery but for Health or Offspring" — and offered as a substitute D.H. Lawrence’s: "Never ‘use’ venery at all. Follow your passion impulse . . . but never have any motive in mind. . . . Only know that ‘venery’ is one of the great gods. An offering-up of yourself to the very great gods, the dark ones, and nothing else."7

In living out the wish not to know as he did, David perhaps offered himself up to the darkness and irrationality of life, life as a blinding, captivating force; to the very great gods, the dark ones. If so, he performed the reversal I loved so much in his relation to the world, on his own body. Here is a paradox that infuses his death with his life, confusing me about which is which; and that makes his death so like death — utterly beyond the reach of reason.

*Christine Jolls*

My gladness over participating in this tribute is tempered by sadness over the way it has been handled. Some authors have chosen to write — and the Harvard Law Review has chosen to publish — material that speculates, implicitly or explicitly, about the cause of David Charny’s death. I deeply believe that David, a person who was different things to different people but showed an intense concern with privacy to everyone who ever knew him, would not have wanted such material printed in the pages of the Review.

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6 *Id.* at 2058.
7 *Id.* at 2058 n.6 (internal quotation marks omitted).
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DAVID CHARNY

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David Charny was my teacher when I was a student at Harvard Law School. That was how I first met him — in 1993, eight years ago, when I took his employment law course as a third-year law student. In that same year, 1993, I experienced the only other time, besides this one, in which someone to whom I was very close died suddenly at a young age. That loss was of one of my closest friends from college when she was killed in South Africa.

At the memorial service for my college friend, I remember sitting through the first couple of speakers, all people she had known in South Africa, with an increasing sense of discomfort, even bewilderment. For they were describing an amazing person, but also a person who bore really only a passing resemblance to the friend I had known. Finally the sole speaker from Stanford, her long-time boyfriend, stood up, and a flood of relief washed over me as he spoke. For here, finally, was an account of the person whom I knew and loved and mourned for.

I had many similar experiences in the weeks after David’s death. Some conversations about him resonated with me completely; they were about the person I knew, and they seemed almost to bring him back. But other conversations were sort of bewildering in just the way that the South African speakers’ remarks were. I learned, for example, that David loved luxuriating at posh resorts — yet the David I knew lived in a modest apartment and made fun of certain law professors for their fancy Italian shoes. I learned also of the depth of his love for music, which I had previously viewed as just one of many sides of this polymorphic genius and not as something as special and central to his identity as it was.

The lesson I take from all of this is that we know people in different ways, and that’s why I was glad to be asked to describe my experiences of David as a teacher and a mentor to young scholars. For he was both of these things to me, and like many of those taught or mentored by David and now teaching at law schools or working in legal practice around the country, my life is very different as a result.

David was, to begin, simply an extraordinary classroom teacher. This was actually quite demoralizing to me as one of the other employment law teachers at Harvard Law School. For, although my classes were reasonably well-regarded, they could never measure up to David’s. More than once I’ve received comments on my student evaluation forms of the sort, “Great class, but not as good as I’ve heard Charny’s is.” But this was certainly not for lack of trying on my part; indeed, my whole goal in teaching — like the goal of many others taught by David — could basically be summed up as “be as much like David as possible,” although in truth that wasn’t realistic. For no one could really be like David. No one could match his adventurousness
in the classroom, his willingness to explore new ideas that he hadn’t fully planned out in advance, his utter lack of complacency in his teaching, and the sense of fun and adventure he brought to the task. It was a wild, exciting ride sitting in his class, an experience unmatched in the rest of my education.

David was extraordinary not only in front of a class but also one-on-one. He was, quite simply, inexhaustible in the help he gave to students on their writing. When I talked to students whose papers I was advising as a faculty member, I always urged them to consult with David because he was, in my experience at least, completely, literally incapable of devoting anything less than 100% of that great mind of his to anything he was reading. After he read a draft, it would be almost unrecognizable, covered with his underlining, marginal comments, cross-outs, exclamation points, question marks, and other notations in whatever color pen he happened to be using at that moment.

The pattern of diligent and brilliant oversight continued, for me, when I joined the faculty here. In the four years we served on the faculty together, David watched over me much like a parent figure, monitoring my progress and guiding me on hard decisions about teaching and research. He read and commented at length on multiple drafts of almost everything I wrote, and in a manner that was truly extraordinary even for the most devoted colleague. He talked to me in depth about my teaching and about what research projects I should take on. I know he did the same for other young academics around the country.

This was a person who loved ideas completely and entirely for their own sake. When it came to the pursuit of knowledge, there was not an instrumental bone in his body. His intrinsic love of knowledge was a big part of his exceptionalness as a teacher and a mentor.

For all of these reasons and more, David was the closest thing to a professional hero I have ever known.

Despite the fact that he is no longer here, I still think about him all the time — especially when I am writing, when I often feel I am writing for him as my audience, my intended interlocutor. In fact the triggers for thinking about him are many: teaching a topic that I had discussed at length with him last year; trying to work out an argument he and I debated before his death; seeing someone whom I associate with him; reading a commentary on an article of mine and observing the author of the commentary praise an argument that was initially due to David, a result of one of our many long and rich conversations about our work in the employment law area.¹

¹ See John J. Donohue III, Understanding the Reasons for and Impact of Legislatively Mandated Benefits for Selected Workers, 53 STAN. L. REV. (forthcoming 2001) (describing the argu-
I find myself chuckling when I reflect upon how much these triggers differ from the triggers for the college friend I mentioned at the beginning of this tribute — triggers that include hearing certain favorite songs that inevitably bring back memories of her singing along with a look of pure, child-like, joy and exultation in her face; although these triggers are so different from the triggers for David, the underlying feelings of elation, thrill, and excitement in the relationship, and a deep sadness that someone so special, so wonderful, so unique, died at such a young age, are exactly the same. It was such a great high to know David, and such a privilege, one that I feel now and also felt acutely while he was alive.

The other day I sorted my email trash and alphabetically, looking for a message from someone with a “Ch” name. In the process I came across a whole list of emails from “charny@law.harvard.edu.” (I am one of those people who never deletes her trash.) It was heartbreaking to read through them; there were messages going back a number of years, and one from just a couple of weeks before his death. They chronicled this relationship that I treasured and now miss so much, and they wonderfully encapsulated in summary form everything that I valued about it — the commitment to providing comments on papers no matter how busy he was, the conscientiousness with which he looked out for my interests and concerns, the willingness to engage deeply with my projects, the fun and sparkling dialogues we had about his own work and teaching, and his care in tracking down sources and papers that we had discussed. The emails are also striking in their style — perfectly capitalized, punctuated, and expressed, so different from my own email correspondence but, at the same time, a wonderful, comfortable shorthand for certain aspects of formality that always pervaded his behavior.

The emails reminded me of one of my favorite traits of David’s, one that I had not really thought about since his death. There was this odd, crazy mix of formality and informality about him; this was indeed one of his most endearing traits. While his emails to me were perfectly capitalized and punctuated, he would circulate drafts for workshops that were unpolished, filled with spelling mistakes and littered with snafus. Another example: He insisted (at least when I was a student) that students call him “Professor Charny” — and went so far as to refer to himself by this name in conversations with us — but would go out and drink wine (and scotch . . .) with us at the same time, still referring to himself, after much wine and scotch, as “Profi-
sor Charny." It was delightful and fun and zany all at once, and we all loved it.

David was, in short, a perfect friend, a lovable person, an irreplaceable mentor and colleague, and someone who, I think, will never be forgotten by anyone who crossed his path.

David Kennedy*

The memorial service is not David Charny's genre, and not only for the astonishing fact of his too early death. The memorial sums up a person, brings his community together, affirms a memory we can share. But David was not to be summed up, he fought that his world would be split, his communities separate; he struggled for the space between us all.

"Who is David Charny?" — however often we posed that question, he made sure it would have no steady answer, or that all of our answers would differ. Many things have been said already, we've heard about many Davids — let me speak a bit about the David I knew. Similar themes, different expressions.

I knew David as a colleague and friend from his first day on the job, when I took him out for what he always called my "forced march to intimacy." David came here as a boy really, and like many of us, grew up at the Harvard Law School. I remember the quotidian perplexed him terribly — how to buy a car, how to get rid of one, how to get a passport, where to get health care — but in our little world, the Harvard Law School of the eighties, all that mattered little.

He thrived in our loosely homo-social milieu. There were great ideas and great debates, terrific dinner parties and big fights. We walked on the beach and worked out and talked about everyone else. And about ideas, and politics and life. Of course, this was all long ago. Over the years, the men’s club changed around him, around us both. And he helped to change it — without David I fear we would not have Christine or Janet with us today.

David never lashed himself to the mast of an identity. I often asked David if there were yet any out gay law professors at Harvard, always sure I would get a spluttering guffaw. And, of course, as our lives, culture, and institution all changed, we kept finding ourselves laughing for new reasons.

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David talked often about his friendships, his loves, his family, his roots here and elsewhere. In the last weeks, I’ve learned more about his Pittsburgh family, who make his accomplishments and talents more comprehensible.

One time, on hearing colleagues lamenting the difficulties faced by someone who had been fired and would need to move his wife and children to a new city, David flashed with disdain. He offered no plea for the equal rights of the unmarried. Rather, he said, “Yes, it is hard to move your family, but harder still for a person like me whose family in Cambridge is the cute man behind the counter where I buy my foccacio, or knowing where to get the best martini and where to walk on that first spring day when young people begin shedding their winter clothes. That is hard to move to a new city.”

The memorial is about going forward, keeping David with us, celebrating and preserving those things of his, of him, which live on. But posthumousness was not his thing. Where David was a great man, it was an evanescent greatness. Where he was a great scholar, the mode and medium of his intellect was ephemeral. David read a lot, thought a lot, listened a lot. Played music a lot. Often when we talked about what to do, I would suggest he apply his CD collection to the study of law. But the collection wasn’t for that — and he had other ideas about law.

David wrote interesting things, and I’ve been reading them again. My favorite recent draft identifies a “yearning” toward action in American constitutionalism, and reframes legal argument as unreasoned political action. David writes: “the resistance of ‘liberal’ constitutionalism to . . . progressive legal initiatives remains the great scandal of modern American jurisprudence.” He proposes “renounc[ing] the liberal aspiration to speak in the voice of ‘public reason.’” He celebrates Justice Kennedy’s opinion in Romer v. Evans because, he says, it is “somewhat surrealist . . . famously bereft of clarity as to its rationale, its holding, or even its understanding of the state action which it purported to invalidate.”

Let us not fill in the “missing pages” in Kennedy’s reasoning, David implores. Let us leave it, he says, as a “magnificent refusal to pretend that it . . . was anything other than unprecedented.” Can we

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2 Id. at 4.
3 Id. at 30.
4 Id. at 30–31.
5 Id. at 31.
6 Id.
do the same for David? Let go, not of reason, but of the will to reasonableness, and with it the continuity of memorial narrative.

David left lots of unfinished drafts and fragments. Many are odd performances, at once within and without their genre. Faculty presentations of Potemkin projects never revisited. Earnest methodological excursus oddly bound by some almost random doctrinal convention, the demands of the stage where the paper premiered. In revisiting his written work, we would each have favorites.

But writing was less his genre than speech, in the classroom, the colloquium, the cafe. The ferocity of his thought, the strange twisted flash of his insight, the entertainment of his best analytic riffs often escaped the printed page, even as they were so stunningly on the surface of his conversation, alive in the intensity of his collegial interventions, or the sardonic bank shots of his classroom performance.

David could be incredibly funny. I often visited his classes where his wit, alongside the clarity of his exposition, the liquid flow of his commentary, and that odd head-cocked pause, were all part of the attraction.

I keep asking — David said so many brilliant things, why is it so hard to remember them? Of course, I do remember a few. The most transgressive moment in a long piece I wrote on comparative law, really my best idea on the subject, is something David said one day at lunch in the Hasty Pudding. For fifteen years, David insisted on reading whatever I wrote in draft, often sneaking an early copy from our secretary, and then taking me out for what always started as feedback and a drink and ended up an incredible head trip.

David’s mind worked in overdrive when reading your work, searching for an escape from sentiment or convention, a heat-seeking missile programmed for your vulnerability. Exploding unexpectedly, even, I’m sure, where he least expected it.

David could be frightening. He could be savage about people and ideas, see your weak spot and hurl himself toward it. But he could also show intense empathy for your projects, see you better than you saw yourself, reflect you back at twice your normal size.

David’s medium was performance, his metier an assimilation which was also in some way a perversion, a slight of hand, an ostentatious disappearance.

I don’t think David said things to be remembered. He said things to be, to assert — for himself as much as for others — the pleasure of his own existence. I remember his famous dinner declaration one night in a group at Biba, eyes flashing with irony and desperation, “but what about me.” Speaking to be there, himself, with us, by demonstrating his capacity to escape our conversational conventions.

We want now to remember his mind, his voice, his wit, but I want also to remember his body, his posture, his eyes, his smile, his explosive laugh. David had lots of body projects at different times — eating
only steamed vegetables, running, lifting weights. Excess overlapping abstinence. And sometimes he was pretty oblivious. For years he wore the same khaki trousers, blue shirt, and striped tie until one day all 140 students in his contracts class dressed exactly the same. It took him a good half hour to notice.

From the first, David was a hard man to love. But I’m finding he is harder still to lose. Harder because however close we were, he escaped me. Because whatever was best in him was somehow not meant to survive him.

David was a wild and crazy guy. And it turns out idiosyncratic people die too. But being idiosyncratic doesn’t kill. He might have lived. Why didn’t he get treatment? Why didn’t we drag him there? I don’t know.

As we’ve heard, David wrote about the economics of death and AIDS. It’s a hard read now. The piece offers no defense of pleasure over reason, passion over prevention. Instead, David imagines people and populations for whom risk taking is rational; prevention, diagnosis, and treatment unreasonable. He imagines people with multiple selves, at once calculating, fantasizing, “clinging to the notion of [their] own indestructibility up to the moment of death.” But also knowing exactly what was happening.

All I know is how intensely David willed his life. He struggled to be as he was. Just as hard as he struggled to change. You have to work hard to be this idiosyncratic, to keep your communities this distinct, your contributions this ephemeral. To remain plausible and inexplicable to so many for so long.

Still, this is a memorial service, our genre, not his. Summing up, coming together, pulling his impermanence into posterity.

What does David leave us? For me, primarily this — knowing we are part of a place, a city, a school, let’s call it a community, with room for a such a one. However inscrutable, David was part of our tradition. An intellectual and social tradition. Of weird and idiosyncratic thought, of refusing to conform without a twist, and refusing to rebel from without. We made room for him, socially, intellectually, institutionally. Many of us made room for him in our hearts. I’m proud of that.

Even if it was not David’s genre to remember, to continue, to memorialize, let it be ours.

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Richard Parker*

David should have been here for 30 or 40 years more. He should have been at memorial services for some of us — not we at his. But, then, David, as far as I know, didn’t go to memorial services. He might well have said he didn’t want one for himself. If so, he would have said it in no uncertain terms. But he would, I think, have been of two minds about it — at least two. That was what was wonderful about him.

I’ve known David for a long time — since his first days as a first-year student here. He didn’t speak up much in my class. Indeed, he once said he came here, rather than Yale, because he felt he’d be unlikely to shine in class. Taking exams, he said, was his strong suit. But, in fact, I got to know him long before he had to write any exams. I’ve thought, recently, about the late evening — early in the fall — when he knocked on my office door. He had, of course, come to denounce me.

I don’t need to tell you that he impressed me, right away, as brilliant. It may be worth adding, though, that he also struck me as . . . extremely . . . polite, even somewhat formal. Now, confrontation has always been the route to my esteem. I sensed, in him, a similar taste for dissonance. What, then, to make of the deferential manner? And what to make of the rather constricted position from which he launched his criticism of me?

He set us up in opposing camps. He identified himself as the “rationalist,” the “rigorous” one (I remember him using the word). In response, I affirmed the value of (what he called) “sloppy irrationalism” — a dramatic, imagistic approach to law. From my point of view, there was no question of trying — even of wanting — to convince him. What was fun was the oddly compatible incompatibility of the personae he had assigned us, the stylized contrast of beliefs and temperaments. It struck me that some sort of projection might be at work.

Through the rest of David’s time as a student, his agonistic energy seemed to me — as a matter of self-presentation — to subside into a groove. In the spring of his second year, I offered him a clerkship with Skelly Wright. He politely turned it down. He was a firm conservative, as well as a “rigorous rationalist” — and he wanted to work for a “sounder,” more conservative judge.

Then, during David’s first years on the faculty, I saw two things happening. Once, I found myself at a restaurant with him and a group from his Contracts class. I recognized then that he was becoming a natural teacher — able to be, and reveal, himself, and make him-

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self publicly vulnerable to others. At the same time — under the spell of untenured status — the rebelliousness I liked so much was obviously coming to a boil inside him. Together, these developments suggested (I thought) that he was liberating his public self — that he was about to set free his taste for dissonance, his brilliant conflictedness.

That, I think, is what happened. During the last decade of his life, David became truly magnificent. He became a magnificent proof of the virtue — the sublime virtue, I would say — of a certain kind of incoherence.

He continued to be an intellectual aristocrat. Yet he insisted he was more of a populist — more in touch with ordinary people, even spent more time in K-Marts — than any of the rest of us. He was still polite — but far from all the time. His commitment to “rigor” continued. His voice of authority became even stronger. He was still, surely, a “rationalist.” But (it seemed to me) his reason had become — not the servant — but the comrade of his passions — even the ones that were at odds with the other ones.

He was predictably unpredictable. I told him that an ongoing conversation with him was, from week to week, like playing pinball. You never knew what would light up next. He seemed less invested in “squaring” arguments he made with one another — resolving them into a package or an equipoise — than in plumbing each to its source and drawing from each its force.

David could have been a professor of anything. But law, I think, was where he “belonged.” He embodied the underground spirit of law — that there is not one truth, but many. No certainty: Only possibility. Only conflictedness.

Just as he saw things from many perspectives, so we saw him from many perspectives and, I’m quite sure, saw him differently. My own friendship with David was on the verge of coming full circle. During the last several years, I saw a lot of him. Since I never knew when he would materialize in his office, I looked forward to his coming by mine — which he did regularly.

A few years ago, he suggested we co-teach something. Last year, we decided to do it. Then, we got around to thinking about what it might be. I proposed that we address “sentimentality” and “cynicism” in argument. David was enthusiastic about that — and added “sublimity” to the mix. What might connect these three ideas? David — to my surprise — proposed that the connection among them was “the idea of America.”

Not too long before — as something of a provocation — I had put up posters in Hauser Hall that proclaimed “Show Your Colors America: Fly Your Flag Daily.” No one — except David — seemed to be provoked. He burst into my office, red in the face, looking like he needed to slug me. Patriotism, he said, was personally offensive to
him. Now here he was proposing a seminar about the "idea of America."

Of course, we expected to disagree about much of this. I enjoyed previewing for him the class we'd do on Norman Rockwell. He seemed to grind his teeth. But then — without missing a beat — he evinced interest even in Norman Rockwell and in the rest of (what he called) the "popular culture crap" I would assign, along with (what I called) the "fancy stuff" he would assign.

From my side, this was going to be a chance to revisit the question of "sloppy irrationalism" with which we'd begun our friendship. This time, the deepest dissonance (I felt) would not be between us — but within beliefs and temperaments we had in common. Whether that's how it would have been, I don't know.

But when there's a knock on my office door, it's still possible to imagine, for a second, that there he's going to be: Looking a little like a middle-sized bear. Walking just a bit from side to side. Head lowered slightly. Asking — ever so politely, as he had twenty years ago — if I have a minute.

And then exploding into indignation about something or other.