

# INTERACTIONS AT WORK: REMEMBERING DAVID CHARNY

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When the *Harvard BlackLetter Law Journal* asked us to do a short piece on David Charny and an aspect of his work, we gladly accepted. Ever since our first-year contracts class, David was both a mentor and a dear friend. His unflagging encouragement and support gave us the courage, not only to seek entry into the legal academy, but to write about issues we care about. On more than one occasion, when others advised us to refrain from working on topics that might cause discomfort to those who were voting on our futures, David told us to stick to our guns. Causing discomfort, especially to senior faculty members, was something that David worried little about. If anything, he would say, causing discomfort was a sign that one was saying something important, something meaningful, something that needed to be said. In fact, that is precisely the standard David demanded of academic work—that it be important, that it be meaningful, that it reflect passion.

David was a brilliant writer and an intellectual genius. We describe him this way even in an age of inflated rhetoric. Indeed, one of the things that gave us pause in accepting the request to write this piece was that we could not hope to do justice to his insights, let alone articulate them with the clarity and style with which he would have done. What caused us to proceed, however, was our need to acknowledge the debt we owe David, a debt that, even if David were here, we could never repay.

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This Essay briefly discusses the importance of David's work to discrimination theory. We focus on David's work on discrimination because this area of his scholarship has had the greatest impact on our own work. It should be noted, however, that discrimination theory was but one of a multiplicity of areas on which David worked and,<sup>1</sup> even within the area of

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1. David Charny, *Formalism in Corporate Law: The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999); David Charny, *The German Corporate Governance System*, 1998 COLUM. BUS. REV. 145; David Charny, *Illusions of a Spontaneous Order: "Norms" in Contractual Relationships*, 144 U. PA. L. REV. 1841 (1996); David Charny, *Hypothetical Bar-*

employment law, was but a small part of David's broad interest in the relationship between employees and the governance of organizations.<sup>2</sup>

The essay proceeds in three parts. Part I outlines some of David's insights on discrimination theory. Part II discusses the influence of those insights on our own work. Part III concludes with a discussion of some of David's ideas for future work on discrimination and how those ideas, to some extent, comport with our own scholarly agenda.

## I. WORKPLACE INCENTIVE MECHANISMS AND DISCRIMINATION

As part of his interest in the governance of organizations, David spent a significant amount of time reading the economics literature on the structural features of organizations and, more specifically, on the ways in which organizations set up incentive mechanisms to motivate workers. To this end, David engaged the work of scholars such as George Akerlof,<sup>3</sup> Edward Lazear,<sup>4</sup> Sherwin Rosen,<sup>5</sup> Paul Milgrom,<sup>6</sup> John Roberts,<sup>7</sup> Bengt Holmstrom,<sup>8</sup> Robert Gibbons,<sup>9</sup> and Kevin Murphy.<sup>10</sup> These scholars helped to identify a number of structural characteristics that are commonly found across organizations, among them: job matching, promotion ladders, team production, tournaments, efficiency wages, and multi tasking.<sup>11</sup> At the time that David was engaging this body of work, the legal academic literature on discrimination either ignored markets or talked about them in their hypothetical, perfect, market clearing form. There was some discussion of market failures/adjustments, but that discussion was decidedly limited. It occurred to David that it might be interesting and

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*gains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991); David Charny, *Competition Among Jurisdictions in Formulating Corporate Law Rules: An American Perspective on the "Race to the Bottom" in the European Communities*, 32 HARV. INT'L L.J. 423 (1991); David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 375 (1990).

2. See David Charny, *The Employee Welfare State in Transition*, 74 TEX. L. REV. 1601 (1996).
3. EFFICIENCY WAGE MODELS OF THE LABOR MARKET (George A. Akerlof & Janet L. Yellen eds., 1986); George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543 (1983); George A. Akerlof & Lawrence F. Katz, *Workers' Trust Funds and the Logic of Wage Profiles*, 104 Q.J. ECON. 525 (1989).
4. Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841 (1981).
5. *Id.*
6. PAUL R. MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION, AND MANAGEMENT* (1992); Paul Milgrom & Sharon Oster, *Job Discrimination, Market Forces, and the Invisibility Hypothesis*, 102 Q.J. ECON. 453 (1987).
7. MILGROM & ROBERTS, *supra* note 6.
8. Bengt Holmstrom, *Moral Hazard and Observability*, 10 BELL J. ECON. 74 (1979).
9. George Baker, Robert Gibbons & Kevin J. Murphy, *Informal Authority in Organizations*, 15 J.L. ECON. & ORG. 56 (1999).
10. *Id.*
11. David introduced us to this literature in his spring 1992 course, Employment Law. This was our starting point for thinking about the relationship between the structure, culture and norms of institutions, on the one hand, and the experiences of employees, on the other. Though we did not know it at the time, this course was the seed to our thinking that there is relationship between *some* of the ideas in Critical Race Theory and *some* of the ideas in Law and Economics—that insights from these two schools of thought could be combined to tell a somewhat new story about workplace discrimination.

useful to theorize about how discrimination would manifest itself in organizations with the structural features that organizational theorists and labor economists had identified.

The move to conceptualize discrimination in the context of organizational structures was important. It had the potential to provide a more realistic portrait of how discrimination operated. By the 1980s, the problem of employment discrimination no longer derived solely from explicit animus. Take the case of race discrimination. Blacks no longer confronted “white only” signs. During this time, most institutions made clear that they were interested in hiring “qualified minorities”—that they were equal opportunity employers, that they were committed to race neutrality and colorblindness. This formal equality commitment made corporate America more (though certainly not entirely) accessible to people of color.<sup>12</sup>

The growth in the number of people of color entering corporate firms created a new set of discrimination questions, questions relating to retention and promotion. Chief among these questions were the following: Why are there so few minority and women corporate officers? Does discrimination explain why minorities and women are experiencing difficulty in breaking the glass ceiling? David wanted to answer these questions in terms of the organizational structures of institutions. His theory was that discrimination could manifest itself in, and simultaneously be obscured by, specific institutional arrangements. Consider for example, team production. Subtle biases (without conscious animus) can affect not only how teams are constituted but also how work is allocated within a particular team. Moreover, within any given team, determinations will be made about what kind of work best suits each team member—about who on the team will be “labor” and who will be “management.” It occurred to David that these kinds of determinations could have racially discriminatory effects.

The second important move David made was to push our understanding of discrimination away from a static model to a dynamic model. When David began to think hard about employment discrimination, it was, for the most part, conceptualized in the academic literature as a snapshot, or temporally finite, event: an employer made a job decision on the basis of animus (usually race- or gender-based).<sup>13</sup> For David, the animus driven employment decision was but a small part of the discrimination story. He reasoned that if there was discrimination, or even the perception of discrimination, employers and employees would likely modify their behavior to cope with it. His thinking was that the structural features of

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12. See Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (discussing the ways in which formal equality structures antidiscrimination law). See also Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1346–49 (1988) (arguing that while equal opportunity law lifted formal barriers to equality, it does not completely remedy racial discrimination).

13. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992); John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411, 1415–20 (1986).

the particular workplace would in part determine the nature of these coping mechanisms.

In what was meant to be only the first in a series of papers on the subject, David decided to focus on two structural features of organizations, Efficiency Wages and Tournaments. The high wages paid to associates at large law firms, in tandem with the up-or-out structures that characterized promotions to law firm partnership, appeared to emulate Efficiency Wages and Tournaments. David's friend and colleague at Harvard, David Wilkins, was simultaneously doing research on the experiences of black lawyers at elite corporate law firms; it was the numerous conversations between the two (often over multiple bottles of extremely good wine) that persuaded David to publish the ideas that he had been working on.<sup>14</sup> The result was a paper that he generously co-authored with one of us, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*.<sup>15</sup> The central argument is that the conditions under which Efficiency Wages and Tournaments were likely to be found (for example, contexts in which high-level jobs are scarce and monitoring employees is difficult) could and most likely would persist as an equilibrium solution.

The point is simple enough. In certain employment contexts—perhaps due to the nature of the work or the opportunity costs for supervisors—monitoring workers is likely to be both difficult and expensive. Because of the difficulties in monitoring, employers are likely to use alternative methods to create incentives for their employees to work hard. Among those alternative methods are paying Efficiency Wages and setting up Promotion Tournaments. In workplaces where one sees Efficiency Wages and/or Tournaments, therefore, it is likely that monitoring is difficult. Low monitoring translates to low information. And the lower the amount of information, the higher the likelihood that workers will begin to look alike.

With the foregoing in mind, assume that the employer is non-discriminatory. Recall that there is a scarcity of high-level jobs. To the extent that employees look alike in this context (let's say the employer perceives each employee to be average), they are similarly situated with respect to their vulnerability to termination. Put another way, they are fungible.

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14. David B. Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493 (1996); David B. Wilkins & G. Mitu Gulati, *Re-conceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998); David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999) (reviewing PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999)); David B. Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. FOR STUDY LEGAL ETHICS 15 (1999); David B. Wilkins, *Rollin' on the River: Race, Elite Schools, and the Equality Paradox*, 25 L. & SOC. INQUIRY 527 (2000).

15. David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for "High-Level" Jobs*, 33 HARV. C.R.-C.L. L. REV. 57 (1998).

But what if the employer has a taste for discrimination against Group A but not Group B? In this case, Group A members and Group B members are no longer similarly situated. Specifically, the former are more vulnerable to discrimination than the latter. The question now is, how will members of the vulnerable group—group A—respond to this context? More concretely, how are women and people of color likely to respond? David theorized that average minority or women employees would know that if they were perceived to be merely average, they would most likely lose out to the average white men. They would understand that, as between average white male workers and average women/minority workers, the institution will likely prefer the former. This awareness creates an incentive for average outsider employees to try and signal that they are not average but superstars. The point is not that superstar status insulates outsiders from discrimination, but that average outsiders may believe the status of superstar renders them less vulnerable to discrimination.

The significance of applying the foregoing observations to low information settings is that the setting may prompt the employee to utilize a signaling strategy. In part, the opportunity for signaling arises because an employee working within a low information setting will typically have a fair amount of discretion with respect to the nature of her workload—that is, the employee may vary the amount and quality of her work. David theorized that, within this context, an average employee who is interested in signaling that she is a superstar, may exercise skewed discretion. For example, such an employee might take large risks. She might take on too much work or assume a leadership position on a project for which she is not yet ready. Whether and to what extent outsider employees (a) engage in this signaling strategy and (b) make skewed choices because of it, are open empirical questions. What David demonstrated was the incentive for the former and the extent to which it could reasonably lead to the latter.

As previously noted, David's observations are relevant to the world of large corporate law firms. The skew towards taking high-risk gambles is especially likely in settings where workers are not able to exhibit superstar standing by simply logging more hours—for example, corporate law firms. The relevance of David's theory to the experiences of lawyers was the subject of much conversation between David and David Wilkins. As mentioned, at the time, the latter was doing work on black corporate lawyers. Not surprisingly, each influenced the other. One of the many sad things about David Charny's untimely death is that the project that he and David Wilkins often talked about doing, was never completed.

## II. WORKING IDENTITY AND CONVERSATIONS AT WORK

Having provided a brief indication of how David was thinking about discrimination in terms of the structure and organization of the workplace, we now discuss the ways in which our own work builds on David's insights.

Recall that one of David's insights was that it is likely employees will respond to perceptions of discrimination in the workplace. In our paper *Working Identity*,<sup>16</sup> we attempt to provide specific examples of the nature of these responses. Consider the following hypothetical: Imagine an employer who values (and promotes) employees who are hard working, team oriented, and loyal. Assume also that the nature of the job is such that these qualities are difficult to observe. Employees who wish to be promoted have an incentive to take extra actions to demonstrate that they have the qualities the employer values. This incentive is especially strong within an institutional context in which the employer is making decisions for scarce promotion slots. Assuming the existence of this incentive, the pertinent question now is, how will the employee respond? In other words, what kinds of strategies will she employ? The possibilities are numerous. For example, in order to show that she is a hard worker, the employee might stay later at work than she needs to. To demonstrate collegiality, she might refrain from criticizing the firm's institutional policies. To show that she possesses a team-spirit orientation, she might attend every firm social event. The list of "good-quality suggesting activities" goes on. The point is that such actions are geared primarily towards signaling. Consequently, they have little value in terms of the organization's bottom line productivity.

Now, consider an outsider employee in the above described environment. This outsider employee, a Latino, perceives that his employers hold certain negative stereotypes about Latinos: they think of Latinos as being lazy, self-focused, and obsessed with identity politics. Assuming that this Latino wants to be promoted, there is a strong incentive for him to undertake the kinds of signaling activities discussed above (staying later at work than necessary, attending social functions, etc.). We say "strong incentive" because the negative stereotypes intensify the incentive system. Because of these stereotypes, the Latino employee will have to do more than signal collegiality. He will also have to negate the presumption that Latinos are uncollegial.

*Working Identity* discusses the various kinds of extra identity work that outsiders often perform as a routine matter. Although much of this work is geared towards negating stereotypes, it has a more general aim: to comfort insiders (e.g., whites) about the outsider's identity (e.g., the fact that the outsider is black). The discussion led us to five conclusions: (1) there is a large amount of extra identity work performed by outsiders as a result of perceptions of discrimination, (2) this work is a cost of discrimination because it derives from negative identity stereotypes, (3) extant antidiscrimination law does capture this work, (4) the failure of judges to recognize that such identity work is being done can result in the denial of valid discrimination claims brought by those either not willing or not able to do adequate amounts of this work; and (5) this work, in addition to having opportunity costs, can often be wasteful, risky, and involve a perceived sense of identity-denial.<sup>17</sup>

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16. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

17. *Id.*

Both *Working Identity* and David's *Efficiency Wages* paper contained a common weakness, which David pointed out to us: in our attempt to move towards a dynamic conceptualization of discrimination, we focused almost exclusively on the behavior of outsider employees. This produced a somewhat static picture of the insider. In other words, even after reading *Working Identity*, one reasonably might ask: What about the behavioral responses of insider employers? Surely, their behavior is not constant?

*Conversations at Work*,<sup>18</sup> our follow up paper, directly engaged David's criticism by attempting to model the dynamics of project choice as an interactive process between employer and employee. Neither actor's behavioral responses are presented as static. The theoretical model is essentially the same as that discussed above. The goal, however, was to more clearly explicate the interactive process between employee and employer and illustrate how that process affects not only how the employer allocates work but also how the employee chooses work. To do so, we are more careful in specifying the project choice environment; the key additional specification being "multi-tasking."

A multi-task environment, one in which employees perform a multiplicity of tasks, is a common aspect of many high level jobs. Some of these tasks will tend to relate more directly to promotions and pay increases and others will interact less. Employees will be motivated to do the first set of tasks—"advancement tasks"—owing to direct incentives, (promotions and pay increases) and the second set—"citizenship tasks"—due to indirect incentives (the desire to show oneself to be a team player or loyal to the institution). The thesis of *Working Identity* would lead one to conclude that to the extent outsider employees perceive that, because of negative stereotypes, their firm believes they are less likely to be team players and less likely to be loyal, those employees are likely to take on more citizenship tasks. The more interesting point, and one that *Conversations at Work* develops, concerns a subset of citizenship tasks: lumpy tasks.

Lumpy tasks, as we define them, are those tasks that take up a lot of space (time and energy).<sup>19</sup> Doing lumpy tasks almost necessarily means the employee will be less able to do advancement tasks. For example, a lumpy task might be a particularly time consuming committee assignment. Outsider workers, though perhaps inclined to take on a small citizenship task, are unlikely to volunteer for lumpy tasks. After all, these hurt one's ability to do advancement tasks, which are more directly related to promotions. Furthermore, it is likely that admirable performance on lumpy citizenship tasks is invisible to the outside market (hence, providing the outsider worker with little market protection should the firm terminate her). Because of their less individually fruitful and more tedious character, employers do not generally wait for volunteers to carry out lumpy tasks. If they did, they would have no one. Instead, they make individualized requests of the following kind: "We understand that you are extremely busy with work. But it would be a great help to the firm if you

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18. Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103 (2000).

19. *Id.* at 130.

would take on this committee assignment." For any worker, the pressure to say yes here is significant because to say no (especially when it is not clear whether others have said no) is to signal being a non-team player. For outsider workers who perceive that there is already a negative presumption about their loyalty and team-orientation, the pressure to say yes is even stronger.

Under a system that allocates work through individualized requests, an important question to raise is: Who will the employer ask to do the lumpy tasks? If outsider employees are more likely to say yes because of the pro-active pressure to disconfirm stereotypes (e.g., to show themselves as loyal) and the reactive pressure not to confirm stereotypes (e.g., to avoid creating the impression that they are disloyal), it goes to reason that the employer will more likely ask the outsider. In addition, if the employer has a simplistic understanding of outsiders (e.g., that they fall into simple categories of "good" and "bad"), it might use the lumpy task request as a screening device to distinguish the good (or those willing to pretend to be good) from the bad. Furthermore, to the extent that the employer is biased towards insiders and has to decide among equals in requesting someone to perform lumpy tasks, the employer will allocate those tasks to an outsider. One reason for this is that employers know an employee's recurring performance of lumpy tasks has the potential to diminish that employee's likelihood of success due to high opportunity costs and relatively low bottom line productivity of lumpy tasks. The suggestion is that an employer's bias in favor of insiders will motivate the employer to protect the insider employees from being overly burdened by lumpy tasks.

An interactional understanding of the workplace buttresses the foregoing observations. The simple point is that to the extent outsiders experience an added vulnerability because of perceptions of stereotyping, that added vulnerability is likely to be exploited by employers. The end result is that outsiders are: (a) more likely to say yes to requests to perform lumpy citizenship tasks, (b) more likely to be asked to do these tasks, and (c) less likely to succeed as a consequence of saying yes to too many of these tasks.<sup>20</sup>

For David, the ideas sketched out above were interesting as thought experiments, but they merely scratched the surface of a rich area of inquiry. The following section notes three ideas for further research that came up in the last few conversations we had with David.

### III. IDEAS FOR FURTHER WORK ON INTERACTION

David's ideas for further research, as we remember them, fell into three categories: broadening the application of the interactional dynamic, supplementing the thought experiments with a specific kind of empirical work, and moving beyond the promotion and retention problems that had received attention thus far.

One question that often came up in conversations was how the interactional dynamic might explain non-workplace encounters between in-

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20. *Id.* at 140-41.



siders and outsiders. Contract formation was an obvious area of application, since it was an area in which David both taught and wrote. In contexts where interactional dynamics systematically disadvantage outsiders in asking for protective terms, protective defaults or mandatory provisions might be justified. Another area of application that interested us, and in which one of us is presently engaged, is the examination of outsider interactions with law enforcement officials. The notion here is that police/citizen encounters are constituted by an interactional dynamic in which a police officer's suspicions about a suspect shape whether and how the police will engage that suspect, and the suspect's suspicions about the police shape the nature of the suspect's response. This observation has profound implications for how we interpret the Fourth Amendment (e.g., the analysis used to determine whether a particular police activity constitutes a seizure of an individual).<sup>21</sup>

The second topic that often came up in conversation was the issue of empirical work. Thought experiments could be elegant, but they were of limited utility in the absence of empirical work. David thought that in-depth organizational case studies were probably our best bet in terms of a methodology to understand interactional dynamics.

Finally, the topic that we probably discussed the most was the need to study the experiences of senior outsider employees. Almost all of the attention in discrimination theory focuses on the hiring and retention problems. Once outsider employees are promoted (for example, to tenure or partnership), all is assumed to be okay. Anecdotally, however, it struck both David and us that all was not well with those who were promoted. Disproportionate numbers of these senior outsiders (primarily white women; there not being enough senior minorities to form much of an impression), seemed alienated, marginalized, and ultimately unhappy and less productive than they could be. It seemed worth looking to see whether the anecdotal observation turned out to be valid for those women, minority men, and other outsiders in the workplace who were promoted. And, if so, what was causing this? One question that we talked about was whether the promotion processes themselves might alienate disproportionate numbers of outsiders.

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David used to tease us that the two of us had taken more of his courses than anyone else. We are skeptical about that—David had a large number of disciples who, like us, were willing to take any course that he taught. This was one indication of the tremendous influence that David had on many of his students. The reasons why we followed David from class to class had to do with so much more than the facts of his brilliant scholarship and teaching. What drew us to him was his willingness to come down to our level and talk *to* us, the eagerness with which he shared his ideas with us, the time he took to listen to ours, and the extent to which he went out of his way to make us believe that we could do

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21. Devon W. Carbado, *E-racing Suspicion* (Apr. 2001) (unpublished manuscript; draft on file with author).

meaningful work. Harvard had lots of brilliant scholars and classroom performers (more of the former than the latter), but very few of them were teachers in the way David was. The magic that he had was in not only conveying ideas, but making his students believe that they could produce them too. And, contrary to what is often the case at Harvard and elsewhere in legal academia, David's magic was not reserved only for the golden ones who were anointed as stars right from the first semester in law school. David always made us feel like we were genuinely important to him, no matter whether we had the right clerkships, had attended the right colleges, or were on the Law Review. Some of the happiest memories we have of law school are when David would come over to our tiny student apartments for dinner, armed always with at least five bottles of expensive wine, and keep us laughing until the late hours of the night. And, while he was terrible about answering his phone or returning e-mails, he was always there when we needed a recommendation letter, advice, or comments on a paper. When we heard the news of David's death, it was horribly sad. Sad, not only because he was so dear to us, but also because he was such a bright star who would have given so much to so many more students. We loved him dearly. And we will always miss him.