

## **DISTINGUISHED JURIST IN RESIDENCE LECTURE**

### **COME, LET US REASON TOGETHER**

*The Honorable Kent A. Jordan\**

#### OPENING REMARKS

PROFESSOR JAMES J. BRUDNEY: Good Afternoon, my name is Jim Brudney, and I am Director of the Center for Judicial Events and Clerkships at Fordham University School of Law. On behalf of myself and Assistant Dean Suzanne Endrizzi, I am delighted to welcome you to this lecture by our distinguished Jurist in Residence, the Honorable Kent Jordan, who sits on the U.S. Court of Appeals for the Third Circuit.

Judge Jordan has had a distinguished career at the bar as well as on the bench. After receiving a B.A. from Brigham Young University in 1981, and a J.D. from the Georgetown University Law Center in 1984, he served as a law clerk to District Judge James L. Latchum on the U.S. District Court for the District of Delaware. Subsequently, he spent a number of years in private practice at a Wilmington law firm, focused on intellectual property, as well as corporate and commercial litigation. He also served as an Assistant U.S. Attorney for the District of Delaware, including as chief of the Civil Division in that office in 1991 and 1992.

Judge Jordan was appointed and confirmed to serve as a judge for the U.S. District Court for the District of Delaware in 2002, a position in which he served until 2006. At that time, he was appointed and confirmed to the U.S. Court of Appeals for the Third Circuit. He has served on the Board of the Federal Judicial Center and has for many years been an adjunct professor at both Vanderbilt Law School and the University of Pennsylvania Carey Law School. Indeed, he taught at Penn last evening before coming up to New York to join us at Fordham for this very special day. We have taken full advantage of his presence: Judge Jordan has met with representatives of four student groups, co-taught a Corporations class, will co-teach an Evidence class this evening, and has met informally with a number of faculty members.

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\* Circuit Judge for the U.S. Court of Appeals for the Third Circuit. These remarks were delivered on February 28, 2024, at the Distinguished Jurist in Residence Lecture held at Fordham University School of Law and hosted by the Center for Judicial Events and Clerkships.

And now, we are delighted to have him present his lecture on the timely and important topic of civil discourse.

Please join me in welcoming Judge Kent Jordan as our Distinguished Jurist in Residence.

#### LECTURE

JUDGE KENT JORDAN: I'm grateful for the opportunity to speak with you today. I thank Professor Brudney and all who have made my wife and me so welcome here.

One of the great things about having kids is that you can get truly candid feedback. A son of mine who was then in high school came wandering into my room once while I was working on a speech I was to deliver the following evening, so I said to him, "Do you want to hear what I'm going to tell them tomorrow night?" And he said, "Not really, but I'll listen if I can walk out when it gets boring." Feel free to follow suit.

Let me begin this afternoon by telling a little story. A few years ago, my wife and I went to a swim meet where the children of some friends of ours were competing. If you have ever been involved with youth swim meets, you'll know that they are lengthy affairs, with big stretches of time between when your own children happen to be in the water, so every meet I've been to has featured a snack bar where the kids can go and blow a dollar or two between their races. There's a lot of other things going on, like card games and flirting among the older kids and, of course, some earnest parental coaching at poolside.

On this particular occasion, I got a glimpse into human nature as I watched a bunch of kids who looked to be about six or seven, separated into their swimming lanes by those ropes on which alternating red and white plastic floats are strung, so you have what look like long, limp peppermint sticks floating on the water. The race was pretty short, but you could tell which kids were fast and which weren't, and which ones were taking it seriously and which weren't. Well, one of the not-so-serious ones was taking some half-hearted backstrokes and then rolling over and pulling himself along the rope for a bit until one of the coaches or timers would yell at him to get off. All the while, there was a fellow who was obviously his dad running alongside the pool yelling, "Go son, go! You can do it! Go, go!!" When the little boy finally got out of the pool, dead last, there was his dad, waiting for him with a towel and more encouragement. "That's okay, son. Good effort." And this kid gave his father a very grown-up, withering look of disdain, as if to say, "We both know what this is about," and then he demanded, "Where's my dollar?" Absolutely classic.

That was one of those great unscripted moments that struck me as very funny and very instructive. When I remember the "where's my dollar" story, I am strongly reminded that what motivates us matters. If all we are about is the money (Do people still say the "Benjamins," or, in the case of that snack bar-bound little swimmer, the "Georges"?),

then it may turn out to be hard to muster anything better than a half-hearted effort for what we are doing.

We can contrast that with the real-life George Washington, whose 292nd birthday we observed last week, and with Benjamin Franklin, and with others in the founding generation. I have the honor of serving on a court whose home base is in Philadelphia, and from time to time, while there for arguments, I walk to the famous Christ Church, four or five blocks from the federal courthouse. I like to soak up the history there. Two signers of both the Declaration of Independence and Constitution, Robert Morris and James Wilson, are buried there, along with two other signers of the Constitution, Jacob Broom (of Delaware) and Pierce Butler. In another burial ground nearby are five more signers of the Declaration of Independence, including Benjamin Franklin, who also signed the Constitution. I have a real feeling of reverence when considering these men and their families and compatriots. They bore terribly real risks to establish our country. When the signers of the Declaration of Independence wrote that they were pledging their lives, their fortunes, and their sacred honor, it was no idle promise. They really were putting everything on the line. They were motivated by much more than money.

So why tell you tales of a mercenary seven-year-old in a Speedo and of founding fathers who risked everything for greater freedom? Because what motivates us really does matter. There is a reason that the question, “What motivates you?” has become a standard inquiry in job interviews. It is a good, open-ended question that can test an applicant’s self-awareness and credibility, and maybe, just maybe, it will reveal something about their commitment to the cause being recruited for. I have come to believe that in forecasting the likelihood of success of a particular action, knowing the motives that drive the actors is a distinct advantage. And I want to suggest that the endeavor of our profession, which ought to be equal justice under law, will be aided and greater success assured if we can share at least this one motivation: a sincere desire to actually reason about, and maybe even through, our differences.

We are in the business of reconciling competing interests. Whether you came to law school with the goal of being a great trial attorney or a skilled dealmaker or a public policy expert or an effective political operative or a profound constitutional scholar—no matter what you had in mind in coming to Fordham—you have likely discovered by now that the law is fundamentally about dealing with differing needs and wants among claimants to scarce resources, whether those resources are physical things, like property, or intangibles, like privacy. We try to assess costs and benefits, to navigate multiple constraints, and to balance the various interests in play. In short, we try to reason our way to a just result.

If this sounds to you like something so obvious it didn’t need saying, I’d have agreed with you not all that long ago, but it seems to me that

the idea of reason itself is eyed suspiciously today. My object is not to be political here, at least not in a partisan sense; quite the contrary. I am rather trying to defend the idea that, no matter how fraught a problem is, there are better and worse ways of addressing it, no matter what your politics may be. Our job as lawyers should include modeling civil, rational, thoughtful, respectful, honest, and kind ways of approaching issues.

Anyone not in a coma is aware of the many contentious issues confronting us today. In no particular order, here is a short sampling: public health policy and the lessons to be learned from the pandemic; gun violence and Second Amendment rights; religious liberties in a pluralistic society; access to abortion and contraceptives in a post-*Dobbs v. Jackson Women's Health Organization*<sup>1</sup> world; gender and the complex tensions among parental rights groups, healthcare providers, feminists, and transgender youth advocates; the battle for favorable public perception and the moral high ground over the fighting in Gaza; immigration policy and border enforcement; climate and energy policy; and race and the meaning of "diversity, equity, and inclusion." I could go on and on, but, you'll be happy to hear, I won't.

Suffice it to say that each of these has gotten a lot of attention in the recent past and much of it has consisted of literal shouting. Even when the tone of voice is moderate, the language often is not, and you can almost see the heat waves rising off the rhetoric. Besides generally generating more heat than light, the one thing all these issues have in common is they affect and are affected by our laws. This is not a new phenomenon. Alexis de Tocqueville observed almost two centuries ago that "there is hardly any political question in the United States which does not sooner or later turn into a judicial question."<sup>2</sup>

That is true, and it lays a special responsibility on us. Lawyers in training, like you, no less than practicing lawyers and judges, should be ready and willing to work at understanding and helping to resolve or at least constructively engage with these and similarly contentious issues. And yet behavior in our educational institutions, online, and in the public square often raises the question now: Why are some people so averse to reasoning and civil debate? I'll cite for you just a few examples.

First, a few years ago, a student group at California State University, Chico set up a table with a sign saying, "I'm pro-gun. Change my mind."<sup>3</sup> It was a simple invitation to debate an important topic. In response, another student organization sent out a warning on social media, as

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1. 142 S. Ct. 2228 (2022).

2. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 441 (Eduardo Nolla, ed., Liberty Fund, Inc. 2012) (1835).

3. Katherine Timpf, *Student Group Concerned About Safety Because GOP Students Wanted to Talk About Gun Policy*, NAT'L REV. (Apr. 3, 2018, 5:57 PM), <https://www.nationalreview.com/2018/04/university-student-pro-gun-event-gets-content-warning/> [<https://perma.cc/RF47-5VSD>].

follows: “Hey folks! Content Warning [I interject here that I was surprised to not see the usual phrase “trigger warning,” but maybe that was too on-the-nose and too much of a trigger in itself, so “content warning” was the phrase chosen to say something scary was coming, but back to the warning]: Chico State Republican Club is hosting an ‘I’m pro-gun, change my mind’ event today . . . . Please be safe, avoid the area if you need and take care of yourselves.”<sup>4</sup>

Be safe?! Is there really so little respect and resilience on college campuses that the mere invitation to talk is met by fear for one’s safety and a desire to avoid being even in the presence of someone that doesn’t share one’s own views?

And speaking of contention springing from the Second Amendment, we have the example from last year of the Tennessee House of Representatives expelling Democratic Representatives Justin Jones and Justin J. Pearson for violating the chamber’s decorum rules. The two representatives, joined by another member of the house, protested on the floor of the chamber for reform of state gun laws, and they, along with demonstrators in the public galleries, caused sufficient disruption that Jones and Pearson were expelled last spring.<sup>5</sup> I don’t know whether the level of disruption within the House Chamber was sufficient to warrant the truly extraordinary step of expulsion. I wasn’t there and saw only snippets of interviews on the news. But, just as a practical matter, I was left wondering what the majority of the Tennessee House of Representatives believed it was going to accomplish.

If the aim was to silence those two legislators, it was a short-term victory because they were both handily reelected in special elections.<sup>6</sup> In the meantime, what might thoughtful engagement by all the legislators have accomplished? The protests were in response to a school shooting in Nashville only days earlier.<sup>7</sup> Could everyone have afforded people with opposing viewpoints a bit of grace in a time of high stress and grief, and, in so doing, have produced less rancor? Two Democrats in a very Republican chamber were not likely to move the needle much on gun regulation. But was there really no way for people to speak respectfully and listen to one another? I’ll repeat: I genuinely don’t know how extreme the provocation was, and perhaps expulsion really was the only

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4. *Id.*

5. Bill Chappell & Vanessa Romo, *Tennessee House Votes to Expel 2 of 3 Democratic Members over Gun Protest*, NPR (Apr. 6, 2023, 1:53 PM), <https://www.npr.org/2023/04/06/1168363992/tennessee-expel-3-democrats-house-vote> [https://perma.cc/7VT8-DVG9].

6. Vivian Jones, *Justin Jones, Justin Pearson Win Reelection Following ‘Tennessee Three’ Expulsion Vote*, USA TODAY (Aug. 3, 2023, 11:10 PM), <https://www.usatoday.com/story/news/nation/2023/08/03/tennessee-three-lawmakers-justin-jones-justin-pearson/70526404007/> [https://perma.cc/94TA-MP9Q].

7. Adeel Hassan & Emily Cochrane, *What We Know About the Nashville School Shooting*, NY TIMES (Sept. 13, 2023), <https://www.nytimes.com/article/nashville-school-shooting.html> [https://perma.cc/63FM-C4ZM].

way for the machinery of government to continue operating. But if respect for differences of opinion had been in greater supply, then maybe events might have played out differently.

Turning to the online world, I recently learned of a pitched battle involving the *Harry Potter* author, J.K. Rowling. This will show you how out of sync I am with popular culture. I was only vaguely aware that Harry's creator had fallen from grace in the eyes of many people and that it had something to do with her views on the importance of preserving women-only spaces. I had no idea of the level of vituperation that her online statements elicited. But I have family members who pay attention to such things, and one of them told me of a podcast called *The Witch Trials of J.K. Rowling* that came out last year. I listened to it in December and found it interesting, mostly for the surprising surge of anger that came pouring out at Rowling. She said things like trans-activism is "seeking to erode 'woman' as a political and biological class," and "[w]hen you throw open the doors of bathrooms and changing rooms to any man who believes or feels he's a woman . . . then you open the door to any and all men who wish to come inside."<sup>8</sup>

For our purposes today, I'm not focused on the content of her remarks; I am interested in the reaction to them. Some people probably pushed back in thoughtful ways, but what made news were the death threats. Yes, death threats. That is so extreme as to nearly defy belief. And that sort of reaction isn't confined to mobs after a celebrity. I know a fine judge who recently issued an opinion that was certain to elicit professional debate, but it also spawned death threats. Something is badly awry in our society when we sink to that. I'm in sympathy with the author Ian McEwan, who said that our "culture seems to have forgotten how to disagree, often threatening death against figures like J.K. Rowling, on issues about which they could be having discussions . . . . They have got to be worked out, yes, but are hardly worth a death threat."<sup>9</sup>

My last example of the "anti-reasoning" rampant today, and the one most directly applicable to law schools and law students, is the dissension surrounding an appearance by Judge Kyle Duncan of the U.S. Court of Appeals for the Fifth Circuit at a Federalist Society meeting at Stanford Law School last year. According to a report in a student newspaper, *The Stanford Daily*, the Federalist Society chapter at the law school "invited Duncan to give a speech on campus about 'Guns, Covid,

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8. *Political Views of J.K. Rowling*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Political\\_views\\_of\\_J.\\_K.\\_Rowling#Transgender\\_rights](https://en.wikipedia.org/wiki/Political_views_of_J._K._Rowling#Transgender_rights) [https://perma.cc/7VFP-NEFS] (last visited Apr. 3, 2024).

9. Jacob Stolworthy, *Ian McEwan Says J.K. Rowling's Transgender Views Are 'Hardly Worth a Death Threat'*, INDEP. (Oct. 10, 2022, 6:36 AM), <https://www.independent.co.uk/arts-entertainment/books/news/jk-rowling-twitter-ian-mcewan-trans-b2199172.html> [https://perma.cc/S9UD-VZFE].

and Twitter.”<sup>10</sup> That never really came off. As Judge Duncan later recounted in *The Wall Street Journal*, “When [he] arrived, the walls were festooned with posters denouncing [him] for crimes against women, gays, blacks and ‘trans people.’ Plastered everywhere were photos of the students who had invited [him] and fliers declaring ‘You should be ASHAMED.’”<sup>11</sup>

Ashamed of what? Some of the posters were directed at the students who had invited Judge Duncan, and they were supposed to be ashamed for even thinking that someone whose views are different from on-campus orthodoxy should be given a hearing.

Before he ever arrived, there was an effort to get the invitation to Judge Duncan rescinded. In an email signed by ninety-three students, the soon-to-be-noisy protesters said, “[W]e are writing to express specific concerns about the effect of bringing this person into our campus community . . . We respectfully request that you cancel your event or move it to Zoom.”<sup>12</sup> An Associate Dean at the law school “organized an alternative gathering space for students, which took place before the protest and speech . . . [and she] sent an email to [law school] community members . . . to inform them of Judge Duncan’s appearance on campus and make them aware of this ‘safe space.’”<sup>13</sup>

What followed when Judge Duncan went to the room assigned for the speech has, as you may know, become infamous. You may well have watched some of it on YouTube. The videos have been shared and viewed by a great many people, and the event generated a lot of news coverage. Protesters were shouting and otherwise disrupting the event. When Judge Duncan asked for an administrator to restore some order, the aforementioned Associate Dean stood up and, among her prepared remarks, said that the judge’s work “has caused harm,” that it “feels abhorrent,” and that it “literally denies the humanity of people.”<sup>14</sup> In a phrase that has gained notoriety, the Associate Dean, evidently speaking about free speech, asked, “Is the juice worth the squeeze?” Or, as she explained while gesturing at the assembled students, “Is it worth . . . the division that this causes?”<sup>15</sup>

I’m here to answer that question with an emphatic “Yes.” The juice is absolutely and unequivocally worth the squeeze. It is worth preserving

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10. Greta Reich, *Judge Kyle Duncan’s Visit to Stanford and the Aftermath, Explained*, STANFORD DAILY (Apr. 25, 2023, 11:39 PM), <https://stanforddaily.com/2023/04/05/judge-duncan-stanford-law-school-explained/> [https://perma.cc/QKN8-6HCX].

11. Stuart Kyle Duncan, Opinion, *My Struggle Session at Stanford Law School*, WALL ST. J. (Mar. 17, 2023, 2:59 PM), <https://www.wsj.com/articles/struggle-session-at-stanford-law-school-federalist-society-kyle-duncan-circuit-court-judge-steinbach-4f8da19e> [https://perma.cc/W2CK-LFBE].

12. Reich, *supra* note 10 (second alteration in original).

13. *Id.*

14. *Id.*

15. Duncan, *supra* note 11.

free speech and open, respectful debate. The alternative is repression and, sometimes, violence.

I don't think it's too much of a stretch here to reference a famous speech by Otto von Bismarck, one of the most consequential figures of the nineteenth century. Bismarck was a Prussian political leader and diplomat dedicated to the unification of German-speaking peoples into a powerful empire. I don't want to pretend to have some expertise in European history that I don't have, but you don't have to be an expert to have heard of Bismarck or his brand of power politics. In September of 1862, while Americans were slaughtering each other in a Civil War that sprang from the failure of civil debate to resolve momentous issues, Bismarck appeared before the budget committee of the Prussian House of Representatives to advocate an increase in military spending for wars that he accurately saw coming on the European continent.<sup>16</sup> He wanted unification, and he wanted Prussia to dominate the discussion. He declared, in effect, that the time for talk was over. He said, "The position of Prussia in Germany will not be determined by its liberalism but by its power . . . . Not through speeches and majority decisions will the great questions of the day be decided . . . but by iron and blood"—meaning by brute force.<sup>17</sup>

Too many people today are willing to abandon speeches and majority decisions—to abandon reasoning—and to resort instead to blood and iron. Real and metaphorical bullets, sticks, and stones are no substitute for reason, and telling someone that words are violence is really just a way of saying "shut up."

The kind of cancel culture and political correctness I'm denouncing is one kind of anti-reasoning, a particularly virulent kind that seems to be on the rise, which is why I've gone on at some length about it. Discomfort with reasoning is not, however, something new. Nearly fifty years ago, the text for my freshman English class was the second edition of a book called *About Language: Contexts for College Writing*.<sup>18</sup> It made quite an impression on me, and I have saved it for lo these many years, chiefly for its clear and concise section on "Logic and Persuasion." It's probable that some of my colleagues and a few—maybe more than a few—of the litigants who have appeared before me have thought that I need to look at that book again. But I did study that text, and I hung onto it because it really appealed to me.

One essay in particular struck a chord. It was by a University of Chicago Professor of English named Wayne C. Booth and is called, "*Now Don't Try to Reason with Me!*": *Rhetoric Today, Left, Right, and Center*.<sup>19</sup>

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16. See generally *Blood and Iron (Speech)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Blood\\_and\\_Iron\\_\(speech\)](https://en.wikipedia.org/wiki/Blood_and_Iron_(speech)) [https://perma.cc/MLN9-YYGL] (last visited Apr. 3, 2024).

17. *Id.*

18. MARDEN J. CLARK, SOREN F. COX & MARSHALL R. CRAIG, *ABOUT LANGUAGE: CONTEXTS FOR COLLEGE WRITING* (2d ed. 1975).

19. Wayne C. Booth, "*Now Don't Try to Reason with Me!*": *Rhetoric Today, Left, Right, and Center*, in CLARK ET AL., *supra* note 18, at 526, 536.



Though it dates a long way back now, it has continued to seem very current when I have occasionally reread it. Booth gave examples from politics, journalism, advertising, and academia, all in an effort to show that reason itself is often either overtly or covertly under attack. Then, after focusing on two examples from political speeches, he said,

I cannot really prove that these . . . rather special examples are in any way representative of right and left, or that their similar tendency to shout and chant rather than reason is representative of American rhetoric today. But I suspect that you have found, in your daily reading, enough that is like these . . . to bear out my hunch that there really is a predominance of irrational persuasion at work here.<sup>20</sup>

Pressing his theme, Booth then said, “My point is not . . . to indict either the left or the right, but to plead for what I take to be the very fragile twin values of honest inquiry and honest rhetoric.”<sup>21</sup> And that, my fellow students of the law, is exactly my point as well.

As someone who deals with rhetoric day in and day out, and to you who are now learning the specialized rhetoric of the law, I say in support of Professor Booth’s still relevant plea, “Hear, hear.” The spirit of honest debate and inquiry, which can lead to a genuine unity on some points and at least a thoroughly explored and narrowed range of disagreement on others, is something to be cheered and fostered whenever and wherever possible. We should recognize its importance and do our utmost to insist upon it. It happens in a stylized but productive way at oral argument in courthouses all over our country, but it can happen anywhere that people will be open to discussion. In the end, Justice Oliver Wendell Holmes, Jr.’s comment in dissent in *Abrams v. United States*<sup>22</sup> is worth remembering: “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .”<sup>23</sup> That is not a certain guide to truth—there are plenty of ideas that gain popular currency for a while but are misguided—nevertheless, Holmes’s observation is a helpful touchstone, and, as a statement encouraging the value of debate, it is excellent.

We need not be fearful to discuss hard questions in plain terms. Sincere and thoughtful debate can persuade, which is a really good thing—and I’m talking about *you* being open to persuasion here too, not just being the persuader. And, when debate does not persuade, it can enhance both commitment to earlier positions and the capacity to articulate those positions. I offer a couple of examples.

The first reaches back a few decades to a time when openly gay men and women could not serve in the U.S. Armed Forces. Homosexuality had long been a disqualification for military service, when, in late 1993, the Clinton administration tried to navigate the changing mores in our

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20. *Id.* at 535.

21. *Id.* at 536.

22. 250 U.S. 616 (1919).

23. *Id.* at 630 (Holmes, J., dissenting).

country by issuing a directive that applicants for military service were not to be asked about their sexual orientation.<sup>24</sup> This came to be called the “Don’t Ask, Don’t Tell” policy, and it was controversial.<sup>25</sup>

Among the responses that developed over time was a movement to prevent military recruiters from having access to on-campus job fairs and other recruiting opportunities. Many colleges and universities also took steps to eject contingents of the Senior Reserve Officers’ Training Corps from their campuses. These steps were justified as nothing more than the educational institutions carrying out their antidiscrimination policies. But Congress saw it differently and passed what was known as the Solomon Amendment.<sup>26</sup>

Originally sponsored by Gerald Solomon, a Congressman from New York, the statute declared that federal funds would not be “provided by contract or by grant to an institution of higher education . . . if . . . that institution . . . has a policy or practice . . . that either prohibits, or in effect prevents [the] operat[ion] [of] a unit of the Senior Reserve Officer Training Corps; or . . . [prevents] access by military recruiters for purposes of military recruiting . . .”<sup>27</sup> In short, if you kick out the military, you kick out all federal funding with it.

There were protests over that, of course, but holding true to de Tocqueville’s axiom, the real action was in courtrooms. And my own court, not long before I joined it, was at the center of the litigation. In 2004, a panel of the Third Circuit heard an appeal from an organization called the Forum for Academic and Institutional Rights (FAIR), an association of law schools and law faculty. FAIR had lost its bid in the U.S. District Court for the District of New Jersey to have enforcement of the Solomon Amendment enjoined as an infringement on First Amendment rights.<sup>28</sup> A panel of the Third Circuit reversed the district court and said that the amendment should be enjoined.<sup>29</sup>

As you may know or could easily imagine, a decision like that, with wide ramifications, rapidly went to the U.S. Supreme Court. In 2006, that Court reversed my court, declaring, “The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever

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24. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670–73 (1993) (repealed 2010).

25. See generally *Don’t Ask, Don’t Tell*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Don%27t\\_ask,\\_don%27t\\_tell](https://en.wikipedia.org/wiki/Don%27t_ask,_don%27t_tell) [https://perma.cc/589G-K2WH] (last visited Apr. 3, 2024).

26. See 10 U.S.C. § 983.

27. *Id.*

28. *F. for Acad. & Institutional Rts., Inc. v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003), *rev’d and remanded*, 390 F.3d 219 (3d Cir. 2004), *rev’d and remanded*, 547 U.S. 47 (2006), *aff’d*, 446 F.3d 1317 (3d Cir. 2006).

29. *F. for Acad. & Institutional Rts., Inc. v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), *rev’d and remanded*, 547 U.S. 47 (2006), *aff’d*, 446 F.3d 1317 (3d Cir.).

views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds.”<sup>30</sup>

At that point, the people supporting the position advanced by FAIR were, of course, unhappy. Yet listen to how a spokesman for the organization handled the legal defeat. Professor Kent Greenfield, a professor of law at Boston College Law School, noted for his corporate law scholarship, acknowledged disappointment but said, “[W]e’re encouraged by the fact that this is just a skirmish in a larger civil rights battle over the rights of all our students to serve our country. While this may be a setback, . . . we’re confident that in the long run, we’ll win that larger civil rights struggle” over the Don’t Ask, Don’t Tell policy.<sup>31</sup>

Now, I might take issue with some of Professor Greenfield’s views of corporate law, and I do think that the Supreme Court was right and that he was wrong about the constitutionality of the Solomon Amendment. But I’m 100 percent on board with how he and his colleagues approached their disagreement with that statute and how he expressed himself when their challenge to the law fell short. And he proved accurate in his prediction about Don’t Ask, Don’t Tell. After advocates for repeal did the political work of debate, persuasion, and wrangling votes in Congress, it was repealed as U.S. policy at the end of 2010.<sup>32</sup> No matter how one felt about the policy itself, the willingness to engage, discuss, and ultimately let peaceful political change take place was and is something to be celebrated.

Here’s the second example of respectful engagement, this one from a campus I regularly visit. Professor David Skeel is the S. Samuel Arsht Professor of Corporate Law at the University of Pennsylvania Carey Law School. Professor Skeel is a man of faith, committed to Christianity. His friend, Dr. Patrick Arsenault is, by contrast, a committed atheist. They met when Dr. Arsenault, then a post-doctoral candidate at the Perelman School of Medicine at the University of Pennsylvania, sent an email to thank Professor Skeel for moderating a public discussion on how faith and reason can be reconciled in daily life.<sup>33</sup> Their friendship prompted a story in *The New York Times* because it helped to shape a book of Christian apologetics that Professor Skeel wrote, titled *True Paradox*.<sup>34</sup>

As the Times reported it,

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30. *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60 (2006).

31. Military Recruiting on Campus and the Solomon Amendment, CAREER SUCCESS U.C. SANTA CRUZ, <https://careers.ucsc.edu/student/events-workshops/Job%20Fairs/solomon.html> [<https://perma.cc/VYA8-8JZP>] (June 30, 2014).

32. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (codified as amended in scattered sections of 10 U.S.C.).

33. See Samuel G. Freedman, *A Christian Apologist and an Atheist Thrive in an Improbable Bond*, N.Y. TIMES (Oct. 3, 2014), <https://www.nytimes.com/2014/10/04/us/a-christian-apologist-and-an-atheist-thrive-in-an-improbable-bond.html> [<https://perma.cc/EYK5-3G6G>].

34. DAVID SKEEL, TRUE PARADOX: HOW CHRISTIANITY MAKES SENSE OF OUR COMPLEX WORLD (2014).

[T]he true paradox of [the book] “True Paradox” is that the volume might not have existed at all, or certainly would not exist in its present shape and voice, without the secular scientist as its midwife. And that odd reality is testament to a rare brand of mutual civility in the culture wars, with their countervailing trends of religious fundamentalism and dogmatic atheism.<sup>35</sup>

The article went on to report:

“True Paradox” became a book of engagement rather than avoidance.

Even so, nothing that Professor Skeel wrote ever changed Dr. Arsenault’s nonbelief. What the book did confirm, though, was their shared value of principled disagreement.

“The thing that really sticks out with me,” Dr. Arsenault said, “is that in the culture wars, the rhetoric is acerbic on both sides. On the humanist side, there’s this tendency to view people of faith as not rational. And David is clearly rational. He’s just looked at the same evidence as me and come to a different conclusion.”<sup>36</sup>

Imagine that: engagement and principled disagreement. It can produce friendship and mutual respect, even over deeply divisive issues. With or without friendship, though, it forms the very foundation of a civil society.

Professor Michael Patrick Lynch, a Professor of Philosophy at the University of Connecticut, wrote a short volume called, *In Praise of Reason*, in which he observes that

a key principle of a civil society [is] that we owe our fellow citizens explanations for what we do. Civil societies are not necessarily polite or homogeneous; but they are societies that value reason-giving, inquiry, questioning, and hashing out one’s differences with others. In so doing, they take seriously the idea that there are better and worse ways of doing these things. If you give up on the idea that there are standards of this sort, you give up on the idea that giving reasons has any real point . . . . Skepticism about reason undermines our commitment to civil society . . .<sup>37</sup>

A commitment to a civil society through civil debate is what has motivated my remarks today and what I hope will motivate you as you study here and practice law in the future. Please don’t be like the “where’s my dollar” boy I told you about at the beginning. I anticipate you will have fulfillment and success in our profession, including financial success, but don’t let money be your sole or even your primary motivation.

Earlier, I alluded briefly to the Civil War. I want to finish with a thought about President Abraham Lincoln, whose birthday we also celebrated this month. He is the ideal model of commitment to

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35. *Freedman*, *supra* note 33.

36. *Id.*

37. MICHAEL P. LYNCH, *IN PRAISE OF REASON* 2–3 (2012).

reasoned debate in the face of intense divisions over law and public policy.

Lincoln rose to national prominence by engaging a political adversary, the famous and powerful Senator from Illinois, Stephen A. Douglas, in public discussion on the big issues of their time: slavery and states' rights. The image I'd like to leave you with today is of Lincoln the powerful debater, though not in the way you might initially suppose. It's not an image of Lincoln delivering his great speech in Peoria in 1854, answering Douglas's claim that slavery's spread was alright if it was a manifestation of popular will. It's not an image of Lincoln in 1857 in Springfield, responding to Douglas's defense of the *Dred Scott v. Sandford*<sup>38</sup> decision. It is instead of Lincoln standing in the audience while Douglas spoke, listening—not passively but attentively, respectfully, and at great length—to all that Douglas had to say, before Lincoln prepared and delivered his later, powerful responses that met, rather than avoided, his adversary's arguments. That is the essence of a civil society. I hope you never tire of your commitment to building and maintaining ours, wherever life takes you. Thank you.

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38. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.