

REMARKS TO WESTERN MASSACHUSETTS AWARDS DINNER
AMERICAN BOARD OF TRIAL ADVOCATES
JUNE 12, 2025 BY JUDGE MICHAEL A. PONSOR

I want particularly to thank Peter McGlynn for his very kind introduction and for the hard work he has done to organize this evening. Peter and I met briefly some years ago, but I've gotten to know him better in preparing for this evening. He has an extraordinarily rich track record as a trial lawyer. In fact, it would probably be a vast improvement on this evening if I just stepped aside at this point and let him have the podium to describe his top ten litigation war stories. Julia Nomberg of Bernkopf Legal has also pitched in energetically, and I am grateful to her.

I want very sincerely to thank the American Board of Trial Advocates for honoring me with its James N. Esdaile Award. I had the privilege of meeting both James Esdaile and his father, Newton Esdaile, long ago when I was a young lawyer starting out in Boston. They both had superb reputations and were gentleman of the of old-fashioned kind, of the highest order. It is, to me, quite humbling to receive an award with the Esdaile name attached to it.

The American Board of Trial Advocates, or ABOTA, is an impressive group, with about 7,500 members, all by invitation, and all with extensive experience in conducting primarily civil trials. For reasons I will get into shortly, strong, outspoken professional organizations have never been more important, and ABOTA is one of the best ones. This recognition means a lot to me.

At this point in remarks like these, it is customary to offer some funny story, joke, or anecdote – ideally something the speaker tells on himself or herself – to loosen things up. I have a number of those stories in my arsenal, and in normal times, about now, I would love to see if I could make you laugh.

But these are not normal times, and our country's situation at the moment is no laughing matter. Our democracy, our republican form of government, and perhaps most especially our legal system, are all at peril. As U.S. Supreme Court Justice Sonya Sotomayor recently pointed out, solidarity within the legal profession, and between lawyers and judges, has never been more important. Therefore, I wish to figuratively join hands with all of you here tonight and to talk about where we stand together.

A footnote first: What I am about to say is not intended to be, and I don't think will be, partisan, in the sense of seeking to shore up or undermine any political party or offer a statement on any hot button issue now before, or likely to come before, the courts. When a Republican president of the United States slams the Federalist Society and calls its board chairman, Leonard Leo, a "sleaze bag," who "probably hates America," we have moved beyond mere partisan issues, and we have entered a wider and more dangerous landscape. Our legal system has been woven, with great effort and at great cost, by men and women of all political persuasions. This system is precious. It is essential to our day-to-day happiness as individuals, and to our health as a society. But this system is not inevitable. It can be destroyed. It is currently under a deliberate attack, and we all have a responsibility to defend it.

Let me step back for a minute and put my remarks here into a personal context. I have been a judge since January 1984, more than 41 years, first as a U.S. Magistrate Judge, and since 1994 as a U.S. District Court judge. My turf, so to speak, has been the four counties of Western Massachusetts and its 100 cities and towns. My flock has been the approximately 800,000 people who live here. I have not been perfect, and I have made mistakes, but I have honestly tried all these years to dispense justice as fairly and evenhandedly as I could.

What is less public is that I have also been a novelist for many years, mostly a failed novelist, with several unpublished manuscripts sitting in my closet. My first novel was published in 2013 when I was 67. Two more novels have been published since then.

The contrast between dispensing justice and novel writing may seem jarring, but I think they fit together perfectly. As a lover of literature, and as a writer, I have acquired a cast of mind that sometimes gives as much force, as much credence, to scenes that have never physically happened, but that are imagined in strongly crafted narratives.

For example, personally, there are few experiences that I have actually lived through that can equal in vividness my memory of the scene in *Treasure Island* where Jim Hawkins has scurried up the rigging to escape the murderous pirate, Israel Hands. The wounded pirate, you will remember, is slowly climbing after him,

and Hawkins has his pistols – possibly useless due to wet powder – aimed at the pirate when he says, “One more step, Mr. Hands, and I’ll blow your brains out!” I feel, even as I stand here now remembering that scene, that I can almost smell the salty breeze and feel the tremor of the ship, tipped on its side in the inlet.

At least for me personally, studying fiction and trying to create it in a novel, is not a bad accompaniment for a life in the law. To me, our system of laws is a form of art. At its core, law is a kind of fiction, not in the sense that it is false or untrue, but because in the etymological sense we might call it “fictive” from the Latin verb *facere*, meaning “to make.” I believe that the basic precepts of our legal system are not to be found in nature, springing up spontaneously on their own, but rather are made – imagined – by human beings using the same areas of the brain we call on to create and enjoy a fictional narrative.

As a community embracing the law, we have invented the notion of a system of rules that can be agreed upon ahead of time and applied equally to all people, regardless of their numbers, or affiliations, or status. We call this “Equal Protection Under the Law.” We take this concept for granted, at least as an ideal, but it is in fact a fragile and courageous proposition, haltingly formed over the centuries at great sacrifice. In history, and in the world today, equal protection under the law is, actually, very rare. In many parts of the world, a person can get be harshly punished for even suggesting it. On the whole, the strong have told everyone else what to do, and if they don’t do it, they are killed, or they have their livelihoods stolen, or they are chased into the woods. Who says people deserve equal protection under the law? Why? Where does that idea come from?

The Fifth and Fourteenth amendments to our Constitution say that no one shall be deprived of life liberty, or property without due process of law. Who says? The rule of nature, as far back as Thucydides, is that the strong do what they will, and the weak suffer what they must. The powerful just take what they want. There is no process except perhaps the process of getting hit over the head if you object.

We as a community, and especially as a community within the legal system, hold up these principles of due process and equal protection by the sheer power of our continuing belief in them, nothing but the breath coming out of our upturned faces. That’s what keeps the system up. And the breath that holds up the basic principles that make the nurturing structure of law possible has no more concrete

reality than the breath coming in and out of Jim Hawkins's lungs as he watches Israel Hands clamber up the rigging with the knife in his teeth.

Our laws have protective structures that allow people to be who they are, unafraid. They say to people: "Go on, you are a free person. Go do your dance!" It has been a rare privilege these past forty years to play a role in protecting and maintaining our system of laws, which is, in part, nothing less than a shelter for humanity's deepest and sweetest dreams.

So where are we now? We have a national leader who hints, or claims outright, that he may ignore the law. We have a government that punishes people and institutions for expressing opinions, or taking actions, that are not strictly in line with the dominant ideology or that are personally offensive to the leadership. We have top government officials who, with a wink and a nod, encourage threats of violence against judges who do not toe the line. Many colleagues and sometimes their families are facing threats as I speak. As Chief Justice Roberts has said, without no accusation that he was taking a partisan position, "the rule of law is endangered." And, as Judge Margaret McKeown of the Ninth Circuit Court of Appeals has observed, Roberts "was not crying wolf." Our system of laws is in really danger.

We all have a responsibility to swim hard against this rising tide before we are swept away. I ask myself, well, what can I do? I answer myself, use your imagination, or in the words of my mother, use your head. Support organizations that are doing good and that are under pressure. Speak up in any way you can. Don't worry if you can't always do big things. Do small things. Small things count. At the moment, our country is being given an extended seminar both on callous cruelty and on indifference to the law. We are told now that empathy -- the ability to perceive, feel, and sympathize with another's pain -- is sign of weakness. In this atmosphere, *every* act of kindness however small, *every* act of generosity and compassion, even in our casual moments, is an act of defiance in the face of this heartless and dangerous trend.

Our legal system, paradoxically, has, on the one hand, the strength of iron. It protects all of us at this very moment from having people kick in those doors, round us up, and take us to some filthy detention center. But it is also gossamer, the insubstantial product of our creative imaginations and our continuing belief. It can

be blown away if it loses support. And make no mistake, there is fear in the air. When a Senator, a Republican Senator, like Senator Murkowski of Alaska says “We are all afraid,” it is time to take note and to stand up for our country and its values, in every small or large way we can imagine or concoct.

I appreciate your patience in listening to me tonight. Warm thanks again to Peter McGlynn and to ABOTA for this honor. Keep the faith. Don’t get discouraged, and don’t give up. Thank you.