University of Washington School of Law
Transcript: Associate Dean Calandrillo
Installed as Stone Professor of Law

October 22, 2009

Dean Testy: Good afternoon, and welcome, everyone. I am Dean Kellye Testy, and it is my great pleasure to welcome you all today. And I am so pleased that you can join us for the installation of Steve Calandrillo as the Charles Stone Professor of Law.

It is wonderful to be with all of you today, and I do warmly welcome you to this special event. I want to extend a very special welcome today to the many distinguished alumni from the School of Law who I see in the crowd. There are so many of you with us. And no surprise, many of you are here for your former professor, Professor Calandrillo.

I also want to extend a warm welcome to the board and committee members from the Law School Advancement Committee, from the Washington Law School Foundation, and also our Law School Alumni Association. In addition, I welcome all the members of our legal community and our academic community here in Seattle. And particularly tonight, I want to extend a special warm welcome to the Perkins Coie firm.

This professorship was established by the late Evelyn Egtvedt. She was the wife of Clairmont Egtvedt, an early president of the Boeing Company. And Evelyn established this professorship, through a bequest from her estate, in honor of her attorney, Charles I. Stone, formerly of Perkins, Coie, Stone, Olsen, and Williams, and now, of course, Perkins, Coie. Her generosity has made possible four endowed professorships for the School of Law.

The importance of named professorships to the law school cannot be overstated. They bring distinction to our institution as one of the world's most accomplished law schools, elevating our reputation for innovative and interdisciplinary legal scholarship and research.

Professorships are vital to our ability to attract, and also to retain, the most notable scholars from around the world--scholars like Associate Dean and Professor Steve Calandrillo, himself a wonderful example of how teaching and scholarship both merge and mutually reinforce each other.

Professorships enable our faculty to become international ambassadors for our law school through the critical support that these professorships provide, to support faculty travel and so that they can deliver their scholarship all around the world.

Further, I also want to note today that endowed gifts such as this one have the blessing of living many, many lives. Living on in perpetuity, they're an opportunity to celebrate those that are important in our lives, to secure their legacy, and to leverage their contributions to law and justice so that they are increasingly magnified over time, enriching law and enriching the society that law serves.

The School of Law is grateful to all of our many supporters. And of course, tonight, we especially extend our thanks to Evelyn Egtvedt and to her family.
With us here today is Mr. Shan Mullin, who will speak more about Charles I. Stone, the lawyer, the friend, and the inspiration for the establishment of this professorship.

Shan Mullin is a senior partner in the Perkins, Coie law firm. He has more than 45 years of experience representing clients and international business transactions and joint ventures, technology licensing and franchising, mergers and acquisitions, and general corporate law.

Shan is a very active member of our alumni network--in fact, a double alum of both the law school and then a business undergrad. And he is certainly a very staunch supporter of this law school. He most recently served on our dean selection committee and did an extraordinarily fine job, I must say.

[laughter]

**Dean Testy**: Seriously, Shan has been incredibly helpful to the School of Law in just so very, very many ways, and has certainly warmly welcomed me to this community, for which I'm grateful. Please welcome Shan Mullin.

[applause]

**Shan Mullin**: Thank you, Dean Testy. And I do say that was a great result from our efforts. We had a number of faculty members within the law school that participated, and they did a wonderful, wonderful job. My respect for them grew, including Steve Calandrillo, who was a member of that search committee as well. Anyway, I'm just delighted that I was invited to be here for this program.

When you go back, I was very privileged to be mentored by Charles I. Stone. And we called him Chuck, so I'll continue to call him Chuck here today. He was in the firm, of course, when I arrived, as a young associate graduate of this law school. He was kind to me from day one, and that continued throughout, for 27 years that we were together in the firm.

I'm also going to mention that I was privileged to become acquainted with Clairmont Egtvedt, whose wife made the gift, as Dean Testy mentioned, I'll mention.

Let me just tell you a little bit about Egtvedt. She established these professorships, as Dean Testy said, in honor of her lawyer, Chuck Stone. Her husband, Clair, was also involved in this. He predeceased his wife, but he was also a great friend and admirer of Chuck Stone's.

Brief background on Clair. He was an engineering graduate of the University of Washington. And in 1917, he joined the Boeing Company. This is interesting, because the Boeing Company, our firm incorporated in 1916. So he was there from the beginning. And his career at Boeing was a very successful one. He rose to become the president. And then, after he served as president, he became, for many years--I think 25 years--chairman of the board of directors of the Boeing Company.

And I had the pleasure of meeting him as a senior associate, responsible for a lot of the corporate legal work of the Boeing Company, including running the annual shareholder meetings. And it wasn't all that exciting, but it was good to meet people like Clair Egtvedt and to be able to say today I knew him and I admired him. And he was, again, like Chuck Stone, a very personable, friendly person. He was not the staid director and isolated. A very nice person.

I mentioned a moment ago that I was privileged to have Chuck Stone as a mentor and friend. The sad part was that in 1985, while he was arguing a case in Tacoma before the State Court of Appeals, he passed away. He just collapsed in the courtroom, and we lost him.

On the other hand, a lot of us thought about that and said, Well, Chuck loved practicing law. He died with his boots on. Maybe it was OK.
[laughter]

Shan: So that's how we addressed it.

He was 72 years old. And his passing was a great loss, of course, to his family, but it was also a great loss to our firm, and a great loss, I think, to the profession and to the community at large.

He was a 1939 graduate of this law school. He was a very personable and very natural leader. For example, professional: he was active in committees, the Washington State Bar Association, and then was selected to serve as its president from 1972 to 1973.

He was also strongly committed to the community, and that resulted in his selection to be the chair of the United Good Neighbors Fund, which we all know today as United Way of King County. Further, he was a fellow of the American College of Trust and Estate Counsel, and he wrote and lectured extensively on matters of probate, trust, and estate planning throughout his career.

Chuck was a major, major player in our firm leadership. He helped our firm grow. When I arrived, we had one office in Seattle. We had 26 lawyers; I was number 26. And he helped the firm grow by saying, "Hey, we've got to expand. Our clients are moving out. We need to move with them."

So we opened offices in Washington, DC, then Anchorage, then Bellevue, and then Portland, while he was with us. Following his departure, his death, we've added 10 more, but that's another story.

He was influential in terms of our firm being committed, not only to our clients interest, but also the well being of the communities where our offices are located.

Further, he's very interested and supportive of the younger lawyers in the firm, such as me, and their families. He, and his wife Naome, hosted a very enjoyable, annual, summer event for the associates and their families at their vacation home over at Vashon Island.

He was a consummate legal technician. He possessed extraordinary judgment and commanded the respect of all who had contact with him. He was also admired by other lawyers in the state. Present this afternoon is my friend, our friend, Ken Schubert, senior partner with Garvey Schubert Barer. I don't know where Ken is. Yeah, OK.

When Ken learned of this award of this professorship to Steve, he contacted me and he mentioned how kind Chuck Stone was to him when he joined as a fellow member of the American College. Ken lists Chuck among his short list of heroes and appreciates how Chuck showed him how a gentleman conducts himself in the practice of law and in his life. I thought that was a very nice quote. Thank you, Ken.

Professor Calandrillo, you are honored to receive a professorship in the name of a lawyer who devoted his professional life to the private practice of law and did so with great distinction and in a manner earning the greatest respect of his clients, the practicing bar, and the community.

I am proud to have practiced with him and I am proud to have practiced with him and I am proud for him and his family to have this honor in his name. Even more important, I am proud of you and delighted that you have been selected to be a Charles I. Stone Professor of Law.

Now, it's my pleasure to introduce Associate Dean, Peter Nicolas, also a member of the search committee for which he receives high praise. Dean Nicolas joined the full-time faculty in the year 2000. His teaching and research interests are quite broad, ranging from Evidence, Federal Courts, and International Civil Litigation to Conflicts of Law and Constitutional Law.
Dean Nicolas received his BA in 1991 from the University of Michigan, his Masters in Public Policy in 1992 from the University of Michigan, and his JD from Harvard in 1999. And with that, I turn this over to Dean Nicolas. Thank you.

[applause]

[silence]

**Dean Nicolas**: Well, good afternoon, everyone, and thank you for attending. It really is a great honor and a privilege to stand before you today to introduce my good friend and college, Steve Calandrillo, on this special occasion.

I've had the good pleasure of knowing Steve since he and I started teaching here at the University of Washington nearly a decade ago. In many ways, both before and since our joining the faculty, we've really lived parallel career lives in some ways.

We have the same college major, economics. We both went to large public schools with great sports teams. Mine better than his. [laughter] We both graduated from the same law school. We joined the faculty here the same year. We received tenure and were promoted to Full Professors at the same time. We're both Associate Deans and we've almost always been housed in offices next to one another.

Now, before Steve became a law professor here, his early years, he grew up in Livingston, New Jersey. He lived there until he was accepted to attend college at the University of California, Berkeley. As he was someone from modest means, going to California to attend college was the first time he even set foot on an airplane.

While he was there, as I said, he majored in economics with a minor in business, with the ultimate goal of becoming a high school teacher. However, while he was at Berkeley, he decided to volunteer at a student legal clinic and that was a decision that, in many ways, changed both his personal and professional life.

Chryssa, who many of you know as his current wife, was the director of the clinic, [laughter] and the one who interviewed him for that position. He ultimately decided that he was worthy of being hired and together, working at the clinic, they had some important victories, during their time there.

As graduation neared, both of them decided that law school was something they wanted to do and they applied to a number of places, including Harvard, and they both got in. Not a surprise, given Steve's credentials, not only the top one percent of his class, the top one tenth of one percent of his class.

Now, unfortunately for Steve, Harvard's tuition was simply out of reach for him, so while Chryssa went on to Harvard, Steve started his first year of Law School at Berkeley. But, of course, love won out and his love and desire to be with Chryssa caused him to look to creative ways to finance a legal education at a private school. [laughter]

Using those excellent skills, as an economist, he spent some studying Wheel of Fortune, watching how many times certain letters came up. With that knowledge, he tried out, competed on the show and was a three time winner and took that money and handed it directly over to the Dean of Harvard Law School. [laughter] Where he joined Chryssa for his second and third years.

Now I said earlier that I've known Steve since we started working here a decade ago, but, technically, I knew, or at least encountered, him before then. As I said, we both went to the same law school. During my second year of law school, I took a course in labor law.
I was really impressed. Sitting right across from me, in the class, was this really intelligent student who was able to field with ease virtually every question the professor posed and frequently raised deep and thoughtful questions about labor law.

As I later learned, when I joined the faculty here, that student turned out to be my now good friend, Chryssa, sitting right over here. [laughter] Sitting next to Chryssa was this sort of goofy, tired-looking, kid, who would usually pass on the questions when the professor asked. I think... [laughter] ...he did a long economics of the situation, figured out the frequency with which the questions were being asked and the perceived benefit and determined that the costs of being prepared on a daily basis outweighed the benefit. [laughter]

Now, despite the fact that he may not have been a gunner in labor law, he graduated with High Honors from Harvard, earning the degree with magna cum laude. He also published two law review articles while a student. And I stress, that wasn't law review articles for a journal he was working on. Those were accepted from other journals.

After Law School, he spent a year as an associate at Foster Pepper and then clerked for Judge Goodwin. Then he joins the faculty here in 2000.

I said before that we joined at the same time. As it turns out, I technically have one month of seniority on Steve. A fact that I learned at the all important moment when we were selecting office space in William Gates Hall, determined on a very archaic seniority system, when I learned that I got to choose before him.

It didn't really matter, because the important thing was that we were next to each other as we were in Condon Hall. Certainly, for anyone who had spent time in Condon Hall, anything here is better than anything over there. [laughter]

After joining the faculty, he quickly advanced in the ranks, becoming an Associate Professor, a Full Professor, now being honored with this endowed professorship and joining me in the dean's office as an associate dean. As a faculty member, Steve has excelled in all aspects of being a legal educator. He's been consistently ranked as one of the Law School's top handful of teachers. His teaching evaluation scores are nearly always perfect.

No matter what course he teaches, it's always over-subscribed. Law and economics, something that very few students at UW ever had an interest in before he joined the faculty, now has 80 plus people wanting to take it and wait lists that are even longer. He teaches courses in Contracts, Law and Medicine, Secured Transactions, and an Externship Perspectives Seminar.

One of the important things about him that makes him so popular for students is that he's extremely accessible. As I said, his office has always been right next to mine and I always see the students lined up outside the door. I can hear their passionate debates about various issues. For this reason, I think, as well as his outstanding presentation in the classroom, he's been awarded the Philip A. Trautman Teaching Award on numerous occasions.

He's also, in addition to being an outstanding teacher, an outstanding scholar. By my count at least 14 different law review articles that he's published with an overarching approach of emphasizing using the law to create incentives for private citizens to align their actions with the greater social good.

Now, his scholarship focuses on provocative topics in law and econ and law and medicine, and his work often has sparked controversy. He's written about such things as physician assisted suicide, mandatory vaccinations and the like.
And sometimes these have been so controversial that he's gotten calls and emails that are very angry in nature and could be perceived as threatening, and of course that would make someone like him and his family members naturally concerned.

The rest of us experienced an emotion more common in academia, namely jealousy. He was the only one who had concrete evidence that someone would actually read his articles.

[laughter]

In addition to the scholarship and the teaching, he does a lot of things to serve the law school and the community in important ways. He's engaged in impact litigation; he's served on a number of key faculty committees while he's been here and cheered them; he works to find our students jobs, supervises externships and independent papers and the like.

And of course, with this sort of track record it would not be too much of a surprise to learn that Steve's been on the radar screen of other law schools. And as I said at the beginning of my introduction, Steve has almost always been in the office right next to me. The one major exception was when he went on a visit to Seattle University.

And of course, when as in Seattle you have two strong law schools, there's always a bit of healthy competition back and forth between the two, a little bit of a chess game. But this was quite an aggressive move by Seattle University. For those who know chess, the second most powerful piece is the Rook, and they were going after one of our rooks.

Now fortunately for us, Steve opted to stay at the UW Law School, and it was the UW's turn to make a strategic chess move of its own.

[laughter]

And recall what I said about the power of rooks-they're the second most powerful piece in chess. The most powerful piece is reserved for a female, and as you've learned, when it was our turn to make a move, with Steve on the committee we were successful in getting the other school's most powerful chess piece.

[laughter]

Finally, besides being a great colleague, Steve is dedicated to his family and always strives for a healthy balance that allows him to spend time with them. And besides being a hard worker, he's one of the nicest and fairest people I've ever known.

So with that let me just close by saying it's an honor and a pleasure to introduce to you my colleague and good friend, Steve Calandrillo, as the Charles I. Stone Professor of Law.

[applause]

Dean Testy: What a greeting, and you still get to receive a medal.

[laughter]

Dean Testy: It's great. Well, I want to take a moment to first thank Associate Dean Nicolas for that wonderful introduction of Steve Calandrillo. It really touched all the parts that make him such a wonderful colleague.
And it is really my great honor now to be able to officially install him as the Charles I. Stone Professor of Law. We do that with a medal, and it is inscribed fairly simply and what one might expect as saying the Charles I. Stone Professor, Steve Calandrillo.

But what I want to say as I put this medal on Steve is that, it may be a simple inscription but it holds extraordinary honored significance because one of the things it carries with it is the deepest commitment to educational excellence that this university and this law school stands for. And so as one wears it, they wear that as a commitment to that standard of excellence.

And it also bears with it the recognition from the Dean, from the faculty, from all the community, that the person wearing it, Steve Calandrillo, is one of the intellectual leaders of our community.

So, Steve, I officially install you as the Charles I. Stone Professor of Law.

[applause]

Steve Calandrillo: Does that installation come with nuts and bolts and a permanent fixture?

[laughter]

Thank you so much. It is such an exciting day for me today. I'm so honored and privileged to be here. I am humbled by this Charles Stone professorship so much. I am so deeply grateful to so many people here.

Dean Testy, I have to say this has just been a fabulous start to your deanship. We are so excited...

[laughter]

Dean Testy: That's not what I meant. I meant...

[laughter]

Steve: ...the atmosphere around the law school has been just really exceptional these past few months. We are really turning the page and moving forward and moving this school in wonderful, wonderful directions, and I could not be more happy to have you as our dean.

And I also want to thank our outgoing dean, our former dean, Greg Hicks, who couldn't be here today, but who nominated me for this award and I owe him a deep debt of gratitude. His leadership over the past two years helped us weather the storm of some incredible financial difficulties, and he deserves commendation certainly for his great service to our law school.

Peter, thank you so much...

[laughter]

Steve: ...for that wonderful introduction. And I even have in my notes your kind introduction. I should add, and humorous at my expense...

[laughter]

Steve: ...at times. But as Peter said, we began our careers together here, and I think so fondly of you. All the years, as you say, we went together, we did everything together. You've been such a great friend to me, to my family sitting right behind you.
Peter is really a role model of what a law faculty member should be. A stellar professor, a stellar teacher, a stellar scholar, a stellar servant to our institution. And his advice and friendship over the past 10 years has meant so much to me, and I really appreciate your introduction. It was really nice.

Shan, it was my pleasure to get to know you on our dean search committee. And I do think we did a fabulous job on that search together. Shan is a shining alum of this great university and of this law school. The practical wisdom and advice you provided on that committee was invaluable, and we would not have been able to do what we did without you on that committee.

And I thank you so much for your kind words about Charles Stone. I obviously didn't know Chuck Stone. But if you think about it, if you think about the Charles Stone professorships and the Egtvedt family's donation in honor of Chuck Stone-excuse me-it is such a remarkable donation.

This is a family, the Egtvedt family, who donated incredibly generously in honor of themselves, not of one of their own family members, but of their lifetime attorney, right? How many folks would make that kind of generous donation in honor of their family lawyer? It shows the power that lawyers have to influence the world for good.

When we look at the media all we see are reports about how evil lawyers are, how lawyers prey upon their clients and upon the problems of other people. Chuck Stone was a model attorney. Someone who was so loved by his clients that they would make this incredibly generous donation in their attorney's name and not their own. That is remarkable.

And the Egtvedt family's generosity is crucial in fostering the culture of intellectual creativity and scholarship that we are engaging in at this law school. In supporting my work and the work of other faculty members here, the Egtvedt family and Chuck Stone are to be absolutely commended and a role model to look up to.

I also want to take an opportunity to thank all of the great faculty and staff and students of this law school. Our faculty is top notch. We are excellent all around, and it is my privilege to work with such great scholars on our faculty.

It's been even more of a privilege as I've taken on the associate dean role this year, to get to know faculty members much more intimately than I did previously. And I thank you so much for all of your support over the years.

Our staff are the unsung heroes of this school. Everyone else always gets thanked but our staff often don't. And I want to recognize some very important staff contributions today over the past 10 years.

My long time secretary, Wendy Condiotty, is here today. I want to thank her so much for her six or seven years as my personal assistant. It means so much to me that we have people like you making us look good. You're behind the scenes making it all happen.

And she was followed by Hannah Lee, who cannot be here today. She's in Africa. And Kelly Rulid. And now in the dean's office, I'm assisted by Bernadette O'Brady and Nina Hamland. And these people are the ones who make the school run, and make the faculty look good. And I am so indebted to their service to this law school.

Our advancement staff, Stephanie Cox and her team. Hana Hughson, the event organizer today. To put on an event like this is no easy task, and I thank you very, very, sincerely.

I thank our communications people, Shari Ireton and Laura Paskin. You've been so wonderful in marketing the school, and doing all that you do for us.
I also want to thank our reference librarians, the people who support all of our scholarship. Mary Wisner and her staff are absolutely exceptional. And for the past ten years, have made my scholarship, and my teaching, so much better. I can't tell you how many times I've emailed her right before a class with some random question, and she's got the statistics for me five minutes later that I can use, either in my writing, or in my teaching. And that makes such a difference.

Then I want to recognize one member in particular of our technology staff, and that's is Lenny Hom. [laughter] He can tell you I email him all the time, right before I show up to events like this, and say "Lenny, is the wireless mic working? Is the podium mic working? How can I do DVD? How can I set my VCR?" I still use VCR tapes in my class, that's how old-fashioned I am. [laughter] He keeps us all going, and makes us look good.

Then my students. I love teaching. This is such a dream job for me, I am so honored to have this job. For ten years, I have taught some of the best students in the entire world. Many of them have flown in today from California, from Oregon, from other parts of the country.

I can't tell you how much that means to me, that my students would do that. I feel very humbled by that. I feel a large responsibility to live up to that, and not disappoint. But I love it. I just love teaching and I love our students so dearly; I love being in the classroom so much.

The various friends of the University of Washington School of Law that are here. Judge Fletcher, and your husband professor Bob Fletcher. It's such an honor that you came today, and I really appreciate it. Judge Ron Cox is also here. Professor emeritus Marjorie Rombauer, and so many notable alums of this great institution. Thank you for coming. It is really special to me.

[Indistinct]

Steve: Oh, thank you so much. [laughter]

I also want to take a chance to thank all of my mentors before I came to the University of Washington School of Law. Former US Magistrate Judge Gene Wilson is here somewhere in the audience. I see him in the back over there.

It's little known that he provided me my very first ever job in the town of Seattle, in 1996. It was an unpaid judicial externship in his chambers. He used to joke with me all the time that I was doing such a great job that he would double my pay.[laughter]

Three years later, he introduced me to a professor on the University of Washington hiring committee. And the rest, as they say, is history. So for an unpaid job, it really, really paid off. [laughter] So I'm deeply grateful to you today.

Then many of my colleagues from Foster Pepper. Both my wife and I started our legal careers after graduation at Foster Pepper. And many of those attorneys, much to my surprise, made the trek here today to support me. I am so honored that they came. In particular, I want recognize Robert Kunold the managing partner of Foster, and a great mentor of mine.

Bob Diercks, who's also here. I shared the office next to Bob's, and he was such wonderful friend to me. Allen Israel, a wonderful friend of the law school. And there are so many more here today, and I thank you so much for coming.

My final thank you is reserved for the most important one, and that is for my family. My mom passed away 11 years ago, but she would have been so proud of me today. I love her so much. My father and my sister couldn't be here, they live over 3,000 miles away. But they are equally proud, and I love them so deeply.
My wife Chryssa, who's managed in here with the children. I have my three beautiful children here today; it means so much that they came to see this. My son Nick, and my daughters Sophia and Alexia. They mean everything to me.

Anyone who has ever visited my office will see hundreds of pictures of them, of their artwork, of their paintings, of their drawings. They are, by far, the most important thing in my life, and I would not be able to be here today if it wasn't for the love and support of my family. And I dedicate this lecture to you, today.

OK, so. [laughter] Let's transition. That concludes the thank you portion of the program. [laughter] I was expecting the Oscar music to start playing, letting me know it's time to move on. [laughter] So let's do it, let's do it.

Often I'm asked to give talks about law and economics, and it's one of my favorite subjects to teach. Obviously I do my scholarship in the area, and I want to just provide a little bit of background on law and economics before we get to the subject of punitive damages, which is at the heart of my presentation this afternoon.

But at the start, I want to just emphasize the dichotomy, the difference, between traditional legal approaches versus economic legal approaches. What is law and economics all about?

Peter mentioned that we now have students who are interested in taking this class. But when I showed up here 10 years ago, the course had not been taught in six years. I believe the previous enrollment was six, in 1994.

The problem was, if you go into a law school, law school student generally don't like numbers. That's why they go to law school, instead of majoring in math, or econ, or you name it, statistics. And so I had my work cut out for me, to convince people that law and economics was not scary, that we were not going to be differential equations and calculus on the board each day.

I tried hard to convince my students that law and economics is somewhat of a misnomer. Because, really, what law and econ is all about, is law and incentives. And everybody understands incentives.

Law and economics, as Peter said, is about aligning private incentives, the way private actors respond to their own self interests, with the greater social good. Where society wants to see private individuals go.

Now the traditional legal system pays some attention to the effect of legal rules on incentives and behavior. But economic analysis of the law pays a ton of attention on legal rules and the incentives that they create. Incentives on individuals, and incentives on firms.

Given a specific legal rule, how would you expect an individual to react? How would they be incented to respond to that legal rule? What are the consequences? And the second, and the third order consequences of any legal rule?

And so law and economists ask two types of questions. We start with the descriptive question. The descriptive question is "Identify the effects of legal rules." Given the legal rule predict, if you will, what effects might you see come out of that legal rule.

And then there is the normative question. The normative question is "OK, given those effects, what legal rule ought we choose in society? What legal rule maximizes social welfare? What legal rule gets us to the place, the best society that we can be?"
For example, in torts, is a strict liability or a negligence standard better or worse for creating incentives to take, on the part of potential tortfeasors? Which legal rule ought we choose? Which legal rule gives the best incentives?

Peter mentioned some examples of my previous economic analysis research. I've used the law and economics framework to tackle a variety of controversial issues. My very first paper ever was an economic analysis of intellectual property rights. Everybody knows that intellectual property rights, copyright and patent predominantly, are necessary to incentivize innovation. You give people a monopoly right, that gives them an incentive to create.

But what's less talked about is the consequence of that monopoly right. The fact that monopoly rights lead to monopoly prices. Monopoly prices lead to deadweight loss, what economists would call. And keep people priced out of the market, who would otherwise benefit from socially valuable goods.

For example, most drugs that are patented cost pennies in marginal cost to produce, but are often sold for $100 a pop. There is tremendous deadweight loss created by that scenario. Incentives to create are there, but the distribution is not there.

So I suggested in this paper that the government might institute a reward system, in lieu of intellectual property rights. That would pay inventors rewards for their innovations, and then make those innovations distributable at their marginal cost. They'd be public domain, instead of covered by monopoly right.

It's a very controversial proposition, but an attempt to maximize overall social welfare, and look at the various incentives that both parties face.

After that I wrote a paper called "Responsible Regulation" that proposed what I thought was a sensible marginal cost-benefit, risk versus risk approach, to federal health and safety regulation.

Many of you will be surprised to know that the congressional mandates passed, and given to most of our agencies, do not contain requirements that the agencies do cost-benefit analysis.

As a result there are many regulations out there that cost hundreds of millions or even more to provide safety. If you channel those dollars where they can do the most good--to vaccines, preventative care, early childhood education--we can save far more lives at far less cost.

Peter mentioned that I wrote a paper called, "Vanishing Vaccinations," that looks at the incentives created by our vaccination laws and more specifically, our exemptions to vaccination laws. Many of you may not know that Washington State is the second worst state in the country at vaccinating our children.

As a result we have whooping cough outbreaks every year. Who knows what will happen with swine flu this year. We need to provide incentives for people to opt in, not incentives for people to opt out. And that's what we are currently doing in Washington State.

A more recent paper I titled "Cash for Kidneys: Utilizing Incentives to End America's Organ Shortage." And I said “Cash for Kidneys” somewhat facetiously but really what I care about is the fact that we have a law that prohibits a marketplace in human organs. And as a direct consequence of that law, 7,000 Americans die each year that otherwise would not die.

And it's our responsibility to figure out other incentives to get people to opt in to organ donation. Because these 7,000 people are dying for no good reason. It's because organs are being taken to the grave with their owners. 7,000 lives, easily savable if we come up with other incentives to get people to opt in.
I outline some of those in my paper. Most recently, Dustin Buehler, who is also in the room, co-authored a paper with me called "An Economic Analysis of Daylight Savings Time." We're getting close to the switch, right? It's coming up next week and we examined the impact and the incentives created by Daylight Savings Time legislation.

We concluded after exhaustive research that switching to year around Daylight Savings Time would save at least 400 lives a year, would potentially reduce juvenile crime by up to 20% a year, and save millions of barrels of oil in our attempt to conserve energy.

Why? Darkness kills. It is much more important to have sunlight in the evening hours than it is to have sunlight in the morning hours. At 5:00 PM everyone is awake. At 7:00 AM not everyone is awake. And so we need to reform laws to improve overall social welfare.

But today for the remainder of my talk I am going to be talking about the economic approach to punitive damages. This is the subject of a forthcoming article in "George Washington Law Review." It grew out of my work with Jeff Fisher of Davis, Wright, Termaine, and who is now at the Stanford Supreme Court Litigation Clinic.

And the Charles Stone professorship has supported this important work. I titled the article "Penalizing Punitive Damages: Why the Supreme Court Needs a Lesson in Law and Economics." So again let's compare traditional approaches to punitive damage jurisprudence to economic approaches to punitive damage jurisprudence.

If you ask somebody (and I ask this in my Law and Econ class all the time), what's the purpose of punitive damages? The very first answer that you are likely to hear is “hey, duh, look at the name. Punitive means punishment. Right? We are here to punish defendants for their egregious acts.” Their super fault behavior as many tort professors call it.

That would go beyond ordinary negligence, gross negligence, intentional malice, i.e. really bad actors. We want to hit them and hurt them. We want to pound them. We want to make them pay. We want to send a message and a clear signal. This act is not to be tolerated. You are going to be hit with punitive damages beyond the actual harm you created in our society.

Less commonly you will hear the traditional jurist, but quite commonly you will hear the economist say, we care about the deterence. We care about incentivizing bad actors to take socially optimal care. And when I say optimal care, I mean care that is just right, not too much and not too little. That's what economists are concerned about: how do we incentivize actors to take optimal care.

So I want to look at traditional Supreme Court jurisprudence on punitive damages and then compare it to what I would consider a sensible economic approach to punitive damages. The one that I advocate for in my forthcoming piece.

The first landmark case in the United States Supreme Court on punitive damages was BMW vs. Gore in 1996. Here are the facts on the case. You have a customer who purchases a BMW. He's purchased a new BMW. Turns out the car was damaged by acid rain in shipment.

BMW does a re-painting job on this vehicle and sells it as new. So this customer thinks he is buying a new car, freshly painted, never had anything done to it. He learns after he bought this car that it indeed had been repainted and it was concealed and it was hidden from him.

The jury estimates his harm, his damages, his compensatory damages at $4, 000 but says “hey BMW, this is really bad what you are doing here. And we're going to hit you with $4 million dollars in punitive damages.” So you have a $4, 000 compensatory award, a $4 million punitive award for the bad act of BMW.
That was later reduced to $2 million but BMW was not very happy with this huge punitive award as you might imagine, and so they appealed the case all the way up to the United States Supreme Court.

And the Court came out famously in the BMW case with three magic guideposts for deciding whether or not the punitive damage award should be upheld. The first is the reprehensibility of the defendant's conduct: how bad, how evil is this particular defendant that you are looking at?

The second factor the Court said to look at is the proportionality of the punitive award to the compensatory award. This is what's called the “ratio analysis.” How large of a ratio? How much of a rate is the punitive award above the compensatory damages?

And the third guidepost was a comparison of this punitive award to the other available civil and criminal remedies. And looking at these three factors, the BMW court held that this enormous punitive damage award was unconstitutional, that it offended the defendant's due process rights, because it deprived the defendant of fair notice of the severity of the punishment.

Now here's a defendant who committed $4,000 worth of harm and is now being hit by millions of dollars of damages. Due process is offended BMW's rights.

The next major case to come out of the U.S. Supreme Court was the State Farm v. Campbell in 2003. In State Farm—I won't go into all the facts—but you basically have State Farm, the insurance company, sued by the Campbells for bad faith failure to settle a liability claim within the term limits of their policy.

Claimants provide a lot of evidence of State Farm’s bad faith and then present a lot of evidence about out of state conduct that State Farm engaged in a national pattern of fraud. The jury comes back with a $1 million compensatory damage award against State Farm. And $145 million punitive award against State Farm, based on all the egregious acts outside the state in question.

The Supreme Court on appeal takes up this case and is looking at the BMW guideposts and says, first, the reprehensibility of the defendant's conduct is the most important factor. That's number one.

Secondly, the Supreme Court says the jury is not permitted to consider defendant's out of state conduct. All the national evidence, the out of state evidence, the national pattern of fraud, you are prohibited Mr. Jury from handling that evidence because you can only consider State Farm's conduct toward this plaintive only, the plaintive in front of you.

Otherwise you offend defendant's right to due process. And moreover, on a due process ratio analysis, the State Farm Court--while stopping just short of a bright line--said it will be presumptively unconstitutional going forward for any punitive damage award to be greater than a single digit ratio. Greater than a single digit multiplier of the underlying compensatory award.

So an award that is nine times greater than compensatory damages--you have a shot at upholding that award--but ten times more, that violates due process.

So we have this arbitrary due process line drawn in the sand. A ten times multiple: no good. Presumptively unconstitutional. Nine times multiple probably OK. And the Supreme Court thinks that make sense.

Phillip Morris came along in 2007. It's a classic tobacco litigation case. You have a widow who sues on behalf of her deceased husband. Her husband was deceived by Phillip Morris into thinking that smoking cigarettes was great for his health. He's dead of lung cancer.
Jury awards $821,000 in compensatory damages to the widow. And awards $79 million in punitive damages. Why? Because there is harm to all of these parties who never sued Phillip Morris. For every one smoker who is dead, look at all the other hundreds of others who didn't sue Phillip Morris.

On appeal all the way to the Supreme Court, the U.S. Supreme Court says you cannot, jury, consider the harm to a non-party. That violates defendant's due process rights because the defendant has a right to confront people, right, and cross-examine them.

And this $79 million punitive award, the Supreme Court clearly will have no part of.

Now this case was thrown out on a technicality earlier this year but the law is still good. That the court really frowned upon this huge punitive damage award and that juries should not be considering harm to non-parties.

Finally Exxon. Exxon Valdez. A case I'm sure everyone in this room has heard of. It's been a 20-year litigation after the Exxon Valdez oil spill up in Alaska.

And the court last year, the Supreme Court last year, was so concerned about these wildly unpredictable punitive damage awards, and the case is governed by maritime law--we'll talk about that later--comes out with a one to one ratio for the ratio between punitive damages and compensatory damages. Anything more that says the court in maritime law, we don't think will stand up.

So what started as a $500 million compensatory damage verdict and a five billion dollar--excuse me--punitive award, has now been reduced to 500 to 500. Right? And we'll talk more about Exxon later.

So, summary of traditional Supreme Court law. Defendants reprehensibility is key. How evil is your particular defendant? That's number one.

Two, we have this arbitrary due process line in the sand being drawn. Nine times ratio, probably OK unless you are in maritime law. Ten time multiple? No way. Presumptively unconstitutional.

And thirdly, juries cannot factor in harm to non-parties, cannot factor in out-of-state evidence.

Now I want to compare this to what a sensible economic approach to punitive damages would be.

Because from the economist's perspective, punitives are not about these arbitrary due process lines being drawn in the sand or punishing morally offensive behavior however we judge that. It's about incentivizing proper care, proper deterrence, optimal deterrence.

Now, if punitive damages result in corporations bearing excessive damages--more damages than the harm that they actually create for society--we would expect corporations to take excessive precaution.

For example, very simple model. If you had a firm who was considering taking a $1 million precaution, like some care that they could take to avoid a harm of $500 thousand, no firm would do this in their right mind. You are not going to spend a million dollars to avoid a harm of $500 thousand dollars.

However, that same firm might indeed take the precaution, if it knew that it would be hit with a punitive award for intentionally, egregiously choosing not to take care of two and a half million dollars. So we have actual harm of $500 thousand, a punitive award of two and a half. This firm will now be incentivized to take care.
And by the way, this is only a five times multiple. This is going to stand up under U.S. Supreme Court jurisprudence. But society would not want this. We do not want to incentivize people to take one million dollar precautions that save a harm of 500 thousand dollars. It does not make sense.

Punitive damages in that context, results in care too high, which means prices are too high, which means quantity of goods purchased are too low.

Alternatively, it means that the firm will either go out of that line of business, or will farm out their work in that line of business to judgment-proof independent contractors.

Why take a risk of a $2.5 million dollar punitive award, if you can just let Joe's Shipping Company do your oil transport and they, hey, they're capitalized at $2...if they spill oil all over Alaska they'll just declare bankruptcy and that's it.

We will create perverse incentives in these categories. So you might say, “well, then, from the economic approach, is there any justification for punitive damages?”

And the answer is yes. It's not that economists are opposed to punitive damages. It's just that we justify punitive damages based on a completely different rationale from today's United States Supreme Court jurisprudence.

It's not about how immoral, or how reprehensible your defendant is, and no two people in this room by the way will agree on what the definition of reprehensibility really is.

From the economist's perspective, the law and econ analysis looks at whether or not your defendant has a chance of escaping liability from the full harm that he or she is causing to society.

So how might a defendant escape paying for full harm? Well, first category, you might imagine that nobody notices the harm that the defendant creates. So you can have a defendant factory who's dumping pollution in a river at 3:00 AM under the cover of darkness, concealing its bad acts, and only gets caught one time out of ten.

And lots of environmental harm, lots of this kind of low level pollution is difficult to detect and defendants go out of their way to conceal their bad behavior and may get only caught one time out of ten, one time out of 100 even.

Another category of cases, this is a category where the individual harms are not large enough even though victims can detect them every single time, they're not large enough to make the victim find it worth their while to sue.

So the best example of this is the Motel 6 Bedbugs case. I don't know if you've seen this case in your torts class. Basically, what happened with Motel 6, is you have a couple that stay in some Motel 6 in the Midwest. Sadly for this couple, after their stay there, they discover the next morning that they've been completely bitten by bedbugs overnight and they've got red welts all over their body.

Now, this is not the greatest thing in the world to have happen to you surely. But how many people would find it worth their time to sue Motel 6 for bedbugs? Maybe you just decided, "Hey, I'm never going to stay at a Motel 6 again." But how many people are going to hire a lawyer, and lawyers are expensive, to go sue Motel 6 for a couple of bug bites?

Motel 6 probably escaped liability 99 times out of a 100 at least in the bedbugs case. And so Judge Posner in the bedbugs case said even though, you know, the compensatory damages, the actual harm to these plaintiffs, were only $5, 000, that’s the value of being bitten by bedbugs.
The punitive award was $370,000 to this particular couple.

Now note, that is more than a single digit ratio. This would not fly under BMW or State Farm. Thankfully the Supreme Court did not take this case. But you have to look at the diluted incentives that Motel 6, the defendant, would have to take care, proper care, in every single case if they are not hit with this large punitive damage award.

So the formula that I lay out in my “Penalizing Punitive Damages Paper” after I met Jeff Fisher, and I tried to persuade the U.S. Supreme Court to adopt, was you should take the harm in the instant case, let's say it's $5,000 from bedbugs, and multiply it by one over the probability of escaping detection.

Either because the defendant is concealing the harm or even though the victims know about it, they are just not finding it worthwhile to sue. Who is going to sue over a couple of thousand dollars worth of bedbugs?

So, you take harm times 1/p, that's the way I do it in my law and econ class, to calculate and that punitive damage award because the defendant is escaping liability.

Let's imagine 99 times out of 100. It should be 100 times greater than the compensatory damages handed out. And that does not offend due process at all. And that is a principled solution to how to set the punitive award.

But it's based on the defendant's hiding or escaping liability and therefore we have to hit him or her with punitive damages in order to incentivize them to take care in every case. Right?

And keep in mind the Motel 6 case might not have super fault egregious factors. You could imagine a motel, it's not like they're having intentional malice sweeping out the bedbugs, it could be just ordinary negligence or maybe something slightly higher than that and in Motel 6.

So “punitive” is a little bit of a misnomer. A defendant could inadvertently create harm, escape liability 99 times out of 100, and that in my mind would justify a 100 times punitive damage award.

And that would not offend due process at all. It would not be governed by the BMW guideposts or the State Farm guideposts even if the defendant wasn't particularly reprehensible.

OK. So that's the economic theory. I want to apply this law and econ theory to the Exxon case. A case that I did a lot of work on, it is the most recent punitive damage case before the Supreme Court.

And it's near and dear to the folks who live in Pacific Northwest, and Seattle and especially in Alaska. So, a brief history. You all recall in 1989 the Exxon Valdez super tanker ran aground off the coast of Alaska. Eleven million gallons of oil spilled over hundreds of linear miles of shoreline up in the coast of Alaska. An area of roughly would have been from Seattle to San Diego if you took the coastline and just stretched it out, all covered by oil from Exxon spill. Two hundred and fifty thousand birds killed, 1000 sea otters, 250 bald eagles. And I could go on and on about the damages in this case. Just a massive environmental catastrophe from the Exxon Valdez super tanker spill.

Now, you also might recall that the captain of the Valdez super tanker, Joe Hazelwood, was drunk at the time of the crash. Exxon had reason to know of his prior alcoholism. They had reason to know that he had, even though he had been to rehabilitation, that he had relapsed, and they had this --according to the plaintiff--this culture condoning alcoholism and this is in large part the reason. The super fault reason according to the traditional jurists, justifying punitive damages in the case.
So, as I mentioned, jury award in this case...jury comes back after the trial with a roughly $500 million compensatory damage award against Exxon for all the harms that they've created. And then, the jury said because of these super-fault factors -- drunk ship captain, corporate culture of condoning alcoholism -- "You had reason to know he was drunk and you let him do it anyway."

Five billion with a "B." Anything that starts with a "B," is a lot of money, especially in the early 90's. Today we're talking about trillions. Back then B's, billions, were a lot. Five billion dollar punitive award against Exxon. This was a massive punitive judgment. And this is a 10 times multiple, mind you, so that creates a little bit of nervousness, so that's why on remand, one of the remands, it was lowered to 4.5 billion, because we've got to fit it in to the State Farm ratio analysis, said the traditional jurist.

But traditional jurists have no problem with the award, because they say, “look, you have super-fault factors, drunk ship caption, terrible corporate culture, hit Exxon where it hurts. Pound it. Give it to them.” That was the traditional jurist justification of the initial punitive award.

Now recall, from the law and econ approach, that's not a sound basis for awarding punitive damages. The sound basis for awarding punitive damages is whether or not your defendant has a chance of escaping liability. If so, then you need to hit that defendant with damages beyond the compensatory damages in the instant case.

So, if you look at the Exxon case, what's the chance of escaping liability when you spill 11 million gallons of oil all over the coast of Alaska? We're talking about zero percent chance of escaping [laughs]...

[laughter]

**Steve:** ...liability for that type of case.

And so many law economists, and I initially was one of these law and economists, said no punitive damages are justified in the Exxon Valdez oil spill case assuming compensatory damages are properly measured. You do not want to hit Exxon with any punitive damages because they had zero percent chance of escaping liability for this type of incident.

And if you hit them with punitive damages...because some people say, "Well, what's the harm of hitting Exxon indiscriminately with punitive damages? They're a big corporation. They can afford it.” Well, look at potential negative ramifications if you don't have a principled reason for imposing punitives.

One, prices go up, oil prices go up. Care goes up. Fewer people can afford to drive their vehicles or afford to heat their homes. And I find it very interesting that every time gas goes above $3.00 a gallon, or $4.00 a gallon, everyone goes crazy about how expensive gas is, and at the same time claiming they want a cleaner environment. You can't have those things both ways.

The second negative ramification of an indiscriminate punitive damage award is that the tortfeasors, the defendants of the world, will decide to start hiring independent contractors to start doing their dirty work, their dangerous work. So, Shell Oil, for example, now hires independent contractors to do much of their oil shipping. Why? They don't want to face a potential $5 billion damage punitive damage award.

Let Joe Shipping Company, the independent contractor, take that chance. And by the way, Joe's Shipping Company is capitalized to $2.00, so when they spill oil all over Alaska, who cares? Why take any care at all? We'll just declare bankruptcy and we'll call it a day, and the plaintiffs in the case will get nothing. So that is perverse.
So, as I said initially, I was in this camp of law and economists who did not believe a punitive award was justified against Exxon. And that was before I started working with Jeff Fisher and learned more about the facts of the Exxon Valdez case. Because there's a big, completely ignored difference in that case, and that is the fact that it's governed by maritime law.

Maritime law prevented many components of damages that would ordinarily be thought of in modern tort law as just ordinary, actual, compensatory damages. If you look at various categories in the Exxon Valdez case, for example, the money damages suffered by all the fishermen who were not physically oiled -- there was a lot of oil that was spilled, but a that oil didn't hit some fisherman -- but whose catches were devalued by the stigma associated with fish from Alaskan waters--that was not recoverable.

That's an actual damage, but that's not recoverable. Fish prices plummet. Fishing permits prices plummet. Not recoverable. The economic damages suffered by local towns and residents up in Prince William Sound whose livelihood depended on the fishing industry -- boat repairmen, fishing net manufacturers.

The tourism industry was absolutely devastated -- restaurant owners, hotel owners, you name it. Absolutely devastated. Most of those damages were unrecoverable under maritime law. Harm that was unknown at the time of the trial, but which we now can trace clearly to the Exxon Valdez disaster.

For example, the collapse of the herring industry in 1993 was not part of the damage calculation because Exxon argued, "Look, our spill was in 1989. You can't blame us for something that happened in 1993. We now know that this was directly related to the Exxon Valdez oil spill. The herring population started to decline in '89, and the collapse wasn't until 1993. No recovery.

And finally, a huge category of damages that would generally be recoverable in modern tort law, are the non-economic emotional stress, psychological distress damages. The people of Prince William Sound in Alaska, this was their livelihood. This was the way it was. Everything depended on the fishing industry up in Alaska. The disruption of family and community life was just devastating in Prince William Sound.

There was widespread destruction of birds and marine life, and just the fabric of all the social life. All of these damages were largely unrecoverable in the Exxon case. So when Exxon claims, "Hey, we've paid our $500 billion compensatory award. We've paid our debt to society," that is totally false.

Under modern tort law, many of these damages would have been recoverable, but they were not recoverable under the maritime law that governed the case, and so hence, in our amicus brief before the Supreme Court, we argued that punitives were necessary for Exxon, not so much to punish Exxon for how evil they were in having drunk ship captains, but to fill in a gap in maritime law to make the defendant bear the full cost of the harm that they created, to internalize those externalities as an economist would say. They're in some ways “quasi-compensatory.” That's the way I viewed them.

Sadly, we all know what happened in the Supreme Court. Justice Souter directly responded to this argument in our amicus, by saying, "Compensation is not part of the role of punitive damages." Punitive damages turn on the defendant's reprehensibility, right?

The defendant Exxon, yes, they weren't that great. They had drunk ship captains, but they weren't that evil either, and under maritime law, as I mentioned, Souter cited numerous studies that says the ratio that we deem appropriate is one to one. That's a number out of pure air, right?
So, the punitives, instead of being $5 billion, then they were reduced to $4.5 billion, $2.5 billion, became $500 million, a slap in the face to the plaintiffs. And Exxon systematically was under assessed its liabilities. That creates diluted incentives to take care, and that's not the way we want to formulate our legal rules.

So, I know I've gone long, I'll give a brief summary. The Supreme Court approach versus the Economic Principle approach to punitive damage law. The Supreme Court has it all wrong, right?

[laughter]

Steve: BMW, State Farm, Phillip Morris, Exxon are perverse decisions for overall social welfare of our society. Arbitrary due process limits like nine times damages, that's fine. Ten times -- too much. How does that make any sense? Where is the economic based rationale now for such a line in the sand?

Relying on the defendant's degree of reprehensibility is equally arbitrary and unpredictable. You never know what you're going to get if you just ask a jury how evil is this defendant? Different juries will have different opinions about that, so we need a principled approach to law. And that's what I advocate with the economic approach to law.

The economic approach looks to award punitive damages in the cases where the defendants escape liability, either because they concealed the harm, or because the victims knew about the harm but just didn't find it worth their while to sue (the Motel 6 bedbugs case.) Or in the case of Exxon, the case where the quirks of maritime law effectively prevent the defendant from bearing the full harm of that he or she has caused to society.

My economic formula is principled. You take the harm in this case, you multiply it by one over the probability of escape. That might be less than a 10 times multiple, it might be 100 times, it might be no punitive damages, no matter how evil the defendant is, but at least it's a principled way of thinking about the law and incentives that it creates in our societies.

So, in conclusion, the Supreme Court, I think, needs a lesson in law and economists, in law and economics, I should say. Arbitrary ratios and guideposts don't get us to principled jurisprudence. They're just arbitrary lines in the sand. We need to think about law clearly, not based on emotional gut reactions to how evil a defendant is, but based on principled analysis of how to incentivize this particular defendant to take optimal care.

So, that is it. Thank you for bearing with me. I thank you so much, and so sincerely for coming. This is truly my great honor and my great, great privilege to receive this Charles Stone Professorship. I deeply appreciate the research and scholarship support it provides, including my work on the Exxon oil case article and the punitive damages article in general, and I hope so much to live up to the model that Chuck Stone set for us all.

Please stay for our reception. I look forward to reacquainting myself with all of you in this room that I haven't seen for many years. Thank you.