

The Tuesday morning session of The American Law Institute convened in the Ritz-Carlton Ballroom, Washington, DC, and was called to order at 9:05 a.m. by Justice Mariano-Florentino Cuéllar.

**Justice Mariano-Florentino Cuéllar (CA):** Let me first begin by just recognizing our new American Law Institute President David Levi and congratulating him on his very successful first year.

Congratulations, David Levi. (*Applause*)

Mr. President, I have long admired your service to the country and to academia and to the law. I would also like to say that it's very clear to me, from the aerial shots of this Meeting, that this is the best-attended Meeting ever in the history of ALI. (*Laughter*)

Mr. President, you've spent a lot of your career in institutions that have an allegiance not only to the present, but to the past and the future—courts, uni-versities. That's also true of The American Law Institute. I think we all have our particular stories of what attracts us to this room and to this institution, but prob-ably at the core is the idea that some combination of integrity, practicality, prin-ciple, and intelligence is not only possible, but important in the law. And I think of this institution every day, day in, day out, through its work, steadily trying to achieve that and maintain that.

That's what we look for in the Early Career Scholars Medal winners. The reality of this is that coming from academia, I can tell you that lots and lots of law-review articles are written. I wonder sometimes the connection between the law and some of what is written in our law-review pages, but I do think that it's important for us to recognize that all of us in law practice, certainly those of us on the bench, are influenced powerfully by what professors do.

But what we look for, in particular, are people who embody through their work the values of The American Law Institute. And those values underscoring the importance not only of intelligence and thoughtfulness, integrity, but also practicality, are what we found in the winners for this cycle.

Now last year, we had the pleasure of hearing from Dan Schwarcz from the University of Minnesota. He's here again. Congratulations, Dan. We won't hear from you again today, unless you have anything you want to add from last year. (*Laughter*) But we're glad that we can recognize you.

We did not get the chance to hear from Colleen Chien, and I want to say a few words about why we're so pleased that Colleen is also the winner in this cycle.

So Colleen is a professor at Santa Clara University Law School, where she writes and teaches about intellectual property, technology, and also a series of related topics that are interesting, ranging from privacy to international trade. I have known Colleen for a while. She is widely recognized as one of the most prolific and interesting new voices in the field of intellectual property.

We read a lot of law-review articles in the course of our committee process, and we found that her work was accessible, thoughtful, creative, insightful, principled, and practical. I'd like to say that it's not entirely surprising because she is not only learned, thoughtful, careful about using empirical methods, understanding of doctrine, but also her career spans not only academia, but public service.

She worked in the Executive Office of the President as an intellectual-property advisor. She has followed very closely, as well as anybody that I know in the field and outside the field, what happens in the USPTO. And ultimately, I believe and the Committee believes that her work has embodied, not only in the papers that we most directly read, but actually in her CV more generally, the combination of practical and concrete that we think of as very important here in the ALI.

In fact, just in the lobby today, somebody was mentioning to me that he has read her work, and he feels like part of what's great about it, and I think this sums up what we thought in the Committee, is that she knows why what she is writing about is important—who it's going to affect, how it's going to bear in some way on the separation or convergence between what we hope for and expect from our system of intellectual property, in terms of its social value, and how it actually operates.

So as you'll see, Colleen is replete with ideas, and she is going to continue to be tremendously influential in the field. We know that the worlds of both law and learning will be better because of Colleen's contribution. So it's my great pleasure and honor to welcome Colleen. (*Applause*)

**Professor Colleen V. Chien (CA):** Good morning. It's a huge honor to be here today. I'm here because my husband, Dirk, and my sons, Max and Benjie, have supported me; because my Dean, Lisa Kloppenberg, believed in me; because Justice Cuéllar and the Early Career Scholars Medal Committee put in many hours reviewing applications; and because ALI Director Ricky Revesz and his staff know how to put on an incredible event.

I am greatly indebted to and share this honor with all of you, as well as with my parents, Patsy Feng and the late Ronald Jen-Min Chien, both of China and immigrants to the United States.

If there has been one theme throughout my early career, it has been listening and taking stories seriously. My approach, if you can call it that, has always been to try to put my own life experiences into their bigger context and, where I can, to listen and tell the stories of those who cannot tell their own stories, in a way that those who have the power to make change can understand them.

In so doing, I've followed in the footsteps of my heroes; women, like Florence Nightingale and Ida B. Wells, who used their voices and their data—I was an engineer before I was a lawyer—to tell the stories of, in their cases, soldiers and lynching victims.

Florence was a nurse and statistician who went to take care of soldiers during the Crimean War. When she went, the conventional wisdom was that soldiers were dying from war wounds. But as she documented month after month, the actual cause of death was not wounds, represented in red, but diseases made mortal by the poor sanitation in hospitals in blue. Her life experience with dying soldiers, then her analysis, allowed her to spur a movement in medicine focused on hygiene.

Ida B. Wells was a reformer and journalist who became aware of the horrors of lynching when she came back from a trip and found her friend having been burned at the stake. Again, the news was that he had committed rape. But Ida found that this was not the reason at all. She called BS on this and 3436 lynchings from 1889 to 1922 that she investigated. Through her exhaustive research, she gave voice to victims and put their experiences in context, building awareness and inspiring action.

Today, it is my great privilege to talk to this esteemed audience, to use my own voice and my data to share two stories, the first about the patent system and the second about second chances.

The first story is about how a nuisance came to dominate our patent system. I'm going to start in the fall of 2011, when my son was six years old, and I found myself spending a lot of time here. You may remember days on the soccer field if you're a parent. On the sidelines, the conversation would go, "What do you do?" I would say, "I'm a professor." "Professor in what?" "Patents."

The response to this was usually silence, but sometimes it was then a pained expression. Then, on several occasions, I got something to the effect of, "Oh, you work in patents. Talk about a dysfunctional system."

From multiple friends working in multiple industries, I heard a story about a start-up that had gotten a letter from a company they had never heard of, holding a patent they had never seen, and demanding that they pay them money that they didn't have or get sued. In practice, I had heard complaints from companies all the time about demands involving patent trolls that didn't make anything but just bought up patents and sued on them, but the sense was this just was a cost of doing business.

You see, the point of the patent system, as the Constitution reminds us, is “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries” or, as Abraham Lincoln said, to “fuel the fire of genius.”

Patents create a race, but they don’t, strictly speaking, require the winner to practice. Under modern law, a patent holder can sit on their rights if they want to. The difference was that these victims were small. Although to be fair, they live in Northern California, where everyone, it seems, has a start-up. (*Laughter*)

But then, after I started writing about these issues, I got a call from a man in Chicago who had been sued over the use of a scanner. Then a woman called me and actually cried on the phone about making payroll and paying her lawyer’s bills. These small-business owners were proud people, who asked me not to use their names; they were embarrassed about what had happened.

At this point, I decided to do what any curious person would do. I dug a little deeper. Based on Supreme Court precedent, in a law-review article, I devised a name “patent assertion entity,” or PAE, for firms that use their patents primarily to sue others rather than to support the development of technology. Then I worked to document their prevalence, especially in suits against small companies. I ran surveys among small businesses and start-ups.

In December of 2012, at a workshop the FTC held on the issue, I presented my results. What we found was staggering; that not only was the share of PAE suits growing, but that they dominated patent litigation. By 2012, over 60 percent of suits were brought by companies who didn’t make anything.

Perhaps more surprisingly, however, 55 percent of the unique defendants were small, making under \$10 million in revenue. Far from being the exception, the stories I had been hearing about, it looked like, were actually the new norm.

On Valentine’s Day 2013, during a hangout with a pink-haired entrepreneur, President Obama drew attention to the issue of patent trolls. I had met the President earlier, at the signing ceremony for the America Invents Act, and had been keeping his staff up to date about my research, but I never expected the President to use his bully pulpit to draw attention to the issue.

Several months later, the White House released the report on patent assertion entities, citing my research extensively. It also announced a bunch of policy initiatives, many, I was pleased to hear, mirroring recommendations which a number of academics made in a series in *Wired* I had curated, in the fall of 2011, called “The Patent Fix” and recommendations I had made in articles, testimony, and op-eds, to which my Chinese mother said, about a *New York Times* op-ed I coauthored with two authors, “Why wasn’t your name listed first?” (*Laughter*) Sounds like some of you can relate.

That was all great until one day I got the call from DC to actually apply to work in the White House on these issues. I applied for and I did not get the job.

A career bureaucrat did. I was disappointed, but my family sighed relief. I had dodged a bullet and could continue driving my kids to soccer practice.

But at that point, I said I'm not going to let a silly thing like not getting the job stop me from doing the job. I asked myself how can I help somebody who's in a position to do something get information that they can use to make a difference? And so I continued to research and write and keep in touch, until one day, the frontrunner dropped out, and I got the job.

That fall, I joined the White House as the first White House senior advisor on innovation and intellectual property and started the brutal commute between DC and the Bay area. I got on and off planes, I ate a lot of tapas boxes, and the kids continued to play soccer.

When I was in DC, Congress held a bunch of hearings, and though we got a bill through the House, ultimately it stalled in the Senate. But the Supreme Court, it appears, was listening and took a record number of patent cases, the most in history since it started the process of taking cert, and it decided them in ways that advanced the ideas we had recommended.

The United States Patent and Trademark Office also carried out a bunch of institutional improvements, and 32 states passed frivolous-demand-letter legislation, to which my Chinese mother said, "Thirty-two states passed legislation on your issue? What about the other 18?" (*Laughter*)

These interventions, as well as Supreme Court decisions since then, have contributed to a much-needed correction in the patent system, a refocus on innovation, not litigation, though now there is a concern that there has been an overcorrection.

I continue to work on issues that impact small innovators, focusing on inequality, regional innovation, patent quality, and subject matter. I have a forthcoming book, with Judge Posner and Tom Cotter, on the importance of design and administrative features of the patent system and how they impact innovation. I look forward to continuing to harness data and stories to drive a better patent system.

So that's my first story. My second, about how second chances become mischances, starts not on the soccer field, but in the classroom and in the academy with one of the best parts of my job, getting to meet, work with, and keep in touch with inspiring young people with whom I also share today's honor.

A few years ago, I met Leticia. Like many young women I meet, she impressed me with her attitude, her initiative, and her optimism. But her communication was poor. It would sometimes take her weeks to respond to my emails, and getting her to do simple things like sign paperwork was really difficult.

Leticia Mendoza, not her real name, is an inmate in federal prison, charged over 10 years ago with a 20-year sentence for being a drug mule. I got to know her when preparing her application for relief under Obama's signature clemency initiative at the urging of an alum who was working on criminal justice.

After he became the first sitting President to visit a prison, Obama set up a program to give priority for clemency to applicants, inmates that met a set of criteria aimed at undoing the damage of the war on drugs, while ensuring public safety would receive priority. Leticia met all the factors. She was only 22 at the time of her incarceration, and her prior offenses were driving without a license and destruction of property.

There was no history of violence and a job in her father's business waiting for her when she left prison. We included over 15 support letters in her petition. She was, in my mind, the perfect candidate.

We gathered the evidence, submitted her application to the clemency office, and planned for her release. But that's not how things worked out. Leticia's was one of 8000—nearly 8000 petitions—that was never reviewed before Obama left office.

Obama granted more commutations than any other President, and when he did, the average impact was huge. A savings of 140 months off of a sentence or 11-plus years of a life; a son or a daughter, a mother, a sister or brother, an auntie back; and a savings of over a quarter million dollars of taxpayer money. But there was simply too much bureaucracy and too little coordination to review all the applications. Leticia never got her second chance.

As I went back to teaching and research, her experience haunted me. How many people are entitled to some sort of second chance but aren't getting it, not because of steel bars, but because of red tape?

I started with the Clemency Project, which, it turns out, did not only have a backlog problem, it had a problem that the criteria were not applied consistently. Many who are eligible for relief, according to the independent U.S. Sentencing Commission, were not getting it. The people who did get it, did not necessarily qualify, according to the published criteria.

When all was said and done, only a tiny fraction of those eligible, three to six percent, actually received relief. That's a gap of 94 to 97 percent of all cases. The United States is home to five percent of the world's population, but over 20 percent of the world's prisoners. Mass incarceration is fueled by how bad we are at rehabilitation.

As President Trump drew attention to, at a White House summit I attended on Friday, in what *The New York Times* editorial page called "a rare moment of empathy for the President," he drew attention to the fact that 77 percent of state prisoners are rearrested within five years. One out of nine black children has a parent in prison. And with a nearly 70 percent cumulative risk of imprisonment among young black males, black male high-school dropouts are more likely to be incarcerated than have a job.

When I started digging deeper, I realized Leticia was not the only person for whom her second chance had become a mischance. The good news is that states and the feds have enacted waves of second-chance laws all around the

country, providing for three main forms of relief—early relief or release from incarceration, clearing of one’s criminal record, and re-enfranchisement of the right to vote to ex-felons.

The bad news is that in many cases to get your second chance, you actually have to apply for and claim it. I started documenting what I call the “second chance gap,” the difference between those eligible for and those receiving second chances. Certain benefits, for example, the Earned Income Tax Credit, have been the subject of similar uptake analyses, but not criminal justice.

The work is ongoing and data is hard to come by, but my preliminary findings suggest that the Clemency Project was not an outlier insofar that there was a huge gap between those likely eligible for relief and those getting relief.

One example comes from my home state of California, which earlier this year legalized recreational marijuana. When we did so, we also retroactively allowed those serving marijuana sentences or who had a marijuana conviction on their record to get those charges reduced or removed from their records.

Records clearing is a big deal because criminal records can have a significant collateral consequence on you, impacting whether or not you get a job, whether you can get a loan, a lease, serve as a notary, or thousands of other collateral consequences. But while it was great that California was moving to clear these records, the problem was that people did not necessarily realize they were eligible for relief or how to apply for it.

When San Francisco D.A. George Gascón took it upon himself to actually figure out who might be eligible, his team found 4940 convictions eligible for resentencing and over 3000 convictions eligible for reclassification, but only 202 resentencing and 30 redesignation petitions have been filed. That amounts to just three percent of the thousands of eligible convictions the D.A.’s office found, or a gap of 97 percent.

I repeated this exercise in other jurisdictions with other forms of second-chance relief and found similarly large gaps, ranging from 65 percent to 97 percent. With it, I can make my own preliminary graph here. You can see the blue circle representing people who are actually likely eligible for relief, and the red representing those who have actually received relief in a number of different programs. The data is preliminary, but will be released in the coming weeks and months.

We, as lawyers, are used to trying each case on its merits, weighing the particular evidence. But the mass problem of fixing our criminal-justice system requires mass scalable solutions, I believe. Seventy-four million Americans, or one in three adults, has a criminal record. That’s more than voted for Obama in 2012 and about the same number that has an undergraduate degree.

To me, this means we need to consider moving away from individualized treatment of each applicant to restore their second chance. It means reducing the

application burden and increasing economies of scale by standardizing processes, rolls, data collection and dissemination.

Here is where I believe two kinds of code, computer code and legal code, must work together to deliver justice in this case—and, in this case, second chances. Computer code can automate parts of the process by making targets aware that they are eligible and pulling in and gleaning data from disparate sources.

Legal code is even more powerful because it can burden shift to the state. It can require automatic clearing and enable these processes to happen at scale. Not on a county-by-county basis where there are sometimes only hundreds of second chances to restore, but at a state-by-state basis or even federal basis, where there are tens of thousands or hundreds of thousands of applications supporting investments in innovation.

Words and pictures, code and code, speaking on behalf of those who cannot tell their own stories, to a roomful of people who can make a difference in a way they can understand.

Thank you to my mentors, teachers, and ancestors for showing the way. Thank you to ALI for this great honor. (*Applause*)

**Justice Mariano-Florentino Cuéllar (CA):** Thank you, Professor Chien.

We have just about enough time to take one or two quick questions, if anybody wants to ask a question or two.

I'm going to ask you a question, and that is it's not very common, even for a law professor who has very eclectic interests, to have a presentation about patents and about criminal justice. (*Laughter*) Discuss. (*Laughter*)

**Professor Chien:** Tenure is a wonderful thing. (*Laughter*) (*Applause*)

**Justice Cuéllar:** You know you have a really great law professor when they can answer it with a very crisp and very short answer. I'm still working on that.

We have one question. Perfect timing.

**Judge Bernice Bouie Donald (TN):** Good morning, Professor, and thank you for this excellent presentation.

I am Judge Bernice Donald from the Sixth Circuit Court of Appeals, and I'm interested in the part of the presentation that dealt with felon re-enfranchisement. You mentioned, I guess, the pace that it's going. What's the largest impediment right now legislatively to the states providing a fix there?

You know, the research that I've done shows that about 5.5 million people right now are under a disenfranchisement, with every state except Maine and Vermont imposing pretty severe disenfranchisement. So what's the largest, I guess, legislative impediment? What are people positing as the barrier to fixing that?

**Professor Chien:** Thank you for the question, Your Honor.



So I think, at each stage of the felony disenfranchisement process, there are things that could be done, both legislatively as well as, I think, in the administration of the law. So of the I believe it's 6.5 million or 5.5 million people that are disenfranchised, there are only two states that you mentioned that do not disenfranchise felons. A vast number of people are disenfranchised while they are in prison, and there, you could have legislation that would actually allow them to vote and have a stake in reentry already while they're in prison.

And I think there are a number of reasons why the momentum for this could be possible, I think, because there has been now a greater focus on thinking about we have this huge problem with recidivism. When people come out, they are not feeling that they are invested in society or that society is invested in them. And again, I'm going to quote President Trump.

You can look at yesterday's op-ed in *The New York Times*, where he said people are so excited to leave prison. They want to come back, and they want to contribute, and society does not give them a chance. They can't get a job. They're not allowed to vote, and they haven't been invested because they've been in prison for, many times, long, long sentences.

So getting people more invested while they're in prison to get back and continue to be involved in civic engagement is one legislative fix. So there are a number of states, the vast majority of states, that disenfranchise in prison.

Now those folks, in most of those states, when people leave prison, they get their right back to vote, and that's automatic. But there are 12 states that represent about 3.5 million people where people are permanently disenfranchised unless they go through this onerous process of applying for their vote back, and the process can be extremely cumbersome.

I tried to chart it out with a number of my research assistants, and we looked at all these different states. We're leveraging work that the Clemency Project and many good groups have done for many years. But it involves not only trying to figure out every time you've ever been in contact with the criminal-justice system across all the different counties, documenting that, making sure all your fines and fees are paid up, then documenting any record you have of, you know, where you've lived, your job, everything else, bringing those records in triplicate, and it's extremely onerous.

So I think there is some role for, in places where there is a legitimate process in place, for those to be automated, and that doesn't necessarily have to require a change in the law. But there are other places where even if you go through all those hoops, at the end of the day, you're still facing a board, which could be the governor, who may not want to do anything because they don't agree with the political stance, or you don't feel like they want to do a pardon on that day, or you face a committee that doesn't have any oversight over it.

And so there are, you know, all these different hurdles, I think, that are in place, and in those cases, you have bills like the Florida bill, which would make it much easier if you go through the process to get your—I think it's not the

Florida bill, but I'm sorry, there's a Florida proposal for the ballot, in the fall, to make it easier and to remove those barriers.

But right now, we put what has been described as a triple penalty on ex-felons to participate in the system. First, we make it really hard for them to get their vote back. Then they have to register. Then they actually have to turn out. And if we want to stem the cycle of the revolving door, then I think we need to try to invest in more engagement.

**Judge Donald:** Thank you.

**Justice Cuéllar:** Before I ask you to join me in recognizing Professor Chien, I just want to make one observation in closing, and that is, to my mind, what connects your interest in patents and IP and criminal justice, and actually, Professor Schwarcz, your interest in insurance as well, is that however proud we might be about the American legal system—and I think if any of us were giving a speech in another country, we'd think of our legal system as one of the most defining features of our country—it is very dependent on our ability to understand where it falls short and what can be better.

And so I want to thank you both for helping us imagine how it can be so. Thank you very much, both of you. (*Applause*)