

## 2021 WRITING COMPETITION VIRTUAL ROUNDTABLE

The California Supreme Court Historical Society convened a video conference to congratulate the 2021 winners of its annual Selma Moidel Smith Student Writing Competition in California Legal History.

The award-winning students introduced themselves and presented summaries of their papers. Participating in the discussion were California Chief Justice Tani Cantil-Sakauye, recently retired Justice Kathryn Mickle Werdegar, Society President Richard H. Rahm, and Selma Moidel Smith who initiated and conducts the competition.

The following is a lightly edited transcript of the video conference that took place on August 5, 2021.<sup>1</sup> The complete papers appear immediately following in this volume of *California Legal History* (vol. 16, 2021).

RICHARD H. RAHM: I want to welcome everyone. My name is Richard Rahm. I'm president of the California Supreme Court Historical Society, and I want to welcome you here today to honor the recipients of the Selma Moidel Smith Student Writing Competition in California Legal History. I want to say that the competition was first proposed by Selma in 2007,

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<sup>1</sup> The video conference is available on the Society's website at <https://www.cschs.org/programs/student-writings> or on the Society's YouTube channel at [https://www.youtube.com/watch?v=Iw5DIdz\\_SF8](https://www.youtube.com/watch?v=Iw5DIdz_SF8).

and she's been producing it ever since. In 2014, on the occasion of her 95th birthday, the competition was named for her. The competition this year was judged by distinguished legal historians: Professor Stuart Banner, UCLA School of Law; Professor Emeritus Christian Fritz, University of New Mexico School of Law; as well as Professor Sara Mayeux, Vanderbilt University School of Law, who incidentally was the first-place winner of the competition in 2010.

Next, I would like to introduce the chief justice of the California Supreme Court, Tani Cantil-Sakauye, who's been chief justice for eleven years now. The chief justice has championed the cause of bail reform, and she leads an initiative called "The Power of Democracy" to support civil discourse education for students. This is my own opinion, but I think that during her tenure there have been an incredible number, maybe a record number, of unanimous decisions on the Court. I haven't done an analysis, but it seems like a record to me, and congratulations on that. Finally, and perhaps most importantly, the chief justice is also chair of the California Supreme Court Historical Society.

Next, I would like to introduce a former associate justice of the California Supreme Court, Kathryn Mickle Werdegar, who is also a long-standing member of the Society. Justice Werdegar, who a couple of years ago, retired after twenty-three years on the Court, was then and remains a champion of environmental law. She has also funded and established a student travel grant at the Society to help California legal history research.

And finally, there's Selma, our Selma. Selma became an attorney in 1943, and practiced for more than forty years. She took over the editor-in-chief position of the Society's *California Legal History* journal in 2009, doubling its size and making it into the preeminent journal it has become. At 102, Selma has remained a leader in the legal profession, being honored by the ABA, the National Association of Women Lawyers, almost every other legal organization, and then some. And did I also mention that Selma was honored by the UCLA School of Music this year by the creation of the Selma Moidel Smith Annual Recital recognizing Selma's 100-plus musical compositions.

Without further ado, Chief, I think this is where you give your greeting.

**CHIEF JUSTICE:** Thank you, Richard, and thank you for being such an excellent and, I want to say, inspiring president of the historical society,



VIRTUAL ROUNDTABLE PARTICIPANTS —

TOP, LEFT TO RIGHT: CHIEF JUSTICE TANI CANTIL-SAKAUYE,  
JUSTICE KATHRYN MICKLE WERDEGAR (RET.), COMPETITION CHAIR  
SELMA MOIDEL SMITH, AND SOCIETY PRESIDENT RICHARD H. RAHM.

BOTTOM, LEFT TO RIGHT: WINNING AUTHORS KAYLEY BERGER,  
BROOK TYLKA, AND KELLY SHEA DELVAC.

and how you led in time of crisis and that the work of the historical society has only flourished under you. I also want to say hello to Chris,<sup>2</sup> without whom so many things with the historical society, including us being here today, could not happen. And I'm going to save the best for last, and that's Selma, but I will say also, when Kay and I served together on the California Supreme Court, it was a joy, always a learning experience. Kay Werdegar is a force, an intellectual force, and poised, and graceful. No one can exceed that. And every day, we miss Kay. And many of Kay's dissents turn out to be, later on, majority — resounding majority — opinions. And so, Kay, if you don't already know it, we miss you dearly every day. Your name has not faded at the Supreme Court amidst our discussions, and so it's a pleasure to see you. Now, let me just say this about Selma. As you know, this

<sup>2</sup> Chris Stockton, CSCHS Director of Administration.

writing competition is named after Selma because it's Selma's brainchild. But Selma is the mother of countless, infinite number, of tremendous ideas in the legal field. I hope you have a chance, if you have not already Googled Selma. Selma has created, started, inspired, been a part of — and this is important to us here, since all three winners are female — the female-empowered movement in the law. Selma Moidel Smith is the conqueror, the starter of that, at a time when it wasn't necessarily popular, or understood, or considered anything that anyone would join, but Selma has been a tremendous, remarkable, extraordinary voice, and she inspires, she mentors, she sponsors, and I'm proud to be in her company. So, when you hear Selma speak and address you, you'll know what I'm talking about. We've also had the pleasure, Kay and I, as well as another justice from the California Supreme Court, Carol Corrigan, to honor Selma many times, and one of our most recent opportunities — they played some of Selma's music, the music she composes and plays, and we had the pleasure of sharing the stage with Selma as she led us through some of her music.

I'll be brief in terms of the rest of my remarks, only to say how impressed I know I am, and all of us here are, not only with the topics that you chose to write about, which reflects your awareness and your keen insight into the issues that trouble our legal profession, and hence California and the United States today, but that I look forward to reading your inner thoughts regarding these ideas. But what you have touched upon, in terms of, well, Kayley with vagrancy and racial exclusion, sit-lie, and the right to exist in public — how poignant that is, especially now, more than ever, so the fact that you were able to anticipate and write this in a time that it now means so much to us, will serve you well in your years to come in law school because you're prescient. And then, of course, to Brook, for "Getting to *Tarasoff*: a Gender-Based History of Tort Law Doctrine." *Tarasoff* continues to be a case of such magnitude that we discuss it regularly at the California Supreme Court, and I look with interest for your view on this with, as you state in your title, the gender-based history of tort law. And of course, next, let me say, Kelly, your article on California wrongful incarceration compensation law — I don't know that there is a week that goes by that we don't read about something like that in the paper, and when we talk about something like that, of course, it brings with it the weight of what has happened to a person because of wrongful incarceration, and the

contrariness that is to our justice system. So your insight is also important for us, and reminds us about the important work we should be doing, always fairly, accurately, and with transparency. So, I look forward to your articles, I congratulate all of you, and wish you the best. I turn this back to you, Richard.

RAHM: Thank you, Chief. Now that we've heard something about these papers, I'd like to hear them described. The first-place winner is Kayley Berger, who will be in the class of 2022 at UC Irvine School of Law. Kayley's paper, as the Chief mentioned, is "Surveying the Golden State, 1850–2020: Vagrancy, Racial Exclusion, Sit-Lie, and the Right to Exist in Public." Kayley, can you tell us something about yourself and something about your paper?

KAYLEY BERGER: Yes, I'm a J.D./M.B.A. candidate. I'm going into my fourth and final year at the amazing UC Irvine School of Law, and I have recently accepted an offer to join Kirkland & Ellis after graduation as a corporate associate, and then, after that, I will actually be clerking on the Ninth Circuit. So, I have an exciting future lined up. My article traces legal and quasi-legal policies that criminalize the right to exist in public. These include early vagrancy laws aimed at Indians, "greasers," "Okies," Chinese racial exclusion, sundown towns, sit-lie ordinances, and probably a more recent phenomenon, the civil unrest emergency curfews. My point in highlighting the ways in which the Golden State has participated in, or even innovated, discriminatory law and policy is for the reader to consider the potential similarities between these contemporary laws such as sit-lie and contemporary curfew laws and older laws that we actually now consider embarrassing. Are they aimed at removing a population that is broadly disliked? Are they legitimate concerns, or a pretext? Does the enforcement broadly infringe on recognized liberties? These are the questions that I want my paper to invoke, not only when you look at these old laws which we now all can agree are not our state's proudest moments, but recent laws, and laws that still exist today.

RAHM: Kayley, how did you come to write about that, or was there some specific event that occasioned this paper?

BERGER: Actually, I wrote this paper last spring, when a lot of the George Floyd protests were going on, and these curfews were being put in place in California. And whenever I think of curfews and civil unrest, I often think

back to the Rodney King incident and those protests, and the amount of people that were arrested and actually hurt and people who died during those protests. Some of that was at the hands of law enforcement, enforcing those curfews, and so I wanted to make a statement at the time about how I felt about that incident that was going on at that time and relate it back to California's history because we think of California — a lot of people think of it — as a very liberal state, and it is, and there's a lot of liberal policies. Maybe that's because we're considered a sanctuary state; California gave COVID aid to undocumented immigrants when the federal government didn't; California has done some amazing things. But we also have been an innovator in discriminatory policy as well, and so I did want to highlight that.

RAHM: Thank you very much, Kayley. Our second-place winner was Brook Tylka, who graduated this year from Boston University School of Law. Brook's paper is entitled, "Getting to *Tarasoff*: A Gender-Based History of Tort Law Doctrine," and, Brook, can you tell us something about yourself, and how you came to write this?

BROOK TYLKA: I graduated this past spring from Boston University. I was a dual-degree J.D. and M.A. in history student, so definitely, I've always been interested in history and knew I wanted to write some legal history papers during my time in law school. I've now moved back to Wisconsin, which is where I'm from originally. I'm working at a small plaintiff-side employment firm here. I really came to this idea in my 1L Torts class, when we first read *Tarasoff*. I was really struck by all the things I felt were going on in this case as far as issues of national origin, race, gender, domestic partner violence, and all these things, and how those dimensions aren't necessarily usually talked about. In a 1L Torts class, you focus on the issue of duty and that kind of role rather than the more in-depth issues. So I wanted to look backwards from *Tarasoff* and see, was this decision really in line with prior decisions, did it represent a turning point, and so I looked backwards to different torts that disproportionately affected women, and these had a very wide range from early breach of promise cases, which involved women bringing suit for a man's failure to follow through on a marriage proposal, all the way to high-standard claims for negligent infliction of emotional distress, which usually disproportionately impacted women in caretaker roles, usually with a negligent injury to a child or a

spouse — even up to the present day, with issues of revenge porn on the internet — there’s a lot of gender dynamics of torts that I was interested in. Taking a historical look more closely at California, I argue that *Tarasoff* represents the culmination of an expansion of tort law in California, to include recovery for situations that disproportionately affect women. I also discuss a little bit about how this didn’t necessarily take place in a vacuum, but there also was, of course, a large women’s rights movement going on at this time, and there was a lot of activism here towards bringing greater attention to domestic abuse against women more broadly, so I examined that as well to look at how this was able to bring more attention to the issue of intimate partner violence which was at issue in *Tarasoff*.

RAHM: As you mentioned, you also go past *Tarasoff* to the present, and I think one of your observations was that there’s been some kind of retraction in the *Tarasoff* doctrine. Do you want to say something about that?

TYLKA: Looking a little bit past *Tarasoff*, I argue that *Tarasoff* represented the culmination and then following that there was a bit of a retraction which would seem to be tied to a rightward shift on the California Supreme Court. That helped as well to show how *Tarasoff* fits within the broader framework of torts in California.

RAHM: That’s great. I very much appreciate it. When we’re in law school, of course, we learn about duty of care, and breaching that duty, and what have you, and to look at this from a different perspective, that is, from the lens of women’s rights, was extremely interesting.

We’ll go now to the third-place winner, Kelly Shea Delvac, who graduated this year as well, from Pepperdine University School of Law. Kelly’s paper is entitled, “California Wrongful Incarceration Compensation Law: A History that Is Still Being Written.” Kelly, can you tell us a little bit about yourself and your paper?

KELLY SHEA DELVAC: To Selma, first, thank you so much for running an amazing competition, and it’s such an honor to be on this call with all of you, so thank you. I come to the law after a career as a circus performer, but the law is just as thrilling as being a circus performer. I just graduated from Pepperdine Law. I just took the bar exam from my home, and that was a harrowing experience, but writing this article was amazing. I had done another article arguing for wrongful conviction as a Fifth

Amendment taking,<sup>3</sup> and to give some compensation that way, because there are many states that don't have compensation statutes for people who have been wrongly convicted, so I wanted to see, what has California done? I was so pleasantly surprised by the history — the first wrongful conviction was in 1852, and wrongful convictions have gone on since the beginning of our statehood. In 1852 when it happened, people actually raised a fund for this man who was wrongly convicted, and the Senate refused to give it to him because, they said, "In society it too often happens that the innocent are wrongfully accused of a crime. This is their misfortune, and the Government has no power to relieve them." That's horrifying, looking back on that, that it's "their misfortune." California has responded. In 1913 was the first time they passed a compensation statute, and every decade — more so in recent history, every few years — they've tweaked the statute to make sure that those who are being wrongly convicted and who have been wrongly incarcerated are not missing out [on the benefits of the compensation law] because, maybe, there was a bad fact on their side, or the Compensation Board — they used to have a totally separate ruling on the merits, separate from the court, and that's been abolished. There are still tweaks that can happen, and California has been responsive, and it's such a testimony to the heart of our justice system here in California that the judiciary does seek justice and seek to right the wrongs that do happen, because we know that they happen, and it's what we do after the fact, and so that's why I titled it "a history still being written" because unfortunately it will probably never happen that we will never have any wrongful convictions, but at least when we have them, we can reverse them and we can also compensate as best as possible.

RAHM: I thought it was particularly interesting, Kelly, that the agency that approves the compensation for those who have been wrongly convicted, one of the things, as Kelly points out, you have to show that you were damaged in terms of your worth, your compensation, things like that. Of course, someone in prison isn't getting any compensation, and it's not that you were thrown into prison wrongfully, and that would be a tort in and of itself, but rather to get reimbursement from the state you actually have

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<sup>3</sup> "Liberty and Just[Compensation] for All: Wrongful Conviction as a Fifth Amendment Taking," *Connecticut Law Review* (forthcoming 2021).



to show that you're not the *sort* of person who would be subjected and put into prison, which is also a type of demonization of anyone who's a little bit different, who might be put in prison because they look different, different race, nationality, things like that. I thought that was very interesting.

DELVAC: Thank you.

RAHM: What I'd like to do now, just for a couple of minutes, is an overview of the papers, because they were all interesting in their own right, but, starting with Kelly's — your paper was the history of a reform, going back to the 1850s, to the present, that gradually it's working itself free, the law is becoming better, and it is getting more reformed, and hopefully it will continue in the future, so it's a policy reform. I want to look at it from social policy. Where do you see the law going in this regard?

DELVAC: I see the law being responsive to who we're leaving behind and changing to make sure that those people are not left behind. Recently, we have our factual innocence ruling, and before 2016, the board that was deciding the compensation didn't have to take that factual innocence ruling — they could make their own, and in 2016 the court said, no, you have to take the exonerating court's ruling as the ruling here, and I think that's just one example — that, as they continue to tweak and find we're leaving people behind that they can continue, and I think the court has been very responsive to doing that, and I see that continuing.

RAHM: Very good.

Brook, your paper, by examining tort through a gender-based lens, points to different sorts of reforms that we *might* have. I thought a lot of the paper was focused on how one can *see* tort through a gender-based lens. Where do you see that sort of policy, or leading to what sort of policy or reform?

TYLKA: Some of the things I mentioned in my paper were current issues involving torts against women, like involving technology and the internet. I think that just a greater awareness of the gendered aspects of some of these torts will lead to more legislative or judicial action in those realms, rather than having that realm be kind of ignored. So, I think just examining the more contemporary issues that are arising with more technology,

through a gender-based lens, will lead to some more acknowledgment of some reforms that need to be done in those areas.

RAHM: Certainly, enough that we're sensitized to what we're doing in the law when we either enact new laws or decide laws.

I want to come back to you, Kayley. Your paper was very interesting in that it was very much a cautionary tale of — here, things got better, but remember that things have not always been that way, and there's been a lot of demonization of the Other, whether it be vagrants, indigents, African Americans, Chinese. At one time or another, these were all the Other, and public policy was against them. It doesn't end on a note of reform, and so, I wanted to ask you, perhaps it's enough to say, "Be cautious," in terms of using the state power. "You have a huge hammer that you're wielding, be careful with it." But do you see it going toward some sort of policy or reform?

BERGER: Yes, it's definitely a cautionary tale, and part of the tale is that it's not just law. Quasi-legal policies like sundown towns — the way society *was* made it illegal to be in public if you were an African-American person at that time, so I guess the hope is that when we do pass laws, as a society we think for example civil unrest curfew is a law that's beneficial for society overall, we consider that maybe it's not and that enforcement of something like a civil unrest curfew can actually lead to a lot of different discrimination arrests and even death. It's a paper to ask people to think — what problem do you have with that, keeping the peace, what problem do you have with that? The problem might be with the way it's enforced. The problem might be why the law was put in place, because what kind of people are we trying to enforce it against? And, even if it's not the intent of the law, in practice, look at what the law does. It's asking people to think and remember that, at the time each of these laws were passed, they weren't thought to be this "horrible" law. Before, they were more blatant — if you're Chinese, if you're indigent — it was more obvious, but then maybe the law becomes not so clear but, who it's enforced against if you look at the numbers, and you actually do the research, it does become clear that the law is targeted.

RAHM: You mentioned California's criminalization of indigency, or bringing indigents into the state in the 1930s — it leads to, there may be reform

and growth because in that case, they convicted someone of bring in his sister and brother-in-law because they were indigent, from Texas. These were primarily against white people — white people in the 1930s, mostly Christian, northern European, but they were indigent, and it was argued before the United States Supreme Court that California should have a right to keep these people out because they're syphilitic, they're inbred, low intelligence, they fill up the criminal calendars, and why shouldn't California be able to keep them out. The law got overturned by the U.S. Supreme Court, but just to let you know, the attorney general who argued on behalf of the state of California was Earl Warren. He later referred to this case, which was *Edwards v. California*, in support of his civil rights cases. So, things *can* get better.

BERGER: In my paper, I also talk about Gov. Gavin Newsom, who, at the time when he was mayor of San Francisco, was actually a proponent of sit-lie, which is so interesting because you also see him as this — like Earl Warren — very liberal policy for the underdog. So it's very interesting when you look back and you see who was making these decisions.

RAHM: Absolutely. What I'd like to do now is go to you Chief, for your responses, followed by Justice Werdegar, and then by Selma. Chief —

CHIEF JUSTICE: Thank you, Richard, and thank you for your probing questions. It makes us all think, and certainly in the business of law, that's what we do. I again reiterate that I'm inspired by your thoughts, and I hope that all of you, sometime in your future, decide to either go into policy, go into judging, or advise someone who is in a decision-making position, because, of all the decisions that are made here in California that have been made in the past, that are going to be made in the future, they're always influenced by current events and influenced by majority feelings, but it's imperative in the law, and for sound policy, that we all be critical thinkers, and as long as there is an us-versus-them mentality, we'll never win. So, I have appreciated all of your thoughts, and it gives me things to think about in the future. Thank you. Thank you, Richard.

RAHM: Thank you very much, Chief. Justice Werdegar —

WERDEGAR: I am so impressed with these three outstanding articles, all of which explore aspects of our law in California that we need to be

educated about. The beauty of this competition that Selma created is it brings to mind for our historical society bits of history that perhaps would not be studied in such depth. These articles in particular give each of us so much to think about with respect to what's the good, the bad, and the ugly in California. In the evolution of the law, we hope we're always going forward. We hope we are always correcting. So, they are fascinating, and I am so pleased they received these awards, and I congratulate all of you. So, those are my comments. I look forward to returning to each of the articles. They are so educational, and they foretell the bright futures that clearly are on the horizon for you.

RAHM: Thank you very much, Justice Werdegar. And Selma, our Selma — SMITH: Congratulations to our three winning students, Kayley, Brook, and Kelly, and I want to mention that their papers — that we are discussing — will appear in our journal later this summer. I want to give a big thank-you to my dear “Chief Tani.” Thank you for making yourself available again for this event. As the chief justice of California, you honor us with your presence and your welcome remarks. And I want to thank my dear friend Kathryn, after your many years on the Court, for the good thoughts and kindness you have brought every year since this competition began in 2007. And I want to thank our fine president, Richard, for his moderating, and our able Chris for making the arrangements. To everyone, thank you all so very much.

RAHM: Thank you, Selma. You're truly an inspiration to all of us. [applauding] And so, to Kayley, Brook, and Kelly, thank you so much. I really enjoyed reading your papers. Also, please don't hesitate to reach out to me to discuss your papers further. If you have other ideas, I'd be more than happy to discuss those with you. Again, thank you very much, Chief, for your remarks. Thank you very much, Justice Werdegar. And thank you, Chris, for organizing and putting this all on. And thank you, Selma. I think this concludes this little awards ceremony, but this isn't goodbye forever. It's a beginning.