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Preserving Legal History in Superior Court Records:

Institutional Opportunities and the Stanford Law School Collection

The records show human hopes, strivings, speculations, and frolics: the successes and the failures. Researchers can observe the misdemeanors and the crimes, the full range of wrongs to person and property, and the offenses against the peace and dignity of the state. Pioneers become the human beings that they actually were – good, bad, and in-between. The circumstances-fortunate and unfortunate, in high places and low-under which they actually lived become real. – W.N. Davis, Jr., Chief of Archives, California State Archives, 1973, describing the value of California county court records.¹

Introduction

State superior court records illuminate a prism of life and legal history.² With voyeuristic precision, they chronicle the dissolution of business partnerships or marriages gone sour.³ When aggregated, they offer insights into matters of legal heritage—like the defense of slaves against criminal prosecution,⁴ the demography of adoptions and probate administration,⁵ or the evolution of terminology used to classify crimes.⁶ For all of their research value, however, collections of historical superior court records can be tricky to find.⁷ Limited records management budgets and chockablock storage facilities can leave county clerks few options but to discard files once

¹ W.N. Davis, Jr., “Research Uses of County Court Records, 1850-1879: And Incidental Glimpses of California Life and Society, Part I,” 52 CAL. HISTORICAL Q. 241, 242 (1973).

² *Id.* See also, WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1994) (using superior court records to trace common law development).

³ See, e.g., “Complaint,” Glinka v. Wundsche, No. 10472 (Alameda Super. Ct. Oct. 18, 1894) (business dispute); “Complaint for Maintenance,” Heringer v. Heringer, No. 10431 (Alameda Super. Ct. Oct. 3 1894) (divorce). Both files are available in the Stanford Law School collection, described *infra*.

⁴ See, e.g., Jenni Parrish, “A Guide to American Legal History Methodology With an Example of Research in Progress,” 86 LAW LIBR. J. 105 (1994).

⁵ See, e.g., Jamil S. Zainaldin, “Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851,” 73 NW. U. L. REV. 1038 (1979) (using court records for tracing adoption social characteristics); Robert A. Stein & Ian G. Fierstein, “The Demography of Probate Administration,” 15 U. BAL. L. REV. 54 (1986) (probate demography).

⁶ Davis, *supra* note 1, at 242-43 (explaining the crime of “cheating or swindling,” often applied to the theft of gold dust); Thomas R. Phillips, *Justice in the New State Capital*, TEX. BAR J., Mar. 2012, at 195 (describing a crime for “marking an unmarked hog without the consent of the owner”).

⁷ See generally Rodd E. Cheit, “The Elusive Record: On Researching High-Profile 1980s Sexual Abuse Cases,” 28 JUST. SYS. J. 79 (2007) (addressing difficulty of finding and accessing state trial court documents).

statutory retention periods expire. This is actually sound records management, but it constrains historical research. Certain files (particularly pre-twentieth century records) may be transferred to official state archives, but these archives—whether by statute or custom—often focus on collecting only appellate-level materials. As a result, researchers seeking particular superior court files, or to develop data sets for empirical research, can face difficulties determining even where to start.⁸

Recognizing superior court records' research value and vulnerability, states have increasingly sought to protect them. Archives like those in Vermont and Utah have obtained grants to preserve such files *en masse*.⁹ In 2011, Texas overhauled its preservation laws when a task force reported that scores of county court files—including the trials of John Wesley Hardin and Bonnie and Clyde—were in jeopardy of deterioration or destruction.¹⁰ In 2012, a historian's inability to locate a nineteenth century murder file led the Missouri Secretary of State to establish a "Local Records Preservation Project" for organizing and preserving that state's trial records.¹¹

These preservation efforts suggest increased opportunities to use historical superior court records in scholarship. Yet, what are the mechanics of accessing the records? What conditions and rules shape their availability for research—particularly beyond the courthouse, as in local universities, museums, or libraries? And by what processes or means have such third-party institutions developed their superior court records collections? This article probes the

⁸ See, e.g., David H. Flaherty, "The Use of Early American Court Records in Historical Research," 69 LAW. LIBR. J. 342, 344 (describing search "odyssey").

⁹ See *Vermont State Archives Awarded Grant to Preserve Court Records*, VSARA'S QUARTERLY NEWSLETTER (August 2011), http://vermont-archives.org/publications/records/Fall2011/Fall2011_news_grant.html; see also *District Court Records*, UTAH DIVISION OF ARCHIVES AND RECORDS SERVICES (May 13, 2008), <http://archives.utah.gov/research/guides/courts-district.html>.

¹⁰ Bill Kroger, *A History of Texas in 21 State Court Records*, TEX. BAR J., at 190 (Mar. 2012); Ken Wise, *The Trial of John Wesley Hardin*, TEX. BAR J., at 202 (Mar. 2012); James Holmes, *State of Texas v. Frank Hardy and the Bonnie and Clyde Murders*, TEXAS BAR J., at 214 (Mar. 2012).

¹¹ Stephanie Claytor, *Truman Students Help Preserve County Court Records*, HEARTLAND CONNECTION (Apr. 18, 2012), <http://www.heartlandconnection.com/news/story.aspx?id=743744#UEUBSsFIQmw>.

underexplored mechanics of researching with historical superior court files. First, it examines factors shaping record availability, then discusses interstate variations in applicable preservation rules. Next, it describes the evolution of institutions' right to collect California superior court files. Finally, it provides an overview of Stanford Law School's collection, using a 1905 dispute between oyster barons to reveal the types of research questions inherent within nearly every file.

Part I: Superior Court Records Preservation Issues

For more than a century, court clerks have bemoaned the volume and condition of the files they oversee.¹² Their stories are eerily similar, and go something like this: Old records are piled floor to ceiling under leaky water pipes, or stacked against furnaces; they are left unorganized in musty basements where documents dampen and mold, or in sweltering attics where records grow brittle and crack.¹³ One 1912 Iowa court clerk described his records as having been filed in "pigeon holes," heaped among "boxes, maps, brooms, and sweepings left by the charwoman."¹⁴ As a result, he concluded that, "No investigator could work to advantage with the [court records] in their present condition. It would first require an archaeologist, in the sense of an excavator, to dig them out of the dirt they are in!"¹⁵

Retention standards for paper files certainly have changed in the past hundred years. Yet, even modern-day historians can wade fruitlessly through boxes at the courthouse, unable to obtain confirmation that the sought-after files still exist.¹⁶ Fault lies not with the clerks, but in the size of the court systems, the volume of materials for which clerks are responsible, and the

¹² Edwin G. Surrency et al., "Legal History and Rare Books," 59 LAW LIBR. J. 71, 73 (1966).

¹³ *Id.*; see also Texas Court Records Preservation Task Force, *Report on the Preservation of Historical Texas State Court Records* (hereinafter *Texas Report*), SUPREME COURT OF TEXAS, at 3, 30-31, 51 (Aug. 31, 2011), <http://www.supreme.courts.state.tx.us/crptf/docs/TaskForceReport.pdf>.

¹⁴ Surrency et al., *supra* note 12, at 73.

¹⁵ *Id.*

¹⁶ See also *Texas Report*, *supra* note 13, at 30-31.

requirements governing what courts must retain—all of which are exacerbated by limited records management budgets and inadequate storage facilities.¹⁷

The records management burdens faced by state superior courts, however, are somewhat unique from those encountered in other United States courts. Federal court records are overseen by the National Archives and Records Administration (“NARA”), which establishes preservation policies for (among other federal entities) the district courts, Circuit Courts of Appeals, and the U.S. Supreme Court.¹⁸ NARA requires the eventual transference of many older files to federal records centers, or to NARA directly.¹⁹ Even state appellate court records can put less of a strain on originating courts: State-run archives, libraries, and universities may accept historical state appellate and supreme court records.²⁰ These procedures alleviate some of the storage, care, and administrative burdens placed upon the courts, themselves. By comparison, superior courts have fewer routinized transfer options for old paper files—leaving counties to foot expensive off-site storage bills, or discard records once retention periods expire.²¹

¹⁷ See, e.g. JUDICIAL COUNCIL OF CALIFORNIA, REPORT ON JUDICIAL COUNCIL-SPONSORED LEGISLATION: MODERNIZING TRIAL COURT RECORDS MANAGEMENT (AMEND GOV. CODE, §§ 68150 AND 68151) (ACTION REQUIRED) (hereinafter *California 2009 Report*), at 2 (Nov. 13, 2009), available at <http://www.courts.ca.gov/documents/121509item2.pdf> (describing records management strain); JUDICIAL COUNCIL OF CALIFORNIA, TRIAL COURT RECORDS MANUAL (hereinafter *TCRM*), at 2 (Jan. 1, 2011), available at <http://www.courts.ca.gov/documents/tcrm-v1final.pdf> (describing costly and cumbersome management).

¹⁸ See, e.g., *Court Records*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/CourtRecords.aspx> (last visited Sept. 3, 2012).

¹⁹ *Id.* See also, e.g., *Court Records: Records Schedule*, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/CourtRecords/RecordsSchedule.aspx> (last visited Sept. 3, 2012); *Records Control Schedules: Judicial and Legislative*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, <http://www.archives.gov/records-mgmt/rcs/schedules/index.html?dir=/judicial-and-legislative> (last visited Sept. 3, 2012); see also *National Archives Statement on Appraisal of U.S. District Court Records*, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION, <http://www.archives.gov/press/press-releases/2011/nr11-174.html> (last visited Sept. 3, 2012) (explaining new retention standards for U.S. district court cases).

²⁰ See, e.g., *California Supreme and Appeals Court Records*, CALIFORNIA SECRETARY OF STATE, <http://www.sos.ca.gov/archives/collections/court.htm> (Cal. state archives hold appellate and supreme court records, but not superior court files); ID. CT. ADMIN. R. 40 (“Appellate Court Records”), available at <http://www.isc.idaho.gov/rules/icar40.txt> (last visited Sept. 3, 2012) (providing for transfer of appellate records to the state law library and University of Idaho School of Law); S.C. CLERK OF CT. MANUAL R. 3.4.3 (archival records may be transferred to the South Carolina Department of Archives and History); WIS. SUPR. CT. R. 72.04 (allowing transfer of court records to the Wisconsin Historical Society).

²¹ See, e.g., *California 2009 Report*, *supra* note 17, at 2 (describing on- and off-site storage costs).

In an effort to relieve the onus on superior courts, in 2010 the California Judicial Council sponsored legislation to modernize superior court records management.²² The legislature amended Government Code Sections 68150 and 68151 to enable and facilitate the electronic creation, maintenance, and preservation of trial court records.²³ The need for these reforms was overwhelming. Literally. A 2007 survey of California superior courts revealed annual storage costs of over \$1.8 million for trial court records—documents that required nearly 2,000,000 linear feet of storage space.²⁴ The new shift toward electronic superior court file creation and management will lessen storage and personnel pressures. It will also help prevent mass destruction of files in the event of natural disasters. Indeed, the near total loss of San Francisco superior court records in the wake of the 1906 earthquake is well documented, and its threat has been echoed by modern-day disasters like Hurricane Katrina.²⁵

Yet, while electronic filing and digitization will transform records management, paper superior court records remain important for legal research. Few California counties possess funds to digitize existing files or house them in climate-controlled facilities, leaving many case records subject to on-site conditions (and pests).²⁶ Even if records are microfilmed or digitized before destruction, easy public access to resulting electronic versions remains a work in progress: No uniform system yet exists for electronically viewing all unsealed court documents (and indeed, many counties still require original filing in paper form).²⁷ Sometimes, paper copies remain the most accessible format.²⁸

²² See generally *California 2009 Report*, *supra* note 17. See also CAL. GOV'T. CODE §§ 68150, 68151 (West 2012).

²³ 2010 Cal. Stat. 690.

²⁴ *California 2009 Report*, *supra* note 17, at 2; see also Brian E. Hamilton, “Chapter 167: Taking Court Records Management from the Stone Age to the Digital Age,” 42 MCGEORGE L. REV. 597 (2010).

²⁵ See, e.g., Richard C. Harrison, “A City Without Records,” AM. LAW., at 155 (Mar. 1908) (describing loss of court records following 1906 earthquake); Hamilton, *supra* note 24, at 599 (documenting loss during Hurricane Katrina).

²⁶ *California 2009 Report*, *supra* note 17; see also *Texas Report*, *supra* note 13, at 51 (pest exposure).

²⁷ *California 2009 Report*, *supra* note 17, at 5 (explaining that electronic public access is beyond scope of 2010 amendments); *TCRM*, *supra* note 17, at 2 (explaining future goal of digitizing all case file contents); see also, e.g.,

Part II: Interstate Variations in Preservation Opportunities

The ongoing importance of paper records creates opportunities for cultural and educational institutions to help safeguard legal history. Universities, libraries, and museums may have space to house files that courts would otherwise destroy due to lack of adequate storage. Most states, however, do not permit private institutions to acquire superior court files, and limit records transfer only to state-run archives, libraries, or historical societies.²⁹ In some cases, state legislatures may not have intended this transfer prohibition; rather, they may not have been tuned in to the issue when drafting records provisions long ago, and simply failed to provide for it.

Sorting out which states permit institutional collection begins with understanding the psychedelic patchwork of rules governing trial records management.³⁰ A given state's preservation rules may be established through multiple sources, including combinations of state statutes,³¹ rules of court,³² the state supreme court,³³ and records retention schedules.³⁴ The retention schedules, themselves, can be set by a number of potential actors—such as state archivists or librarians, the secretary of state, a judicial council, or another statutorily-designated

SOLANO CTY. SUPER CT. R. 4.14, *available at* <http://www.solano.courts.ca.gov/materials/Rule%204%20--%2007-01-2012.pdf> (prohibiting electronic filing); *cf.* SANTA CLARA CTY. SUPER. CT. R. 15, *available at* http://www.sccourt.org/court_divisions/civil/civil_rules/civil_rule15.shtml (permitting electronic filing for civil cases designated as complex).

²⁸ Many historians also prefer original paper copies over digitized records.

²⁹ Telephone Conversation with Bill Raftery, Court Research Analyst, National Center for State Courts (Sept. 5, 2012). *See also* Rachael G. Samberg, *Preservation Rules for Trial Court Records: Sample Survey of Ten States* (hereinafter *Ten-State Survey*), CALI (June 13, 2012), http://conference.cali.org/2012/sites/conference.cali.org.2012/files/slides/Preservation%20Rules%20for%20Trial%20Court%20Records_10-State%20Survey.pdf. In author's ten state sample, at least six states did not permit transfer to unaffiliated institutions.

³⁰ *See generally Ten-State Survey*, *supra* note 29 (revealing range of authorities for retention and destruction rules).

³¹ *See, e.g.*, OKLA. STAT. tit. 20, §§ 1005, 1005.1 (2012) (Oklahoma statutes setting forth disposal/destruction periods).

³² *See, e.g.*, ID. CT. ADMIN. R. 37, 38 (Idaho court rules establishing retention schedules)

³³ *See, e.g.*, VT. STAT. ANN. tit. 4, § 659 (West 2012) (statute assigning state supreme court the authority to issue administrative orders governing records preservation and destruction); 42 PA. CONS. STAT. § 4321 *et seq.* (2012) (Pennsylvania Supreme Court is responsible for promulgating retention schedules).

³⁴ *See Ten-State Survey*, *supra* note 29.

entity.³⁵ The schedules often split hairs by prescribing different conservation periods for various types of documents (e.g. pleadings vs. exhibits) and case matters (e.g. adoption vs. probate, or civil vs. criminal).³⁶

Though perhaps a rare mandate, some statutes require clerks to destroy files once retention periods have expired or the documents have been digitized or microfilmed.³⁷ In most states, destruction is optional, but statutes may obligate clerks to first offer the files to state archives or libraries.³⁸ Unfortunately, these statutes sometimes fail to address whether clerks can transfer files to *outside* institutions if the state-run entities decline them.³⁹ Complicating matters, each party involved in records management—whether the court, state archives, state historical society, or the like—may adhere to localized policies affecting the records’ ultimate disposition.⁴⁰ This means, for example, that even if a statute requires destruction, the courts may not have actually discarded the files.

With this understanding of where to look for applicable rules and customs, one can begin piecing together which jurisdictions allow third party collection. Unfortunately, the issue is not addressed in ready-made fifty-state surveys. This author’s preliminary crack at comparing

³⁵ See generally *id.* As examples of the varied entities that can create records schedules: California’s Judicial Council establishes the records schedules, which it set forth in the Trial Court Records Manual. CAL. R. CT. 10.854 (directing the Administrative Office of the Courts to develop trial records management guidelines by creating a TCRM); *TCRM*, *supra* note 17. South Carolina has instead designated its Department of Archives and History to establish its records schedules. S.C. CODE ANN. §§ 30-1-10, 30-1-80 (2012). Pennsylvania has tasked the state supreme court with schedule-setting authority; the supreme court then delegated part of its authority to the County Records Committee, which in turn issued the County Records Manual. 201 PA. CONS. STAT. § 507 (2012); 201 PA. CODE. § 507(a) (2012).

³⁶ See, e.g., *TCRM*, *supra* note 17 (denoting separate retention periods based on both document and case type).

³⁷ See, e.g., UTAH JUDICIAL COUNCIL R. OF JUDICIAL ADMIN., at Appendix F (2012), *available at* http://www.utcourts.gov/resources/rules/ucja/append/f_retent/appf.htm (paper documents “shall be destroyed” after the retention period expires or the file has been copied to microfilm).

³⁸ See, e.g. ID. CT. ADMIN. R. 37, 38 (written notice to Idaho Historical Society prior to destruction of civil and criminal files).

³⁹ See generally *Ten-State Survey*, *supra* note 29.

⁴⁰ See, e.g., E-mail from Scott Reilly, Archivist III, Vermont State Archives and Records Administration, to author (June 13, 2012, 11:42 PDT) (on file with author) (explaining that one must look beyond the face of statutes); Telephone Conversation with Jeffrey M. Kintop, State Archivist, Nevada State Library and Archives (Sept. 4, 2012) (discussing local or *ad hoc* records management decisions); see also Cheit, *supra* note 7, at 93 (“local practice may not always follow” formal policies).

participation rules suggests that, of the ten states sampled,⁴¹ three—California, Illinois, and Oklahoma—expressly allow non-state-affiliated participation for at least some categories of superior court records.⁴² It is still advisable, though, to contact state archivists and confirm local practices, irrespective of what rules purport to allow.⁴³

Part III: Institutional Participation in Preserving California Superior Court Records

Because Stanford Law School’s set of California superior court records was developed pursuant to state statutes, the evolution of California’s collection rules is of particular interest. Just how did cultural or educational institutions acquire the right to collect California superior court records? To understand the right’s development, it is first necessary to briefly explain what the right is *not*—by distinguishing it from another unique feature of California court records management: the historical records sampling program.

Since 1992, California superior courts have been required to preserve all pre-1911 court records and, if practicable, all from 1910 to 1950.⁴⁴ Of the latter, courts must retain at least ten-percent, plus a two-percent subjective sampling—as explained both in the applicable rule of

⁴¹ The Ten-State Survey reflects the author’s attempt to reconcile retention and transfer rules. Analysis remains a work in progress, and results have not been verified by state judiciary representatives. The states sampled include: California, Georgia, Idaho, Illinois, Oklahoma, Pennsylvania, South Carolina, Utah, Vermont, and Wisconsin.

⁴² See CAL. GOV’T. C. § 68150 (West 2012) and CAL. R. CT. 10.856 (West 2012); 50 ILL. COMP. STAT 205/7, 50 ILL. COMP. STAT 205/4 (West 2012); OKLA. ST. tit. 20, § 1005.1 (West 2012). South Carolina’s applicable rule on its face also appears to permit transfer of archival records; however, this is possible only upon “written permission of Court Administration and the South Carolina Department of Archives and History.” See S.C. JUDICIAL DEP’T, CLERK OF COURT MANUAL, R. 3.4.3. Because of these additional hurdles, the author did not treat South Carolina as a state that expressly allows transfer.

⁴³ For instance, the author found that Vermont Supreme Court Directive 16, which pre-dates Vermont’s statutory changes over the past decade, allows for transfer to *any* “organizations that may wish to preserve and maintain the records.” VT. JUDICIARY ADMIN. DIRECTIVE NO. 16 (Oct. 1987), *available at* <http://vermontjudiciary.org/LC/Shared%20Documents/Administrative%20Directive%2016.pdf> (“Destruction of Superior Court Records”). However, the authorizing statute delegating this destruction-setting authority to the supreme court prescribes transfer only to the “secretary of state, Vermont historical society, or the University of Vermont.” VT. STAT. ANN. tit. 4, § 659 (West 2012). In practice, there is not conflict between these two mandates, as transfer is now made solely to the Vermont State Archives and Records Administration. See E-mail from Scott Reilly, *supra* note 40.

⁴⁴ CAL. R. OF CT. 10.855. When the rule was implemented in 1992, it was originally numbered Rule of Court 243.5. See JUDICIAL COUNCIL OF CALIFORNIA, IMPROVEMENTS IN RECORDS MANAGEMENT SYSTEMS IN CALIFORNIA’S TRIAL AND APPELLATE COURTS—REPORT TO THE LEGISLATURE (hereinafter *Improvements in Records Management Report*) (July 1992).

court and an associated Trial Court Records Manual (“TCRM”).⁴⁵ Additionally, on a schedule set forth in the TCRM, each year two California counties must permanently retain all paper records from that year.⁴⁶ The program does allow “suitable California archival facilities” (like museums, universities, and libraries) to house the historical samples, but these institutions serve merely as caretakers rather than transferees.⁴⁷ The historical sampling program, therefore, does not explain how institutions can collect files that otherwise would be destroyed.

Instead, the right may be said to have evolved from changes to the California Government Code beginning in 1967. Prior to 1967, only a party to the case could intervene in a file’s destruction by responding to the superior court’s notice of intended destruction published in county newspapers.⁴⁸ In 1967, the addition of Government Code Section 69503.1 afforded the first non-party intercession right: Clerks were required to notify the California secretary of state sixty days prior to destruction of certain files.⁴⁹ In 1981, the legislature expanded the range of transfer recipients to include city or county museums. These government-affiliated museums could acquire any non-sealed “civil, criminal or probate superior court case records” which were not pending appeal, and in which no materials had been filed for fifteen years.⁵⁰ Notably, the museum needed to provide written affirmation that it would maintain the records and make them available to the general public.⁵¹ Purging the records after receipt was not allowed!⁵²

⁴⁵ CAL. R. CT. 10.855; *TCRM*, *supra* note 17.

⁴⁶ *Id.*

⁴⁷ CAL. R. CT. 10.855 (i).

⁴⁸ 1931 Cal. Stat. 1386 (adding Section 189 to the Code of Civil Procedure). Section 189 was the first California statutory right for a party to receive notice of and intervene in destruction of his or her own case file. *Id.*

⁴⁹ 1967 Cal. Stat. 1242. In the 1967 statute, criminal, probate, real property, and adoption matters were excluded from being subject to notice and transfer. *Id.* Note that, by that point, retention and destruction matters had been transferred from the Code of Civil Procedure to the Government Code. *See* 1951 Cal. Stat. 168.

⁵⁰ 1981 Cal. Stat. 4733.

⁵¹ *Id.*

⁵² *Id.*

The first statutory carve-out for collection by *non-government* or *non-state-affiliated* institutions arose in 1989. Government Code Sections 69503 and 65903.4 were repealed and re-enacted to require notification of the following entities prior record destruction: (1) the secretary of state; (2) any city or county museum in the county; (3) any law school in the state accredited by the State Bar Association of California; and (4) any university or college located in the State of California.⁵³ These entities could seek a court order granting records accession by submitting a transfer request within sixty days of the clerk's mailed notice of intended destruction.⁵⁴ Unfortunately, just how this list of entities was decided upon remains a bit unclear. Research into this issue is not complete, but it is fair to say that little information has been published about why participation was expanded in this fashion.

Even if short on fanfare, California's legislature continued to expand third-party collection rights. In 1990, it added new entities to the notification list, including: (1) county archives (rather than just county museums), and (2) privately endowed libraries or research institutions that agreed to adhere to recognized archival practices.⁵⁵ Again, transfer of documents was strictly conditioned upon the institution's agreement to make the records publicly available during normal business hours.⁵⁶ In fact, the public access requirement was so strong under these revisions that it was actually a *misdemeanor* for recipient institutions to discard any transferred files without advising the court clerk of such intentions.⁵⁷

This stringency surrounding records collection was relaxed in 1994 with the addition of California Rule of Court 243.6, opening transfer opportunities to any entity upon court approval.

⁵³ 1989 Cal. Stat. 4174; *see also* "Public Entities, Officers, and Employees; destruction of court records," 21 PAC. L. J. 545 (1990) (summarizing new rules). Microforming was required prior to destruction, and parties retained the rights to receive the paper copy of their files. 1989 Cal. Stat. 4174.

⁵⁴ 1989 Cal. Stat. 4174. Institutions could also opt out of notification under Section 69503.4(b). *Id.*

⁵⁵ 1990 Cal. Stat. 1479.

⁵⁶ *Id.* (§ 69503.4(c)(3)).

⁵⁷ *Id.* (§ 69503.4(e)).

Also gone was the imposition of a misdemeanor for non-compliance with transfer restrictions. Instead, the rule required simply that receiving entities “make the records reasonably available to all members of the public” and with reasonable copying fees.⁵⁸

Rule 243.6 came on the heels of Government Code amendments consolidating scattered records management provisions.⁵⁹ These amendments emanated from a 1992 Judicial Council report laying out the first iteration of the historical sampling program.⁶⁰ At the time the report was issued, the Judicial Council was still addressing document destruction (and presumably transfer) policies.⁶¹ As such, the 1992 report does not explain the subsequent 1994 expansion of transfer rights to “any” entity with the creation of Rule 243.6. Research into this expansion is ongoing. In the meantime, evidence of Judicial Council intent may lie in their express consideration of “organizations such as California State University, the University of California, and others” to store records under the historical sampling program.⁶² This may suggest the Council was similarly contemplating expanding transfer rights for non-sample documents, too.

Over time, Rule of Court 243.6 has been revised and renumbered.⁶³ Under its current iteration as Rule 10.856, entities that have asked to be maintained on the Judicial Council’s master list, or that notify a superior court of their desire to receive notice, will be advised of proposed records destruction.⁶⁴ The Judicial Council has also created official forms to assist

⁵⁸ CAL. R. CT. 243.6 (West 1994) (renumbered Rule 6.756 Jan. 1, 2001; renumbered Rule 10.856 Jan. 1, 2007).

⁵⁹ Judicial Council of California, Administrative Office of the Courts, COURT NEWS (Dec. 1992-Jan. 1993), at 10; see also *Improvements in Records Management Report*, *supra* note 44, at 2-3 (describing Judicial Council Advisory Committee’s plan to consolidate confusing and scattered records management provisions).

⁶⁰ *Improvements in Records Management Report*, *supra* note 44.

⁶¹ *Id.*, at IV-18.

⁶² *Id.* at IX-2.

⁶³ CAL. R. CT. 243.6 (West 1994) (renumbered Rule 6.756 Jan. 1, 2001; renumbered Rule 10.856 Jan. 1, 2007).

⁶⁴ CAL. R. CT. 10.856.

with the notice and transfer process.⁶⁵ In addition, the TCRM describes the Records Management Clearinghouse, created to assist historians and researchers with records management and access questions.⁶⁶ The Clearinghouse is just another example of California's undertaking to support cultural and educational institutions in preserving legal history within the nation's busiest court system.

Part IV. Stanford Law School's Collection

Whether under the aforementioned rules, or through courts' *ad hoc* records management decisions over time, various institutions have acquired excellent (and well-indexed) collections of California superior court records. One of the most remarkable is the Huntington Library's "Los Angeles Area Court Records, 1850-1900"—consisting of 2,159 boxes and 295 bound volumes.⁶⁷ Stanford Law School's California trial court records collection ("CTCRC") is a mere fraction of this size, and more nascent in origins and processing, but rich in history nonetheless.

The CTCRC developed through the collection efforts of Professor Lawrence S. Friedman who, for many years, has responded to superior courts' notices of intended file destruction. In particular, he has collected San Bernardino County probate and guardianship documents (filed circa 1931-2000), which have been used for research into matters such as that county's inheritance process as it existed in 1964.⁶⁸ The largest corpus of collected records originates from Alameda County (filed from 1895-1908), and includes a wide variety of civil matters such

⁶⁵ *Id.* See JUDICIAL COUNCIL OF CALIFORNIA, REC-001(N), <http://www.courts.ca.gov/documents/rec001n.pdf> (last visited August 20, 2012) ("Notice of Intent to Destroy..."); JUDICIAL COUNCIL OF CALIFORNIA, REC-001(R), <http://www.courts.ca.gov/documents/rec001r.pdf> (last visited August 20, 2012) ("Request for Transfer...").

⁶⁶ *TCRM*, *supra* note 17, at 45.

⁶⁷ See Bill Frank & Katrina Denman, *Finding Aid For Los Angeles Area Court Records, 1850-1899*, THE HUNTINGTON LIBRARY (Sept. 19, 2011), <http://hdl.huntington.org/cdm/compoundobject/collection/p15150coll1/id/1920/rec/6> (identifying 2,159 boxes, 295 bound volumes); see also Peter L. Reich, "California Legal History Manuscripts in the Huntington Library: An Update," 5 CAL. LEGAL HIST. 323, 326 (2010) (describing L.A. Area Court Records collection).

⁶⁸ See Lawrence M. Friedman et al., "The Inheritance Process in San Bernardino County, California, 1964: A Research Note," 43 HOUS. L. REV. 1445, 1453 n. 35 (2007) (explaining acquisition of twelve boxes of probate records from San Bernardino County Superior Court).

as contract violations, real property disputes, divorces, and insolvency petitions. These have been used for researching matters such as testamentary behavior in the late nineteenth century.⁶⁹ The most recent additions to the collection include 1935 Tuolumne County criminal records, and 1990s Sonoma County domestic violence files, currently being utilized for empirical research on restraining orders.

The collection totals approximately 100 bankers' boxes,⁷⁰ each of which was assigned an internal control number. Files from each box were transferred intact into hanging folders, then placed into nineteen file cabinets reflecting 210 cubic feet of storage space. Roughly, cases are represented in the following quantities and types:

<u>County</u>	<u>Quantity</u>	<u>Nature of Matters</u>	<u>Years Filed</u>
Alameda County	49 boxes	Miscellaneous Civil; Divorce; Adoption	1895-1908
Imperial County	2 boxes	Probate	1967-1999
San Bernardino County	43 boxes	Probate; Guardianship; Conservatorship	1931-1989
Sonoma County	2 boxes	Domestic Violence	1991-2001
Sutter County	1 box	Probate	1953-1983
Tuolumne County	2 boxes	Criminal	1935

The library estimates there to be approximately 4,000 individual case files, but a detailed finding aid is in progress. The finding aid captures each file's county of origin, case number, party names, year filed, and general nature of suit. Though recording the contents of each file is beyond the finding aid's scope, the files examined thus far typically include documents such as

⁶⁹ LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW, at 141, 210 (2009).

⁷⁰ Not all the files arrived in boxes, and a few were bags of loose papers. Thus, the figure is approximate.

complaints, summonses, pleadings, affidavits, notices, and judgments—collectively referred to as part of the “judgment rolls.”⁷¹

Each case file presents unique personal stories and legal issues. Some, for instance,⁷² implicate questions of civil procedure and race relations in 1890’s Oakland. In *Continental Building & Loan Association v. R.L. Aitchison*, filed in Alameda County in 1894, a clerk’s attempt at personal service on a black defendant was sufficient when, among other things, the clerk inquired with all other “persons of color” in the clerk’s acquaintance—believing “that other persons of that race might know” the gentleman’s whereabouts.⁷³ Other files present opportunities for legislative research, such as 1896’s *In the Matter of Rudolf Bartsch*—in which a potter’s insolvency petition, filed under a newly-revised debtor statute, used certain forms referencing the statute’s 1880 predecessor.⁷⁴ One can also observe the pace of civil proceedings, as in *Glinka v. Wundsch*, which recounts the formation of the Oakand Tinware Company in September 1894, and the dispute between its founders just weeks later.⁷⁵ Glinka filed a complaint in October, and by early November, Wundsch had already filed a demurrer. The court appointed a receiver and the parties settled, but the suit did not resolve their ill will. Less than a

⁷¹ Davis, *supra* note 1, at 242 (explaining “judgment rolls”).

⁷² Additional discussion of particular case files may be found in the author’s presentation given at the 2012 CALI Conference for Law School Computing. See Rachael G. Samberg, *Collecting State Trial Court Files: How Law Schools and Libraries Can Teach and Preserve History (and Use Technology to Do It)*, CALI (June 21, 2012), <http://conference.cali.org/2012/sessions/collecting-state-court-files-how-law-schools-and-libraries-can-preserve-history-and-use-tec>.

⁷³ “Affidavit of John M. Newbert,” *Cont’l Bldg. & Loan Ass’n v. Aitchison*, No. 10427 (Alameda Cty. Super. Ct. Oct. 5, 1894).

⁷⁴ 1895 Cal. Stat. 131 (“An act for the relief of insolvent debtors, for the protection of creditors, and for the punishment of fraudulent debtors”). As part of his petition, Bartsch identified in his estate twelve tons clay, two pottery turntables, and 409 vases—all subject to an assignee’s disposition. See “Voluntary Petition by Debtor, Schedule B ‘Real and Personal Estate,’” *In re Rudolf Bartsch*, No. 12425 (Alameda Ct. Super. Ct. Apr. 1, 1896).

⁷⁵ “Complaint,” *Glinka v. Wundsch*, No. 10472 (Alameda Cty. Super. Ct. Oct. 18, 1894).

year later, Glinka sued again, this time for defamation. He accused Wundsch of calling him “a robber, thief and a scoundrel,” and was awarded \$100 in damages.⁷⁶

Examining in detail the surrounding historical context and facts in even just one file—happened upon because of its intriguing party names in the finding aid—reveals the spectrum of questions ripe for research in Stanford’s CTCRC. For this examination, one is transported to the realm of the oyster barons of San Francisco Bay.

A Tale of Two Oyster Barons:

The Darbee and Immel Oyster and Land Co. v. The Smith Oyster Co., et al.

Following the gold rush, California’s legislature sought to improve the productivity of San Francisco’s burgeoning waterfront by encouraging the importation and cultivation of Atlantic oysters.⁷⁷ By the 1870s, oysters had become a ubiquitous staple food for working class people of the Bay, and by 1888, sales of oysters in the region soared upwards of \$1.25 million annually.⁷⁸ Oyster farming was facilitated by California statutes like 1874’s “[A]ct to encourage the planting and cultivation of oysters”⁷⁹ (the “Oyster Act”). The Oyster Act afforded private parties a license to plant and grow oysters along state-owned shorelines.⁸⁰ Farmers were required simply to stake-off and put signage around their beds, and register the boundaries of their farmed land.⁸¹ Cultivation was dangerous work, however. Jack London’s fictional accounts, like *The Cruise of the Dazzler*, provide vivid portraits of oyster “pirates” who, by cloak

⁷⁶ See *Sued for Slander*, SAN FRANCISCO CHRONICLE, Oct. 13, 1895, at 23; *Oakland News Notes*, SAN FRANCISCO CHRONICLE, Jan. 16, 1896, at 11.

⁷⁷ Matthew M. Booker, “Oyster Growers and Oyster Pirates in San Francisco Bay,” 75 PACIFIC HISTORICAL REV. 63, 72-73 (2006).

⁷⁸ *Id.* at 76, 79.

⁷⁹ 1874 Cal. Stat. 940.

⁸⁰ See *Darbee & Immel Oyster & Land. Co. v. Pacific Oyster Co.*, 150 Cal. 392 (1907) (describing statute’s creation of a qualified license or leasehold, revocable at the will of the state).

⁸¹ *Id.*

of night, pillaged oysters from privately-cultivated beds.⁸² Given these threats to their livelihood, oyster farmers commonly built wharves with “oyster houses” to shelter watchmen and fend off intruders.⁸³

With such lucrative (and life-threatening) matters on the line, disputes between rival farmers ended up in court. The Smith Oyster Company (“Smith”), for instance, filed several suits against competitors like the Darbee & Immel Oyster and Land Company (“Darbee & Immel”) and the Pacific Oyster Company (“Pacific”).⁸⁴ These suits sought injunctions to protect oyster beds from theft, and Smith employees from “threats of bodily injury.”⁸⁵ It is difficult to discern, however, just who the aggressors were, as allegations were lodged in all directions.⁸⁶

At least one of the challenger’s case files can be found in Stanford’s collection: *Darbee & Immel v. Smith*, Case No. 21,643, filed in 1905 in Alameda Superior Court. Invoking the authority of the Oyster Act, Darbee & Immel sought to restrain Smith from entering and removing oysters from Darbee & Immel’s farms.⁸⁷ The original complaint also requested \$25,000 in damages for “unlawful and forcible” destruction of wharves and stakes. Smith and its

⁸² Booker, *supra* note 77, at 75; see also Charles Crawford, *Oyster Newest Giant of Fishing Industry*, LOS ANGELES TIMES, Apr 7, 1958, at B13 (“Back in the days following the gold rush, in Jack London’s time...[t]here were oyster barons, oyster pirates and oyster fortunes [] made and lost...First Fish and Game regulations of California had to do with the protection of oyster beds from the famed oyster pirates and forbade trespassing on the oyster farms of San Francisco Bay.”)

⁸³ Booker, *supra* note 77, at 77; see also “Affidavit of L.W. Smith,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,643 (Alameda Cty. Super. Ct. Apr. 21, 1905) (describing the dwelling houses that Smith Oyster Co. claimed to have built on its wharves).

⁸⁴ *The City in Brief: Oyster Companies Clash*, SAN FRANCISCO CHRONICLE, May 4, 1905, at 13.

⁸⁵ *Id.*

⁸⁶ Darbee & Immel and Pacific had several other frays in court. These are particularly intriguing, as Messrs. Darbee and Immel were also on Pacific’s board of directors. In one lawsuit, Pacific stockholders accused Messrs. Darbee and Immel of self-profiteering by binding Pacific to sell oysters to the Darbee & Immel Company at below market rate. See *Directors Accused by a Stockholder*, SAN FRANCISCO CHRONICLE, Feb. 11, 1904, at 16. In another dispute, Darbee & Immel asked for a partitioning to divide oyster farms between the companies. See *Darbee & Immel Oyster & Land Co. v. Pacific Oyster Co.*, 150 Cal. 392 (1907). The California Supreme Court affirmed the determination that Darbee & Immel had no grounds by which to seek partitioning: The farmed land was not held as an “estate of inheritance,” but rather a mere license under the Oyster Act. *Id.*

⁸⁷ “Summons,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21, 643 (Alameda Cty. Super. Ct. Feb. 10, 1905).

employees were accused of, “under armed menace,” sawing and chopping down Darbee & Immel’s signage, stakes, and structures, and physically threatening Darbee & Smith employees.⁸⁸

Smith petitioned for removal based on the amount in controversy being over \$2,000.⁸⁹ Following a temporary and “improvident” grant of removal, and after further hearing at Darbee & Immel’s request, the matter was ordered to remain in superior court—at least for the time being.⁹⁰ On April 7, 1905, the superior court issued a temporary restraining order and ordered Smith to show cause why an injunction should not issue. In affidavits submitted for the hearing, Smith and its employees did not dispute their destruction and removal of Darbee & Immel’s property.⁹¹ Rather, they claimed years of prior property rights, and that Darbee & Immel were not continuously occupying the land.⁹² Numerous affiants (including third parties) countered Smith’s assertions.⁹³ They averred that Smith’s allegations were “actuated by the sole purpose and intent of forcibly jumping and seizing said oyster lands.”⁹⁴

Over the year that followed, there was a dizzying series of additional attempts at removals and remands. Copies of federal court orders in the Alameda file suggest that Smith had the case removed again to the circuit court (i.e. the district court) for the Northern District of

⁸⁸ “Affidavit of F.C. Immel, on Application for Injunction,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,643, at 4-5 (Alameda Cty. Super. Ct. Apr. 7, 1905).

⁸⁹ See “Petition for Removal of Cause,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,643, at 2 (Alameda Cty. Super. Ct. Feb. 10, 1905) (stating amount in controversy as one ground for removal).

⁹⁰ See “Order Denying Petition to Remove Cause to U.S. Circuit Court,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Feb. 24, 1905).

⁹¹ See, e.g., “Affidavit of L.W. Smith,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Apr. 21, 1905); “Affidavit of W.S. Montgomery,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Apr. 24, 1905); “Affidavit of Hans Mathiesen,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Apr. 22, 1905).

⁹² “Affidavit of L.W. Smith,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Apr. 21, 1905).

⁹³ See, e.g., “Affidavit of William Roberts,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Apr. 24, 1905) (claiming more than ten years of prior occupation than Smith to the land); “Affidavit of Hans Mathiesen,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Apr. 22, 1905) (asserting that his father had been previous farmer of certain parts of the disputed tracts since 1887, and that Darbee & Immel began farming other portions before Smith).

⁹⁴ See “Affidavit of William Roberts,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Apr. 24, 1905).

California.⁹⁵ However, Darbee & Immel were granted remand once more in April 1906.⁹⁶ Smith may not have been too troubled by these circuitous events: Unwilling to accept the superior court's jurisdiction under any circumstances, Smith had filed a concurrent action for quiet title in federal court soon after Darbee & Immel's original complaint.⁹⁷

With the case squarely back in Alameda, Darbee & Immel amended their complaint, upping claimed damages to \$50,000 for Smith's ongoing trespasses.⁹⁸ On September 17, 1906, Smith answered, asserting that the superior court could not grant the requested relief because of the quiet title action pending in district court.⁹⁹ Ultimately, the parties stipulated to dismissal of the Alameda action in December 1906, possibly on account of Smith's federal petition.¹⁰⁰

This was not Darbee & Immel's last hurrah in court. Only weeks later, they were sued by their lawyer, Louis Goldstone, for failure to pay his legal fees.¹⁰¹ Goldstone's office address, stamped on the *Darbee & Immel v. Smith* filings, is also of historical interest: All documents until April 1906 reflect an office suite in the Crossley Building, which was reduced to rubble in

⁹⁵ "Order Remanding the Cause to the Superior Court," *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 13718 (N.D. Cal. Apr. 24, 1905).

⁹⁶ See *Ruling in Oyster Case*, SAN FRANCISCO CHRONICLE, Apr. 17, 1906, at 13 (describing remand); "Certified Copy of Order Remanding Cause," No. 13718 (N.D. Cal. Apr. 17, 1906).

⁹⁷ See "Answer of Certain Defendants to Amended Complaint," *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. Sept. 17, 1906) (explaining Smith's federal court case).

⁹⁸ "Amended Complaint," *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634, at 8 (Alameda Cty. Super. Ct. June 11, 1906).

⁹⁹ See Answer of Certain Defendants to Amended Complaint," *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634, at 9-10 (Alameda Cty. Super. Ct. Sept. 17, 1906).

¹⁰⁰ *Id.* Darbee & Immel moved to dismiss the district court action on the grounds that the court lacked jurisdiction to quiet title for land Smith did not actually own. See *Smith Oyster Co. v. Darbee & Immel Oyster & Land Co.*, No. 13753, 149 F. 555 (N.D. Cal. 1906). The district court denied the motion, finding that ownership was not a prerequisite for quieting title in equity. *Id.*

¹⁰¹ *Oyster Companies are Sued*, SAN FRANCISCO CHRONICLE, Jan. 8, 1907, at 16.

the earthquake and resulting fires.¹⁰² With his old building in ruins, Goldstone moved shop farther west and, by June of 1906, operated from an address near Golden Gate Park.¹⁰³

While some procedural blanks in *Darbee & Immel v. Smith* are hard to fill in, the Alameda court records are pearls of history. They offer sociocultural evidence of working-class life along the waterfront in early twentieth century San Francisco. For legal historians, the documents present thought-provoking questions of land use rights under the Oyster Act and common law; the sufficiency of evidentiary proof among competing affidavits; and, the labyrinthine process of successive removals and remands. Remarkably, such issues are identifiable in even one of the approximately four thousand files in the collection.

Conclusion

State legislatures are increasingly striving for better conservation of historical superior court records, whether in electronic or paper form. Private cultural and educational institutions may be uniquely positioned to alleviate some of the historical records management burden on superior courts. Museums, libraries, and universities may be able to house paper records that would otherwise be earmarked for destruction—thereby making legal history more accessible. Not all jurisdictions, however, permit private organizations to participate in collecting superior court records. Legislatures have an opportunity—as California has done—to streamline records destruction and transfer guidelines, and facilitate third-party opportunities to preserve our legal past. California’s rules have enabled universities like Stanford to acquire small but unique superior court records collections that present interesting questions prime for further study.

¹⁰² See, e.g., “Notice,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. March 11, 1905) (showing Goldstone’s address of Crossley Building, San Francisco, Suite 427); Herman Davis, *Ruins of the Crossley Building. [New Montgomery Ave. and Jesse St.]*, CALISPHERE (1906), <http://content.cdlib.org/ark:/13030/hb687008tk/>.

¹⁰³ See, e.g., “Amended Complaint,” *Darbee & Immel Oyster & Land Co. v. Smith Oyster Co.*, No. 21,634 (Alameda Cty. Super. Ct. June 11, 1906) (reflecting Goldstone’s office address of 2207 Fulton St., San Francisco).