From the Benches and Trenches
The Elusive Record: On Researching High-Profile 1980s Sexual Abuse Cases*

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This article reports on the difficulties encountered trying to research trial court documents in dozens of "high-profile" child sexual abuse cases from the 1980s. The article is organized around three concepts that are central to researching trial transcripts: 1) permanence, 2) completeness, and 3) accessibility. Each of these concepts is called into question by research the author conducted over a period of ten years. The article also reports the results from an original state-by-state survey of court record-retention policies. Twenty states have a permanent record-retention policy for all felony cases, and twelve have permanent retention policies for some felony cases and time-limited policies for others, while three employ a sampling procedure to identify the cases to be retained permanently. Fifteen states have policies limiting the time before they dispose of court records. Overall, less than a majority of states treat trial transcripts in felony cases as archival documents. Some states destroy such transcripts as soon as three years after the case is over. A surprising amount of material that is painstakingly transcribed and memorialized in felony trials is subsequently lost to history.

Trial transcripts are often referred to in terms that suggest that they are tangible and permanent. Trial lawyers famously intone phrases like "let the record reflect" and "strike that from the record," suggesting that whatever follows will be available to be checked at a later date. In most trial courts, the record of the oral proceedings is literally produced by court reporters, who transform proceedings from oral to written form. While some jurisdictions have adopted audio- or video-recording systems, court reporters are still the norm across the country. The court reporter creates a "certified transcript" if there is an appeal. In extraordinary cases, transcripts are created overnight. These "dailies" are available for attorneys to use while a trial is in progress. In the Internet age, daily transcripts might even be posted online, as they were in the O.J. Simpson murder trial. All of this leaves the impression that *the record* is a solemn, almost sacrosanct artifact of court proceedings, one that would be possible to examine at a later date.

At least, that is what I assumed when I embarked on a research project to examine the record in high-profile child sexual abuse cases that went to trial in the 1980s. The focus of the research was cases that have since been labeled as "witch hunts" (see, e.g., Charlier and Downing, 1988; Nathan and Snedeker, 1995; De Young, 2004), and the basic approach was to review as many court documents in each case as possible.

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The research in each case began with the court docket and the ultimate aim of inspecting or photocopying the trial transcript. Sarat (1999:355) points out that "the essential narrative elements of the trial are recorded and encoded in a transcript," but he cautions that "transcripts also invite readings of silences and exclusions."

With the sustained contribution of dozens of dedicated undergraduate research assistants, original research has been conducted in seventy-two cases to date. A few of those cases remain open research challenges; otherwise, the research is now largely complete, more than ten years after the first case was researched. All but two of these cases were filed in state court, and almost all of the trial dates ranged from 1984 through 1992. Many of these cases were the longest criminal trials in the history of their state or county. There were a handful of acquittals and mistrials. All of the cases that resulted in conviction were appealed.

Much has been written about these cases, particularly in the 1990s, when many of these convictions were overturned on appeal. While I knew that the sheer size and complexity of these cases would pose research challenges, I assumed that the archival work would be tedious but not otherwise difficult. I was spectacularly wrong. As I discovered over the last ten years, researching court dockets and trial transcripts, even from contemporary, high-profile cases in state court, can be extremely difficult. Files are not always complete; court clerks are not always amenable to assisting with requests; and sometimes the records have been destroyed. This article is a brief account of those travails, organized around three concepts that are central to researching trial transcripts: 1) permanence, 2) completeness, and 3) accessibility. Each concept is called into question when one researches state trial court transcripts and related court records from the 1980s.

PERMANENCE

I began this research with the assumption that trial transcripts were historical records, that is, that they would be kept permanently. I pictured dusty warehouses with long aisles of boxes. That image captures the reality of the federal system, at least for felony cases. The National Archives is in charge of federal court records, and the Archives saves court documents, including transcripts, permanently in all felony cases. These records can be accessed and photocopied at regional facilities around the country. For example, court records from New England are in Waltham, Massachusetts, where I had no difficulties conducting a project years ago involving business litigation in Rhode Island federal court decades earlier. The National Archives, as it turns out, does not permanently retain records from misdemeanor cases but does so for only five years after a case is closed.

The discovery that some states had record-retention policies that actually mandated destruction of the transcript of a case tried in the 1980s prompted the question that motivated this article: What are the rules for retaining trial transcripts from felony cases in state courts across the country? Unfortunately, there is no repository of state-by-state information on this matter, and states vary enormously in their approach to

Table 1
Record-Retention Policies for Trial Transcripts in Felony Cases, by State and General Type of Policy*

Type of Retention Policy	Permanent, comprehensive (all felony records saved)	Permanent, partial (some felony records saved)	Permanent, sample (sample of felony records saved)	Time-limited (all felony records eventually discarded)
States	Alabama, Arizona, Colorado, Georgia, Hawaii, Illinois,** Kentucky, Louisiana, Maine, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Rhode Island, South Carolina, South Dakota, Washington	Alaska, Delaware, Idaho, Iowa, Montana, New Jersey, New York, Nebraska, Texas, Utah, Virginia, Wyoming	California, Indiana, Massachusetts	Arkansas, Connecticut, Florida, Kansas, Maryland, Michigan, Missouri, North Dakota, Oklahoma, Oregon, Pennsylvania, Tennessee, Vermont, West Virginia, Wisconsin
Total	**20**	**12**	**3**	**15**

* Policy specifics and source notes are detailed in Appendix A.
** Illinois policy does not apply to Cook County.

this issue. The results reported here are based on a state-by-state survey conducted largely in 2003-04. This research revealed that almost all states have a statewide record-retention policy. Most of the statewide policies were adopted through the judicial branch. In nine states, however, the rules emanated from the state library, the state archives, or a historical records body. In a few states, the judiciary developed rules in partnership with the state library or archive (see Table 1 and Appendix A).

The record-retention policies for felony cases in state courts can be grouped into four general categories: permanent and comprehensive retention, permanent but partial retention, permanent retention based on sampling, and time-limited retention. The first category, the approach that assures future researchers that records will not be destroyed by rule, mirrors the approach of the National Archives. Some of these jurisdictions retain the records in microfilm, others in hard copy. While Nicholson Baker (2002) protests that microfilm lacks essential qualities of hard copy, the level of preservation that he urges for newspapers seems unduly luxurious in an environment in which most jurisdictions routinely destroy court records from some or all felony cases. Microfilm is at least as permanent as hard copy and is counted as such in this survey. By those terms, twenty states have a permanent retention policy for felony cases. That is slightly overstated because it includes Illinois, where there is a separate time-limited policy in Cook County (60 years).

Twelve states have permanent retention policies for some felony cases and time-limited policies for others. The difference is generally based on the seriousness of the

felony, but a few states base it on the seriousness of the sentence. In New York and New Jersey, for example, records from capital cases are kept permanently; others are kept between 20 and 50 years. In Nebraska, records from cases involving lower classes of felonies are retained for 20 years; while records from more serious felony cases are retained permanently. In Utah, records from all felony cases are retained permanently, except certain lesser felonies, which are retained for only 10 years. Texas differentiates the seriousness of cases by the sentence, not the crime; records are retained permanently in cases where the defendant is sentenced to more than twenty years, otherwise, they are retained for 25 years after the final judgment.

Three states employ a sampling procedure to identify the cases to be retained permanently. In Indiana, a 2 percent sample of felony cases is designated each year for permanent retention, while others are retained for 55 years. Massachusetts also employs a 2 percent sampling rule, but it also retains all files over two inches thick. That presumably ensures that cases of significance will be saved, but otherwise files from felony cases are destroyed 5 years after final disposition. California has the most elaborate method. On a rotating basis, three counties each year are designated to retain all documents from felony cases. There is also permanent retention of a systematic sample of 10 percent of cases statewide each year. Finally, there is a 2 percent "subjective" sample that includes all cases accepted for review by the California Supreme Court, "fat files," and cases deemed by the court clerks' office to be of local, national, or international significance. California's approach might be the best in balancing the desires of history with the realities of storage costs, although that depends in part on how the subjective aspects are implemented over time.

From the point of view of history, of course, only "permanent comprehensive" policies are adequate. However, that ideal is easy to recognize and difficult to implement. Indeed, no jurisdiction, not even the National Archives, maintains that kind of archive for misdemeanors. The demands of permanent record retention are just too overwhelming. The issues of physical space and monetary cost are pressing realities at the trial-court level. The states with "permanent, partial" records-retention policies seem to have struck a balance between these competing values, preserving the most serious cases. The states with sampling procedures have done even better, as they ensure a more comprehensive approach to permanent retention. This approach ensures the preservation of "routine" cases, which are undoubtedly more common in frequency but less likely to be preserved under retention policies that are based on the severity of the felony.

The bad news for anyone interested in the historical record is that fifteen states have time-limited record-retention policies for all felony cases, while another fifteen states allow for destruction of records in some felony cases. About half of the states with time-limited policies retain records for between 25 and 75 years, ensuring the possibility of researching contemporary cases but eliminating the possibility of researching those cases in the more distant future. Others have retention policies that limit opportunities even for relatively contemporary research. These cases are

"record-retention" policies in name only, as they are really record-destruction policies because they actually specify when it is acceptable to destroy records. The most aggressive policy is in Pennsylvania, where felony cases are kept only three years after final disposition.

Some of the states with time-limited records-retention policies for all felonies nevertheless distinguish the length of record retention by the seriousness of the crime. In Oklahoma, for example, felony cases are retained for 10 years, unless they involved sentences of either life or death, in which case they are retained for 50 years. In Oregon, felony cases are retained for either 10 or 75 years. The longer time period is for records "with ongoing legal or financial effect," otherwise known as WOLFE records. Similarly, the range in Wisconsin is 50 to 75 years. These policies are apparently designed to ensure that records outlive defendants, but appellate cases indicate exceptions, such as the Ohio Supreme Court case where "the transcript of the original trial convicting Jones had been destroyed in accordance with proper procedures" (*State v. Jones*, 1994).

Ten states have special provisions for "historical documents" in statewide policy; that is, there is a specific date and any records before that time are never to be destroyed. These policies can, however, also be seen as the beginning of systematic record destruction. The most recent date to establish "historic" status is used in Minnesota and New York, where documents before 1950 have permanent status. After that date, records are subject to a record-retention schedule. Massachusetts has the earliest date, as all records before 1800 must be permanently retained, and it uses a sampling system that ensures that there is no time period where trial-court records are a total blank. The California policy designates pre-1911 documents as "permanent" and those from 1911-49 as "permanent if practicable," demonstrating an understanding that some court buildings are better equipped than others to handle storage. California also has a robust system of selective retention, combining three separate sampling methods.

It should be kept in mind that local realities can trump state policy. Local courts, after all, have to contend with the realities of physical space and actual budgets. In researching the 1963 Zantzinger murder case in Baltimore, a case that inspired a song by Bob Dylan, Coffino (1994:798, n. 146) discovered that "a Baltimore Circuit County space-saving policy mandates that stenographers' notes are to be burned 12 years after the conclusion of the trial." Trial documents other than the transcript were preserved in the state archives, but the transcript had been destroyed.

State mandates to retain records do not necessarily come with the resources to ensure compliance. I discovered that, in states with "permanent" records-retention policies, there are counties where transcripts are not being retained permanently. One transcript that had been destroyed under what was described to me as a "ten-year rule" was in a state that had a permanent retention policy. On the other hand, one advantage of studying high-profile cases is that even in an era of records destruction, high-profile cases sometimes carry a sense of historical importance that prompts

lawyers and clerks to save documents. Indeed, there were several instances in which a transcript had been saved by a court clerk, apparently because of its perceived historical significance, when local practice would have permitted its destruction.

COMPLETENESS

The second unexpected obstacle to researching state-court criminal trials from the 1980s involves the completeness of the records that are retained. Even if a transcript is made and preserved, how complete are the records that are actually retained by the court years after the case is over? The answer is, "Less complete than one might think." There are two separate reasons, one relating to the fact the exhibits are treated differently from court-generated records, such as docket sheets and trial transcripts, and the other involving the complexity of large cases, the idiosyncrasies in local practices for indexing and archiving, and the general difference between records management and an actual archive.

Transcripts Without Exhibits. Exhibits are rarely retained with the transcript once the case is over. Although exhibits are, in legal nomenclature, "entered into" the record at trial, they are generally kept with the transcript until shortly after the matter has ended. Exhibits can vary significantly in size and nature. Some documentary exhibits are in the same size and format as the transcript. Physical exhibits, on the other hand, can include drugs, weapons, and stained clothing. The possession of such property in criminal trials is controlled through court orders. The difference in treatment between transcripts and exhibits is based on the fact that the transcript and other court records are essentially created by the court, while the exhibits come from the parties. Exhibits can also be created by the parties. Prime examples of exhibits are photographs, charts, and diagrams. Even after exhibits are "entered into the record," they are considered the property of the party that offered them into evidence; they are essentially on loan to the court for the trial and, if necessary, any subsequent appeals. The general practice is that exhibits are offered back to the parties once the case is over; if they are not claimed, the exhibits are destroyed.

The survey of state document-retention policies identified twenty-two states with specific provisions concerning exhibits, but in none of those states are exhibits retained permanently as a matter of routine. In North Dakota and Virginia, exhibits are supposed to be retained for the same period as the records in the case. Those are the only states with a specific policy that treats exhibits the same as other records, but neither retains felony records permanently. In North Dakota, felony records are supposed to be retained 21 years from the date of entry of judgment or 1 year after the execution of sentence, whichever is greater. In Virginia, trial records in felony cases are supposed to be retained for 20 years after the sentencing date, unless the sentence is still ongoing. Virginia also allows for permanent retention in cases of "historical, genealogical, or sensational significance." Two other states provide for the possibility of permanent retention of exhibits in cases considered historically significant. In Delaware, exhibits are supposed to be transferred to the state archives for permanent

retention if the case will be used to "set a precedent." In Kentucky, "parties shall be given the opportunity to claim exhibits. If unclaimed, transfer to Archive if exhibits have archival value."

Most states provide for quick disposal of exhibits. Although the practices vary across states with explicit policies, none retain exhibits permanently as a matter of routine, and almost all dispose of them fairly soon after the case is over. Clearly, courts view exhibits as a burden and not as part of the archival record. That is understandable, as exhibits cannot easily be stored or archived in the standard methods used for transcripts and other legal documents, but this view can be a major hindrance to research. In many of the cases in the underlying research there was medical evidence presented at trial, and sometimes slides were introduced into evidence as well. Slides are vital to a complete assessment of contested medical testimony. The lack of exhibits created a major limitation in the analysis of a number of cases even though the transcript was available in these cases.

Missing Papers, Missing Boxes. The underlying research was also hampered by missing documents and occasionally by the lack of any sort of index of court documents. These problems were partly due to the enormous size of these cases. The contents of boxes from high-profile cases often looked as if they had been deposited with little or no attention to ordering the contents. It was a rare surprise to encounter a well-organized series of boxes. Researchers looking at standard-size cases would presumably encounter fewer such problems. Not only were materials generally out of order, but also, quite frustratingly, were rarely complete when they were put back in order.

There are several "books" of the trial transcript missing in the famous Amirault case from Malden, Massachusetts. Ultimately, the missing pages were not vital to the case, but it was frustrating to try to replace them. During the appellate process in the Kelly Michaels case, the loss of all records from the trial court's multiday pretrial hearing on child competency allowed the appellate court to substitute its own judgment for the trial court on the most important issue in the case. Another extreme version of the missing records problem is one of the famous Bakersfield sex-abuse cases from the 1980s (*People v. Kniffen*, 1982), where the clerk located eight boxes of materials at one stage of the underlying research but agreed that there should be ten or eleven. In separate visits to the court, different research assistants were met with seven or eight boxes. The clerk's office indicated that they had no way of locating the missing boxes.

A related obstacle concerned the quality of indexing and archiving practices. Some court clerks could provide a kind of index of court documents and an index of court events for any case, but there were some significant exceptions. The Los Angeles County Archive files materials by docket number, but it does not maintain any kind of index of the materials connected to each number. This contradicts my general theory that archives as institutions are likely to have more useful indexing of materials than the "archives" maintained by court administrators, whose first and foremost concern is that records are complete during trial and any subsequent appeal.

With records management as the primary goal, it is not surprising that courts are not run as archives. What is surprising is that archives are not always run well as archives. They certainly are not in Los Angeles.

My quest at the Los Angeles County Archive began with a desire to review the transcripts from the McMartin Preschool case (*People v. Buckey*, 1984). That case was the longest criminal trial in American history, and it ended with acquittal on many counts and a hung jury on several others. I knew that daily transcripts had been prepared, but I was unsure where they were located. After a number of court employees directed me to the archive, for months to follow different representatives of the archive insisted that they did not have the McMartin transcript. After countless letters, phone calls, and faxes, they relented and ascertained that they *did* have the transcript from the case. Then they were unwilling to find and photocopy any portions of the transcript, even with a detailed written request specifying the specific page numbers. Someone had to appear in person.

The underlying problem is that the archive has a rudimentary filing system with only a location marker for each docket number. If the case constitutes a single file folder, the system works quite well—unless the folder has been misplaced, in which case it might never be found. In the McMartin case, I wanted to obtain photocopies of particular portions of testimony. I knew the dates of the testimony and the names of the witnesses. Yet there was no way that the court clerk could locate those specific documents because the archive had no substantive index of its holdings. In a massive case like McMartin, this literally means that the archive staff cannot ascertain how many boxes they have, how many boxes they are supposed to have, or what is in any given box.

I spent almost a week just making an inventory of the McMartin holdings at the archive. I ascertained that they were missing four boxes of materials. I knew the box numbers, but there was no way to find the errant boxes except to look in other aisles in the hopes of finding them by chance. Several years later, we located one of those boxes on a follow-up visit; the others are still missing. I hasten to add that the archive employees were apologetic about the situation; one told me that staff members had volunteered to work vacation days if the archive would close and allow them to conduct an actual inventory.

ACCESSIBILITY

The third major constraint in researching fairly contemporary criminal trials in state courts is accessibility. The ethic of openness that should characterize court proceedings did not always prevail when one dealt with clerks in state trial courts. Three obstacles affecting the accessibility of transcripts were encountered during the underlying research. First, given that the cases all involved allegations of child sexual abuse, there were often protective orders and other confidentiality provisions. These obstacles were anticipated and understandable; that is, the purpose of such protections is understandable. Ironically, my own research experience suggests that while confiden-

tiality provisions create significant barriers to research they are remarkably ineffective in actually protecting confidentiality. Second, under a system based on court reporters (discussed below), it was not always possible to have a transcript prepared in cases that ended in acquittal. Third, there were significant obstacles involving the logistics of requesting documents and often excessive charges in photocopying them.

Protective Orders and Confidentiality Provisions. Given that the underlying cases involve child-sexual-abuse allegations, it was anticipated that the most serious obstacle in the research would be protective orders or statutory provisions that would render transcripts sealed and inaccessible. There is an array of state statutes designed to protect the identities of children in such cases. If the transcripts are prepared using only the initials of the child, then confidentiality should be protected without any special limitations on access by researchers after the case. However, numerous states go further, automatically sealing the files in such cases (National Center for Prosecution of Child Abuse, 2000). These provisions make it much more difficult to conduct research on these cases. In one case, I approached the original trial judge about obtaining access to a sealed case that ended in a hung jury; I was given the clear signal that the judge was confident "there were other things I could more profitably study" than that case.

When confidentiality protections exist and court documents are not prepared in a manner that shields identities, perhaps the only avenue available for the interested researcher to obtain unfiltered access to the transcript is to pay for redacted photocopies. In the Kelly Michaels case in New Jersey, for example, the *Village Voice* sued for access to the trial transcript, which had been sealed by a protective order agreed to by media outlets that covered the trial. The New Jersey Supreme Court eventually ruled that the newspaper *was* entitled to examine, or copy, a redacted version of the transcript, but they could be assessed the costs of preparing it (*In the Matter of the Application of VV Publishing Corp.*, 1990). The newspaper never availed itself of the opinion because, ironically, there had already been significant media coverage of the case without any approved access to the transcript. Notably, the cost of redacting a transcript can be significant. I made a public-records request for the transcript in a famous Massachusetts day-care case (*Commonwealth v. Amirault*, 1985); after some negotiation, I agreed to pay $1,000 for a redacted copy.

Some states have even stricter confidentiality rules. In New York, authorities can decline requests to examine, or copy, court documents in sexual-assault cases even if the request is for redacted information. A 1991 privacy statute protects the personal identities of sexual-assault victims and "any portion of any police report, court file, or other document, which tends to identify" the victim (New York Civil Rights 51-b). That final clause provides ample room for court clerks to decline requests even for redacted documents. That situation currently inhibits research into the Friedman case from Long Island, New York (*People v. Friedman*, 1987), made famous by Andrew Jarecki's 2004 film, *Capturing the Friedmans*. This is another instance where the media spotlight has tightened the accessibility of records.

Although I had been provided with numerous unredacted documents from the same case several years earlier, after the movie was released, the court denied a request for redacted versions of the police reports.

Similarly, I went to Miami for one week in January 1999 and examined all the boxes in the Fuster case (*State v. Fuster-Escalona*, 1984). After a national television program about the case, I was denied access to return to the same archive for the same purpose. This is a disadvantage of studying high-profile cases: media attention can prompt court clerks to be unusually restrictive in their response to researchers. Then again, in high-profile cases, there are more sources outside the court that are likely to have duplicates of court documents. Indeed, I eventually obtained a complete photocopy of the transcript in Frank Fuster's case, but not from the Dade County Archive.

In lower-profile cases, however, the court records that I encountered often included documents that were presumably under some kind of protective order. In the course of the research, I obtained a host of documents that should not have been mixed in with the public record: presentencing reports, psychological evaluations, and even grand-jury transcripts.

The Court Reporter System. Alan Gless (2004:12) cautions trial-court researchers that "each state's court system developed its own unique reporting practices." Basically, court reporters have two separate tasks: first, creating their own encoded version of the proceedings in real time, and second, converting that raw material into a written transcript. In practice, those tasks have merged with the development of computer-based technologies that have made the production of "real-time" transcripts possible (Pribeck, 2004). However, for the 1980s, and well into the 1990s, court reporters literally produced a paper record of the proceedings. The paper was a few inches wide and it streamed slowly out of the stenograph machine, stacking up into a pile that required changing every hour or two. The court reporter was charged with safeguarding those paper records in the event that they might need to be transcribed. That duty has not changed, but court reporters now generally create digital records.

The creation of an actual transcript is time-consuming and expensive. This fact alone makes it almost prohibitively expensive to study cases that ended in acquittal, where there would be a transcript only if daily transcripts were prepared during the trial. That actually occurred in three cases in the underlying research, which clearly serves to demonstrate the unusual nature of "high-profile" cases. Unless a daily transcript was prepared, however, the trials that end in acquittal remain "recorded" but not transcribed. In those cases, court reporters are essentially the private archives of public proceedings. The same would be true for trials that ended in conviction but were not appealed. There were no such cases in the underlying research. To the contrary, there were a few cases in which people who pleaded guilty tried to appeal their convictions.

Under the paper-based regime, court reporters would accumulate countless narrow stacks of paper over the years. Yet if a trial were not transcribed at the time, then it would, at least in theory, remain with the court reporter, available for possible tran-

script later. Would it be possible, I wondered in several cases, to find the court reporter, many years later, from those proceedings and get that paper transformed into a written transcript? Researching cases that were twenty years old was coming close to testing the boundaries of the court reporter system since the reporters from these cases were all apparently retired.

This private archival system proved surprisingly effective in a few cases. There is a fairly well-known Chicago day-care case from the 1980s that went to trial but did not result in a conviction. There were no daily transcripts prepared. One of the two court reporters from the case had retired and moved out of state. However, she still had her stenographic records, and she was willing to produce an actual transcript (for a fee). I was never able to locate the other reporter, so I do not have a complete transcript in that case. On the other hand, there were also some disappointing lapses by court reporters. In one fairly prominent case, a court reporter had apparently discarded the record because she found the case so disturbing. That would not have mattered had the court not suffered a major flood in which the original transcript was destroyed. There was also a case in which a court reporter had apparently inadvertently discarded the records.

Logistics of Requesting and Photocopying Records. An obstacle not anticipated before this research was undertaken concerns the limits of what some court clerks will (and will not) do over the telephone or by mail. I assumed that it would always be possible to obtain some basic information about what documents were available in a case, either by phone or by written request. This usually meant ordering docket sheets and indices of trial transcripts as a first cut. One local practice that was encountered in numerous jurisdictions bears mention because it posed a potentially significant obstacle in several cases: some court clerks' offices literally require that requests be made in person. Court clerks in cases from trial courts in California, Hawaii, New Hampshire, and Texas required someone to come in person to ascertain even the most basic facts about the contents of certain files. Naturally, the idea of traveling to Hawaii for "research purposes" was intriguing but not practical. Fortunately, my university draws students from across the country, and I discovered that many were more than willing to engage in judicial scavenger hunting while home for the summer or between semesters. For anyone without this kind of extraordinary network, however, this local practice could pose a major obstacle to trying to study cases from states across the country.

There were similar challenges with photocopying. Some clerks' offices indicated that they could not "put a court employee" on a major photocopy job such as photocopying an entire transcript. In the case of *Maryland v. Craig,* a case known by its name because it was ultimately heard by the U.S. Supreme Court, this was understandable as the transcript was typed on translucent onion paper and could not be sheet-fed into the photocopy machine. I hired someone to do the job by hand. Other clerks' offices had specific policies that limited the amount of photocopying that could be ordered by phone or mail.

Overall, the clerks that I encountered over the last ten years were extraordinarily helpful. Some helped facilitate ingenious solutions to my unusual requests. A court clerk in Tennessee allowed a local Kinko's employee to take three boxes out of the court and photocopy them overnight, saving me hundreds of dollars and expediting the job. In some larger cities, it was often possible to arrange for an attorney service to do photocopying. In a case where the transcript was missing from the court files but the California Attorney General's Office still had a copy, I arranged for an attorney service to photograph the transcript on-site and convert the film to hard copy, all for thirty-five cents a page.

There were, however, also problems related to the costs of photocopying. It was expected that the costs of acquiring copies of transcripts would be significant; after all, many underlying trials had lasted for many months, and the trial transcripts were sometimes tens of thousands of pages long. The photocopy fees encountered during this research varied significantly by jurisdiction. Some charged close to the prevailing market rate of seven to ten cents per page; many charged twenty or twenty-five cents per page, which seemed reasonable as it generally included the assistance of someone from the court clerk's staff. However, several jurisdictions charged more than those amounts, fifty cents or more per page. The court in Maryland charged fifty cents, as did the state court in El Paso, Texas, where several research assistants labored for me. The Los Angeles County Archive charged fifty-seven cents per page. The highest fees were in Florida and Maine, which both charged a dollar a page for photocopying. A court clerk in upstate New York offered documents from a recent case at a dollar a page, and the Berkshire County (Mass.) Court Clerk recently charged a dollar a page for a copy of a brief. Obviously, the importance of this matter is magnified significantly when the transcript is unusually long. These fees are generally set by rules, and these rules in this instance create barriers to access.

Digitization. Our image of contemporary legal research is that it is carried out in digital form. Westlaw and Lexis/Nexis are impressive electronic databases that contain the entire universe of appellate decisions in easily accessible digital form. The federal courts' Public Access to Court Electronic Records (PACER) database is working similar wonders at the trial level, including documents from federal habeas-corpus proceedings (http://pacer.psc.uscourts.gov/). Many trial-court filings are available online for seven cents per copy. In the underlying research, in two cases, both from the 1990s, the transcript was available in digital form.

Digitization may ultimately eliminate several of the problems encountered in this research. For example, in Alabama, all court records, including transcripts, created after 1999 are stored in a digital format and can be printed out on demand. Other states appear surprisingly slow to adopt new technologies. The court clerk in Clark County, Nevada apparently keeps microfilm and digital copies of all new records because the Nevada Revised Statutes considers microfilm acceptable and does

not consider a digital copy a valid permanent archive. While digitization may be the wave of the future, the research reality for cases even as recent as the 1980s is entirely different. A key transcript in a Maryland case from the 1980s was typed on onion paper, and an important pretrial hearing in a Florida case from the 1980s was recorded on eight-track tape. These are the challenges of the pre-digital age; they may ultimately characterize the digital age as well (Gless, 2004).

CONCLUSION

The challenges of doing original trial-court research are formidable. There are significant issues involving the accessibility of transcripts. In large cases, at least, it is not uncommon to have some portions of the transcript missing. Exhibits are rarely with the transcripts. Moreover, less than a majority of states treat trial transcripts in felony cases as archival documents. Some of the challenges of trial-court research in state court can be overcome with resources and ingenuity and good luck. Still, a surprising amount of material that was painstakingly transcribed and memorialized in felony trials around the country is subsequently and systematically being lost to history. **jsj**

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APPENDIX A

These are the state-by-state results of an Internet and telephone survey conducted in 2004 and updated in 2006. There may be additional policies in various jurisdictions that amend or otherwise alter the provisions listed below. Clerks in a few jurisdictions described existing practice but were unable to provide a specific legal citation. Also note that local practice may not always follow these policies.

STATE	Source/Issuing Body. Date Issued/Amended.	Record-retention policy for felonies (or general criminal cases, if not delineated)
Alabama	Supreme Court rule.	1999 onwards, everything is digitized, and kept permanently. All cases before 1999 have been kept on microfilm.
Alaska	Alaska Court System Office of the Administrative Director, Administrative Bulletin #25. Amended 6/6/2002.	4 years after case is closed, but then retain many important documents permanently (at least on microfilm). Transcripts may be destroyed without being microfilmed after the final judgment in the case has been decided and the time for further appeal has elapsed. Since audiotape and log notes are being retained permanently, the transcripts can be recreated if they are ever needed in the future.
Arizona	"Records Retention and Disposition for Arizona Counties." Arizona State Library, Archives and Public Records, Records Management Division (2/2002).	Permanent. Microfilming and destruction of original are allowed.
Arkansas	Administrative Order # 7. http://cpirts/state/ar/rules/admord7.html.	For felony cases with greater than 10-year sentence: retain 10 years, then offer for donation.
California	2003 California Rules of Court: Title Six Rule 6.755.	Sampling system. Three courts rotate each year and preserve 100% of their court records. All other courts shall preserve a systematic sample of 10% or more of each year's court records and a 2% subjective sample of the court records Subjective sample will include all cases accepted for review by California Supreme Court, "fat files," cases deemed to be of local, national, or international significance.
Colorado	Colorado Judicial Department "Retention and Disposition Schedules" (6/7/2002).	5 years after filing date, but microfilm or e-image kept permanently.

Connecticut	Connecticut Practice Book. Chapter 7—Superior Court Clerks, Files and Records.	Files may be purged of all nonessential documents mostly relating to judgment. Purged documents may be destroyed within 90 days. Remainder of file shall be destroyed 20 years from date of disposition or upon expiration of sentence, whichever is later.
Delaware	Division of Historical and Cultural Affairs Bureau of Archives and Records Management and the Supreme Court of Delaware (1985-86).	Permanent. Purge some lesser documents (but keep transcript and other important docs), and film remaining. Keep microfilm permanently.
Florida	General Records Schedule GS11 for Clerks of Court. Department of State, Division of Library and Information Services, Bureau of Archives and Records Management (12/1997).	75 years.
Georgia	Superior Court Records Retention Schedules (11/2000).	Permanent. Microfilming permitted. If certified, felony transcripts not filed in case files: Transcripts in capital cases, retain for 70 years. Transcripts in noncapital cases retain for 20 years.
Hawaii	Office of the Administrative Director of the Courts. Records Control Schedule # 2 (12/1999).	Permanent. 5 years, then microfilm.
Idaho	http://www2.state.id.us/judicial/rules/icar37.rul and http://www2.state.id.us/judicial/rules/icar38.rul. Rules 37 and 38.	Destroy after 1 year from expiration of time for appeal, but retain ROA.
Illinois	Part 1. Section K of Manual on Recordkeeping (1/1996).	Permanent (filming and destruction permitted).
Illinois (Cook County)	Plan for Destruction of Certain Records of the Circuit Court of Cook County Pursuant to Supreme Court General Administrative Order. Approved 1970, last amended 1978.	60 years after filing.
Indiana	Indiana Rules of Court: Administrative Rule # 7.	Maintain 2% statistical sample. Destroy remaining 55 years after final disposition. Maintain packet for post-conviction relief.
Iowa	Judicial Administration. Rule 22.38 (6/2002).	List of items to retain in files and those to discard from files. Must retain minutes of testimony.
Kansas	Kansas Judicial Branch. Supreme Court Rule 108 for the District Courts. Effective 1977, last amended 1997.	50 years from date of filing.

Kentucky	Records Retention Schedule: Court of Justice, Post-1977 Records. State Records Branch, Public Records Division. KY Dept. for Libraries and Archives (12/1996).	Retain permanently. Transfer to state record center for 10 years, then to state archives.
Louisiana	General Records Retention Schedule. Clerk of Court (2/1998).	Permanent, film 5 years after definitive judgment.
Maine	Supreme Judicial Court. Administrative Order, Records Retention (2/2003).	Permanent.
Maryland	Maryland Court System. General Schedule # 653.	12 years after closure. Retain transcript permanently.
Massachusetts	District Court Records Retention Schedule. S.J.C. Rule 1:11. Amended (9/1991).	All case files with a thickness of 2 inches must be retained permanently. If not, then 5 years after disposition. 2% sample for records after 1969.
Michigan	General Schedule #16. 2001.	25 years from latest court order.
Minnesota	http://criminal.justice.state.mn.us/courts/ret_sch.htm "Disposition of Records: District Courts."	Permanent.
Mississippi	Miss. Code 1972 annotated - 9-3-1 to 9-3-61, and Laws 1993, ch. 518, sec. 1 994, ch. 564, sec. 97 2001, ch. 574, sec. 1	Supreme court (the only level of appeal) keeps transcripts for 5 years, and then they are transferred to the state archive, which puts them in a complete database and keeps them forever.
Missouri	Office of State Courts Administration. Court Operating Rule 8 (8/1995).	50 years after case is closed. When sentence is 25 years or more, record on appeal kept for 50 years.
Montana	Montana Local Government Retention Schedule: Clerk of District Court (8/2001).	Permanent except items on purge list.
Nebraska	Schedule #8. Nebraska Records Management Division (1989).	Class II, III IV Felonies: 20 years. Class I, IA, IB Felonies: permanent, or microfilm and permanent. May be transferred to state archives after 30 years.
Nevada	Minimum Records Retention Schedules, Nevada Supreme Court, Nevada Revised Statute.	Permanent; but there is significant county-based discretion. Microfilm is considered an allowed archive method, but digital sources are not.
New Hampshire	New Hampshire Superior Court Administrative Rule 3-9; New Hampshire Supreme Court Rule 15.	Permanent.

New Jersey	Judiciary-State of NJ Records Retention Schedule—Law Division, Criminal and Civil Part (3/2001).	Capital cases: Purge case file (but not transcript, only lesser documents) one year after termination of appeal period or disposition of appeal provided no filings in past 6 months, retain permanently. 1st and 2nd degree: Purge, retain remainder 40 years. 3rd and 4th degree: Purge, retain remainder 20 years.
New Mexico	General Government Administration. Judicial Records Retention and Disposition Schedules. New Mexico District Courts. New Mexico Commission of Public Records—State Records Center and Archives in conjunction with NM Supreme Court (2/2003).	Permanent.
New York	Superior Criminal (and Civil) Courts Records Retention Schedules.	Retain for 50 years from date of disposition, then destroy. If capital case retain permanently.
North Carolina	"Records Retention and Disposition Schedule" Issued Jointly by the Division of Archives and History Department of Cultural Records and the Administrative Office of the Courts (7/2001).	All "life or death" cases, permanently (25 years at court, then to state archives). All others, permanently, may be destroyed if microfilmed.
North Dakota	North Dakota—Records Retention Schedule—Courts (8/2001).	21 years from date of entry of judgment or 1 year after execution of sentence, whichever is greater.
Ohio	Ohio Supreme Court Rule 26.	5 years after final disposition, then kept forever on microfilm. Capital cases are kept forever.
Oklahoma	Oklahoma Statutes. Title 20. Chapter 15. Section 1005. Last amended 6/2002.	50 years after any action taken if sentence was death, life without parole, or life. 10 years after action taken for all other felonies.
Oregon	State Trial Court Records. Section 2.2 (7/2002).	"WOLFE records" 75 years; all others 10 years after last document entry.
Pennsylvania	Administrative Office of Pennsylvania Courts. Record Retention and Disposition Schedule.	3 years after final disposition.
Rhode Island	Supreme Court rule.	Permanent.
South Carolina	Clerk of Court General Schedules.	Permanent.

South Dakota	Unified Judicial System Judicial Records Retention and Destruction Schedule for Circuit Courts (6/2000).	Retain permanently (may microfilm).
Tennessee	Tennessee Supreme Court/ Administrative Office of the Courts (10/2001).	The records are to be maintained in the supreme court offices while they are active, then transferred to the state records center to be held for 50 years, then to be transferred to the state library and archives and a representative of the supreme court. Those records deemed historic may be microfilmed. All records of nonhistoric value may be disposed of by state-approved method.
Texas	Texas State Library and Archives Commission. Local Schedule DC. Retention Schedule for Records of District Clerks (10/1997).	Sentence 2 to 20 years: retain 25 years after final judgment. Sentence over 20 years: permanent. Criminal minutes: permanent.
Utah	Utah State Court Records Retention Schedule (11/2002).	Permanent unless 3rd-degree felony then retain for 10 years.
Vermont	The Records Management Program. Vermont Superior Court (12/1987).	Retain for 23 years, microfilm, and destroy. Do not microfilm transcript, destroy when destroy file.
Virginia	The Library of Virginia. Records Management and Imaging Services Division. Records Retention and Disposition Schedule. General Schedule # 12, Circuit Courts (7/1999).	Retain permanently for cases ended after 1912 that have historical, genealogical, or sensational significance. Others, post-1912 destroy 20 years after sentencing date (unless sentence is still ongoing).
Washington	Records Management Guidelines and General Records Retention Schedules. Washington State Local Records Committee (12/2001).	Permanent.
West Virginia	Circuit Court Record Retention Schedule (9/1995).	75 years.
Wisconsin	SCR Chapter 72. Retention and Maintenance of Court Records (4/1998).	50 years after entry of final judgment; 75 years if Class A felony.
Wyoming	Wyoming Circuit Courts (10/1998).	Permanent, if court docket does not contain complete information about case. If docket is complete, retain 5 years then destroy.