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## Archiving Revolution: Historical Records Management in the Massachusetts Courts

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### Introduction

The Court as Archive Project is unique in its consideration of the records of Australian superior courts in centring the fundamental value of court records as more than simply a collection of process, but as a social and cultural archive. As the editors discuss in the introduction to this volume, historical court records have assumed an increasing significance as a primary source for researchers across a range of disciplines. Engagement with the substance of court records has opened opportunities to develop more diverse and more complete narratives of individuals' relationships with one another and with the state.

As an inheritor of English legal tradition, Australian courts share features with other former colonial possessions, including the practice and traditions of adversarial, common law courts of record. Therefore, international experience provides a valuable source on which to draw in the development of retention and maintenance practices.

As part of the process of drawing together those experiences for the Court as Archive Project, the experience of United States courts—particularly those of its oldest colonies—has become increasingly relevant.



Figure 1: Massachusetts Supreme Judicial Court, Boston, Massachusetts.

Source: Author's photograph.

Massachusetts is one of the oldest colonies in North America, having been claimed by British adventurers in 1602, armed with letters patent from Queen Elizabeth I.<sup>1</sup> Massachusetts is also the landing site of the *Mayflower*, carrying the Pilgrims to the new world,<sup>2</sup> and the site of the ‘shot heard around the world’<sup>3</sup>—the confrontation between British soldiers and colonial militia at Concord in Middlesex County—that heralded the War of Independence.

The lengthy history of Massachusetts courts and their establishment as courts of record means that their records of proceedings contain a wealth of information about the development and growth of the colony as part of a nascent United States. Hidden among the records of the Massachusetts courts are proceedings that include the names of a number of the United States’ ‘founding fathers’, including John Hancock, Paul Revere, Samuel Adams and President John Adams; the biographical value of this collection, it has been argued, is ‘difficult to exaggerate’.<sup>4</sup>

Although Massachusetts courts are much older than the Federal Court of Australia, they have confronted similar issues regarding records retention and the vexed question of what constitutes a ‘significant’ record that requires permanent retention. However, through a process of determining historical context, sampling and inspection, Massachusetts found that a definition of ‘significance’ was largely unnecessary.

### ‘Significance’: Context and ‘Fat Files’

Two inspections conducted in the 1970s assessed the significance of Massachusetts courts records as one of several potential sources of historical and cultural information. Those inspections found that pre-1859 court forms contained important biographical information about the parties that, as a result of changes to the forms, was omitted after 1859. For records after 1859, the historical and cultural value of the record to researchers could be preserved by retaining only a small, random sample and an oversample of

1 John Stetson Barry, *The History of Massachusetts: The Colonial Period* (Phillips, Sampson & Co., 1855) 10. Interestingly, there was also a competing claim to Massachusetts by the Dutch East India Company under a Charter from William of Orange.

2 Ibid 80–1.

3 Ralph Waldo Emerson, ‘Concord Hymn’ in Edward Waldo Emerson (ed), *The Complete Works of Ralph Waldo Emerson* (Houghton Mifflin, 1904) 159.

4 Robert Brink, ‘Deferred Maintenance of Court Records’ (1980) 73 *Law Library Journal* 997, 1001.

any file larger than two inches in thickness or which had been the subject of an appeal. As a result of a large-scale sampling and inspection process, a determination of the ‘significance’ of a record did not require the physical inspection of every file, but a high degree of confidence could be taken that the larger the file, the more ‘significant’ the record was likely to be.

Despite now being more than 40 years old, the same process of random sampling and an additional oversampling of large files remains in place in Massachusetts today.<sup>5</sup> The practice is the subject of little complaint or comment. On occasion, researchers find that a record important to their research has been destroyed. However, the court’s experience has been that the instances are rare and, when the practice is explained to researchers, it is accepted.<sup>6</sup>

This chapter provides an overview of the origins of the Superior Court’s approach, adopted as a result of the Colonial Courts Record Project and, subsequently, the Superior Courts Record Project. It also draws together some of the lessons and concepts from both projects as a means of providing an analysis of how a project of this size came into being, and how it reached what many might consider an unusual approach to determining the question of ‘significance’. In doing so, it suggests that Massachusetts courts’ approach to the development and implementation of records retention practices may be valuable in approaching similar superior courts’ collections in Australia.

## Massachusetts Court Records: History in an Unbroken Line

The origins of the justice system in Massachusetts are almost as old as the colony itself. The *Research Guide to the Massachusetts Courts and their Records* goes as far as to argue that the justice system ‘traces its history in an unbroken line’ to 1630.<sup>7</sup> Until 1639, records of judicial proceedings were

5 *Supreme Court Judicial Rules* (10 February 1995), r 1.11; see also Executive Office Trial Court, *Guide: Trial Court Record Retention Schedule* (n.d.) Mass.gov <<https://www.mass.gov/guides/trial-court-record-retention-schedule>>.

6 Interview with Bruce Shaw, Director, Massachusetts Superior Judicial Court, Archives and Records Preservation (Boston, Massachusetts, 5 July 2017).

7 Catherine Menand, *A Research Guide to the Massachusetts Courts and their Records* (Supreme Judicial Court Archives and Records Preservation, 1987) 7.

‘irregularly kept’.<sup>8</sup> However, in arguably one of the very earliest directions on the maintenance of judicial records in the colonies, the Massachusetts General Court directed that all evidence was to be kept ‘to posterity’.<sup>9</sup> All courts, including a superior court to exercise the same powers of the Courts of Common Pleas in England, were subsequently re-established as ‘courts of record’ in 1691 when William III appointed a governor to the colony.<sup>10</sup>

The significance of ‘courts of record’ is discussed elsewhere in this volume.<sup>11</sup> However, the designation of Massachusetts courts as courts of record brings with it two important signifiers—one affecting the status of the court and the other affecting the status of its record.

First, and according to English practice at the time, Massachusetts courts transformed from being informal or ad hoc tribunals to adopting a permanent existence and developing a transparent and consistent body of law.<sup>12</sup> Second, and more importantly, in the context of courts as archives, the establishment of a perpetual record meant that the record’s contents became immutable and incontrovertible. As early as the 13<sup>th</sup> century, the oral history of proceedings in the King’s courts in England were considered to be authoritative and above question. With the advent of a written record, the same character was attached to those records. The court record was not required to be further proved or supported by reference to oral evidence.<sup>13</sup>

Despite the political upheaval of the War of Independence, and the successive realignments of colonial boundaries to both amalgamate<sup>14</sup> and then separate the colonies and, subsequently, states,<sup>15</sup> Massachusetts courts

8 Emory Washburn, *Sketches of the Judicial History of Massachusetts* (Charles C Little and James Brown, 1840) 89.

9 Ibid.

10 Ibid. Interestingly, the Governor was styled as a ‘president’ with a deputy president and elected assistants to provide advice, similar to an executive council.

11 See Chapter 1, this volume.

12 Enid Campbell, ‘Inferior and Superior Courts of Record’ (1997) 6 *Journal of Judicial Administration* 249.

13 SE Thorne, ‘Courts of Record and Sir Edward Coke’ (1937) 2(1) *The University of Toronto Law Journal* 24; Gaillard Lapsley, ‘The Court, Record and Roll of the County in the Thirteenth Century’ (1935) 51 *Law Quarterly Review* 299.

14 Alan Taylor, *American Colonies* (Viking, 1<sup>st</sup> ed, 2001) 277.

15 For a detailed account of the waxing and waning of Massachusetts’ boundaries with the surrounding states, see Franklin Van Zandt, *Boundaries of the United States and the Several States* (United States Department of the Interior, 1966) 95.

have remained in a similar tiered structure.<sup>16</sup> The current Massachusetts General Law establishes a Supreme Judicial Court, an Appeals Court, a Trial Court (consisting of a series of specialist jurisdictions), a Superior Court and District Courts.<sup>17</sup> The establishment of each tier under the General Law places the administration of the court largely under the supervision of the court itself.

## Record Retention in Massachusetts

By the mid-1970s, there were approximately 2.7 million court files stored in locations all over Massachusetts. No preservation or conservation work had been done on the materials, and there was no designated central repository. Clearly, the Massachusetts courts' extensive history contributed to the volume of the materials. At the same time, that history also meant that the records constituted an invaluable archive of economic, social and political disputes stretching back more than 200 years.

As a result of a substantial records inventory, assessment and sampling exercise, supervised by a board comprised of judges, historians and other scholars, the Massachusetts Superior Judicial Court<sup>18</sup> adopted a unique approach to the management of its records. Rather than developing a definition of 'significance' as a means of determining which files should be retained, the project found that the thickness of the file and whether it had been taken on appeal were the only consistent indicators of historical significance. Only those files that were greater than two inches in thickness, or were appealed, were recommended for permanent retention.

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16 Menand, above n 7, 21.

17 *Massachusetts General Law* (MGL) ch 211, 211A, 211B, 212 and 218.

18 Michael Hindus, Theodore Hammett and Barbara Hobson, *The Files of the Massachusetts Superior Court, 1859–1959: An Analysis and a Plan for Action* (GK Hall and Company, 1979) (the 'Hindus Report').



## Origins of Massachusetts' Records Management

The origins of efforts to adopt a structured approach to the management of court records in the United States can arguably be found at the intersection of two significant events during the 1970s: Chief Justice Burger's 'deferred maintenance' address and the consequent creation of the National Center for State Courts; and the bicentenary of the United States.

### Deferred Maintenance

In 1971, President Richard Nixon and Chief Justice Burger of the United States Supreme Court spoke at the first National Conference of the Judiciary. The *American Bar Association Journal* acknowledged that the occasion was a rare one to have brought the head of the executive and the judiciary to the same conference platform.<sup>19</sup> Both the President and the Chief Justice addressed delays in the justice system and the need for reform to improve public confidence.<sup>20</sup> However, while the President's remarks were addressed to procedural reform, the Chief Justice adopted a different approach. Acknowledging that delays in litigation were something on which even Roscoe Pound had expressed concern,<sup>21</sup> he also drew attention to the ageing administrative practices of courts, particularly in the context of their records administration. Commenting specifically on the increasing complexity of litigation, Chief Justice Burger noted that:

In terms of methods, machinery and equipment, the flow of papers ... most courts have changed very little fundamentally in a hundred years or more. I know of no comprehensive surveys, but spot checks have shown that the ancient ledger type of record books, sixteen or eighteen inches wide, twenty-four or twenty-six inches high, and four inches thick are still used in a very large number of courts. These cumbersome books, hazardous to handle, still call for longhand entries concerning cases. I mention this only as one symptom of our tendency to cling to old ways.<sup>22</sup>

19 'Williamsburg Cradles Another Revolution—This One in the Administration of Justice', (1971) 57 *American Bar Association Journal* 421.

20 Richard Nixon, 'Reforming the Administration of Justice' (1971) 57 *American Bar Association Journal* 421; Warren Burger, 'Deferred Maintenance' (1971) 57 *American Bar Association Journal* 425.

21 Burger, above n 20.

22 Ibid 427.

As a means of addressing the diverse methods of administration consistently, Burger proposed the development of a National Center for State Courts as a 'national clearinghouse or center to serve all the states and to co-operate with all the agencies seeking to improve justice at every level'.<sup>23</sup>

The National Center for State Courts (NCSC) that Burger had proposed commenced operation less than 12 months later.<sup>24</sup> Among its earliest projects was a survey of records management practices in state courts nationally.<sup>25</sup> The survey found that a large number of courts held records more than 100 years old, but that 'many states [had] allowed these records to be relegated to attics, basements, and closets with little selectivity and virtually no management'.<sup>26</sup> Importantly, the NCSC survey was subsequently submitted as a successful proposal for seed funding to undertake records management activities in courts to the National Historical Publications and Records Commission—the significance of which is discussed further below.<sup>27</sup>

## Bicentennial Fever

The push for a better approach to the management of courts' historical records, in particular, was assisted by a significant historical milestone. The bicentenary of the United States in 1976 brought with it an enthusiasm for historical information, just as the Canadian centenary had done nine years earlier.<sup>28</sup> Planning began some 10 years before and, based on recommendations of the American Revolution Bicentennial Commission, the United States Congress established a national coordinating body—the American Revolution Bicentennial Administration<sup>29</sup>—and a number of institutions were gripped by 'bicentennial fever'.<sup>30</sup>

23 Ibid.

24 Warren Burger, 'The State of the Federal Judiciary—1971' (1971) 57 *American Bar Association Journal* 855, 856.

25 National Center for State Courts, *Court Records Retention Survey and Guidelines Project Proposal* 627, cited in Brink, above n 4, 998.

26 Ibid 998; see also Robert C. Harrall, 'Court Records Management: "The Mitten" Revisted' (1976) 2(1) *Justice System Journal* 77.

27 Brink, above n 4.

28 Gabrielle Blais and David Enns, 'From Paper to People Archives: Public Programming in the Management of Archives' 31 *Archivaria* 101, 102.

29 Act of 12 November 1973, Pub Law No 73-179, 87 Stat 697 (1973).

30 Richard Baker, 'Reflections on the Modern History of Congressional History' in Glenn Gray, Rebecca Johnson Melvin and Karen Paul (eds), *An American Political Archives Reader* (Scarecrow Press, 2009) 6.



To mark the bicentenary, the American Association of Law Libraries (AALL) held its national conference in Boston with a focus on the legal history of the American Revolution and the management of historical records.<sup>31</sup> A number of speakers at that conference drew attention to the absence of a collected history of colonial administration as well as the value of the historical records that many institutions and private collections held.<sup>32</sup> However, they also emphasised the difficulty of building a complete picture of America's legal history, referring to the sources being contained in an 'immense and scattered mass'<sup>33</sup> and being 'diffuse'.<sup>34</sup> David Flaherty, who had published work on a history of Massachusetts as told through court records, noted that there was a significant inconsistency in the way in which court clerks had marked or catalogued court records across time, making it difficult for the historian to determine not only the content of the record but whether a particular record even existed.<sup>35</sup> He also noted that he had, in effect, had to travel to every colonial county seat to determine what records were available.<sup>36</sup>

In addition to the difficulty of locating material, concerns were also expressed about the manner in which valuable records were being kept. Records were being stored in basements and decommissioned cells in environments that did not suit long-term preservation. Speakers at the AALL conference also emphasised the need for a 'carefully planned and rigidly supervised program of housekeeping'<sup>37</sup> to ensure that materials did not continue to be lost as a result of age.

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31 American Association of Law Libraries, 'Association News' (1975) 7(1) *Newsletter* 1, 2.

32 Kinvin Wroth, 'Documents of the Colonial Conflict: Part I—Sources for the Legal History of the American Revolution' (1976) 69 *Law Librarians Journal* 277; Gerard Warden, 'Commentary on Sources for the Legal History of the American Revolution: Part II—Documents of the Colonial Conflict' (1976) 69 *Law Library Journal* 292.

33 Wroth, above n 32.

34 Morton Horwitz, 'Documents of Constitutional Development' (1976) 69 *Law Library Journal* 295, 296.

35 David Flaherty, 'The Use of Early American Court Records in Historical Research' (1976) 69 *Law Library Journal* 342.

36 Ibid 344; see also Michael Hindus, 'Designing Projects for Maximum Impact: Saving the Early Court Records in Massachusetts' (1979) 42(3) *The American Archivist* 307.

37 George Cunha, 'Preservation and Conservation of Legal Materials' (1976) 69 *Law Library Journal* 300.

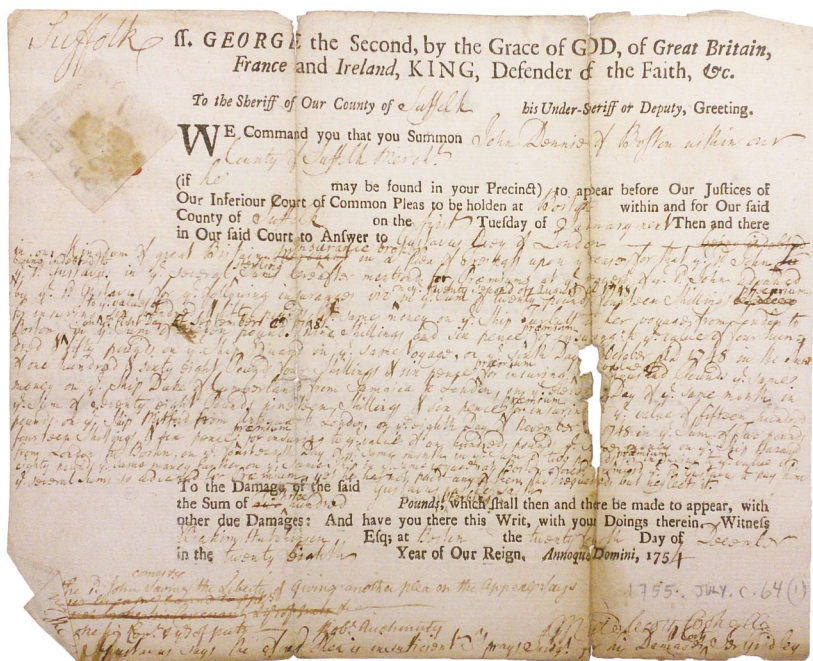


Figure 2: An example of court records held by Massachusetts courts—Writ of Summons dated 1775.

Source: Author’s photograph.

### A New Wave of Users

While the concerns of scholars and court staff about the scattered and imperilled historical records of Massachusetts courts are cited as the principal origin of the development of Massachusetts court record practices,<sup>38</sup> part of those concerns also related to the interests of a new and growing body of users. A lack of administrative structure is clearly a cause for concern, but it was not the objective in itself. Many of the concerns expressed by scholars related to their inability to find materials to support their research. Among court staff, it related to the inability to *help* researchers by finding the material for which they were searching.

The concerns of the materials’ *users* rather than their keepers also reflected a new movement in archival and library management occurring at the same time, prompted, at least in part, by a renewed interest in history. The bicentenary introduced a new ‘wave’ of users to archives—genealogists

38 The Hindus Report, above n 18; Brink, above n 4.

spurred on not only by the bicentenary, but also by the broadcast of historical miniseries like *Roots* a year later<sup>39</sup>—and coincided with more popular awareness in North America of the availability of historical information.<sup>40</sup> Attempts were made to provide a more ‘user-friendly’ approach to archival records and to move away from the understanding of archives as the domain of the expert archivist, as had been the subject of debate among North American archivists during the 1970s and 1980s.<sup>41</sup> However, the impetus given to the public’s interest in historical material by the bicentenary prompted a renewal of the debate.<sup>42</sup>

### The National Historical Publications and Records Commission

Important for the development of a number of projects during the bicentenary was also the expansion in 1974 of the National Historical Publications Commission (NHPRC), which had been established in 1934, to now include records.<sup>43</sup> The expansion allowed the National Archives and Records Authority (the equivalent of the National Archives of Australia) to make funds available to state and private archival collections for their preservation—some of which was made available to Massachusetts courts.

## Sampling and ‘Significance’

The current records management practice was not the first attempt to introduce a method of structured record-keeping to the court’s historical records. In 1976, the Colonial Courts Records Project commenced under the supervision of a judicial committee appointed by then Chief Justice Edward Hennessy to undertake a survey and inventory of the courts’ records to be conducted by lawyer and legal historian Michael Hindus.

39 Heather MacNeil and Terry Eastwood, *Currents of Archival Thinking* (ABC-CLIO, 2<sup>nd</sup> ed, 2017) 229.

40 Ibid.

41 See, for example, Mary Pugh, ‘The Illusion of Omniscience: Subject Access and the Reference Archivist’ (1982) 45(1) *American Archivist* 33; Bruce Dearstyne, ‘What Is the Use of Archives? A Challenge for the Profession’ (1987) 50(1) *American Archivist* 76; Francis X Blouin Jr and William Wallach, *A Decade of Sponsored Research: The Research Fellowship Program for Study of Modern Archives* (University of Michigan, 1994) 17.

42 Edward Weldon, ‘Lest We Forget: Setting Priorities for the Preservation and Use of Historical Records’ (1977) 40(3) *The American Archivist* 295, 295; Howard Applegate, Richard Brown and Elsie Freigovel, ‘Wider Use of Historical Records’ (1977) 40(3) *The American Archivist* 331.

43 44 USC § 25 (1974).

The principal objective of the Colonial Courts Record Project was to locate, identify and microfilm the hundreds of thousands of scattered records for Suffolk County, within which Boston lies.<sup>44</sup> The project was supported by a grant from the NHPRC and eventually produced a survey of the records published in 1977: *The Records of the Massachusetts Superior Court and its Predecessors: An Inventory and Guide*.<sup>45</sup> Chief Justice Hennessy considered the project to be his most significant contribution as Chief Justice.<sup>46</sup>

The judicial committee responsible for the Colonial Courts Record Project recommended permanent retention of all pre-1859 files for two key reasons. The survey had identified some 40,000 cubic feet of records stored in various locations across the state. However, only 5,000 cubic feet contained pre-1859 materials.<sup>47</sup> The survey suggested that the change in volume was due to changes in the administrative practice of courts and the legal profession. The advent of printed forms, rather than bespoke process, meant that the rate at which material could be produced had increased.<sup>48</sup> It also suggested that the increase in volume, particularly in the early 20<sup>th</sup> century, appeared to relate to motor vehicle torts—a cause of action previously unknown.<sup>49</sup> Storage requirements for pre-1859 files were, therefore, significantly less onerous.

Second, from about 1859 onwards, the practice of Massachusetts courts changed so that court records contained substantially less sociological and biographical data. Pre-1859 materials commonly contained addresses, gender, occupational and other data that made them a valuable and unique source. Post-1859, that data was omitted but was also available from a range of other sources.<sup>50</sup>

The Colonial Courts Record Project and the survey provide some important direction and advice about the scoping of any form of management strategy. First, the records need to be seen in a much broader context

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44 Interview with Bruce Shaw, Director, Massachusetts Superior Judicial Court, Archives and Records Preservation (Boston, Massachusetts, 5 July 2017).

45 Michael Hindus, Superior Court of Massachusetts and Judicial Records Committee of Massachusetts, *The Records of the Massachusetts Superior Court and its Predecessors: An Inventory and Guide* (Archives Division Office of the Secretary of the Commonwealth, 1978).

46 Interview with Bruce Shaw, Director, Massachusetts Superior Judicial Court, Archives and Records Preservation (Boston, Massachusetts, 5 July 2017).

47 Hindus, above n 45.

48 Hindus Report, above n 18.

49 Ibid.

50 Ibid 7.

than simply a collection of process; it is a social archive. Approaching the initial assessment of the records process from the perspective of the *value* of the records from *different perspectives* rather than an inward-looking assessment of importance to the court or legal history is fundamentally important.

Supporting this assessment is a sound understanding of the content of the records not in isolation but in connection with other archives. The 1977 survey identified the content of pre-c1859 records as unique in telling a much wider story about the colony and state as a whole. From the perspective of the Australian Federal Court, it is arguable that the management of native title court records, their uniqueness having been explored in other chapters in this volume, and acknowledged in the Federal Court's existing Disposal Authority, fall within the same category.

## A Proposal for Sampling

While the judicial committee responsible for the 1977 survey had recommended a clear approach to pre-1859 records, it made no recommendations about the much larger collection of post-1859 materials. However, rather than leaving the matter, the committee chose to undertake a further project to determine what to do with the more recent records.

The Superior Courts Records Project began in 1977, still under the supervision of the judicial committee but now to be conducted by a larger team including Michael Hindus, lawyer and historian Theodore Hammett and historian and sociologist Barbara Hobson. The project's objective was to attempt to find a way to rationalise the large body of post-1859 files in a cost-effective manner that would not devalue the collection for researchers. Very early on, the committee agreed to a process of 'selective retention',<sup>51</sup> but which files to retain and which to keep was a sensitive question.<sup>52</sup>

What is important about this observation of 'sensitivity' is that one of the underlying concerns of the committee and the court was the level of risk that both were prepared to accept: by destroying a certain proportion of

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51 The Hindus Report notes that 'this is, of course, a euphemism. We use this term to refer to the destruction of files': *ibid* 5.

52 *Ibid*.

files, historically significant material would be lost. That is, the committee and the court had made the initial, fundamental decision that everything could not be kept and that material would clearly have to be destroyed. Therefore, the project's objective was to find a point of compromise. How much historical material were the committee and the court prepared to lose in the interests of managing such a massive collection before the risk and rate of loss became unacceptable?

Hindus and his co-authors proposed a method of selective retention based on a sampling methodology: a random sample was proposed to be taken from the collected body of files with the balance to be destroyed. Underpinning this approach was the concept that by selecting an appropriate sample, conclusions could be drawn about the population as a whole.<sup>53</sup>

A random sample was selected from two counties—Suffolk and Hampshire—based on a randomly generated set of file numbers. The choice of counties was deliberate: Suffolk being predominately urban (it includes Boston and other major urban centres) and Hampshire being predominately rural.<sup>54</sup> The sample was split again across civil and criminal matters as being substantively different classes of matters with different characteristics.<sup>55</sup>

A randomly generated set of numbers was chosen instead of a set number series from each period or a sample from specific jurisdictions to avoid distorting the sample. For example, Hindus notes that if a predetermined number range were used, it would skew the sample towards a particular period.<sup>56</sup> File numbers tend to be assigned in all courts in numerical order so to set a range would, consequently, predetermine a period in time.

The sampling methodology also took into account the volume of matters and historical interest. Once the number of post-1859 matters was identified, a total sample size was selected that would provide a statistically significant result. However, a sliding scale of the proportion of matters within years was also identified. Hindus notes that this was done for two reasons: older matters were considered by the committee to be of greater value and, because the total number of matters commenced in the

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53 Ibid 42.

54 Ibid 45.

55 Ibid.

56 Ibid 13, 42.

Massachusetts Superior Court increased over time, a smaller proportion could be taken while producing a similar number of physical files as for earlier years.<sup>57</sup>

This approach, as an alternative to the physical of *every* file, has some clear advantages. It is clearly more time- and cost-effective. However, Hindus acknowledges that it may not be appropriate for all matters or all jurisdictions. For example, Hindus notes that while undertaking the project, the committee was also approached for advice on sampling with respect to probation files. Ultimately, sampling was not recommended based on the absence of important identifying information, which would allow a sample to be taken as representative of a set, the unique nature of the records and their sensitivity.<sup>58</sup>

Therefore, the application of a sampling methodology as a starting point for determining an approach to selective retention is not entirely random. As Hindus explains, the nature and size of the collection need to be considered and understood at the very start. Factors such as geographical, temporal and jurisdictional spread need to be taken into account in determining the overall size of the sample, and this cannot be done without adequate identifying data. Within that spread, factors such as the increase in total filings or filings of a particular type need to be identified and taken into account in setting the parameters of the sample.

However, once those parameters are determined, then the method of selecting the sample needs to be as random and objective as possible. For example, Hindus and his team used a random number generator to determine file numbers within the predetermined objectives. The advantage here is to avoid skewing the nature of the sample. In such a sensitive context as the preservation of records in which members of the committee may have an interest, it also avoids skewing in favour of individual members' interests that, ultimately, might not be representative of, or shared by, researchers 10, 20 or 50 years later.

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57 Ibid 13.

58 Ibid 14.



## Testing the Sample: Historical Significance Within the Sample

As acknowledged earlier in this chapter, the process of selective retention requires an assessment of, and compromise on, the risk of the ‘wrong’ records being destroyed. As a means of testing the sampling process and providing a sense of what Hindus refers to as ‘comfort’ to the committee responsible for supervising the project, the project took the additional step of developing a methodology to determine how many records contained information of real historical interest.

Eighty-two different variables were established as a means of identifying the characteristics and historical significance of each file. The codes, signifying important legal, social, historical and cultural factors, were determined by a committee composed of nine scholars prominent in the fields of legal history, social history, criminology, law, demography, minority history and statistics.

For example, in relation to civil files, codes were assigned to the basic information of jurisdiction, the identity of the plaintiffs and the defendants (grouped by social or economic interest) and the cause of action. Additional codes were assigned to reflect the procedures on the file (eg, claim, counterclaim and appeal) and, very simply, its size. A third set of codes was then applied to identify historical elements of interest (eg, if the matter dealt with issues of ethnicity, race, labour or family).<sup>59</sup>

The process also allowed for an overall rating of historical interest based on a simple low-to-high scale. The variables upon which this ranking could be based were not listed to remain flexible, but might include variables such as social context, detailed descriptions of social practices or the political context within which a matter was occurring.

Hindus and his co-authors acknowledge that, while the process of settling on a list of codes and assigning them to files was as robust as it could be made, it cannot be argued that a different group of scholars, or even different scholars, may have agreed on the same variables.<sup>60</sup> This is a weakness in the process. However, the broadly representative nature of the committee, looking outside just the judges and court staff, and,

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59 Ibid Appendix B.19.

60 Ibid 59.

thereby, reflecting a much broader range of perspectives, arguably makes the list of codes more defensible. The importance of the contents of the file was not being determined from a purely legal or administrative perspective, but, at the same time, those elements were not ignored.

While the initial sample identified was up to 6,000 files, time constraints and the amount of material on some files meant that, ultimately, a sample of 3,500 files was inspected—1,422 criminal files and 1,968 civil files—and the variables present in the files identified.

Once the files were coded for characteristics and significance, the project was then able to produce data on the extent to which the sample, and, therefore, the complete collection of files, held material of historical value. Surprisingly, the sampling process revealed two key findings:

- Only 6.8 per cent of sampled civil files and 8.1 per cent of criminal files were of historical interest, and the majority (4.6 per cent and 6.6 per cent, respectively) were ranked of ‘low’ historical interest.<sup>61</sup>
- Out of the 82 different variables, the study found that the size of the file (literally thickness), whether the matter had been taken on appeal to a superior court and (in the case of civil matters) whether the matter was one in equity were the only consistent indicators of historical interest.<sup>62</sup>

## Implementing Hindus: Summary and Lessons

As discussed earlier, the results of the Superior Courts Record Project and the recommendations of the Hindus Report were consequently adopted as records retention policy in Massachusetts and continue to be applied today.

However, the Hindus Report was also written with the intention of providing a set of principles or practices for courts to follow in emulating the records management practices of the Superior Court of Massachusetts.<sup>63</sup> While the methodology is summarised in this chapter, there are some broader lessons and concepts that also need to be taken into account.

61 Ibid 62, 66.

62 Ibid 62, 64, 71.

63 Michael Hindus, Theodore Hammett and Barbara Hobson, ‘Preface’ in *ibid*.

## The Importance of Timing

The management of historical court records, both in Massachusetts and across the United States, was not something on which the courts or the NCSC had haphazardly or accidentally focused in the early 1970s. As Chief Justice Burger and the AALL had highlighted, courts' records were generally in a parlous state by the early 1970s and management had remained fundamentally unchanged 'for a hundred years or more'.<sup>64</sup>

Records and records management was therefore hardly a new issue or problem. However, what appears to provide the motivation for it to be addressed is increasing community awareness of the value of the courts' records, driven by external events coupled with an acknowledgement by courts of the value of their records to the community as a whole. Massachusetts was able to take advantage of Chief Justice Burger's call for the establishment of a National Center for State Courts and additional resourcing from the NHPRC to give impetus to its own efforts.

In the context of the records of Australian superior courts, it is difficult to identify an event or events that might provide the same level of national focus and motivation as the country's bicentenary. However, given the nature of the Federal Court's collection of materials in particular, events such as the 30<sup>th</sup> anniversary of the *Mabo* decision<sup>65</sup> or the introduction of the *Native Title Act 1993* (Cth) might provide the basis for a renewed focus by the community and by the government on the value of those materials.

Nevertheless, there is an important and perhaps perennial issue bound up within the issue of timing, which is also worth noting.

## Content and Purpose of the Records

The development of a records management policy for Massachusetts courts was not something that was compelled or forced by the bicentenary or the clamour of researchers. Just as with Australian Commonwealth courts, Massachusetts courts are constitutionally separate from the other arms of government, and any decision to change its practices was required to be made by the courts themselves. What is critical to understanding how comprehensive the process becomes is the overall commitment by the courts to that process.

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<sup>64</sup> Burger, above n 20.

<sup>65</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

As noted above, while the initial Colonial Courts Records Project was prompted in part by an acknowledgement that administrative practices needed to change simply as a matter of efficiency, it also acknowledged the value of court records to the community as a whole. That is, the project, survey and Hindus Report all acknowledged that the records were more than merely records of process, but were also invaluable historical, social and cultural records that might form part of a larger narrative about the colony, state and, ultimately, the nation. For example, the former Director of Archives and Record Preservation at the Massachusetts Superior Court, Bruce Shaw, notes the purpose of court records retention is not 'warehousing dead and static paper', but the retention of materials that 'are living historical documents'.<sup>66</sup>

This acknowledgement is also evident in some of the decisions made about permanent retention. For example, the decision to preserve pre-1859 records was in part made on the basis that as biographical (and not process) records, they formed an invaluable part of a wider narrative, whereas other elements of a resource 'community' took up the same story after 1859.

It is also evident in the decision that the project and the Hindus Report be overseen by a committee drawn from a diverse array of interests. It is not only the diversity of interests that is important. It is also that the process of drafting rules about the records to be retained was overseen rather than conducted by that committee. This is an important distinction. To have the same committee review samples or attempt to develop a definition of 'significance' rather than to review the outcomes of the sampling process avoids compromise or confusion in decision-making and drafting.

In the context of the Australian Federal Court's records, there is a need to acknowledge that its records have more significance than simply a record of process. As is discussed elsewhere in this volume, the records have the same historical, social and cultural value, and the same integral role as a part of a larger narrative, as the records of Massachusetts courts. However, that acknowledgement must also come with an understanding that to determine how to approach the management of that resource, lawyers and judges represent only one perspective.

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66 Interview with Bruce Shaw, Director, Massachusetts Superior Judicial Court, Archives and Records Preservation (Boston, Massachusetts, 5 July 2017).

## Significance and Sampling

One of the most challenging aspects of the Hindus Report and the implementation of Massachusetts record management practice is the seemingly simplistic manner in which the issue of 'significance' was ultimately determined. Without context, the practice of random and oversampling based on physical size of files can appear to be only a few steps above simply tossing files down a set of stairs and keeping those closest to the top.

However, as has been summarised in this chapter and is discussed at length in the Hindus Report, the manner in which the practice was developed was based on an understanding of the nature of the records being surveyed and objective testing of the proposed method against a substantial section of the existing files. Put another way, the random sampling of files was not a practice arrived at randomly.

As noted much earlier in this chapter, the practice is, and has been, the subject of little complaint and even less discussion. It was also one developed by taking into account the nature of the records themselves. Hindus and his co-authors acknowledge that the same methodology may not be appropriate for every set of records. This is very similar to the decision taken, for example, by the Federal Court of Australia to keep *every* native title court file but to keep only a smaller proportion of other matters.<sup>67</sup>

However, there is a further interesting sidenote to the Hindus Report that reinforces the extent to which a similar process might apply. In an Appendix to the Hindus Report entitled 'Historical Interest and the Front Page', Hindus and his co-authors discuss steps taken to address concerns that had been expressed by the committee overseeing the project that the sampling process would lead to the destruction of matters of 'unusual interest'.<sup>68</sup>

As a means of assessing the extent to which matters that might have been the subject of significant community or media interest, the Hindus Report reviewed front pages of the *Boston Globe* for 1933 and traced matters mentioned through the Superior Court's files. What the process identified was that the focus of media attention was predominately on

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67 Records Authority No 2010/00315821, Federal Court of Australia (FCA), 19 October 2011.

68 Hindus Report, above n 18, 185.

criminal matters, which was not representative of the bulk of the court's overwhelmingly civil work. Second, and perhaps importantly for public organisations with limited resources, the process of historical media review and tracing was found to be time-consuming and labour-intensive, particularly in the case of matters that might have a number of related proceedings.<sup>69</sup>

Ultimately, there are no recommendations made about retention practices and 'unusual interest'. That is not to suggest that a court considering a similar approach might not find a need to address media interest. One of the issues identified in the Hindus Report, though, is the demand of a historical media review. However, in relation to current or prospective records, the same issues would not be applicable. A current or prospective matter might be marked for permanent retention as a result of ongoing media discussion.

What the Hindus Report does warn against is the potentially distortive effect of relying on media attention as an indicator of significance. One of the key concerns of the Hindus Report was to ensure that the sample taken was truly representative of the work of the relevant court. As a result, a larger sample of civil matters compared to criminal matters was taken, as well as a smaller proportion of modern proceedings, given the similarity of their content. The case file numbers selected for any one year were also randomly generated to avoid taking a sample that reflected any one part of a legal year than another.

The distortive effect of media attention is something that needs to be considered in the context of the work of each court to which a similar methodology might be applied. The Federal Court of Australia, for example, has a diverse jurisdiction. To the extent that media interest was to be taken into account in a determination of significance, it would be necessary to review that criterion in terms of the effect that it has on the sample collected for any particular year. In a year in which there is a large degree of media focus placed on television broadcast rights<sup>70</sup> or the enforcement of intellectual property rights against 'torrent' downloading websites,<sup>71</sup> care needs to be taken to ensure that it does not produce a sample of matters that are not representative of the work of the court as a whole.

69 Ibid 186.

70 *Seven Network Ltd v News Ltd* [2007] FCA 1062.

71 See, for example, the extensive litigation leading up to *Dallas Buyers Club LLC v iiNet Limited (No 5)* [2015] FCA 1437.

## Washing Records: Record Preservation versus Record Retention

What is not apparent from the work discussed in this chapter and the implementation of the Hindus Report's recommendations is the substantial commitment that Massachusetts was required to make not only to the proper identification of records, but also to the process of their physical preservation.

Although discussed as early as the 1970s, the poor physical state of court records was as much of a concern to researchers as the poor identification of their location.<sup>72</sup> The former Director of Archives and Records Preservation at the Superior Judicial Court noted that from the start of the Colonial Courts Record Project, it was necessary not only to identify where records were kept but also to begin a process of repairing and preserving those records.<sup>73</sup> Consequently, Archives and Record Preservation has a large document-preservation facility in the Superior Judicial Court Building.



Figure 3: Document preservation facility, Superior Judicial Court.

Source: Author's photograph.

<sup>72</sup> See, for example, Brink, above n 4; Harrall, above n 26; Wroth, above n 32.

<sup>73</sup> Interview with Bruce Shaw, Director, Massachusetts Superior Judicial Court, Archives and Records Preservation (Boston, Massachusetts, 5 July 2017).



Archives and Records Preservation has continued to work on the painstaking process of preservation since the 1970s, and continues on that work today. By virtue of the sheer volume of materials, the process of recovering and repairing records means that the end of the process may still be some years away.

The effort required in the case of Massachusetts records is principally the result of almost 200 years of inattention—a problem that the Federal Court of Australia does not face. However, what the experience of Massachusetts does highlight is that the practice of records retention, and their acknowledgement as a valuable source, does not stop at the point of selecting records but incorporates everything required to maintain that record permanently. The National Archives of Australia has the necessary expertise and facilities to ensure that that occurs. However, while a decision on ‘significance’ by the Federal Court is outstanding, and records remain in its possession, there is a need to ensure that appropriate steps are taken to ensure those records’ physical integrity before additional remedial measures are required.

## Conclusion

As examples of English colonial legal systems, the United States and Australia share a common heritage. They are steeped in the concept of superior courts’ records providing a perpetual and incontrovertible record of their contents. Both legal systems also share aspects of a common experience in developing awareness of the wider significance of those records as a social and cultural resource. Although the origins of Massachusetts courts and the Federal Court are separated by almost 300 years, that same common experience is nevertheless evident.

As this chapter has endeavoured to summarise, because of internal and external pressures, Massachusetts courts were compelled to find a way of balancing the value of their collected records with the administrative and financial cost of simply retaining everything. The practice adopted of random sampling and oversampling based on the physical size of a file might, on first look, appear to be haphazard and potentially dangerous in terms of the potential loss of important historical material. However, what this chapter has attempted to make apparent is that the current practice developed based on an understanding of Massachusetts courts’

role as part of a larger narrative of the nation's history—both in terms of those records that might not be found elsewhere and those records in which information might be duplicated.

It would also be incorrect to assume that the practice equates significance to size—it does not. Through a careful survey and sampling process, Massachusetts has been able to identify that, in that particular jurisdiction, file size provides a clear and consistent indication of the potential significance of that record into the future.

What this chapter does not suggest is that another court, seeking to apply Massachusetts' experience, adopt file size as an indicator of significance. What is instead required is a careful sampling and survey of records to determine what indicators might provide the same level of confidence and consistency in identifying appropriate records for retention as a permanent archive.

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