

TOWARDS AN ARCHIVAL CONCEPT OF EVIDENCE

by

JENNIFER MEEHAN

B.A., University of California, Berkeley, 1997

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF

THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF ARCHIVAL STUDIES

in

THE FACULTY OF GRADUATE STUDIES

SCHOOL OF LIBRARY, ARCHIVAL AND INFORMATION STUDIES

We accept this thesis as conforming

to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

July 2003

© Jennifer Meehan, 2003

In presenting this thesis in partial fulfilment of the requirements for an advanced degree at the University of British Columbia, I agree that the Library shall make it freely available for reference and study. I further agree that permission for extensive copying of this thesis for scholarly purposes may be granted by the head of my department or by his or her representatives. It is understood that copying or publication of this thesis for financial gain shall not be allowed without my written permission.

Department of School of Library, Archival and Information Studies

The University of British Columbia
Vancouver, Canada

Date August 25, 2003

Abstract

Various conceptions of evidence permeate all aspects of archival discourse, but at no point is a concept of evidence directly addressed and explicated in archival terms. While the seeming ubiquity of the term seems to suggest that evidence is, or has the potential to be, an important archival concept, a certain lack of clarification effectively diminishes such importance and furthermore glosses over the complexities of the concept. Moreover, the archival notion of records as a special kind of evidence draws primarily upon other disciplinary conceptions of evidence, which, while emphasizing the scholarly use of records, do not take into proper account the archival use and treatment of records.

In considering the concept of evidence in archival discourse, this thesis seeks to clarify the role of evidence as a traditional and contemporary term of archival practice and to further formulate a concept of evidence that is particular to archival practice – that is, an archival concept of evidence. In clarifying evidence as an archival term of practice, this thesis explores how evidence serves to express a certain functionality of records and how a concept of evidence serves to establish certain terms or grounds of archival practice. In considering the potential limitations of evidence as an archival term of practice, this thesis explores the extent to which the archival notion of records as a special kind of evidence draws upon legal conceptions of evidence in general and a highly limited, rule-bound concept of legal evidence in particular. In attempting to formulate an archival concept of evidence, this thesis explores current trends in Anglo-American evidence scholarship that constitute a broader approach to the study of evidence in academic law and traces a broader concept of evidence apart from the legal rules. This thesis then formulates a broader concept of

evidence in archival terms and considers its possible applications to and implications for archival practice.

Table of Contents

Abstract.....	ii
Table of Contents	iv
Acknowledgements.....	v
Introduction.....	1
Chapter 1: Exploring aspects of the concept of evidence in archival discourse.....	7
1.1 What the term expresses.....	8
1.1.1 The concept of perpetual memory.....	8
1.1.2 The concepts of traditional diplomatics.....	10
1.2 Traditional terms of archival practice.....	15
1.3 Contemporary terms of archival practice.....	20
1.3.1 Contemporary archival diplomatics.....	20
1.3.2 Limitations of evidence as a contemporary term of archival practice.....	24
Chapter 2: Exploring legal concepts of evidence and a broader approach to Anglo- American evidence scholarship.....	31
2.1 Legal rules of evidence and contemporary archival discourse.....	31
2.2 Legal concepts of evidence.....	39
2.3 A broader approach to Anglo-American evidence scholarship.....	43
2.4 Towards a broader concept of evidence.....	46
2.4.1 Legal theories of evidence and proof.....	49
2.4.2 Considerations of the use and treatment of evidence.....	55
Chapter 3: Towards an archival concept of evidence.....	59
3.1 Formulating a broader concept of evidence in archival terms.....	59
3.2 Applications of the concept as an archival term of practice.....	67
3.3 Implications of the concept as an archival term of practice.....	80
Conclusion.....	85
Notes.....	92
Bibliography.....	100

Acknowledgements

Thanks to Heather MacNeil for her encouragement at the beginning, her patience and generosity throughout, and her insightful advice and suggestions.

Thanks to Terry Eastwood for his thoughtful comments and suggestions.

Thanks to Tom Anderson and Reto Tschan for their encouragement.

Special thanks to my family, Jim, Sheila and Kristen Meehan, for their faith in me and their continual support of me in all my endeavors.

Introduction

As a term that refers to “that which manifests and makes evident,”¹ various conceptions of evidence permeate, to one degree or another, all aspects of archival discourse, from prescriptive writings on archival theory and methodology to writings that critique traditional formulations of archival concepts. Evidence, as a term and as a concept, is variously employed to articulate the nature of records, to conceptualize the potential value of records, to establish a rationale for and the purpose of archival endeavors, and to determine the parameters of archival practice. Evidence also appears in archival discourse as a retrospective notion that is often associated with, and thereby limited to, the use of records, and as a prospective notion that is associated with the creation and preservation of electronic records.

The concept of evidence in archival discourse largely draws upon other disciplinary conceptions of evidence, the two most obvious being those of history and law. Concepts of historical evidence serve to formulate records as sources from which to infer historical facts in the course of studying and/or writing history and such concepts serve to characterize archival practice according to its perceived historical and cultural purposes. Concepts of legal evidence serve to formulate records as sources from which to infer legal facts in the course of demonstrating accountability or settling a dispute in a court of law and such concepts serve to characterize archival practice according to its perceived administrative and legal purposes. The seeming ubiquity of evidence, as a term and as a concept, in archival discourse suggests that, when related to records, evidence is, or has the potential to be, an important archival concept. However, there remains a certain amount of confusion as to just what it is that archivists mean when they talk about evidence. Does evidence refer to the

nature of records, the value of records, the purposes of archival endeavors? Does evidence refer to the retrospective preservation and use of records, as well as the prospective creation of records? As Lyman Ray Patterson suggests, writing of evidence in a legal context, “the varied uses of the term indicate that evidence is a thing of many aspects.”² As such, evidence may very well refer to the many aspects of archival practice. At the same time, however, a certain lack of clarification (of the term itself and its use as a concept in archival discourse) has the effect, however unintentional, of constituting evidence as a word that potentially signifies everything and, therefore, ultimately means nothing.³ While not wishing to gloss over the varied uses of the term or to minimize or lose sight of the complexity of evidence and its prescriptive and/or descriptive force as drawn from historical and legal concepts, this thesis will seek to consider and clarify certain aspects of the concept of evidence in archival discourse, by exploring in detail the role of evidence as a traditional and contemporary archival term of practice, and will furthermore work toward formulating and articulating a concept of evidence that is particular to archival practice.⁴

The concept of evidence in archival discourse partakes of certain general notions of evidence that, when linked with archival notions of record, establish particular archival ideas about the capacity of records to serve as a special kind of evidence. Such general notions of evidence include a concept of ‘internal evidence,’ that is, the evidence of things, as distinct from testimony, the evidence of witnesses and of authorities. ‘Internal evidence’ consists of one thing pointing beyond itself and is a matter of inferring one thing from another.⁵ When linked with certain archival notions of record as a by-product of activity, a record becomes, at least conceptually, more than just an instance of documentary evidence or written testimony. A record becomes a sort of thing that can point beyond itself to the particular

event which gave rise to it and that can provide a special kind of evidence of (more than just information about) the unfolding of the event because it is, at once, *about* and *a part of* the event. Literally speaking, a record is the part of the past event that remains.

Underpinning these general notions of evidence and archival notions of records as a special kind of evidence is a certain ‘metaphor of visual perception.’ As Nancy Partner explains, “evidence is that which can be read metaphorically as a manifestation, or “realization” of something (event, process, thought).”⁶ According to this conceptualization, evidence is more than just “that which manifests and makes evident;” evidence is that which is metaphorically transformed “into the present pieces of a past whole, the partial *visibilia* of an entire invisible world.”⁷ Records, conceived of as the surviving remnants of past-recorded activity, are especially suited for undergoing such a metaphoric transformation because they stand in a unique relation to the events which gave rise to them.

The link between these particular notions of evidence and record is something more than just a concept of ‘documentary evidence.’⁸ Such a link serves to formulate a concept of records as a special kind of evidence, a concept that more or less operates as an archival assumption about the nature of records. Broadly speaking, this archival assumption at once derives from and underpins various formulations of archival theory and methodology. In explicating this particular archival assumption, by exploring certain aspects of the concept of evidence in archival discourse, this discussion will initially limit itself to a consideration of the set of ideas about the nature of records (one formulation of archival theory) and the set of ideas about the treatment of records that stem from archival theory (one formulation of archival methodology).⁹ In the course of formulating and articulating a concept of evidence that is particular to archival practice, the focus of the discussion will shift to a consideration

of a set of ideas about the nature of archival processes. While the discussion may at certain points touch upon the value of records and the purposes of archival endeavors, given the limited scope of this thesis, such mentions will only be in passing and will not involve a sustained consideration of these particular archival ideas.

In exploring certain aspects of the concept of evidence in archival discourse on theory and methodology, Chapter 1 will consider the role of evidence as a term of archival practice. Building upon such notions of 'internal evidence' and evidence as a 'metaphor of visual perception,' the discussion will explore how, as a term, evidence serves to express a certain functionality of records (that is, the function of manifesting and making evident, and of converting the present into the permanent) and, in so doing, will serve to make explicit what is otherwise an implicit assumption underpinning the concept of records as a special kind of evidence. The discussion will then explore how, as a concept, evidence serves to establish certain traditional and contemporary terms of archival practice, that is, how a concept of records as a special kind of evidence determines the shape and course of archival functions, as well as archival methods for treating records. The discussion will finally touch upon the potential limitations of the concept of evidence as a term of archival practice, by considering the extent to which such a concept limits the archival function in contemporary archival discourse to an almost exclusive focus on organizational records.

Chapter 2 will pick up the discussion where it leaves off in the previous chapter, by exploring the legal rules of evidence and their attendant concepts in relation to contemporary archival discourse on electronic records and by further considering the extent to which current archival conceptualizations of evidence implicitly draw upon a highly limited, rule-bound concept of legal evidence, in effect narrowing the concept of evidence to that which

the rules deem is admissible in a court of law. As a preliminary step to formulating a particular concept of evidence for archival practice, the discussion will consider current trends in Anglo-American evidence scholarship that constitute a broader approach to the study of evidence and that conceive of evidence as a subject apart from the legal rules. By exploring William Twining's approach of 'evidence, proof and fact-finding' (EPF) to the study of evidence, Patterson's functional definition of evidence, and certain legal theories of evidence and proof, the discussion will trace a broader concept of evidence as a relation between two facts, will configure the use of evidence as an analysis of relations between facts and, in so doing, will begin to shift the focus from the nature of evidence to the nature of the processes that treat and use evidence.

Drawing together the various threads of the discussion, Chapter 3 will work to formulate a broader concept of evidence in terms particular to archival practice, in other words, to formulate an archival concept of evidence. This particular concept configures evidence as a relation between record and event, and analysis of the record-event relationship as establishing matters of evidence.¹⁰ The discussion will then consider possible applications of this particular concept as an archival term of practice, by connecting it to certain established concepts of archival theory and methodology (context and the archival bond) and by bringing it to bear upon the retrospective activities of appraisal, arrangement and description and the prospective activities of devising standards and archival requirements for the creation and preservation of trustworthy records in electronic systems. In applying an archival concept of evidence and configuring various archival processes as, in part, analyses of relations between records and events, this discussion is not meant to be in any way normative or explanatory, but, instead, merely suggestive. Finally, the discussion will

consider the implications of this particular concept as a term of archival practice. While application of an archival concept of evidence involves a shift from consideration of the nature of records to consideration of the nature of archival processes that treat records, this particular concept serves to highlight the inferential nature of the analytical processes that underpin many archival activities, to reconcile retrospective and prospective notions of evidence, and to take into better account the whole range of archival material, from public to private records, and from organizational records to personal papers.

Chapter 1: Exploring aspects of the concept of evidence in archival discourse

This chapter aims to explore various aspects of the role that the concept of evidence plays in archival discourse. As a term of archival practice, evidence at once serves to express a certain functionality of records and to determine the shape and course of archival functions. In exploring the first aspect of evidence as a term of archival practice, that is, as a term that refers to “that which manifests and makes evident,” the discussion will consider the Roman legal concept of *perpetual memory* and traditional diplomatic concepts and the extent to which these concepts explicate the particular function of records. In exploring the second aspect of evidence as a term of archival practice, the discussion will consider Hilary Jenkinson’s concepts of ‘archive quality’ and ‘the moral defence of archives’ and the extent to which these concepts shape the archival function within traditional archival discourse, in constituting a retrospective approach to the consideration of records as a special kind of evidence. The discussion will then consider the concepts and methods of contemporary archival diplomatics and the extent to which they re-shape the archival function within contemporary archival discourse in general and within the context of electronic records in particular, in constituting a prospective approach to the consideration of records as a special kind of evidence. Finally, the discussion will touch upon the potential limitations of the concept of evidence as a contemporary term of archival practice, by considering David Bearman’s concept of ‘electronic evidence’ and Brien Brothman’s critique of the conflation of concepts of record and evidence in archival discourse.

1.1 What the term expresses

Because records are created “in the natural course of transactions carried out in the performance of the functions and activities of juridical and physical persons, whether public or private, and preserved as evidence of those functions and activities,” they are characterized as being “utilitarian.”¹ That is, they serve a specific purpose in the performance of a given function or activity – they form a physical part of the transaction and they subsequently serve as evidence of the transaction. Understanding the initial purpose of a record is crucial to understanding its meaning and to preserving its capacity to serve as evidence. Analyzing records in relation to the function or activity of which they are by-products and articulating that relationship serve to express one aspect of the functionality of records and to make it possible to identify and preserve records as evidence of past action. However, these ideas about the nature of archival material presuppose a prior function of records – that is, the function of manifesting and making evident.

1.1.1 The concept of perpetual memory

As Luciana Duranti explains, “fundamental concepts of archival theory are rooted in concepts embedded in Roman law.”² The Roman legal concept of *perpetual memory* in particular underpins archival ideas about the nature, characteristics and properties of records, as well as archival ideas about how to treat records, by expressing a certain functionality of records. Duranti describes the concept as:

a formula (*in perpetuum*, *ad perpetuum* or *ad perpetuum rei memoriam*) that established the function of the document with respect to the fact it was about. Because only the present could be known, a device was necessary to freeze the fact occurring in the present before it slipped into the past, and the document, as embodiment of the fact, had the function of converting the present into the permanent.³

The concept of *perpetual memory* serves to highlight the fact that prior to taking part in a transaction or serving as evidence of past action, a record serves the primary function of embodying, manifesting and making evident the particular fact which it is about, thereby converting the present into the permanent. Linking this concept to records does not suggest ideas of eternity or infinity nor does it imply an obligation of eternal preservation. Rather, the concept expresses ideas of continuity, stability, and endurance, all of which are necessary preconditions for constituting and preserving continuing, uncorrupted memory of actions and for assessing the trustworthiness of records as evidence.⁴ Furthermore, the concept explicitly constitutes records as a means (both physical and intellectual) for effectively rendering a fact continuous, stable and enduring. Archival notions of records – their capacity to “aid the performance of purposeful activity”⁵ – and more specifically archival notions of records as a special kind of evidence – their capacity to serve as continuing evidence of that activity – stem from the functionality of records as expressed in the concept of *perpetual memory*. The concept at once expresses the role of a record with respect to the fact it is about and links the preservation of evidence and memory.⁶

Analogous concepts contrast the continuity of written memory with the transience of oral memory. Armando Petrucci traces this broadly diffuse motif, citing its appearance as various statements and formulas in Italian medieval documents. The motif serves to establish the role of writing (and hence, the role of the record) in preserving memory, by contrasting the running of time and the fallacy of human memory with the firmness of writing and by expressing the usefulness of fixing events in writing.⁷ The concept of *perpetual memory* and Petrucci’s motif serve to make explicit an assumption about records that underpins archival ideas about their nature, their creation and their preservation. The assertion that records

serve as evidence and memory of past events (and should therefore be preserved as such) at once assumes that records function to manifest the facts of those events. At the same time, the term evidence, when related to a certain notion of records (as in the concept of records as a special kind of evidence), implicitly suggests this function of records. In other words, the concept of records as a special kind of evidence seems to have become a sort of shorthand in archival discourse for expressing the role of records in converting the present into the permanent, in giving continuous and fixed form to what otherwise would be transient memory, in providing the material for certain matters of evidence. The term evidence refers, in part, to the fact that records are one instance of “that which manifests and makes evident.” Of course, this fact alone is not enough to render records capable of serving as evidence; however, it is a necessary precondition for and an implicit assertion of the archival notion of records as a special kind of evidence. Making this assertion explicit allows for understanding one of the ways that evidence operates as a term of archival practice.

1.1.2 The concepts of traditional diplomatics

As a method of record analysis, traditional diplomatics constituted a retrospective approach to the consideration of records as evidence.⁸ In analyzing medieval documents, diplomatics regarded the formal elements of documents as the evidence from which to infer the documentary truth; having established the documentary truth (in modern terms, the trustworthiness of the record), the document itself became a source from which to infer legal and historical truth.⁹

Certain fundamental diplomatic concepts are based on and further express an assumption as to the functionality of records, analogous to that of archival theory. Positing

the record as a 'window on the world,' diplomacy makes the general assertion that it is possible to understand the world through the record and the more specific assertion that once found to be trustworthy, records can serve as evidence of past events (that is, events that happened in a previous time and place and that also happened to be documented).¹⁰ In diplomatic terms, the record serves as a 'window on the world' to the extent that the record (the documentary world) manifests identifiable and analyzable elements relating to specific events of the world. To understand the past events of the world it is necessary to understand the present elements of the record, that is, elements that are both present in time and space, and presented to the viewer in the form and content of the record. This notion of the permanently present touches upon another aspect of records functioning to convert the present into the permanent.

In constituting an analytical approach that seeks to proceed from record to event, diplomatic concepts build upon a concept of *perpetual memory* and a set of assumptions as to the functionality of records, as well as upon certain principles of observation that underpin the creation and use of records. In establishing a link between observing and recording in his sociological analysis of the creation and use of medical records, Stanley Raffel specifically grounds the activity of recording (and thereby the functionality of records) in observational principles. As explicated by Raffel, observational principles determine that only the present can be known. Records are therefore necessary because they function as a "device for freezing the observed present before it becomes the foreign past," effectively making the present remain and eternalizing the event.¹¹ Broadly speaking, in order to create a record that adequately reflects the event, observation (that is, presence at the event) is required. In order to use a record, in the determination of facts about a past event, another kind of presence and

another kind of observation are required – the presence of formal elements within the record and the observation of those elements by the record user. In an extension of the observational principles that underpin the creation and use of records and that further express the functionality of records, diplomatics asserts that the formal elements of the record are perceptible (that is, present) matters of fact that are directly linked to imperceptible (that is, past and therefore not present) matters of fact.¹²

Viewing the documentary world as a system, traditional diplomatics built a system to understand and explain it. The components of this system were the juridical system, the act, the persons, the procedures and the documentary form.¹³ In order to understand the world through the record, diplomatic concepts had to differentiate the record from the world and then relate them to each other, so as to make the record *about* the world.¹⁴ This ‘about’ or ‘correspondence’ relationship is precisely what makes it possible for records to be seen as facts and what, furthermore, establishes records as matters of evidence (that is, what makes it possible for records to be seen and treated as evidence of some past event in the world).¹⁵ Early diplomatists then “separated the world from the document, and identified, first, what to look for (the elements of the outside), and second, what to look at (the elements of the inside).”¹⁶ This process of identification and analysis, which resulted in tracing the relationships between the (formal elements of the) record and the (juridical, administrative and procedural contexts of some event in the) world, was at once based upon some notion of records as a special kind of evidence and further served to establish records as capable of serving as effective evidence.

An operating principle in diplomatic analysis, as traditionally practiced, was that each document was “linked by a unique bond to the activity (fact or act, juridically relevant or

irrelevant) producing it, a bond qualified by the function served by the document.”¹⁷

Traditional diplomatic analysis was able then to more or less trace a bilateral relationship between each document and the fact it was about, thereby establishing matters of evidence so that if fact (A) is manifested in written form, the document resulting from it, (B), will guide one directly to the fact: $A \rightarrow B \rightarrow A$.¹⁸ Understanding and making explicit this relationship between document and fact makes it further possible for the document to serve as evidence of the fact.

Diplomatics also sought to characterize the particular relationship or bond between document and fact according to the function served by the document. Diplomatic categorization of documents represents an attempt to codify the different possible functions of documents above and beyond the primary function of manifesting and making evident facts, and of converting the present into the permanent. The traditional categories of documents focused primarily on written forms that were required by the juridical system, on documents that manifested juridically relevant acts, that is, “legal records.” Documents that were required in order to bring an act into existence were termed *dispositive* documents and documents that were required in order to prove the existence of an act were termed *probative* documents. With the diffusion of the use of writing and the creation of “non-legal documents,” the categories were expanded to include discretionary written forms. Documents that manifest a juridically relevant activity but do not result in a juridical act were termed *supporting* documents and documents that manifest a juridically irrelevant activity and also do not result in a juridical act were termed *narrative* documents.¹⁹ The diplomatic conceptualization of document categories serves to make explicit the various functions performed by the documents – dispositive documents function to put into existence an act;

probative documents function to prove the existence of an act; supporting documents function to support a juridically relevant activity; and narrative documents function to give an account of a juridically irrelevant activity. By explicating the possible functions of documents in this way, the diplomatic categorization of documents serves to shed light on the range of evidentiary roles that records can play, from in effect being the act itself to serving as perfect evidence (that is, proof) of the act to constituting written evidence of facts and acts, that may or may not be juridically relevant.

Traditional diplomatic methods contribute to the conceptual foundations of archival theory and methodology by formulating a retrospective approach to assessing the trustworthiness of records as evidence after the fact of their creation. But more than this, diplomatic conceptions of the bond between document and fact (the relationship between the record and the world) and the categorization of documents according to their function provide a precise terminology and means for understanding and articulating the nature of archival material and the complex evidentiary functions of records. Diplomatics provides the tools, a set of terms for understanding and articulating precisely how records serve as evidence. Casual use of the term evidence in archival discourse belies the complex nature and function (not to mention, value) of records as a special kind of evidence. The preceding discussion has sought to explicate one aspect of the term as an expression of a certain, potentially complex functionality of records; the following discussion will trace some of the ways the concept of evidence effectively determines the shape and course of archival functions.

1.2 Traditional terms of archival practice

In his definition of archives and his formulation of the concept of 'archive quality,' Hilary Jenkinson seeks to articulate in a precise and systematic way the nature of archival material. This particular nature is determinative in shaping the methodology for the treatment of archival material (that is, in delineating the primary and secondary duties of the archivist) and therefore in establishing certain traditional terms of archival practice.

Jenkinson's comprehensive definition of archives takes into account both the circumstances of creation and preservation in establishing the nature of archival material.

A document which may be said to belong to the class of Archives is one which was drawn up or used in the course of an administrative or executive transaction (whether public or private) of which itself formed a part; and subsequently preserved in their own custody for their own information by the person or persons responsible for that transaction and their legitimate successors.²⁰

This definition begins to establish boundaries between what is and is not archival material (and therefore between what material is of archival concern and what is not) based upon a distinction between different classes of evidence. For instance, outside the boundaries of this definition of archives, there are just plain documents or "pieces of written evidence each one of which must be treated upon its individual merits."²¹ While plain documents do have some capacity to serve as evidence, they do not necessarily constitute primary sources (a particular class of evidence), are not archival material per se and, therefore, are not of archival concern. On the other hand, within the boundaries of this definition, there are documents with 'archive quality,' a fundamental quality that constitutes these documents as archival material. As such, they are constituted as primary sources, as capable of serving as a special kind of evidence and as the primary concern of the archivist.

Jenkinson identifies two features of 'archive quality' – impartiality and authenticity. Impartiality derives from the circumstances of creation (those aspects characterized in the first part of the definition of archives), from the fact that a document is created "in the course of administrative or executive transactions." Authenticity derives from the circumstances of preservation (those aspects characterized in the second part of the definition), from the fact that documents are preserved in official custody and for official information only.

Jenkinson's definition of archives and his conception of 'archive quality' serve to distinguish between and thereby establish different classes of evidence – on the one hand, primary sources and first-hand evidence and, on the other, secondary sources and supplementary evidence – and to furthermore associate archival material with the special class of evidence that comprises primary sources and first-hand evidence. Archives are first-hand evidence, according to Jenkinson, because "they are actual material parts of the administrative and executive transactions," they are "written memorials...of events which actually occurred and of which they themselves formed a part," and, as such, "they form an actual part of the *corpus*, of the facts of the case."²² The circumstances of creation and preservation effectively constitute archives as a special kind of evidence and the two features of 'archive quality' effectively characterize archives as this special kind of evidence and serve to establish a certain notion of the evidentiary character of archives. The probative value of archives (their capacity to serve as evidence) stems directly from the nature of archival material – from their inherent characteristics of impartiality and authenticity with which they are endowed according to the circumstances of their initial creation and subsequent preservation. It follows from Jenkinson's theoretical assertion that in order to preserve the evidentiary character and value of archives, it is necessary to preserve the

inherent qualities of archives. In this way, a notion of records as a special kind of evidence comes to determine the shape and course of archival functions.

Jenkinson's definition serves to establish the nature of a record and its character as evidence. However, the evidentiary character of archives (as the whole of the records created) does not stem merely from the impartiality and authenticity of each individual record, but also stems from the relationships between and amongst records, and between records and events. The records themselves *and* their network of relationships provide evidence of the activity of the creator. In order to preserve the capacity of records to serve as evidence, it is necessary to preserve the evidentiary character of records in relation to each other. The archival principles of provenance and original order constitute the methodological basis for safeguarding the evidence revealed by archives as a whole. In formulating the duties of the archivist, Jenkinson builds upon these foundational principles (as originally articulated by the Dutch archivists S. Muller, J.A. Feith and R. Fruin in their manual), and proceeds to further formulate the rationale behind archival theory and methodology. Based upon the nature of records as a special kind of evidence, the evidentiary character of archives as conceived by Jenkinson, the primary role of the archivist becomes one of trusted custodian and the archival function comes to comprise "the physical and moral defence of archives."

As a trusted custodian of records, the primary duty of the archivist is "to take all possible precautions for the safeguarding of his Archives and for their custody, which is the safeguarding of their essential qualities."²³ In other words, the archivist's foremost duty is to the archives, the records themselves and second to this is providing for the needs of researchers. More specifically, archival duties only pertain to those records in archival custody. According to Jenkinson, the archivist has "no responsibilities before the moment of

reception and every responsibility, that no genuine evidence be lost nor false one manufactured...after that moment.”²⁴

As the fundamental characteristics of archives derive from their circumstances of creation and official preservation and as the archivist has no involvement in these initial processes, the archivist, according to Jenkinson, plays no part in determining, much less in creating the evidentiary character of archives. The archivist can do nothing to endow records with qualities they do not (yet) have, nor can the archivist enhance in any way those qualities records may have. From the time of transfer to archival custody, the archivist can only work to preserve whatever qualities records already possess. By preserving the evidentiary character of archives, the archivist works to preserve their probative value as evidence. In order to do this, the archival function becomes one of not so much *doing something*, as ensuring that *nothing is done* to the records.

Based upon Jenkinson’s narrow formulation of archival theory, the archival function becomes one of defending archives against all physical and moral dangers, that is, external dangers posed by sources other than the archivist (such as storage and environmental conditions) and internal dangers posed by the archivist which include unintentional wrongdoing as a result of hasty treatment (such as incorporating something foreign into or cutting something essential out of the archives).²⁵ The detailed plan of duties for “the physical and moral defence of archives” emphasizes the non-intervention of the archivist in any way that would potentially compromise the nature and character of archives. Instead, the scope of archival activities is limited to “the physical and moral conservation” and the arrangement and description of archival material.

However, while Jenkinson is able to clearly distinguish between the duties of the archivist and the work of the historian with regards to the 'archives of the past,' such a boundary cannot so distinctly be drawn between the archivist and the administrator with regards to the 'archives of the future,' in other words, with regards to the issue of 'archive-making.' In outlining the work of the 'Archive Maker' and discussing the 'Golden Rule of Archive Making,' Jenkinson constitutes these duties as those of the administrator. It is up to the administrator to ensure that the 'archives of the future' have the same qualities as those of the past, to leave a memorial of all proceedings of importance which occur in the office, to leave as little as possible, and to deposit documents with the archives as regularly as possible.²⁶ However, by even including consideration of the making of archives in a manual for archivists, Jenkinson seems to suggest that this is an area of some archival concern. He writes:

Much of what we have said concerning the Archives of the past will hold good in relation to those of the present and future... But there is one matter entirely new: whereas up to the present we have been concerned only with the preservation of Archive quality we have now to consider the possibility of creating it: that is to say, we have to try to balance between the desire to provide for the needs of the Future and a determination to copy the impartiality of the Past; to lay down lines for Archive-making to follow now, while excluding any possibility of what should be Archives becoming propaganda for posterity.²⁷

While not going so far as to extend the duties of the archivist to the making of archives, Jenkinson seems to indicate that there is and should be some role for the archivist to play, whether in merely indicating "a profound conviction that certain action must be taken along certain lines" or in more actively outlining certain principles of 'archive-making' to be adopted by the administrator.²⁸

A concept of evidence underpins Jenkinson's definition of archives and his conception of 'archive quality' and serves to shape the methods for the treatment of archival

material so defined, effectively constituting archival treatment of records as a retrospective approach to the consideration of records as a special kind of evidence. In this way, a concept of evidence establishes one set of terms of archival practice, according to which the archivist serves as trusted custodian of records in archival custody and the archival function becomes primarily one of 'the moral defence of archives.'

1.3 Contemporary terms of archival practice

Similar assumptions as to the functionality of records and the potential capacity of records to serve as evidence underpin contemporary archival discourse on electronic records. However, the archival analysis and treatment of records created and preserved in electronic systems constitute a prospective approach to the consideration of electronic records as evidence. The archival function takes on a slightly different shape in this context, where it incorporates processes that seek to ensure the creation and preservation of trustworthy records in electronic systems.

1.3.1 Contemporary archival diplomatics

As a retrospective mode of analysis, traditional diplomatics served as a tool for determining the authenticity of medieval records in the 17th century and for assessing the authority of medieval records as historical sources in the 19th century. Diplomatic analysis made it possible to consider and treat records initially as manifestations of legal and historical facts, and later as sources for inferring historical facts.²⁹ In other words, as traditionally practiced, diplomatics made it possible to consider and treat records as evidence of legal and historical facts well after the fact of their initial creation and use. Establishing

records as evidence was a matter of tracing (identifying and analyzing) the relationships between the formal elements of the record (documentary form) and the elements of the world (juridical system, act, persons, procedures). Based upon the assumption that the world had been brought into the record through the process of record making, the subsequent process of analysis traditionally proceeded from the record to the world.

Contemporary archival diplomatics serves “as a standard for ensuring the trustworthiness of modern records generally and electronic records specifically” and as an analytical tool for ensuring the creation of records that can subsequently serve as sources for inferring legal and historical facts.³⁰ As a standard, diplomatics identifies the formal elements required for creating a complete and effective electronic record and for linking that record to the action in which it participates. As an analytical tool, diplomatics allows for understanding the records-creation processes (in terms of juridical system, act, persons, procedure) of modern bureaucracies. Whereas traditional diplomatics viewed the documentary world as a system and built a system for understanding it, contemporary archival diplomatics views itself as a system from which to conceptualize and/or develop an electronic system capable of creating and preserving trustworthy records. Ensuring the creation of records that are then capable of serving as evidence becomes a matter of analyzing the elements of a given world (juridical system, act, persons, procedures), establishing relationships between the world and the record, and explicitly manifesting those relationships in the formal elements of electronic records (what was traditionally considered documentary form, but has come to include content, context, archival bond, persons, and action, as well as form). Taking place before the fact of record making, this analytical process proceeds from the world to the record and constitutes a prospective approach to the

consideration of records as evidence. More specifically, contemporary archival diplomatics is a prospective approach to the creation of records capable of serving as effective evidence.

As a potentially formative discipline, diplomatics contributes certain key concepts and methods to archival ideas about the nature and treatment of records in electronic systems. First and foremost, traditional diplomatics conceptually establishes the record as “embodiment and evidence of action.”³¹ Diplomatic methodology (traditional and contemporary) both proceeds from and further supports this foundational notion. Methods for analyzing individual documents are incorporated into archival methodology and expanded to facilitate the analysis of record aggregates. For instance, the concept of a bond linking document to act and the method of establishing (identifying and analyzing) a bilateral relationship between the two are extended to include the concept of a bond linking a record to every other record participating in the same matter and methods for establishing multilateral relationships between records and acts. The adoption of contemporary diplomatics for the purpose of analyzing modern records (in order to determine their trustworthiness as evidence) represents one aspect of the broadening of the archival function. Control of active and semi-active records, as well as preservation of inactive records becomes a matter of archival concern. Furthermore, in the context of electronic records, diplomatic methods provide a means for ensuring the creation of complete, reliable and authentic records in electronic systems, that is, records that are capable of serving as effective evidence. The archival role is no longer primarily one of trusted custodianship, which entails the preservation of the essential characteristics of records and limits the scope of archival activity. Instead, the archival role is expanded to include potential involvement in the record making process, for instance, in the design of electronic systems capable of creating and

preserving trustworthy records and in the definition of standards governing those systems.³²

Such a development in the re-shaping of the archival function is, more or less, consistent with Jenkinson's discussion of 'archive-making' and what it seems to suggest with regard to the expansion of areas of archival concern.

In traditional, paper-based environments, it was possible to rely upon formalized record making processes to bring the world into the record, to create records, which manifested and made evident the (f)acts of which they formed a part and of which they could therefore serve as evidence. Furthermore, it was possible to rely upon the official circumstances of creation and preservation to endow records with the essential qualities of impartiality and authenticity and to effectively constitute the evidentiary character of records so created and preserved. Traditionally then, the capacity of records to serve as evidence stemmed in large part from the controlled and formalized processes of record creation and preservation. The trustworthiness of records as evidence could potentially be assessed according to the degree of control over creation and preservation (by establishing an unbroken chain of custody) and the degree of formalization in the making of the record (by analyzing the formal elements of the record and assessing it according to what elements were present and/or absent). With the advent of computers and information technology, there were initially no such formalized procedures for the making of electronic records, nor was there control over the creation and preservation of records in electronic systems comparable to that in paper-based systems. Accordingly, electronic records lacked the formal elements that could identify them as *records* and that could further enable them to serve as evidence; and moreover, they lacked the essential qualities derived from the circumstances of creation and preservation that could effectively establish the evidentiary character of the records. In

this context, archival assertions about the nature of records as evidence and the treatment of archival material could no longer be supported without a certain re-shaping of the archival function. Broadening the archival function to include control of active and semi-active records and involvement in the creation of trustworthy electronic records does not represent a theoretical shift in ideas about the nature of records, but rather represents a different approach to the traditional archival aim of preserving records according to their nature. Jenkinson's concepts of 'archive quality' and 'the moral defence of archives' represent an ideal from which to proceed in the traditional treatment of archival material and towards which to aim in the conceptualization, creation and identification of archival material in an electronic environment. This archival ideal partakes of a certain concept of evidence that, when linked with a certain notion of records, constitutes the fundamental concept of records as a special kind of evidence. The archival function takes shape around this ideal and this concept of evidence. As long as records are created and preserved in a certain way (in a paper-based environment), the archival function constitutes a retrospective approach to the treatment of records as evidence. As records increasingly come to be created in ad hoc fashion (in electronic systems), the archival function becomes, to the extent necessary, a prospective approach that provides for the creation of trustworthy electronic records, and therefore provides the necessary grounds for considering and treating such records as evidence.

1.3.2 Limitations of evidence as a contemporary term of archival practice

The above discussion suggests how a concept of evidence serves to shape the archival function in traditional and contemporary archival discourse. In the context of electronic

records, there is a particular trend in this process of disciplinary shaping that effectively narrows the scope of the archival function by focusing primarily on organizational records and thereby implicitly devaluing records created in other contexts. This trend can be traced in David Bearman's concept of and writings about 'electronic evidence.'

Bearman's concept of 'electronic evidence' represents a slight departure from the archival notion of records as a special kind of evidence that grounds both retrospective and prospective approaches to the treatment of records. An assertion that "records are evidence" underpins the concept of 'electronic evidence.'³³ The distinction between this assertion and the archival notion is a subtle but significant one. Bearman's concept effectively eliminates all traces of metaphor, all associated processes of inference, and all sense of relativity in the use of the term evidence. Evidence no longer partakes of a 'metaphor based on visual perception.'³⁴ Evidence is no longer a matter of tracing relationships between record and event, and between and amongst records involved in the same event. Evidence is no longer a matter of ensuring the creation and preservation of trustworthy records, so that records are capable of serving *as* effective evidence. In Bearman's use of the term, records simply *are* evidence. Therefore ensuring the creation of records in electronic systems is tantamount to ensuring the creation of evidence.³⁵

Bearman's concept of 'electronic evidence' doesn't just refer to any kind of record and, therefore, any kind of evidence. Rather, his concept refers specifically to records (that is, evidence) of business transactions. In Bearman's definition, "records are transactions which have significance in business terms (rather than computing terms) because they constitute evidence of a business event."³⁶ By providing organizations with evidence of business transactions, record keeping systems function as repositories of organizational

memory and further provide for organizational accountability. While issues of organizational memory and accountability represent one aspect of the archival function as articulated in its broadest terms, Bearman represents this aspect as the only archival function, thereby reducing the scope of archival activities to the extreme point where “(r)ecords and archives management are *housekeeping functions of an organization*.”³⁷

Concepts such as Bearman’s are at the heart of Brien Brothman’s critique of the conflation of the concepts of record and evidence in contemporary archival discourse. Brothman views this particular archival trend as being based on a limited and exclusionary concept of record, what he terms a *strong sense* notion of record. Underpinning this particular notion is the assumption that “documents function as records only to the extent that they purvey the truth about something from the past.”³⁸ Records then, according to the strong sense usage of the term, are only those writings that stem from real events, that manifest “the facts” of some now inaccessible past, that provide information about and evidence of those past events. The strong sense notion of record also partakes of some notion of recorded truth, in which “truth entails an exact correspondence between the written word – recorded propositions and statements – and a single worldly reality of now-inaccessible past people, actions, and events, ‘non-propositional facts.’”³⁹ Records as recorded truth are further limited to those writings created in particular circumstances that, more or less, control the processes of record-making (that is, truth-telling). In other words, the strong sense notion of record effectively limits the scope of the archival function by “includ[ing] only public or business documents made during the course of, or as a means of, completing an action – or a business transaction.”⁴⁰

Brothman further asserts that this particular concept of record underpins the “archival dream of transparency” (that is, the degree to which records can be left to speak for themselves and the assumption that a record possesses one meaning and refers to one set of facts), is aligned with “objective truth” and “the truth of facts,” and accounts for the vague synonymy of the concepts of record and evidence.⁴¹ He contrasts the strong sense notion and its attendant implications for archival theory and methodology with a *weak sense* notion of record, which broadens the definition and is open to multiple notions of record, which forgoes institution- or process-based conditions and requirements, and which encompasses more than government and business documents. The weak sense notion of record alternatively emphasizes the “historical-cultural notion of archive” and is aligned with “subjective truth” and “truths of meaning.”⁴²

Traditionally archival discourse has tended to shift, to varying degrees, between these two conceptions of record. More strong sense formulations of archival theory and methodology have emphasized the record creator’s perspective and the preservation of records as evidence of the creator’s activities. More weak sense formulations of archival methodology have emphasized the record user’s perspective and the preservation of records as sources for historical interpretation. However, according to Brothman, in the context of electronic records, contemporary archival discourse becomes increasingly grounded in a strong sense notion of record. Some implications of this archival trend are an almost exclusive focus on organizational records and a shift in the archival function from “selecting and keeping records to manufacturing and promoting evidence.”⁴³

For the purposes of this discussion, Brothman’s contrast of strong sense and weak sense notions of record offers some general insight into how a concept of evidence in general

and a notion of record as a special kind of evidence in particular serve to effectively narrow the scope of the archival function, especially in regards to electronic records. This narrowing can be traced in Bearman's definition of records as evidence of business transactions, a definition that suggests that beyond the transactional procedure and/or outside the organizational context, there are neither records nor matters of evidence. In a similar though perhaps less drastic fashion, traditional and contemporary diplomatic methods serve to narrow the scope of the archival function, to the extent that the objects of analysis are the "documents which result from a practical administrative activity, be it public or private."⁴⁴ Diplomatic concepts however do account for various possible relations between record and action, ranging from bringing an act into existence and proving the existence of an act to constituting written evidence of supporting and/or narrating activities. In so doing, diplomatic concepts do not simply assume that records are evidence, but rather seek to explicate the myriad ways in which records may potentially function as evidence.

It is more difficult however to draw any meaningful conclusions about archival theory and methodology from Brothman's contrast, because one notion touches upon ideas about the nature of records as evidence (the strong sense) and the other notion touches upon ideas about the value of records as evidence (the weak sense). To talk about one set of ideas is not necessarily to talk about the other. And while there may be a correspondence between the two, it is neither a direct matter of deriving one from the other, nor emphasizing one at the expense of the other, nor simply comparing and contrasting the two. Brothman writes of archival confusion stemming from inconsistency in distinguishing between records as sources of subjective truth and as repositories of objective truth, as well as from inconsistency in identifying with record user's and record maker's perspectives. These

inconsistencies (the sources of archival confusion) seem to stem from an even more fundamental confusion between the nature of records and the potential value of records.⁴⁵ It remains to be worked out how or whether it is even possible to conduct critical analyses or explorations of the value of records in the context of or in relation to archival theory (as the set of ideas about the nature of records).

However, Brothman's critique does serve to highlight a potentially problematic trend in contemporary archival discourse, based upon certain concepts of record and evidence, which limits the scope of the archival function to an almost exclusive focus on organizational records. Questions remain as to how archival theory (as the basis for methodology) may or may not account for records created and preserved outside an organizational context. Is it simply a matter of extending methodological principles to personal papers by means of analogy? Is it a matter of analyzing personal record keeping in the same way as organizational record keeping?⁴⁶ Is it a matter of imagining a functional equivalent of 'evidentiary character' for personal papers? Brothman's use of a particular concept of evidence in his critique – one that is rooted, more or less, in legal conceptions of evidence – suggests a possible way to re-imagine the scope of the archival function in terms of evidence. If it is a highly limited concept of evidence that, when associated with records, effectively narrows the focus of archival activities to organizational records, then perhaps a broader concept of evidence will take into better account the possible range of records and allow for a broader approach to the archival consideration and treatment of records as a special kind of evidence.

The next chapter will explore the legal rules of evidence in relation to contemporary archival discourse on electronic records. In considering current trends in Anglo-American

evidence scholarship that seek to broaden the study of evidence in academic law, the discussion will begin to trace a broader concept of evidence apart from the legal rules.

Chapter 2:
Exploring legal concepts of evidence and
a broader approach to Anglo-American evidence scholarship

Contemporary archival discourse on electronic records significantly draws upon the criteria and methods of the legal rules of evidence and, in so doing, implicitly incorporates certain legal conceptions of evidence. This chapter will explore the role of the rules of evidence and their attendant concepts in archival discourse and will consider the extent to which the archival concept of records as a special kind of evidence has become equated with a highly limited concept of legal evidence. This chapter will then explore certain trends in Anglo-American evidence scholarship that constitute a broader approach to the study of evidence and that conceptualize evidence as a subject apart from the legal rules. This approach provides a framework for tracing a broader concept of evidence, as an alternative to the rule-bound concept of legal evidence, as well as a framework for shifting the focus of the discussion from the nature of evidence to the nature of the processes that treat and use evidence.

2.1 Legal rules of evidence and contemporary archival discourse

In his critique of the strong sense notion of record and its association with a highly limited concept of evidence, Brothman argues that the pervasiveness of the concept of evidence in archival discourse is partly attributable to “the permeation of legal discourse in contemporary culture and the frequent resort to instruments of law...to manage social behaviour and relations, and to regulate conflict.”¹ This cultural phenomenon manifests itself within the archival community by the seeming fact that “archivists now know the rules of evidence. As never before, they have become acquainted with the notions of hearsay

evidence, best evidence, relevant evidence, and “laying a foundation” for evidence.”² In this way, the legal rules of evidence have become an important archival resource.³

Within the discourse and practice of law, the rules of evidence serve to govern the admissibility of various kinds of evidence in common law courts. In determining the admissibility of documentary evidence, the rules in effect function as a procedural mechanism for assessing the trustworthiness of records. That is to say, if records are found to meet certain requirements or circumstantial presumptions of trustworthiness, then they are admissible in a court of law. In legal terms then, the trustworthiness of records is closely associated with the admissibility of records as evidence, such that establishing one (trustworthiness) effectively provides for the other (admissibility). As an archival resource, the rules of evidence provide a language of purpose for articulating the necessity for standards of record trustworthiness, as well as a set of specific requirements from which to formulate record keeping standards. In archival terms then, the trustworthiness of records becomes, to a certain extent, linked to the legal issue of admissibility.

Terms derived from legal criteria and methods have entered archival discourse in the form of references to the rules of auxiliary probative policy, which is one category of the rules of admissibility.⁴ The rules of auxiliary probative policy specifically address questions of law and represent an attempt to increase or safeguard the trustworthiness (in legal terms, the reliability, identity and integrity) of evidence in order to ensure that the evidence is of sufficient probative value to be presented to a jury.⁵

As they pertain to documentary evidence, the rules governing reliability are embedded in exceptions to the hearsay rule. Rule 801 of the U.S. Federal Rules of Evidence defines hearsay as “a statement, other than one made by the declarant while testifying at the

trial or hearing, offered in evidence to prove the truth of the matter asserted.”⁶ The hearsay rule (Rule 802) effectively excludes all such statements, that is, testimonial evidence (oral or written) about statements made out of court, on the basis that they are second-hand statements and as such their reliability cannot be provided for by the usual measures of the swearing of an oath and the personal presence of the witness at trial, and cannot be tested by cross-examination and confrontation. As an out of court statement of facts, records are a form of testimony that is not subject to an oath and cannot be tested by cross-examination; therefore all records are, by definition, hearsay and inadmissible in a court of law. However the conditions of necessity and of a circumstantial probability of trustworthiness provide the foundation for all exceptions to the hearsay rule.⁷ The condition of necessity allows for hearsay to be admitted if it is the only way to hear the evidence and the condition of a circumstantial probability of trustworthiness allows for hearsay to be admitted if the circumstances in which the testimony is given (or the record is created) provide a probable degree of trustworthiness analogous to that of tested testimony. The business records exception to the hearsay rule asserts that records created “in the usual and ordinary course of business” meet the requirement of a circumstantial probability of trustworthiness and are admissible as evidence.⁸ Certain suppositions – that business records are subject to controlled procedures of creation and use (which involve systematic checking and ensure a certain degree of accuracy), are made in the routine of business and are relied upon by the business – provide the necessary grounds for a circumstantial probability of trustworthiness.

The business records exception to the hearsay rule in the U.S Federal Rules of Evidence specifically requires that the records be made “at or near the time of the transaction recorded” and by one with “personal knowledge of the matter” (or upon reports by one with

such knowledge).⁹ Embedded within these requirements are certain assumptions based upon observational principles. These assumptions posit a particular relationship between records and the reality they purport to represent in which the observer/recorder is present at the event in order to witness and transcribe, in which there is a clear separation between observer and event, and in which the activities of observation and recording take place closely in time. As Raffel argues, these embedded assumptions provide the grounds for the activities of recording and using records. Kim Scheppele establishes a link between observational principles, on the one hand, and the Anglo-American law of evidence in general and the business records exception to the hearsay rule in particular, on the other, in her characterization of the “ground-zero” theory of evidence. She writes: “the law of evidence deems a piece of information to be true if it was produced close to the events that are in question in the lawsuit, the “ground-zero” of the metaphor.”¹⁰

The identity of documentary evidence is considered under the legal rules governing the authentication of documents. In general terms, authentication serves to establish “proof of authorship of, or connection with, writings.”¹¹ In more specific terms, authentication serves to establish the identity of the document by explicitly attesting to, rather than just assuming, the connection between the physical object (the document) and the person who wrote it.¹² In requiring the authentication of documentary evidence, these rules serve to guard against perpetration of fraud or occurrence of mistake (i.e. mistaken attribution of a writing to a person who happens to have the same name as the author).¹³ Authentication of documentary evidence by direct proof takes the form of witness testimony about the writing (or creation of the record), production of attesting witnesses, or proof of handwriting. Authentication of documentary evidence by circumstantial evidence pertains to ancient

documents (that is, documents at least 20 years old) and documents found in official custody.¹⁴

The integrity of documentary evidence is considered under the legal rule requiring the production of originals (the best evidence rule).¹⁵ This particular rule is intended “to secure the best obtainable evidence of a writing’s contents” and to protect against mistaken or fraudulent transmissions.¹⁶ Based upon the broad assumption that a copy is liable to errors, the best evidence rule serves to establish the integrity of the record by requiring production of the original when trying to prove the facts contained within the record.

In relation to electronic records, the best evidence rule takes on a slightly different shape, though its overall function (to establish the integrity of records) remains the same. The focus of the rule shifts from establishing the integrity of the individual record to establishing the integrity of the electronic system within which the record is created and managed. For instance, Section 31.2 of the Amendments to the Canada Evidence Act reads: “the best evidence rule in respect to electronic documents is satisfied...on proof of the integrity of the electronic documents system by or in which the electronic document was recorded or stored.”¹⁷ Furthermore, “electronic documents system” is defined as “a computer system or other similar device by or in which data is recorded or stored and *any procedures related to the recording or storage of electronic documents*.”¹⁸ By constituting record keeping procedures as part of what comprises an electronic documents system, this definition effectively incorporates consideration of record keeping standards and requirements in establishing the integrity of an electronic documents system under the best evidence rule, and in establishing, by extension, the integrity of electronic records. This development, in respect of electronic records, is made explicit in Section 31.5, which reads:

For the purpose of determining under any rule of law whether an electronic document is admissible, evidence may be presented in respect of any standard, procedure, usage or practice concerning the manner in which electronic documents are to be recorded and stored, having regard to the type of business, enterprise or endeavor that used, recorded or stored the electronic document and the nature and purpose of the electronic document.¹⁹

Archival requirements for record keeping in electronic systems are one set of standards that may be considered under the legal rule governing the integrity of electronic records. This development seems to highlight the extent to which archival requirements have permeated legal discourse on the rules of evidence. More noteworthy, however, is the extent to which the legal rules of evidence serve to ground the various archival research projects (such as, the UBC Project, InterPARES, and the University of Pittsburgh Project), which precisely aim to develop those requirements to ensure the trustworthiness of electronic records.

In order to support a circumstantial probability of trustworthiness, Rule A132 of the UBC Project requires the integration of business and documentary procedures.²⁰ As a mechanism of bureaucratic record keeping, the integration of business and documentary procedures establishes control over the creation of records by embedding such control within specific operational and administrative procedures and by establishing a near simultaneity between the moment of action and the moment of documentation. This particular archival standard seeks to ensure the reliability of records by satisfying the requirements of and the assumptions underpinning the business records exception to the hearsay rule.

In order to support a presumption of the authenticity (that is, the identity and integrity) of electronic records, Requirement A.1 of the Benchmark Requirements for assessing the authenticity of electronic records developed by the Authenticity Task Force of InterPARES prescribes the capture and preservation of certain metadata elements, which

explicitly express the record attributes and which inextricably link these to the record. The metadata elements that serve to establish the identity of electronic records include the name of the author, the name of the action or matter, and the dates of creation and transmission. The metadata elements that serve to establish the integrity of electronic records include the name of the handling office, the name of the office of primary responsibility, and the indication of any types of annotations added to the record.²¹ This particular archival requirement, while seeking to meet the legal rules governing the identity and integrity of documentary evidence, also seeks to address the weakness of electronic records that are created in an ad hoc fashion, by establishing a degree of formalization in the process of creation and thereby ensuring that electronic records possess the necessary formal elements to identify them as *records* and to further enable them to serve as evidence.²²

Finally, in order to satisfy the best evidence rule in respect of electronic records, Rule A131 of the UBC Project prescribes the design of a “recordkeeping and record-preservation system.” Such a system adheres to specific rules that establish and implement procedures to protect the integrity of the electronic system. These rules include, but are not limited to, the integrated control of electronic and non-electronic records within the electronic system, the definition of general, group and individual space within the electronic system, the establishment of procedures for registration and auditing, the establishment of procedures to prevent loss or corruption of records because of intentional or inadvertent unauthorized additions, deletions and insertions, and the establishment of procedures to prevent the loss of records due to factors such as technological obsolescence.²³ Such rules are an example of certain record keeping standards that may be considered by a court in assessing the integrity of an electronic system and, by extension, the integrity of an electronic record and in

determining the admissibility of an electronic record. At the same time, such archival requirements are predicated upon the very legal rules that will consider them. It is precisely because the best evidence rule (in respect of electronic records) requires proof of the integrity of the “electronic documents system” that the archival rules governing the creation and preservation of electronic records explicitly set out to establish and protect (and thereby, prove) the integrity of the electronic system, within which the records are created and preserved.

In seeking to satisfy the standards of trustworthiness of records as set out in the legal rules of evidence, archival requirements in effect become mapped onto legal requirements. The legal rules provide archivists with a language for articulating the necessity of standards for record trustworthiness and for creating a very real incentive for organizations to manage their electronic and non-electronic records more effectively.²⁴ At the same time, the incorporation of the legal rules of evidence into contemporary archival discourse on electronic records has resulted in increasingly narrow and rule-bound notions of record and evidence.²⁵ That is, trustworthy electronic records come to be conceived of as electronic records that meet the legal requirements of admissibility and are therefore capable of serving as evidence in a court of law. This highly limited concept implicitly draws upon certain legal concepts of evidence that underpin the rules of evidence. In exploring certain of these legal concepts and the extent to which the archival concept of records as a special kind of evidence has become equated with a concept of legal evidence, the next section will begin to question the adequacy of such concepts as archival terms of practice.

2.2 Legal concepts of evidence

Early evidence scholars, such as Jeremy Bentham and John Henry Wigmore, sought to establish a broad concept of evidence upon which to build their respective theories of evidence and proof. Bentham identified the legal concept of evidence with the idea of evidence operative in science and in common life and Wigmore drew an analogy between legal and historical evidence. Such broad conceptions are based upon assertions about the nature of evidence in general. In articulating the general nature of evidence in broad terms, Carl Joynt and Nicholas Rescher maintain that “one statement or body of information can be evidence for another that goes *beyond* it in assertive content.” Accordingly, they characterize evidential argument as an “inductive extension of the range of our information” and evidential reasoning as a process of inferring one thing from another, in effect going beyond the assertive content of the evidential statement. According to this broad characterization, evidence is a matter of degrees and therefore a probabilistic concept.²⁶

However, Joynt and Rescher seek to re-examine the analogy between the use of evidence in history and law and to highlight the methodological differences and the reasons for such differences. To this end, they begin to narrow the concept of evidence by suggesting that what constitutes “good evidence” is always relative – to the specific purposes for which the evidence is required, to the context of the disciplinary field and to the availability of information. This narrowing serves to distinguish between what is “good evidence” in terms of history and what is “good evidence” in terms of law. For historical purposes, the evidential criteria are that of applied science. That is, the evidence is only required to indicate “that the explanatory hypothesis...is more probable than any alternative that has been (or can reasonably be) envisaged.” For legal purposes however, the evidential criteria are

those of theory or pure science. The requirements of evidence tend to be stricter because legal proceedings must result in a conclusion that is “beyond a reasonable doubt.”²⁷

The disparities between the functions and purposes of history and law lead to fundamental differences in the use of evidence. The single purpose of history, as argued by Joynt and Rescher, is to establish the truth regarding the past. The purpose of law, on the other hand, is primarily *adjudicative* and secondarily *investigative*. The trial is concerned with matters of proof rather than matters of truth per se; that is, the trial is concerned with proving a given fact, rather than establishing its truth, in the course of resolving conflicting claims or deciding upon disputed facts.²⁸ In achieving their disparate purposes, the historical and legal disciplines make different use of evidence and make use of different kinds of evidence. The same principles of evidential reasoning apply to historical and legal uses of evidence, but the legal rules of evidence essentially establish the difference in methods by determining a priori what kinds of evidence are admitted or excluded and how the evidence is to be presented.²⁹

Joynt and Rescher begin to articulate a legal concept of evidence by examining the conditions that serve to narrow a general concept of evidence to a more limited notion of “good evidence” specific to law. Furthermore, they seem to suggest that the rules of evidence serve to codify a legal concept of evidence by establishing specific criteria and methods for the legal use of evidence. In “The Nature of Legal Evidence,” Morris Forkosch builds upon the distinction between general and legal concepts of evidence in order to explicitly articulate a concept of legal evidence as a special category of evidence. According to Forkosch, general evidence is “whatever bears substantively on the merits of the question” and legal evidence is relevant and admissible “facts.” The concept of legal evidence refers to

both the substantive facts admitted to a court of law and the procedural rules that govern the admissibility of those substantive facts.³⁰

Forkosch links this particular conception of legal evidence to the evolution of the jury system in common law jurisdictions. Before the institutionalization of the jury as fact-finder, the process of fact-finding concentrated on the substance of proof; which is to say, the process was primarily concerned with the evidence, not its method of introduction. Within this legal context, evidentiary substance was still tied to evidentiary procedure. However, the use of juries as fact-finders eventually led to the overshadowing of evidentiary substance by strict procedural rules.³¹ Accordingly, legal evidence has acquired over time, what Forkosch terms, an “exclusionary and procedural character.” Legal evidence becomes then a special category of evidence specifically characterized by the rules of evidence, which prescribe how evidence is presented and which determine what classes of evidence are excluded. Forkosch sums up the rule-bound and narrow concept when he writes: “legal evidence starts with that evidence ordinarily utilized by the other disciplines and proceeds to whittle it down, both quantitatively and qualitatively.”³²

Archival conceptions of evidence do not rest solely upon legal concepts of evidence in general and the concept of legal evidence in particular. However, the use of the legal rules of evidence as an archival resource is a particular phenomenon that has the implicit effect of incorporating a narrowed and therefore highly limited concept of legal evidence into contemporary archival discourse. One implication of this phenomenon is that the archival notion of records as a special kind of evidence becomes more or less equated with the rule-bound concept of legal evidence, as illustrated by the notion of trustworthy electronic records as electronic records that meet the legal requirements that govern reliability, identity and

integrity and are therefore admissible as evidence in a court of law. Accordingly, the law in general and the legal rules in particular become the determinative context of the probative value of records. That is, the legal rules determine whether or not records have the capacity to serve as evidence in a court of law and in so doing, the legal rules effectively constitute records as legal evidence. A further implication of this phenomenon is that such a highly limited concept of legal evidence applies to only a narrow range of records, that is, to organizational records which, created and maintained in a controlled way, allow for a certain presumption of authenticity and a circumstantial probability of trustworthiness.

As an archival resource, the legal rules of evidence provide archivists with a language and a set of requirements for devising and articulating record keeping standards, especially in electronic systems, and for ensuring the creation of trustworthy electronic records. But how well do the rules and their attendant concepts serve the broader archival function? How well do they inform archival theory and guide archival methodology if they do not take into proper account the whole range of archival material, from organizational records to personal papers? if they do not take into account the whole range of archival treatment, from retrospective to prospective considerations of records as evidence? These questions are neither meant to suggest that the legal rules and the concept of legal evidence should be extended to cover all aspects of archival concern nor that they should be done away with completely as archival terms of practice. Rather, these questions are meant to suggest that a much broader concept of evidence is needed, a concept that incorporates the legal rules and the concept of legal evidence as component parts of a larger whole. Tracing a broader concept of evidence is not so much a matter of developing a new idea but rather of building upon and expanding certain of the interdisciplinary concepts underpinning archival theory

and methodology. A departure point for re-thinking the concept of legal evidence and its seeming centrality in contemporary archival discourse on electronic records is provided by current trends in Anglo-American evidence scholarship that, in constituting a broader approach to the study of evidence, seek “to construct alternatives to...[the] narrow, rule-bound ‘formalism’” of a subject that traditionally focuses almost exclusively on the law of evidence.³³

2.3 A broader approach to Anglo-American evidence scholarship

A major critique of evidence scholarship (and one that resonates with a critique of the use of the legal rules in archival discourse) is that the law of evidence is conceived of as coextensive with the subject of evidence. In *Rethinking Evidence*, William Twining argues that:

...most Evidence scholarship in the Anglo-American tradition...has concentrated on and been organized around the *rules* of evidence, especially the exclusionary rules, and their rather limited framework of concepts. Within that tradition, work on other aspects of evidence, proof and fact-finding has at best been fragmented and spasmodic.³⁴

This exclusive concentration on the rules of evidence has placed artificial limitations on the prevailing tradition of evidence scholarship, resulting in a tradition that is too narrow, atheoretical, and incoherent and which moreover tends to distort key evidentiary issues and phenomena. Evidence scholarship is too narrow in that it focuses almost exclusively on the rules of admissibility and systematically neglects a whole range of other, related questions. It is atheoretical because “most discussions of evidentiary issues have proceeded without any articulated and coherent theoretical framework for describing, explaining or evaluating existing rules, practices and institutions.” It is incoherent because “the conceptual

framework of legal doctrine often does not provide an adequate basis for establishing links with other kinds of discourse.” As characterized by Twining, this tradition of evidence scholarship leads to distortions such as a misplaced emphasis on the jury trial as the primary legal means of reaching a decision, when in reality relatively few cases actually make it to the trial stage, but are resolved instead by other legal means.³⁵

In an attempt to formulate a broader approach to the study of evidence, Twining seeks to develop a coherent framework for the study of evidence, proof and related matters within academic law. Underpinning his approach are the notions that questions of fact deserve as much attention as questions of law and that there is more to the study of law than the study of rules. By considering questions of fact and evidentiary matters beyond the rules of evidence, Twining’s approach of ‘evidence, proof and fact-finding’ (EPF) to the study of evidence serves to shift the emphasis from the rules governing admissibility (which are linked to only the most formal and public part of judicial processes) to “questions about the collection, processing, presentation and weighing of information that reaches the decision makers.” These sorts of questions have to do with the analysis and treatment of evidence in a legal context. The study of EPF then involves the teaching of fact-handling skills, the elucidation of concepts such as ‘fact,’ ‘proof’ and ‘relevance,’ and the study of reasoning in regard to disputed matters of fact.³⁶

Such an approach to the analysis of evidence is moreover grounded in an organizing theory of evidence, which maps connections and develops a systematic and internally consistent overview in order to provide coherence to the subject and study of evidence. Twining suggests that a theory of evidence doesn’t need to be created from scratch, but rather can draw from and be based upon the theory of evidence as articulated by Bentham in *The*

Rationale of Judicial Evidence and the theory of proof as articulated by Wigmore in *The Principles of Judicial Proof*. Bentham's theory of evidence integrates the logic, psychology and philosophy of evidence and is an important part of a theory of adjudication, which in turn is a sub-theory of his general theory of law. Wigmore's theory of proof integrates the study of the logic and psychology of proof with the study of evidence doctrine and thereby serves to situate the rules of evidence as only one part of evidence doctrine. By mapping connections between concepts and principles of evidence on the one hand and principles and processes of adjudication and proof apart from the rules of evidence on the other hand and by doing so in a systematic and comprehensive way, these complementary theories provide a coherent framework for the study of 'evidence, proof and fact-finding' in law.³⁷

Questions having to do with the analysis and treatment of evidence and related concepts and principles are not limited to the study and practice of law. Broadly conceived, the "analysis of evidence involves careful exploration of *relations between propositions*."³⁸ This conception of the treatment of evidence and the broad concept of evidence that underpins it can be extended to the archival treatment of records as a special kind of evidence, in much the same way that the legal rules of evidence have been incorporated into archival discourse. Highlighting certain legal concepts and exploring aspects of Bentham's theory of evidence and Wigmore's theory of proof in more detail will hopefully serve to situate the concept of legal evidence as one part of a broader concept of evidence in the same way that the proposed study of EPF seeks to situate the legal rules as one part of a broader subject of evidence. But more than just displacing the concept of legal evidence from a seeming predominance in contemporary archival discourse, the following discussion will begin to formulate the possible shape and substance of a broader concept of evidence that can

then be articulated in particular archival terms and further applied as a potential term of archival practice.

2.4 Towards a broader concept of evidence

Lyman Ray Patterson's definition of evidence in "Evidence: A Functional Meaning" resonates with Twining's concept of EPF and serves as a useful basis for discussing Bentham's theory of evidence, and therefore provides a useful segue-way from the narrow concept of legal evidence as articulated by Forkosch to a broader concept of evidence. Patterson seeks to define evidence according to its more general function of proving, as opposed to the more specific function of proving-in-a-trial. In order to devise the functional meaning of evidence, it is necessary to establish "what is evidence, why we use evidence, and when we use evidence."³⁹

Patterson asserts that "evidence...is evidence only because it is used as evidence." His assertion is based upon a distinction between fact and proposition of fact and the notion that evidence doesn't consist of facts but rather of propositions of facts. Serving as the basis for proving a proposition, "what is evidence" is effectively determined by use. That is to say, whenever a proposition is used as the basis for a conclusion, it is evidence; and likewise, a proposition becomes evidence when it serves as the basis for a conclusion. Succinctly stated, a proposition is not evidence until it is related to a proposed conclusion.⁴⁰

Broadly speaking, the function of evidence is to prove or disprove a proposition of fact. However, this particular characterization of "why we use evidence" overlooks an important distinction between what is evidence and what is proof. On the one hand, proof is conceived of as "a body of evidence sufficient to produce a conviction that the proposed

conclusion is true.” In other words, proof is perfect evidence. On the other hand, proof is conceived of as the “process by which conviction is produced.” Not taking both aspects of proof into consideration tends to obscure the issue, especially as it relates to evidence. In a legal context, there is a tendency to think of proving as consisting only of a presentation or demonstration of evidence, when the whole purpose of presenting evidence is to produce a conviction in the mind of the person who receives the evidence. Furthermore, the process of producing a conviction in the mind of the person who receives the evidence is not based upon the evidence per se, but rather upon inferences drawn from the evidence. Proof then is a matter of inference and evidence is the matter (physical and/or intellectual) that serves as the basis for inference. Patterson characterizes the relationship between evidence and proof thus: “(supposed) fact is a basis of a proposition of fact (evidence), and evidence is the basis of inference (proof).”⁴¹ His characterization emphasizes the inferential process of the fact-finder and relates to the analysis of evidence within a legal context. In extending legal discussions of the analysis and treatment of evidence to an archival context, this concept of inference will come into play and will serve to shift the focus from the nature of records (as evidence) to the nature of the archival processes that treat and therefore constitute records as a special kind of evidence.

Finally, Patterson considers “when we use evidence” in rounding out his functional definition of the term. Evidence is used as a basis for proving a proposition of fact when that fact is not or has not been directly perceived. Evidence is capable of serving as a basis for drawing inferences because it presumably is the result of direct perception. “The condition of the use of evidence...is based on the distinction between acquiring knowledge by direct perception and acquiring knowledge through proving.” Knowledge based on direct

perception is acquired through the use of one or more of the five senses; knowledge based on proof is acquired through a process of inferential reasoning.⁴² Patterson's characterization of "when we use evidence" resonates with Raffel's discussion of the principles of observation that underpin the activities of recording and using records. The grounds of recording require that one be present at an event, in order to observe (that is, acquire knowledge through direct perception) and to make a record that adequately reflects the event. The grounds of recording effectively provide the necessary grounds for using records; such grounds constitute a presumption that the records result from observation (that is, direct perception) and therefore, adequately reflect the event; and such a presumption makes it possible to rely upon records in order to acquire knowledge about past events. This connection between the use of evidence and the observational principles that underpin the making and use of records makes it possible to extend these considerations of the use of evidence in general to considerations of the use of records as a special kind of evidence in particular and, from there, to further considerations of the archival treatment of records.

Based upon the various aspects relating to the 'what, why and when' of evidence, Patterson defines evidence as "a proposition purportedly based on a fact and used as a basis for inference for confirming or denying a proposition based on a fact not directly perceived."⁴³ This definition is a far cry from one that defines evidence according to what the legal rules say is evidence. Instead this definition moves in the direction of opening up the legal concept of evidence to include considerations of relations between propositions (the relationship between record and event) and analysis of those relations in the treatment and use of evidence (the archival treatment of records as a special kind of evidence).

2.4.1 Legal theories of evidence and proof

A theory of evidence seeks to establish the underlying (logical and epistemological) basis for the (legal and historical) use of evidence in order to devise a systematic and coherent set of ideas about the nature of evidence and a set of principles to guide the use and treatment of evidence. A legal theory of evidence further seeks to situate the concept of evidence within a generalized and generalizeable context in order to establish broad terms for legal practice instead of basing legal practice in general and fact-handling in particular on ad-hoc conceptualizations of evidence as determined by the legal rules of evidence. This is the case that Twining makes for a return to the legal theories of evidence and proof as articulated by Bentham and Wigmore. Such a return marks a transition from a narrow focus on the practical implementation of the rules of evidence to a theoretical consideration of the concept and the grounds for its use and treatment. Broadly speaking, these theories of evidence allow for a mapping of connections within and beyond the legal discipline that constitutes a more comprehensive approach to the subject of evidence. Exploring aspects of these theories will allow for a further mapping of connections to the archival discipline in an attempt to broaden the concept of evidence that underpins contemporary discourse on archival theory and methodology.

Discussion of Bentham's theory of evidence and Wigmore's theory of proof is a return rather than a departure because, as Twining suggests, there is a tradition of evidence scholarship that began with the earliest writings on evidence and that has continued through over two centuries of evidence discourse. All writings on evidence within this tradition share certain basic assumptions about the nature and ends of adjudication, about knowledge or belief in past events, and about what is involved in reasoning about disputed questions of fact

in forensic contexts, and which establish Reason, Truth and Justice as central notions.

Twining labels this tradition the 'Classical Rationalist Tradition of Evidence Scholarship,' which highlights 'rational proof' as one of its central ideas and a particular view of rationality as the basis for its assumptions.⁴⁴ Twining further argues that the Rationalist Tradition is a continuous one because although critical and sceptical writings do seek to challenge legal processes, these writings present no significant or direct challenge to the central notions of Reason, Truth and Justice underpinning Anglo-American evidence scholarship.⁴⁵ So, even though the framework of Bentham's theorizing is an argument against all exclusionary rules of evidence (his anti-nomian thesis), his concepts and theory of evidence partake of the same logical and epistemological assumptions that underpin the Rationalist Tradition and furthermore operate according to a Rationalist model of adjudication.

Bentham's theory of fictions formulates ideas about the nature of the real world by distinguishing between real and fictitious entities, and ideas about how we construct our knowledge of the real world largely by means of language. His theory of fictions serves as the main philosophical basis for his theory of evidence. Accordingly, his theory of evidence is based upon the ideas that:

... we form judgements about the truth of statements in the real world on the basis of evidence which we evaluate in terms of general experience; experience is the basis of all knowledge; language is the instrument, at once misleading and necessary, by which all experience is apprehended and ordered.⁴⁶

His theory of evidence likewise rests on the idea that evidence in law turns on the same principles as evidence in all fields of human activity and, to this extent, is based on a certain notion of common sense. In particular, his theory is based upon the common sense empiricism of John Locke, which is grounded in 'observation, experience and experiment.'⁴⁷

And as touched upon above, Bentham's ideas about evidence are not an isolated set of ideas but rather are an important part of a broader theory of adjudication that, in turn, is a sub-theory of a general theory of law. Given the coherence and scope of Bentham's theory of evidence, it is possible to trace (or at least to imagine) a concept of evidence from its philosophical basis to its broad purpose and function within the general context of law.

In order to make his case against all rules that govern the admissibility of evidence, Bentham necessarily conceives of evidence apart from such rules and apart from any specific legal context. He broadly defines evidence as "any matter of fact, the effect, tendency or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact: a persuasion either affirmative or disaffirmative of its existence." Questions of evidence are not limited to forensic contexts of a legal or even a historical nature but rather "are continually presenting themselves to every human being, every day, and almost every waking hour, of his life."⁴⁸ Bentham seems to suggest that to lose sight of this general nature of evidence and its applicability to and use in all aspects of human endeavor leads to an impoverishment of the concept itself and a skewed understanding of the nature of knowledge and reasoning in legal contexts.

Bentham further conceives of evidence apart from the legal rules by highlighting the relativity of the term. Evidence is not evidence simply because the rules say so. Rather, "evidence is a word of relation" and as such, "has no complete signification of itself." In order to determine questions of evidence, it is necessary to determine just *what* the evidence signifies. The first, fundamental question of evidence then is: "Evidence of what?" Perhaps this is a question that is, more often than not, answered before it is even asked, but Bentham specifically poses the question in order to formulate the grounds of all uses of evidence.

Evidence signifies a certain *fact* or *facts*. “Facts then, matters of fact, are the subject matter, the necessary subject matter of evidence: facts in general, of evidence in general.” Bentham then distinguishes between principal facts and evidentiary facts, a distinction that more or less corresponds to Patterson’s distinction between fact and propositional fact. According to Bentham, principal facts are “the facts sought, for the purpose of their constituting the immediate basis or grounds for a decision”; in other words, the facts to be proved.

Evidentiary facts are “such facts as are not competent to form the ground of a decision of themselves...[but] serve to produce...a persuasion concerning the existence of such and such other facts...viz. principal facts”; in other words, the facts that prove. The degree of connection between the principal and evidentiary facts goes directly toward the probative value or weight of the evidence.⁴⁹

In these passages, Bentham works to formulate the notion that general questions of evidence are in effect questions of fact (generally speaking). This particular notion serves the purposes of his argument against all rules that govern admissibility by suggesting that questions of evidence in a legal context are questions of fact (legally speaking) and not questions of law. Accordingly, Bentham’s concept of legal evidence has nothing to do with the legal rules of evidence, but rather stems from his general definition of evidence while accounting for the particular circumstance of its being presented to a judge in the course of deciding upon some question of fact.⁵⁰ In this way, his particular definition of legal evidence is built upon the circumstances of its use and function within a legal context rather than being based on the a priori distinctions of the legal rules. In accordance with Patterson’s approach, a definition that touches upon the functional meaning (the ‘what, why and when’) of evidence links the concept to the processes of acquiring knowledge about past events and of

deciding upon questions of fact. Highlighting these processes that involve the use of evidence in formulating a general concept of evidence serves to highlight further processes that involve the use and treatment of evidence (and records as a special kind of evidence) within and beyond the forensic contexts of law.

Bentham has a great deal to say about the different species of evidence and the various degrees of trustworthiness of documentary evidence that relate to the number of securities attendant upon the creation of such and that serve to distinguish between “makeshift evidence” and “preappointed evidence.”⁵¹ However these concepts, as well as his concept of legal evidence, are subordinate to his general theory of evidence and it is at the level of his general theory that certain aspects can fruitfully be selected and applied to further considerations of the use and treatment of evidence. Bentham’s theory of evidence moves in the direction of formulating evidence as a relation between two different kinds of facts and, in so doing, is a useful starting point for imagining a broader concept of evidence.⁵² Wigmore clarifies this concept of evidence (as a relation between two facts) and his theory of proof further expands upon the concept by considering the processes that seek to analyze evidence.

A Treatise on Evidence in Trials at Common Law and *The Principles of Judicial Proof* represent two complementary parts of the broad subject of evidence, the first focusing on the legal rules of evidence and the latter focusing on proof in the general sense, that is, the “ratiocinative processes of contentious persuasion.”⁵³ Considered together, these works integrate the law of evidence and the principles of proof within a single theoretical framework. The concept of evidence underpinning the legal rules and the process of proof as

articulated by Wigmore resonates with and further expands upon aspects of Bentham's concept. In section 2 of the *Treatise*, Wigmore writes:

Evidence is *always a relative term*. It signifies a relation between two facts, the factum probandum, or proposition to be established, and the factum probans, or material evidencing the proposition. The former is necessarily to be conceived of as hypothetical: it is that which one party affirms and the other denies, the tribunal as yet not committed in either direction. The latter is conceived of for practical purposes as existent and is offered as such for the consideration of the tribunal. The latter is brought forward as a reality for the purpose of convincing the tribunal that the former is also a reality.⁵⁴

In this particular conception, Wigmore more clearly indicates just what evidence signifies.

Whereas Bentham asserts that evidence refers to a certain fact or facts, in particular to some evidentiary fact that in turn relates to (in the course of proving or disproving) some principal fact, Wigmore asserts that evidence more precisely signifies the *relation* between two facts, that is, between the fact to be proved (factum probandum) and the fact that proves (factum probans). Of course, in the next section, Wigmore proceeds to use the term 'evidentiary fact' to refer to the factum probans, which would seem to confuse the newfound clarity of the concept of evidence as a relation between two facts. This confusion may result from a general imprecision in the use of terminology rather than from a particular lack of conceptual clarity. Variations on the term 'evidence' are used to refer to "that which manifests and makes evident," that which serves as evidence and so on within and beyond the legal discipline. These uses of the term derive, I would suggest, from the conceptual premise that evidence signifies a relation between two facts. In other words, the signification of this particular relationship, though often implicit or unexplicated, is the very grounds for all subsequent uses of the term. To focus on the general concept is not to necessarily overlook the varied uses of the term but rather to more fully explicate, to re-think to a certain degree the grounds for such uses.

Wigmore's theory of proof builds upon this concept of evidence as signifying a relation between a proposition to be proved and a proposition that proves, and formulates the key notion that "analysis of evidence involves the study of *relations between propositions*." This particular analysis takes place within a legal context, however the principles applied in this sort of analytical process are not legal per se, but rather are ordinary principles of logic. The philosophical assumption underpinning this theory of proof is that "the number of types of mental process, in dealing with evidence, is strictly limited." The study of relations between propositions entails an inference from *factum probans* to *factum probandum*, which in turn involves a straightforward application of ordinary principles of inductive logic. Accordingly, such analysis is based on common sense empiricism and results in judgements of probabilities.⁵⁵ Framing the analysis of evidence in this way makes it possible to map connections between the concepts and use of evidence in a legal context to related concepts and the treatment of records as a special kind of evidence in an archival context. In this instance, the purpose of mapping such connections is not to establish exact correspondences between the disciplines, but rather to draw forth aspects of the legal concepts and related matters that, when applied to archival practice, serve to effectively broaden the approach to conceptualizing and treating records as matters of evidence.

2.4.2 Considerations of the use and treatment of evidence

The discussion so far has proceeded from a consideration of the legal rules of evidence and the associated concept of legal evidence in relation to contemporary archival discourse to a formulation of a broader concept of evidence as a relation between two facts, and which serves as an inferential basis for proving a particular fact or for acquiring

knowledge of a fact not directly perceived. The integrated approach to the study of evidence, as developed by Twining and based upon the theories of Bentham and Wigmore, conceptualizes evidence as a matter that is, for all intents and purposes, inseparable from the actual and/or potential uses of evidence. That is, evidence does not signify anything in and of itself; rather evidence is always pointing (that is, referring) to something beyond itself. Moreover, evidence is constituted by the very processes that make use of evidence, in the course of proving a fact or acquiring knowledge of past events. To conceptualize evidence in a theoretical and practical way is then to consider the processes of inference involved in the analyses of relations, which provide a basis for reaching conclusions in the determination of facts.

Is there a theoretical gap between legal and archival perspectives on the concept of evidence? As the set of ideas about the nature of archival material, archival theory does not explicitly formulate a concept of evidence, but rather is based upon certain assumptions about the nature of records and their capacity to serve as first-hand evidence. As traced in the preceding chapter, these assumptions are variously articulated in the concepts of *perpetual memory*, of documents as manifestations of legal facts, and of records as sources from which legal and historical facts can be inferred. Archival methodology derived from this set of ideas focuses on, broadly speaking, the preservation of the nature of archival material. The retrospective approach constitutes the assessment of a document's authenticity (traditional diplomatics) and the protection of 'archive quality' (Jenkinson's 'moral defence of archives') so that records are effectively capable of serving as evidence of past events. The prospective approach constitutes the devising of standards and requirements for record keeping in electronic systems in order to ensure the creation of trustworthy electronic records

that then have the capacity to serve as effective evidence. The ideas about the nature of archival material and how to treat it do not seek to address the potential uses and/or values of such material. It could perhaps be argued then that to consider the use of evidence as part of mapping a broader concept of evidence to the archival discipline contradicts certain fundamental tenets of archival theory. To the extent that ‘use of evidence’ is limited exclusively to the use of records already processed and housed within an archival repository as a source for inferring facts, this argument is well-founded because archival theory (narrowly conceived as the set of ideas about the nature of archival material) does not specifically address the future use and/or value of records. However, if the ‘use of evidence’ is expanded to include the *treatment* of evidence and is further formulated as an “analysis of relations between propositions,” then it becomes possible to make connections between legal ideas about the use of evidence and archival ideas about the treatment of records.

In writing about how evidence is used across disciplines, David Schum highlights commonalities in methodology. He suggests it is possible to map such connections “if we ignore the *substance* of evidence and focus instead on its *inferential properties*.”⁵⁶ A ‘*substance-blind* categorization of evidence’ reveals two dimensions of evidence that are of concern to all who use evidence in whatever (disciplinary) capacity – credibility and relevance. The issue of relevance, which seeks to address how the evidence stands in relation to the facts to be proven, is not of concern to this discussion. The issue of credibility, which seeks to address how the user stands in relation to the evidence, addresses issues concerning authenticity, accuracy and reliability, and resonates with archival discussions on record trustworthiness. Moreover, as Schum writes, “(e)stablishing the credibility of evidence provides the foundation upon which all subsequent inferences from

the evidence are based.”⁵⁷ Rather than just sharing overlapping areas of concern, this notion suggests that the cross-disciplinary use(s) of evidence in general and the archival treatment of records (as a special kind of evidence) in particular are not necessarily disparate processes but rather are related parts of an inferential process, holistically conceived of as a continuum of activities. In the same way that foundation evidence can serve to establish the identity of a record thereby allowing that record to serve as evidence in a court of law, so it is possible to imagine the archival treatment of records as constituting certain foundational activities that, by establishing the trustworthiness of records (whether retrospectively or prospectively), allow records to serve as reliable and authentic bases for making inferences about past events.

The next chapter will formulate a broader concept of evidence (as a relation between two facts) in archival terms and will consider the possible applications and implications of an archival concept of evidence as a term of archival practice.

Chapter 3: Towards an archival concept of evidence

This chapter will gather together some of the various threads of the preceding discussions in formulating a broader concept of evidence in archival terms and in considering its possible applications to and implications for archival practice. Exploring and, to a certain extent, re-working Brothman's notion of 'afterglow' as a metaphor for the record-evidence relationship will provide a framework for mapping connections between a broader concept of evidence drawn from evidence scholarship and the archival discipline – in effect formulating an archival concept of evidence as a relation between record and event. Exploring some possible applications of this concept as an archival term of practice will touch upon the archival treatment of records and the extent to which various archival processes can be characterized as an analysis of relations between record and event. The discussion will also consider certain implications of this concept as an archival term of practice, including a shift of emphasis from the nature of the record to the nature of the archival processes that treat the record. Such a shift highlights the inferential nature of the archival analysis of record-event relationships and makes it possible to reconcile retrospective and prospective notions of evidence and to better account for the whole range of archival material.

3.1 Formulating a broader concept of evidence in archival terms

In "Afterglow: Conceptions of Record and Evidence in Archival Discourse," Brothman critiques the extent to which the concepts of record and evidence have become coterminous in archival discourse. According to Brothman, this conceptual conflation glosses over significant temporal differences between the two concepts and results in a

conflict between an “attitude of retrospection” (characteristic of traditional archival practices that emphasize record *keeping*) and “a stance of retrospective anticipation” (characteristic of more contemporary archival practices that emphasize record *making*, especially in the realm of electronic records). Brothman introduces the ‘afterglow’ metaphor in order to better describe the relationship between record and evidence and in so doing, to account for the elements of time and difference that he sees necessarily existing within that relationship. He writes:

The image of an afterglow serves as a heuristic analogy for the discussion of the record-evidence relationship. Though afterglows clearly follow initial glows, the distinction between glow and afterglow is not always easily discernable. In some circumstances, it is difficult to determine at what point and moment exactly light emitted from a source ceases to strike the eye as primary and originary and becomes detectable as afterglow – the difference between effect and after-effect. On a phenomenological level, this analogy expresses the vitiating effect of time on efforts to ontologize. It captures the difficulty of defining the exact limits – the singular identity – of entities entering into the flow of time, be they physical objects or intellectual concepts. The image of afterglow represents the elusiveness of the temporal relations between “record” and “evidence” for archivists and other record keepers.¹

The concept of evidence that underpins Brothman’s critique and ‘afterglow’ metaphor is a particular, highly limited concept that is more or less rooted in legal conceptions of evidence and that is related to the use of the legal rules of evidence as an archival resource. Brothman seeks to overcome the limitations of this particular concept of evidence, as it relates to records, by highlighting the elements of time and difference that he sees coming into play between the concepts of record and evidence. To this end, the ‘afterglow’ metaphor serves Brothman’s purpose of further distinguishing between “two social acts: the making and keeping of records and the gathering and making of evidence.”² As suggested earlier however, Brothman’s use of a particular concept of evidence, one that is highly limited and rule-bound, in his critique suggests that a broader concept of evidence will perhaps serve to

expand the scope of archival functions and to better account for the possible range of records and the various approaches to the consideration and treatment of records.³

Current trends in Anglo-American evidence scholarship and aspects of the legal theories of evidence and proof as articulated by Bentham and Wigmore serve to formulate a broader concept of evidence as a relation between two facts. A slight re-working of Brothman's 'afterglow' metaphor makes it possible to formulate an archival version of this concept. In situating record as the glow and evidence as the afterglow, Brothman characterizes the relationship between record and evidence as one of effect and after-effect. Glows and afterglows, however, do not occur spontaneously, nor does the relationship between the two exist in isolation. Rather, glows and their subsequent afterglows are emitted from some originary source, and the relationship between glow and afterglow assumes, indeed is grounded upon, a prior relationship between source and glow – in keeping with the metaphor, a relationship that can be characterized as one of cause and effect. If record is situated as the glow, then the event that gives rise to the record can be situated as the source of the glow. This re-working of Brothman's metaphor serves to shift the focus from the relationship between record and evidence to the relationship between event and record and, in so doing, makes explicit a relationship that is otherwise assumed and establishes this relationship (between event and record) as the necessary grounds for conceptualizing and comprehending any subsequent relationship (such as that between record and evidence, as formulated by Brothman). In further considering this re-working of the 'afterglow' metaphor, especially in light of a broader concept of evidence as a relation between two facts, it becomes possible to configure evidence, in this instance, as a relation between event and record. That is to say, the event is an instance of *factum probandum* (the fact to be

proved) and the record is an instance of *factum probans* (the fact that proves) and the relations between these two facts establish matters of evidence. However, this re-working of the 'afterglow' metaphor cannot be meaningfully extended to all matters of evidence; rather it specifically relates to matters of documentary evidence, where it is possible to conceive of an event that produces a record and a record that is produced by and that can therefore serve as a special kind of evidence of an event, and where it is furthermore possible to characterize the record-event relationship as one of evidence. In this way then, this re-working of the 'afterglow' metaphor serves to formulate a broader concept of evidence in archival terms and, therefore, to establish a working version of an archival concept of evidence.

Duranti further articulates aspects of an archival concept of evidence when she writes:

...evidence is not an entity, but a relationship. It is the relationship shown to the judge of a fact between the fact to be proven and the fact that proves it. This relationship can be found in a written document...the concept of evidence is at one time much broader than that of a record...and much more specific, as it requires a specific relationship.⁴

At one time much broader and more specific than the concept of record, evidence is a relationship that can be associated with a record but that is not and cannot be contained within a record. In other words, the record is not so much a manifestation of the relationship that is evidence, as Duranti seems to suggest when she writes that "this relationship *can be found in* a written document." Rather, the record is a material object that can potentially serve as one part of a possible relationship with a past event, the tracing of which establishes matters of evidence. The record neither contains evidence, nor facts per se. The record refers to events, facts outside itself. Raffel more fully explicates the record-event relationship in his discussion of the grounds of the use of records. "Justifications of the use of records turn primarily upon an unstated notion of fact as a relation between record and event,

which parallels the idea of language as a relation of words to things.”⁵ Highlighting the relation between record and event, and words to things reinforces the notion that the one thing is not and does not necessarily embody the other, but rather that the one thing only ever refers to the other. Raffel characterizes a record as “a special kind of thing, a thing which can be related to other things so as to be ‘about’ them.”⁶ The record-event relationship then is an ‘about’ or ‘correspondence’ relationship, in which records are first differentiated from and then related to the ‘real world.’⁷ This relationship is the necessary grounds for any and all potential uses of the record, but at the same time, this relationship is always only a contingency, never a certainty. To the extent, then, that records are implicated in a relationship with past events and are used to reveal or refer to past facts, records have the capacity to serve as a special kind of evidence. The determination of facts from records can be characterized as a matter of tracing the relationships between record and event, of establishing these relations as matters of evidence.

In her discussion of the concept of evidence and its association with records, Duranti argues that the notion of records as potential sources of evidence about past events is a strictly retrospective notion. From the user’s view, it is possible to conceive of records as a special kind of evidence because the records themselves “are used as such in relation to specific research questions.” However, from the creator’s point of view, it is not possible to conceive of record making as creating evidence because, according to the legal perspective, “nothing that is generated for the sole purpose of serving as evidence of something... is admissible as evidence.”⁸ In other words, it is only well *after the fact* of record creation, within a specific context of use, and when a record is used to prove a specific fact that a record can properly be constituted as an evidentiary source. This distinction between

retrospective and prospective notions of evidence, the possibility of one and the impossibility of the other, resonates with Brothman's critique of the concept of evidence and the conflict it generates within archival discourse between a concern with the past (record keeping) and a concern for the future (record making). Brothman argues that evidence cannot be created as and when records are. "Evidence rather arises out of the processes of social negotiation *after the fact*...Record makers do not determine what the evidence is and what it is evidence for; record users do."⁹

But how well does such a sharp distinction between retrospective and prospective notions of evidence, as they relate to records, serve the archival function? By formulating evidence as a purely retrospective notion and by taking the extreme position that such a notion only comes into play in the context of record use, archivists run the risk of theoretical inconsistency when undertaking any activities that constitute a prospective approach to the consideration of records as evidence. Rather than narrowly conceiving of evidence as a term of archival practice, it may be more beneficial to take fuller advantage of the fact that, as Patterson suggests, "evidence is a thing of many aspects."¹⁰ While there are no doubt retrospective and prospective aspects to the concept of evidence broadly conceived, are these aspects necessarily at odds with one another? When formulated as a relation between record and event, is not the concept of evidence broad enough to account for these various aspects and to re-configure them as different, rather than opposing or even mutually exclusive approaches (*before the fact* and *after the fact*) to the archival consideration and treatment of records as evidence?

An archival concept of evidence as a relation between record and event is not a departure from traditional archival theory, but rather a re-working of some of the

fundamental concepts that underpin ideas about the nature of records and of the archival processes that treat them. Previously, the Roman legal concept of *perpetual memory* and the concepts and principles of traditional diplomatics were discussed in terms of the functionality of records as expressed by the concept of evidence.¹¹ An archival concept of evidence incorporates and further builds upon aspects of these concepts in formulating and describing the relationship between record and event. By constituting records as a physical and intellectual means for rendering a fact continuous, stable and enduring, that is, for converting the present into the permanent, the concept of *perpetual memory* underpins notions of the record-event relationship. More than just being a thing which can be related to other things so as to be 'about' them, a record is a special kind of thing that materially manifests elements that relate to a particular event and that, furthermore, functions to fix and render permanent those elements, thereby constituting the possibility of tracing the record-event relationship based upon an analysis of those elements.

Traditional diplomatic concepts further serve to formulate and describe the record-event relationship that underpins an archival concept of evidence. In positing the record as a 'window on the world,' traditional diplomatics asserts that the record (the documentary world) manifests identifiable and analyzable elements that relate to specific events of the 'real world.' In devising principles for the identification and analysis of the extrinsic and intrinsic elements of documentary form, traditional diplomatics serves to establish that an understanding of past events is based upon an analysis of the elements present within the records. In other words, analysis of the extrinsic and intrinsic elements of documentary form is an early step in the process of tracing and analyzing the relations between record and event, and of establishing matters of evidence.

The concepts of traditional archival theory and diplomatics constitute a retrospective mode of analysis of the record-event relationship and thereby underpin the retrospective aspects of a broad archival concept of evidence. Contemporary archival diplomatics, which combines the concepts and principles of archival science and diplomatics in devising standards for the creation of trustworthy electronic records, constitutes a prospective mode of analysis of the record-event relationship. As discussed earlier, whereas traditional diplomatic analysis proceeds from the record to the world, contemporary archival diplomatic analysis proceeds, in general terms, from the world to the record. Rather than tracing evidentiary relationships between record and event based upon an analysis of the elements of documentary form, the prospective approach analyzes the elements of a given event (in terms of juridical system, act, persons, procedures), establishes relationships between the event and the record, and seeks to explicitly manifest those relationships in the formal elements of electronic records. Whether tracing relationships from record to event or event to record, retrospective and prospective modes of archival analysis work toward a common aim of understanding records according to their circumstances of creation and use, and of preserving the records and an understanding of the records over the long term. An archival concept of evidence as a relation between record and event will account for these various approaches to the consideration of records as a special kind of evidence and will provide a broader framework for further considering and potentially re-characterizing the archival processes that treat records.

3.2 Applications of the concept as an archival term of practice

Formulated in terms particular to archival practice, a broader concept of evidence signifies the record-event relationship. In applying this concept to the terms or grounds of archival practice, it becomes possible to configure the archival treatment of records as, in part, an analysis of the relations between record and event. The following discussion will explore the fundamental archival concepts of *context* and the *archival bond*, in order to map connections between an archival concept of evidence and the theoretical and methodological concepts of archival practice. The discussion will then touch upon the role of these concepts in the retrospective processes of selection, arrangement and description of records and in the prospective processes of devising requirements for trustworthy electronic record making and keeping, and will (re)consider the nature of archival processes in light of an archival concept of evidence.

In archival terms, the concept of context refers to the framework of action in which a record participates. The possible contexts of record creation and use range from the general to the specific. The juridical-administrative context refers to the legal and organizational system within which the creator operates. The provenancial context refers to the creator and, if an organizational body, to its mandate, function and structure, or, if an individual, to his/her professional and personal activities. The procedural context refers to the procedure in the course of which the record is created. And the documentary context refers to the internal structure of the record aggregation.¹² The archival concept of context takes into account the external relationships of record to event, the various elements of which comprise the relations between record and juridical system, record and act, record and persons, and record and procedure. The complex of these external relationships combine to shape a record's

meaning. Therefore in order to comprehend or interpret a record's meaning, it is necessary to understand the context(s) of the record, to trace and analyze the external relationships between record and event. The archival concept of context effectively articulates an aspect of the record-event relationship, by situating a record in relation to the various contexts of its creation and use, and by determining and describing the framework of action in which the record participates.

While the documentary context signifies the totality of relationships between and amongst records, the concept of the archival bond refers to an instance of those relationships, that is, to the network of relationships that each record has with other records within the same aggregation. "The archival bond is the relationship that links each record to the previous and subsequent one and to all those that participate in the same activity."¹³ The archival bond is originary (because it comes into existence when the record is created), necessary (because it exists for every record), and determined (because it is qualified by the function of the record within the aggregation to which it belongs).¹⁴ The archival bond is "an essential part of the record, which would not exist without it," and effectively determines the nature and meaning of a record.¹⁵ The concept of the archival bond takes into account the internal relationships between and amongst records within an aggregation. When these internal relationships are linked with the external ones of record to event, the archival bond serves as an "expression of the development of activity in which the document participates...[while] it contains within itself the direction of the cause-effect relationship."¹⁶ Therefore preservation and elucidation of the archival bond not only serves to establish and perpetuate the nature and meaning of a record within its documentary context, but also contributes to establishing and understanding

the external relationships between record and event. In this way, the concept of archival bond likewise articulates an aspect of the record-event relationship.

As theoretical and methodological concepts, context and the archival bond serve at once to express ideas about the nature of records and to guide archival processes for treating records (thereby determining, to a certain extent, the nature of archival processes). Furthermore, to the extent that the concepts of context and the archival bond contribute to the analysis of relations between record and event in the course of preserving and perpetuating the nature and meaning of records, these concepts likewise contribute to establishing and preserving records as matters of evidence. Exploring the role of the concepts of context and the archival bond in retrospective and prospective archival processes will serve to further map connections between an archival concept of evidence and the theoretical and methodological concepts of archival practice and to configure the archival processes that treat records as, in part, various analyses of relations between records and events.

Traditionally, the activities of selection, arrangement and description of records take place *after the fact* of records creation and use. As retrospective approaches to the consideration of records as evidence, these archival processes employ the concepts of context and the archival bond in order to identify, preserve and make accessible a selection of records that are capable of serving as evidence and memory of past events. In this formulation, the archival treatment of records aims to “preserve and communicate knowledge of [the context of the record’s original purpose] so that [records] will continue to possess value as evidence and be capable of being exploited for that value.”¹⁷ The emphasis in this traditional characterization of archival practice rests on the nature and meaning of the record, and its preservation and communication in the hands of the archivist. Highlighting certain analytical

processes that underpin the activities of selection, arrangement and description shifts the emphasis to the nature of the archival processes themselves. For instance, how does an archivist acquire knowledge about the context of a record's initial purpose? The means for acquiring this particular knowledge is a necessary precondition for any and all archival processes that aim to identify, preserve and communicate this knowledge to others. This particular knowledge does not reside in the record per se, but rather arises from the archival analysis of relations between record and event according to the theoretical and methodological concepts of context and the archival bond. Preserving and communicating this knowledge do not serve to constitute the record as a special kind of evidence per se, but rather serve to render the record capable of serving as evidence. In this way, the archival treatment of records establishes the grounds for the use of records as evidentiary sources from which to infer facts about past events. Consideration of the treatment and use of records as evidence has always emphasized the use of records apart from the archival treatment of records. In applying an archival concept of evidence to the archival processes that treat records, it becomes possible to configure the treatment and use of records as a continuum of activities that necessarily involve various analytical processes, each of which must be accounted for by the respective practitioners. That is, historical and legal scholars (to name a few) must account for their methods of using documentary sources and their processes of inferring historical and legal facts; and likewise, archivists must account for their methods of treating records and of establishing them as matters of evidence.

As a means for accomplishing the selection function, appraisal is alternately characterized as the attribution of value to archival material, the act of taking archival documents into archival custody and constituting them as documentary sources of evidence

of the past, the act of determining the scope and quality of evidence of past actions and events, and an objective process of the acquisition and selection of objective objects.¹⁸ This discussion will not venture into the debate over the nature and methods of appraisal, but will explore instead aspects of the analytical processes that constitute a part of the overall activities of appraisal. In "Towards a Social Theory of Appraisal," Terry Eastwood suggests that there are two bases for the analytical dimension of appraisal: provenance and pertinence. Appraisal based on pertinence, which involves an assessment of information contained within records, is not of concern to this discussion. The provenance-based approach to appraisal assumes that "the significance or value of [records] is related to the importance of the creating person, whether juridical or physical." Accordingly, "the archivist decides upon the value primarily by analysing the provenance of any given body of records."¹⁹ As an approach to appraisal, the analysis of provenance potentially includes assessments of the various contexts of a record's initial purpose. In evaluating the importance of the creator, the appraisal process will analyze, in general, the juridical-administrative, the provenancial, and the procedural contexts of the record and, in particular, the mandate, structure and function of the creator, as well as the procedure which generated the record. The evaluation of the creator is based upon an analysis of the external relations between the record, on the one hand, and the elements that comprise the event, on the other (in terms of juridical system, act, persons, and procedure, for example). Other provenance-based approaches to appraisal likewise involve an analysis of the relations between record and event. Macroappraisal involves the analysis and evaluation of the functions and structure of an organization as a top-down approach to identifying records for selection. This process of appraisal will likewise analyze the juridical-administrative and the provenancial contexts and any

evaluation of function is ultimately based upon an analysis of the contextual elements that comprise an event. Macroappraisal effectively identifies the function (or event) to be documented and thereby determines the selection of records related to that particular event. When performed in conjunction with the bottom-up approach of microappraisal (or records analysis), these approaches to appraisal serve to link an analysis of records with an analysis of events. More than just assuming a relation between the two, these analytical processes serve to establish a relation such that the records are 'about' and potentially capable of serving as evidence of the event(s). In light of this, it becomes possible to re-configure the appraisal process as, in part, an analytical process, based upon a body of archival inferences, that traces, to a certain extent, relations between record(s) and event and that works toward establishing the grounds necessary for records to serve as evidence.

Arrangement and description are complementary functions that serve to establish intellectual control over records, and to preserve and communicate the nature and meaning of any given body of records. Underpinning the activities of arrangement and description are analytical processes that trace the external and internal relationships of a body of records, and that identify and therefore establish relations between records and events.

In "Putting the Parts of the Whole Together," Eastwood writes:

Archival arrangement is essentially a process of identifying relationships, not a process of physically ordering and storing documents...the essence of archival arrangement is the identification of the natural accumulations of archival documents or records which take shape during the process of their generation.²⁰

In this configuration, arrangement constitutes an analysis of a body of records, including the various contexts in which the records were created and used (what Eastwood terms, the external structure of provenance) and the relationships between and amongst records (the internal structure of provenance). Analysis of the external structure of provenance includes

studying how the creator organizes and structures its activities, as well as studying “the various administrative relationships governing the way organizations and persons conduct their business, which in turn governs the way they create and maintain [records].” Analysis of the internal structure of provenance includes studying the relationships among the records as they were organized by the creator during the conduct of affairs, in other words, the totality of the archival bonds within a given body of records.²¹

Based, as they are, upon a perceived need to protect the evidence revealed by the relationships between a body of records and its creator, as well as the relationships between and amongst records, the methodological principles of provenance and original order serve to facilitate and guide the analysis of the external and internal structures of arrangement. The principle of provenance determines that, in order to understand the nature and meaning of records in terms of gaining intellectual control over them, it is necessary to understand the creator and the contexts in which the records were created. Acquiring this particular knowledge, building this understanding is a matter of exploring the activities of the creator from the top-down, in terms of organization, function and competence, and establishing relations between the various juridical-administrative and provenancial contextual elements that comprise any given event and the resulting records. In this way, the process of analyzing the relationships of external structure is an inference-based approach to arrangement that provides indirect information and knowledge about the nature and meaning of records within a given aggregation.

The principle of original order determines that, in gaining intellectual control over a body of records, it is necessary to understand the records themselves. Acquiring knowledge about the records themselves is a matter of understanding the most immediate context(s) of

records creation, that is, of tracing the procedural and documentary relationships between and amongst records. The very concept of original order assumes that records are ordered according to the way in which activities are carried out. Therefore, understanding the relationships between and amongst records (the archival bonds) and linking this understanding of the records themselves to specific procedures and activities that gave rise to the records serve to establish records as sources that are capable of providing particular knowledge about those activities. Identifying the external and internal structures of arrangement is, to a certain extent, a matter of analyzing the relations between records and events. According to an archival concept of evidence as a relation between record and event, the archival treatment of records, in terms of arrangement, is not so much a matter of revealing and protecting the evidence contained within a body of records and its network of relationships, but more a matter of establishing the relationships that effectively constitute records as potential evidentiary sources from which to infer facts about past events.

As a process and a product, description provides access to, enables users to understand, and preserves the authenticity of records. "The term 'archival description' literally means writing about archival material and embraces the ideas of representation, identification and organization."²² As a process of writing about records, description further builds upon and refines the processes of analysis, identification and organization that constitute the archival arrangement of records, in the creation of a finding aid that links information about provenance with information about records and that serves both to explain the context of a body of records and to relate the parts to the whole. Description is at once a process, which represents a body of records (in the course of documenting and communicating the relationships between records, and the relations between records and

events) and a product, which serves as a representation of a body of records (that is, “a final product which illustrates archival material, its provenancial and documentary contexts, its interrelationships and the ways it can be identified and used”).²³ As a representation of the external structure of arrangement, description serves to explain the external relationships of a body of records in the form of descriptive elements, such as title proper, administrative history/biographical sketch, and custodial history, and in the creation of access points that link administrative (i.e. functional and structural) relationships across bodies of records (for instance, in the indexing of corporate or personal names). As a representation of internal structure, description serves to explain the internal relationships of a body of records in the form of descriptive elements, such as custodial history, scope and content, and notes on arrangement and related groups of records in different fonds, and in the creation of access points drawn from these descriptive elements (for instance, subject access, documentary form and function terms).²⁴ As a representational activity, archival description is not a matter of merely reflecting the external and internal relationships of a body of records as revealed in the course of arrangement. The combined activities of arrangement and description serve to establish records as matters of evidence, by analyzing and thereby establishing relations between records and events, and by documenting and communicating and thereby codifying those relations in the form of findings aids and other descriptive tools.

In terms of appraisal, arrangement and description, the analysis of relations between records and events constitutes a retrospective approach to the consideration and treatment of records as a special kind of evidence. The analysis of these same relations in the course of devising standards and requirements for trustworthy electronic record making and keeping constitutes a prospective approach to the archival treatment of records. So far, in applying an

archival concept of evidence as a term of archival practice, the discussion has sought to configure the analytical processes underpinning appraisal, arrangement and description as activities that effectively constitute records as matters of evidence, that is, as documentary sources capable of serving as evidence of past events. This configuration of the archival treatment of records can be extended to include the analytical processes that underpin the various research projects that, in seeking to ensure the creation and preservation of electronic records capable of serving as evidence of past events, likewise constitute records as matters of evidence. Different approaches to the analysis of relations between records and events do not represent a fundamental difference in the nature of the processes, so much as a difference in the direction or emphasis of each analysis.

The analysis of relations between records and events in the course of appraising, arranging and describing records seeks to identify, preserve and communicate the nature and meaning of records. These retrospective analyses treat 'real world' objects (records) and, though these analyses take into consideration a variety of sources other than just the records in establishing the external and internal relationships of a given body of records, the retrospective approach can be characterized as proceeding, more or less, from record to event. To a certain extent then, the process of treating records resonates with that of using records; both processes are based upon an assumption that an understanding of past events is dependent upon an understanding of present records. The archival treatment of records consists, in part, of an analysis that proceeds from the record to the event, in order to generate an understanding of the record so that the record can serve as a reliable and authentic basis from which to infer facts about past events. The use of records across disciplines likewise consists of an analysis that proceeds from record to event; but the use of records is a

subsequent process that is almost entirely dependent upon a prior process that effectively constitutes records as potential sources of evidence. While not venturing into the debate over the role of the concept of use in archival theory and methodology, this discussion merely suggests that the treatment and use of records comprise a continuum of activities.

Accordingly, it is possible to configure the archival treatment of records as the foundational activities that make possible any and all future uses of records, without taking into consideration or serving the purposes of any one particular use.

The analysis of relations between records and events in the course of devising standards and requirements for the creation and preservation of trustworthy records in electronic systems seeks to identify what elements are necessary to constitute an electronic record and what conditions are necessary to ensure the meaningful creation and use of electronic records. This prospective analysis treats hypothetical objects in identifying "the necessary and sufficient components of a complete, reliable and authentic electronic record."²⁵ The same terms of practice are employed as in retrospective analyses, that is, the principles and concepts of diplomatics and archival science; however, rather than guiding the treatment of records in the course of identifying, preserving and communicating their nature and meaning, diplomatic and archival principles "function as standards for the design of record keeping and record preservation systems."²⁶ In the course of identifying the nature of an electronic record and the conditions necessary to ensure its trustworthiness, the UBC Project found that "electronic records possess essentially the same components as traditional records, however these components are not inextricably joined to one another as they are in traditional records."²⁷ Therefore, in order to establish the conditions necessary for the meaningful creation and use of records in electronic systems, it is necessary to devise

specific methods for explicitly linking the components of an electronic record together and for ensuring the reliability and authenticity of electronic records. The reliability of a record, its ability to stand for the fact it is about, is determined by the degree of completeness of the form of the record and the degree of control over the procedure of creation; the authenticity of a record, the fact that it may be proven to be what it purports to be, is determined by controlled procedures of transmission and preservation.²⁸ Assessing the reliability and authenticity of a record is an analytical process that traditionally proceeds from record to event. Devising specific methods for ensuring the reliability and authenticity of electronic records requires formulating policies, strategies and standards for the creation and preservation of electronic records; in other words, it requires shaping certain elements that relate to the creation of the record and that constitute, in part, the event that produces the record. The prospective analysis of relations between records and events can be characterized as proceeding, more or less, from (hypothetical) event to record.

Methods for controlling the procedure of creation and the completeness of form (and thereby ensuring the reliability of the record) include establishing and embedding access privileges in the system, maintaining an audit trail, and integrating business and documentary procedures.²⁹ Methods for preserving the identity and integrity of records in the course of their transmission and use (and thereby ensuring their authenticity) include capturing and preserving metadata that establish the identity of the record (including name of author, date of record, and subject), maintaining an audit trail, appending digital signatures, and controlling their transmission and the mode of their custody and preservation.³⁰ These methods seek to shape the process of record making and keeping so as to make possible initially the creation and use of trustworthy electronic records and subsequently the

identification, preservation and communication of the nature and meaning of electronic records. However, the nature and meaning of electronic records do not derive solely from controlled processes of record making and keeping, but rather from the relation of these processes and their products to some event. Devising methods that ensure the creation and preservation of trustworthy electronic records requires analyses of potential events (in terms of the contextual elements of business activity) and a breakdown of business functions and procedures in order to ensure that electronic records are created and preserved *in context*, that is, in relation to the specific events that give rise to them. The implementation of such methods by means of integrating business and documentary procedures further requires analyses of potential events in order to identify and establish the link between act and record, in order to determine and control the moment of record creation and in order to constitute the evidentiary relations between event and record.

The prospective approach to the archival treatment of records does not contravene the respective natures of records and evidence by, as Brothman argues, attempting to put evidence into records. The formulation and articulation of requirements and standards for trustworthy electronic record making and keeping represent aspects of the foundational activities that make possible any and all future uses of records. That is, according to an archival concept of evidence, the prospective approach is not so much a matter of creating electronic records as evidence, much less of creating 'electronic evidence,' but one of providing grounds for trusting and using electronic records as documentary sources of evidence. The analysis of the components of electronic records and the elements of given events, in order to establish relations between records and events in the course of conducting affairs and keeping records, makes possible any and all potential analyses of record-event

relationships that comprise the subsequent archival treatment and cross-disciplinary use of records.

3.3 Implications of the concept as an archival term of practice

The application of an archival concept of evidence as a term of practice concerns the processes that treat records and formulates those processes as, in part, various analyses of relations between record and event. This concept effectively shifts the emphasis from a consideration of the nature of records per se to a consideration of the nature of the processes that treat records and thereby constitute them as a special kind of evidence. In so doing, an archival concept of evidence begins to touch upon the inferential nature of archival processes, while reconciling retrospective and prospective notions of evidence and providing a means to better account for the whole range of archival material.

The inferential nature of any process that has to do with evidence stems from, what Schum terms, the 'inferential properties of evidential material.'³¹ In formulating a functional definition of evidence, as discussed earlier, Patterson begins to explicate certain aspects of these 'inferential properties.' According to Patterson, the function of evidence is to serve as the basis from which to confirm or deny a proposition. In other words, evidence serves as the basis for the process of proof, which is a matter of reasoning and drawing inferences from the evidence. Proof does not consist of evidence per se, but of the inferences drawn from the evidence. By formulating evidence as the basis for inference in the course of defining evidence according to its function, Patterson's definition emphasizes the processes that use evidence (processes of proof, reasoning, drawing inferences), rather than the supposed or inherent nature of any given proposition of fact that serves as evidence. Patterson asserts that

“evidence...is evidence only because it is used as evidence,”³² which suggests that evidence is constituted by the processes that use evidence, that the analysis of relations between propositions serves to establish, more than merely identify, matters of evidence, and that, moreover, such analysis is by nature an inferential process (that is, a matter of drawing inferences). Patterson’s assertion seems to suggest then that, in applying a concept of evidence to a consideration of the processes that use evidence, it becomes potentially possible to describe and account for the inferential nature of such processes.

The extent to which Patterson’s functional definition explicates the ‘inferential properties’ of evidence is limited to considerations of the *use* of evidence. In order to explore how evidence is used and how conclusions are reached, that is, in order to analyze inferential methodologies across disciplines, Schum argues for a ‘*substance-blind* categorization of evidence.’ In articulating the two dimensions of such a categorization, Schum implicitly extends his consideration to the processes that *treat*, as well as use evidence. As touched upon earlier, these two dimensions are credibility and relevance. The issue of credibility addresses the question of “how does the user of the evidence (the person drawing conclusions from it) stand in relation to the evidence?” The issue of relevance addresses the question of “how does the evidence stand in relation to the hypotheses of interest or matters to be proven?”³³ Establishing the credibility and relevance of evidence provides “a specific basis for assessing the inferential force of evidence on the possible conclusions being entertained.”³⁴ In other words, establishing credibility and relevance effectively makes possible any and all potential uses of evidence in the course of proving a fact, drawing a conclusion or acquiring knowledge about a past event. The dimension of relevance is not of direct concern in mapping connections to the processes that treat records

(as evidence) and so, the following discussion will only further consider the dimension of credibility.

In addressing the question of “how does the user...stand in relation to the evidence,” the issue of credibility seeks to address and assess the degree to which a piece of evidence warrants belief or trust. According to Schum, the attributes required to establish the credibility of evidence depend on what form the evidence takes; this is the case because the user stands in a somewhat different relation to different forms of evidence.³⁵ In relation to records as a special kind of evidence, what Schum terms credibility corresponds to the archival concept of trustworthiness. Establishing the credibility of evidence in general serves the same purpose as establishing the trustworthiness of records as a special kind of evidence in particular, that is, the purpose of “provid[ing] the foundation upon which all subsequent inferences from the evidence are based.”³⁶

The archival treatment of records constitutes a fundamental means of establishing the credibility of a form of tangible evidence in general and of establishing the trustworthiness of records in particular, and, in so doing, provides the necessary grounds for the use of records as a special kind of evidence. A broad concept of evidence, which configures the use of evidence as an analysis of relations between two facts, serves to emphasize the inferential nature of the process. An archival concept of evidence, which configures the archival treatment of records as various analyses of relations between record and event, begins to touch upon the inferential nature of archival processes. The analytical processes that seek to identify, preserve and communicate the nature and meaning of records constitute a body of archival inferences. The capacity of records to serve as a special kind of evidence derives then from various archival processes of inference that underpin the foundational activities of

the archival treatment of records and that make possible all subsequent inferences involved in the use of records across disciplines. Highlighting the inferential nature of archival processes is an important starting point for assessing and ensuring, as well as accounting for, the integrity of archival methods.

Further implications of an archival concept of evidence include reconciling retrospective and prospective considerations of records as evidence and providing a means to better account for the whole range of archival material. The discussion has already touched upon the retrospective and prospective notions of evidence, in an attempt to reconcile the two and to configure the respective analyses as different approaches to the treatment of records as a special kind of evidence. By highlighting the inferential nature of archival processes, an archival concept of evidence goes further toward dissolving the distinction, by characterizing the various archival activities according to the inferential nature of their analytical processes and thereby configuring *before the fact* and *after the fact* activities as similar in nature and as constituting different approaches to the analysis of relations between record and event.

An archival concept of evidence also provides a means to better account for the whole range of potential archival material, by dissolving certain distinctions between public and private records, and between organizational records and personal papers, similar to the way of Schum's '*substance-blind* categorization of evidence.'³⁷ By highlighting the inferential nature of the processes that treat and use records, such a concept suggests that the capacity of records to serve as a special kind of evidence, that is, their 'inferential properties,' derive not from any inherent nature of the records, but rather from the archival processes that treat and thereby constitute records as evidence. The inferential nature of archival processes becomes determinative of the evidentiary capacity of records, rather than the public or private

character of records, or the organizational or personal character of record keeping.³⁸ In other words, the concept suggests that evidence is a matter of establishing and articulating the relations between records and events, in order to be able to infer facts about past events from the records. To the extent that archival processes establish these relations in the course of appraising, arranging and describing records and devising requirements for trustworthy electronic record keeping, archival treatment constitutes records, whether public or private, organizational or personal, as matters of evidence.

Conclusion

This thesis has explored certain aspects of evidence in archival discourse, by tracing particular ways in which the concept of evidence, more or less implicitly, operates as an archival term of practice and by considering legal concepts of evidence and the extent to which these have permeated archival discourse on electronic records. This thesis has moreover worked toward formulating an archival concept of evidence, by mapping connections between a broader concept of evidence (drawn from readings of Anglo-American evidence scholarship) and the archival discipline, and has gone further to suggest possible applications and implications of such a concept as a term of archival practice. Various themes specific to this discussion have included the complex role and ad hoc formulation of the concept of evidence in archival discourse, the implicit reliance upon other disciplinary conceptions of evidence (primarily those of law and history), and the perceived need to formulate a concept of evidence particular to archival practice. This line of inquiry has, likewise, touched upon certain broader motifs, which give prospect of further explorations and fuller articulations of an archival concept of evidence.

One such broader motif can be traced in the threads of postmodernism that have infused and served as an interpretive framework for this particular archival discussion. While not explicitly engaging or citing specific postmodern concepts in the course of this discussion, this thesis is, in effect, a postmodern undertaking – it comprises a creative endeavor that seeks to bring about a shift in archival thought on evidence. According to Terry Cook, the incorporation of postmodernist discourse into archival discourse has the effect of producing an “archival paradigm shift.” He writes:

...archival theoretical discourse is shifting from product to process, from structure to function, from archives to archiving, from the record to the recording context, from the “natural” residue or passive by-product of administrative activity to the consciously constructed and actively mediated “archivisation” of social memory.¹

Such a shift, Cook further suggests, remains focused on traditional core principles (such as concepts of context, provenance, original order and so on), while, at the same time, re-working them and treating them to new and different interpretations, implementations and practical applications.² The postmodernist project does not seek to replace one set of ideas with another,³ but rather seeks to shift seeming-solid ideas that speak of essences and universalities, that constitute a ‘grand theory’ for archival practice, and that tend toward foundationalism, in order to create the very possibility of new and different conceptualizations of archival ideas. In other words, the postmodernist project in general and this discussion in particular seek to open up discursive space for considering various sets of ideas; within this space, it is possible to formulate an archival concept of evidence and to articulate such as, potentially, one concept among many.

An archival concept of evidence still relies upon some notion of record and event, in order to configure evidence as a relation between the two. However, these notions can and do partake of postmodern conceptualizations of the record as “a sign, a signifier, a meditated and ever-changing construction, not some empty vessel into which acts and facts are poured.”⁴ Acknowledging that the record is a human construct and that knowledge of past events is mediated by such does nothing to diminish the social importance of and necessity for records that are capable of serving as effective evidence. An archival concept of evidence seeks to incorporate postmodern and traditional notions of records, the events that produce them, and the possibility, as well as the difficulty of establishing relations between them, by shifting the focus from the nature of records (as product) to the nature of archival processes

and by emphasizing the very provisional and contingent nature of the concept itself. This concept, like all archival concepts, methods and criteria, is, as Heather MacNeil suggests, “the product of historical, cultural, and political choices and do[es] not exhaust all the possible ways of looking at the world or at the relationships between records and the world.”⁵ Rather, an archival concept of evidence offers one way of making sense of archival practice (by exploring and seeking to articulate its character in terms of the inferential nature of the analytical processes that underpin archival activities) and further suggests that more ways of making sense of the world are needed, not fewer.⁶

Another broad motif can be traced in the holistic conceptualization of the archival treatment and cross-disciplinary use of records as a continuum of activities. Such a configuration suggests that the use of records (as a special kind of evidence) is, in certain fundamental ways, similar in nature to the archival treatment of records and moreover, that the processes that use records are entirely dependent upon the archival processes that effectively establish records as matters of evidence. Accordingly, it becomes possible to fruitfully apply insights from general discussions of inferential methodologies in the use of evidence across disciplines to specific theoretical considerations of archival methodology. The issue of credibility, which arises in the course of using evidence and which poses the question of ‘how does the user stand in relation to the evidence,’ overlaps particular areas of archival concern. Attempts to answer this sort of question (not definitively, of course, but with a relative degree of certainty) amount, more or less, to archival attempts to assess and evaluate the trustworthiness of records. Establishing the trustworthiness of records (in archival terms) and the credibility of evidence (in Schum’s terms) provides the grounds necessary for posing and attempting to answer further questions that arise in the course of

using records as evidentiary sources for research or other purposes.⁷ Conceived of as one part of a continuum of activities and considered in light of an archival concept of evidence, it becomes possible to configure the archival treatment and use of records as posing the particular question of ‘how does the record stand in relation to the event which produced it?’ Attempts to address this question touch upon issues relating to how archivists establish, describe and communicate the relations between records and events, and how users (archivists being one set of users) interpret such relations.

The conceptualization of a continuum of activities – from the archival treatment of records to the cross-disciplinary use of records as evidentiary sources from which to infer facts about past events – provides a means for exploring the inferential nature of archival processes and for re-characterizing archival practice as establishing, more than just preserving, records as matters of evidence. This discussion has only scratched the surface of these issues and serves therefore to suggest that further exploration is required in order to formulate and articulate, in a more extensive and detailed fashion, the nature and role of archival inference in theory and practice. Furthermore, by dissolving the distinction between the treatment and use of records, the conceptualization of a continuum of activities also provides a potential framework for (re)considering the role of the concept of use in archival theory in general and in appraisal theory in particular, as well as for contemplating the values of records and the purposes of archival functions.

A final broad motif can be traced in the implied movement of this discussion towards a more pragmatic formulation of archival theory and methodology. While not an explicit pragmatic undertaking, this discussion has been influenced by Michael Seigel’s pragmatic critique of modern evidence scholarship and his argument for an intellectual shift from

foundationalism and logical positivism toward pragmatism and practical reason.⁸ This discussion has likewise been shaped by certain elements of pragmatic discourse, such as antiessentialism, and by certain pragmatic assertions, such as the assertion that “the pattern of all inquiry – scientific as well as moral – is deliberation concerning the relative attractions of various concrete alternatives,” and the further assertion that there are “no constraints on inquiry save conversational ones.”⁹ Broadly speaking, a more pragmatic formulation of archival theory and methodology would serve to counterbalance certain foundationalist trends in archival discourse – trends that seek to formulate and articulate a ‘single dominant value’ for archival practice or a ‘grand theory’ about the inherent nature of records, and that, more or less, claim “to represent the building blocks upon which a large doctrinal tower can rest.”¹⁰ While not itself an explicitly pragmatic concept, an archival concept of evidence moves in the direction of a more pragmatic formulation of archival theory – it has something to say about notions of record and evidence, and the analytical processes that underpin archival practice, but it does not necessarily derive from nor contribute to a strict formulation of archival theory, “in the sense of sets of answers to the textbook problems.”¹¹

An archival concept of evidence implicitly highlights a distinction similar to the one that James Wilkinson draws with regards to the historical discipline – that is, a distinction between evidence and the remains of the past. The remains of the past constitute what survives of everything that ever happened and those remains that historians use in making histories are what constitute evidence.¹² This distinction suggests that the capacity of some thing, some set of remains to serve as evidence is inseparable from, even entirely dependent upon the very process that seeks to use it as such. In other words, the capacity to serve as evidence does not necessarily derive from the nature of the thing being used, but rather

derives from the very process that uses it. In extending this insight to archival practice, the capacity of records to serve as evidence does not necessarily derive from any supposed or inherent nature of the record, but rather derives from the archival processes that treat the record. An archival concept of evidence builds upon such a distinction (between the remains of the past and evidence) and, in formulating evidence as a relation between record and event, and analyses of relations as constitutive of matters of evidence, serves to shift the emphasis from the nature of records to the nature of archival processes. Such a shift represents a movement away from foundationalism in archival theory, where archival theory is narrowly conceived as *the* set of ideas about the nature of records and is formulated as *the* premise from which methodology (as the set of ideas about how to treat records) is deduced. Such a shift does not seek to replace such formulations of archival theory and methodology, so much as to displace them, in order to create discursive space for the formulation and articulation of alternative ideas. An archival concept of evidence is one such idea. If pragmatism provides a sense of direction to this discussion (that is, to the formulation and preliminary articulation of this concept), then certain methods of practical reason provide a potential means for undertaking further explorations and fuller articulations of the concept, and its possible applications to and implications for archival practice. As Seigel explains, “practical reason is the process through which individuals argue about and justify decisions made under the conditions of immutable uncertainty; it is, fundamentally, a conversation. The methods of practical reason include induction, analogy, ends-to-means rationality, and the test of time.”¹³

An archival concept of evidence is very much a *working concept* – in the sense that it is an effective and valid concept only to the extent that it does or does not *work*, and in the

sense that it is a provisional concept, which requires and serves as the basis for further *work*. An archival concept of evidence potentially works by serving as a 'conceptual lens' through which to view and re-consider archival conceptions of record and evidence, the nature of archival processes, and the character of archival practice.¹⁴ By explicating and complicating certain conceptions of evidence in archival discourse, and by highlighting the role of archival inference in the processes that treat records, an archival concept of evidence marks the beginning of a conversation that seeks to deliberate the relative attractions of alternative sets of archival ideas. Pursuing this line of inquiry further is necessary for clarifying and deepening our understanding of the archival endeavor (its nature, purpose and role in society, as well as the role of the archivist in carrying it out), and for assessing and ensuring, as well as accounting for, the integrity of archival methods. By providing a sense of direction for further exploration and discussion, an archival concept of evidence potentially serves as a basis for future archival work.

Notes

Introduction

¹ *Oxford English Dictionary*, 2nd ed., s.v. "evidence."

² Lyman Ray Patterson, "Evidence: A Functional Meaning," *Vanderbilt Law Review* 18 (1964-1965): 876.

³ Theodore Roszak makes a similar assertion about the word *information*, which, he suggests, is like other words "that come to mean everything [and] may finally mean nothing." Theodore Roszak, *The Cult of Information* (New York: Pantheon, 1986), x, quoted in Kent M. Haworth, "The Principles Speak for Themselves: Articulating a Language of Purpose for Archives," in *The Archival Imagination: Essays in Honour of Hugh Taylor*, ed. Barbara Craig (Ottawa: Association of Canadian Archivists, 1992), 92.

⁴ This line of inquiry follows a similar course to that pursued by Barbara Craig in her consideration of the concept of memory and its pertinence to archives. She writes: "The concept of memory should have special resonance for archivists, and not only because it is a convenient shorthand to explain the purpose of archives to audiences unfamiliar with our work. The memorial metaphor is a powerful conceptual lens through which to view archives, as documents and as institutions, and to understand the inevitable and the potential effects of our professional economy on both." Barbara L. Craig, "Selected Themes in the Literature on Memory and Their Pertinence to Archives," *American Archivist* 65 (Fall/Winter 2002): 280-81.

⁵ Ian Hacking, *The Emergence of Probability* (London: Cambridge University Press, 1975), 32-34.

⁶ Nancy Partner, "Making Up Lost Time: Writing on the Writing of History," *Speculum* 6 (1) (January 1986): 94.

⁷ *Ibid.*, 105.

⁸ 'Documentary evidence' is defined as "evidence derived from conventional symbols (such as letters) by which ideas are represented on material substances. Such evidence as is furnished by written instruments, inscriptions, documents of all kinds, and also any inanimate objects admissible for the purpose, as distinguished from "oral" evidence, or that delivered by human beings viva voce." *Black's Law Dictionary*, 5th edition, s.v. "documentary evidence."

⁹ In her definition of archival science, Luciana Duranti formulates archival theory as "the whole of the ideas archivists hold about *what* archival material is" and archival methodology as "the whole of the ideas about *how* to treat it." Luciana Duranti, "Archival Science," in *Encyclopedia of Library and Information Science*, ed. Allen Kent. Vol. 59. Supp. 22 (New York: Marcel Dekker, 1997), 1. Elsewhere, Duranti further emphasizes that "the theory must determine the methods, and the methods must guide the practice." Luciana Duranti, "The Concept of Appraisal and Archival Theory," *American Archivist* 57 (Spring 1994): 344, n. 58. For further clarification of the relationships among archival theory, methodology and practice, see also Terry Eastwood, "Nailing a Little Jelly to the Wall of Archival Studies," *Archivaria* 35 (Spring 1993): 233.

¹⁰ Event, in the course of the discussion, refers to one instance of 'fact', where 'fact' is defined as "an action performed or an incident transpiring; an event or circumstance; an actual happening in time or space or an event mental or physical; that which has taken place. A fact is either a state of things, that is, an existence, or a motion, that is, an event." *Black's Law Dictionary*, 5th edition, s.v. "fact." Event also refers to the concept as discussed by Stanley Raffel in relation to the creation and use of medical records. See Stanley Raffel, *Matters of Fact: A Sociological Inquiry* (London: Routledge and Kegan Paul, 1979), 50-70.

Chapter 1

¹ Terry Eastwood, "Towards a Social Theory of Appraisal," in *The Archival Imagination: Essays in Honour of Hugh Taylor*, ed. Barbara Craig (Ottawa: Association of Canadian Archivists, 1992), 72-73.

² Duranti, "Concept of Appraisal," 331.

³ *Ibid.*

⁴ *Ibid.*; Heather MacNeil, *Trusting Records: Legal, Historical and Archival Perspectives* (Dordrecht: Kluwer Academic Publishers, 2000), 1.

⁵ Eastwood, "Towards a Social Theory of Appraisal," 73.

⁶ MacNeil, *Trusting Records*, 1.

⁷ Armando Petrucci, "The Illusion of Authentic History: Documentary Evidence," in *Writers and Readers in Medieval Italy: Studies in the History of Written Culture*, ed. and trans. Charles M. Radding (New Haven: Yale University Press, 1995), 240-42.

⁸ Luciana Duranti, "Diplomatics: New Uses for an Old Science (Part I)," *Archivaria* 28 (Summer 1989): 7-27; "Diplomatics...(Part II)," *Archivaria* 29 (Winter 1989-90): 4-17; "Diplomatics...(Part III)," *Archivaria* 30 (Summer 1990): 4-20; "Diplomatics...(Part IV)," *Archivaria* 31 (Winter 1990-91): 10-25; "Diplomatics...(Part V)," *Archivaria* 32 (Summer 1991): 6-24; "Diplomatics...(Part VI)," *Archivaria* 33 (Winter 1991-92): 6-24.

⁹ MacNeil, *Trusting Records*, 22.

¹⁰ In his discussion of the grounds of the activity of recording, Raffel complicates the notion of record as a 'window on the world' when he touches upon how the process of record making shapes the very world that it seeks to reflect. He writes: "...the possibility that a record could represent the world or part of it...depends on formulating the world as made up of witnessable events, of happenings, of occurrences to which an observer can testify." The assertion that the record reflects or equals the event – an assumption that underpins the initial activity of recording and all subsequent activities of using records – necessitates an implicit formulation of a particular notion of 'events' and of a particular way of seeing the world as divisible into events. Raffel, 50-51.

¹¹ *Ibid.*, 43.

¹² MacNeil, *Trusting Records*, 22.

¹³ Duranti, "Diplomatics...(Part IV)," 10.

¹⁴ Raffel, 17; Duranti, "Diplomatics...(Part II)," 4.

¹⁵ Raffel, 17-19. The 'about' or 'correspondence' relationship between record and world, which underpins the activity of recording as discussed by Raffel and the traditional diplomatic analysis of documents, seems to be predicated upon a correspondence theory of truth. Such a theory asserts, in part, that the truth of a proposition (in this particular instance, the truth of a fact determined from the use of records) is assessed "in relation to its correspondence with an external, verifiable reality." However, in her discussion of diplomatic methods for assessing record trustworthiness, Heather MacNeil suggests that contemporary archival diplomatics operates within a coherence theory of truth, according to which "the truth of a proposition is assessed in relation to its coherence with other propositions that we accept as true." MacNeil, *Trusting Records*, 114-15. While still describing a 'correspondence' relationship between record and world, Raffel complicates the notion of the world as 'an external, verifiable reality' apart from the record, or rather apart from the process of record making. He writes: "The common conception is that records correspond to the world or that records make selections from the world. Our conception is that it becomes possible for a record to correspond to the world only when 'the world' is formulated as itself revealing the things which must be said about it...The proper statement of the relationship of records to the world is that, in so far as one wants to see records as corresponding to the world, one must treat the world as revealing or presenting what must be said about it." Raffel, 64.

¹⁶ Duranti, "Diplomatics...(Part II)," 4.

¹⁷ *Ibid.*, 15.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, 7-9.

²⁰ Hilary Jenkinson, *A Manual of Archive Administration* (London: P. Lund, Humphries, 1965), 11.

²¹ *Ibid.*, 11-12.

²² *Ibid.*, 4.

²³ *Ibid.*, 15.

²⁴ *Ibid.*, 86.

²⁵ *Ibid.*, 84.

²⁶ *Ibid.*, 152.

²⁷ *Ibid.*, 156-57.

²⁸ *Ibid.*, 190. See Part IV of the Manual for Jenkinson's discussion of 'Archive Making.'

²⁹ MacNeil, *Trusting Records*, 86.

³⁰ *Ibid.*, 86-87.

³¹ Duranti, "Diplomatics...(Part VI)," 11.

³² *Ibid.*

³³ David Bearman, *Electronic Evidence: Strategies for Managing Records in Contemporary Organizations* (Pittsburgh, PA: Archives and Museum Informatics, 1994), 6.

³⁴ Partner, 94, 105-6.

³⁵ In a similar way, the U.S. National Archives and Records Administration employs language that, more or less, establishes "evidence" as a term that is coextensive with "records." NARA's mission statement reads: "NARA ensures, for the citizen and the public servant, for the President and the Congress and the Courts, ready access to essential evidence." And in its Strategic Plan, NARA defines 'essential evidence' "not just as documents needed for court cases, but as material generated by or received by the Federal Government, that documents the rights of citizens, the actions of Federal officials, and the national experience." In other word, 'essential evidence' refers to the records of the Federal Government that are selected for preservation, and, likewise, the selected records comprise the 'essential evidence' of the activity of the Federal Government.

³⁶ Bearman, 17.

³⁷ Ibid. (emphasis added), 92.

³⁸ Brien Brothman, "Afterglow: Conceptions of Record and Evidence in Archival Discourse," *Archival Science* 2 (2002): 316.

³⁹ Ibid., 317. Implicit in Brothman's critique of the strong sense notion of record is a critique of the extent to which such a concept of record has become associated with a correspondence theory of truth. In critiquing the notion of record as 'recorded truth,' he is, in effect, critiquing the very notion that a record is reducible to its relation, or degree of correspondence, to the world.

⁴⁰ Ibid., 318.

⁴¹ Ibid., 323-28.

⁴² Ibid., 315-23.

⁴³ Ibid., 331. Brothman's discussion is consistent with Mark Greene's distinction between the 'archival paradigm' and the 'recordkeeping paradigm,' and his critique of the resurgence of the 'recordkeeping paradigm' (at the expense of the 'archival paradigm') in archival discourse on electronic records. Mark Greene, "The Power of Meaning: The Archival Mission in the Postmodern Age," *American Archivist* 65 (Spring/Summer 2002): 42-55.

⁴⁴ Duranti, "Diplomatics...(Part I)," 15-16.

⁴⁵ Such confusion likewise crops up in Greene's argument for a return to the 'archival paradigm.' He writes: "Ultimately the archival mission is about meaning – perhaps a better short-hand term than 'memory.'" When we speak of memory, of corporate needs, etc., we are really talking about documentary material that has meaning – meaning that transcends the immediate purpose for which the material was created and suggests the appropriateness of making it accessible for the long term." Greene, 50. The emphasis on meaning arises from a consideration of the (potential) value of records. Positing meaning as 'the archival mission' effectively displaces any consideration of the nature of records. Both Brothman and Greene seem to suggest that consideration of one (nature or value) only ever takes place at the expense of consideration of the other.

⁴⁶ Sue McKemmish, "Evidence of Me...", *Archives and Manuscripts*, vol. 24, no. 1 (May 1996): 28-45.

Chapter 2

¹ Brothman, 328.

² Ibid., 329.

³ Ibid., 318.

⁴ The two other categories of the rules of admissibility are the rules of relevancy and the rules based on extrinsic policy. MacNeil, *Trusting Records*, 35.

⁵ In considering aspects of the Common Law rules of evidence as interpreted in United States and Canadian legislation, the following discussion will alternate between the U.S. Federal Rules of Evidence and the Canada Evidence Act. U.S. Federal Rules of Evidence, arts. VIII-X; Canada Evidence Act, R.S.C. 1985, c. C-5.

⁶ U.S. Federal Rules of Evidence, Rule 801.

⁷ MacNeil, *Trusting Records*, 39.

⁸ According to the U.S. Federal Rules of Evidence, 'records of regularly conducted activity' comprise this particular exception to the hearsay rule, that is: "A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information

transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11), Rule 902(12), or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." See U.S. Federal Rules of Evidence, Rule 803(6). Section 30.1 of the Canada Evidence Act deals with the admission of business records in evidence: "Where oral evidence in respect of a matter would be admissible in a legal proceeding, a record made in the usual and ordinary course of business that contains information in respect of that matter is admissible in evidence under this section in the legal proceeding on production of the record."

⁹ *McCormick on Evidence*, 3rd edition (St Paul: West Publishing, 1984), 878-80.

¹⁰ Kim Lane Scheppele, "The Ground-Zero Theory of Evidence," *Hastings Law Journal* 49 (1997-98): 322-23, quoted in MacNeil, *Trusting Records*, 42.

¹¹ *McCormick on Evidence*, 684-87.

¹² MacNeil, *Trusting Records*, 46.

¹³ *McCormick on Evidence*, 684-87. For the rule governing authentication in general, see U.S. Federal Rules of Evidence, Rule 901, which reads: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." For the rule governing authentication of electronic documents, see Personal Information Protection and Electronic Documents Act, Part 3, Amendments to the Canada Evidence Act, Section 31.1, which reads: "Any person seeking to admit an electronic document as evidence has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic document is that which it is purported to be."

¹⁴ *McCormick on Evidence*, 687-95. For examples of authentication that conform with requirements of the rule, see U.S. Federal Rules of Evidence, Rule 901(b).

¹⁵ See U.S. Federal Rules of Evidence, Rule 1002, which reads: "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress."

¹⁶ *McCormick on Evidence*, 704-5.

¹⁷ Amendments to the Canada Evidence Act, s. 31.2(1). Section 31.3 expands upon this application of the best evidence rule to electronic documents by delineating the grounds for a circumstantial presumption of integrity. The section reads, in part: "For the purposes of subsection 31.2(1), in the absence of evidence to the contrary, the integrity of an electronic documents system by or in which an electronic document is recorded or stored is proven...by evidence capable of supporting a finding that at all material times the computer system or other similar device used by the electronic documents system was operating properly or, if it was not, the fact of its not operating properly did not affect the integrity of the electronic document and there are no other reasonable grounds to doubt the integrity of the electronic documents system."

¹⁸ Amendments to the Canada Evidence Act, s. 31.8 (emphasis added).

¹⁹ *Ibid.*, s. 31.5.

²⁰ See Luciana Duranti, Terry Eastwood, and Heather MacNeil, *Preservation of the Integrity of Electronic Records* (Dordrecht: Kluwer Academic Publishers, 2002).

²¹ See Authenticity Task Force, "Establishing and Maintaining Trust in Electronic Records: The Final Report of the Authenticity Task Force," in InterPARES Project, *The Long-term Preservation of Authentic Electronic Records: Findings of the InterPARES Project*, appendix 2, August 2002, <<http://www.interpares.org>>.

²² For a detailed discussion of this matter see pp. 23-24 above.

²³ See Duranti, Eastwood, and MacNeil, *Preservation of the Integrity of Electronic Records*.

²⁴ The concept of 'literary warrant,' as discussed by Wendy Duff, touches upon this aspect of the legal rules as an archival resource. 'Literary warrant' refers to authoritative statements that "describe or explain the requirements for records and recordkeeping systems," one instance of which derives from the law. Duff argues for the archival use of 'literary warrant,' for highlighting the connection between archival requirements and legal standards for record keeping (according to the rules of evidence), in order to increase the credibility of

archivists and to gain further acceptance for archival requirements for trustworthy record keeping in electronic systems. Wendy M. Duff, "Harnessing the Power of Warrant," *American Archivist* 61 (Spring 1998): 88-105.

²⁵ In his critique of the 'recordkeeping paradigm' and its displacement of the 'archival paradigm,' Greene indirectly critiques the extent to which the legal rules of evidence have permeated contemporary archival discourse on electronic records. According to Greene, the 'archival paradigm' partakes of broad conceptions of record and archives, and holds the notions of evidence and memory in balance. The 'recordkeeping paradigm,' on the other hand, narrowly conceives of records as transactional records, that is, records that "are solely evidence of transactions, that...are kept primarily (some argue solely) for purposes of administration, law, and accountability, and...serve primarily the needs of records creators." Replacing the 'archival paradigm' with the 'recordkeeping paradigm' serves to narrow the archival purview to "the preservation of records defined in transactional, institutional, evidential terms." Such a phenomenon, one aspect of which is reflected in the use of the legal rules of evidence as an archival resource, poses a danger to the archival profession and, therefore, Greene argues for a return to the 'archival paradigm.' Greene, 42-48.

²⁶ Carl B. Joynt and Nicholas Rescher, "Evidence in History and Law," *Journal of Philosophy* 56 (1959): 561-62.

²⁷ *Ibid.*, 564.

²⁸ *Ibid.*, 566-67.

²⁹ Differences in method include: the exclusion of hearsay and other kinds of evidence and the disqualification of witnesses in the legal use of evidence, as opposed to the utilization of hearsay and other evidence that falls far short of the ideal of first-hand accounts in the historical use of evidence; as well as, rigid standards of proof and criteria of evidential sufficiency in the legal use of evidence, as opposed to more flexible standards that seek to approximate or approach truth, rather than establish full proof and no corresponding criteria of minimal evidence in the historical use of evidence. *Ibid.*, 571-76.

³⁰ Morris Forkosch, "The Nature of Legal Evidence," *California Law Review* 59 (1971): 1357.

³¹ *Ibid.*, 1368.

³² *Ibid.*, 1378.

³³ William Twining, *Rethinking Evidence: Exploratory Essays* (Oxford: Blackwell, 1990), 1.

³⁴ *Ibid.*, 2.

³⁵ *Ibid.*, 2-3.

³⁶ *Ibid.*, 8-26.

³⁷ *Ibid.*, 28-29. In a later essay in the same book, Twining reworks his concept of EPF in order to formulate a 'total process model.' He writes: "it is illuminating to view questions about evidence and proof as questions about the processing and uses of information in important decisions in litigation. Information in litigation (hereafter IL) is substituted for 'judicial evidence' or 'evidence, proof and fact-finding' (EPF) as the basic organizing concept for an area of study that deserves a more central place in the discipline of law than it has occupied until now." *Ibid.*, 342, 353.

³⁸ *Ibid.*, 18.

³⁹ Patterson, 878.

⁴⁰ *Ibid.*, 878-80.

⁴¹ *Ibid.*, 881-82.

⁴² *Ibid.*, 886.

⁴³ *Ibid.*, 887.

⁴⁴ Twining, *Rethinking Evidence*, 71-72.

⁴⁵ See "Some Scepticism About Some Scepticisms" for a discussion of sceptical legal writings and the lack of direct challenge to the fundamental assumptions of the Rationalist Tradition. *Ibid.*, 92-152. In "A Pragmatic Critique of Modern Evidence Scholarship," Michael Seigel challenges certain assumptions by arguing that optimistic rationalism operates as a foundationalist theory of evidence. That is, optimistic rationalism "purports to be an overarching principle from which right answers regarding evidence doctrine can be logically deduced." The problem with this foundationalist theory, as with all such theories, is that it fails to "provide the singular concept or value upon which...[evidence] doctrine can be logically constructed." Such a failure, Seigel argues, results in extreme conclusions and indeterminacy and has led to the overall impoverishment of evidence discourse. Michael L. Seigel, "A Pragmatic Critique of Modern Evidence Scholarship," *Northwestern University Law Review* 88 (1993-1994): 996, 1010.

⁴⁶ William Twining, *Theories of Evidence: Bentham and Wigmore* (London: Weidenfeld & Nicholson, 1985), 19-20.

⁴⁷ *Ibid.*, 51-52.

⁴⁸ Jeremy Bentham, *Rationale of Judicial Evidence*, ed. J.S. Mill, vol. 1. (London: Hunt and Clark, 1827), 17-18.

⁴⁹ *Ibid.*, 17, 39-41.

⁵⁰ According to Bentham, juridical or legal evidence is "any fact, in contemplation of its being presented to the cognizance of a judge, in the view of its producing in his mind a persuasion concerning the existence of some other fact; of some fact by which, supposing the existence of it established, a *decision* to a certain effect would be called for at his hands." *Ibid.*, 24.

⁵¹ See *ibid.*, 53-57.

⁵² The use of the term 'subject matter' in articulating the signifiatory relation between evidence and fact confuses the issue a bit; it seems to suggest that evidence is the matter, the object (physical or intellectual) and the fact is the content or subject of that evidence. So, if the evidence is a physical object (a record), then the fact is the content of or statement made within the record; or if the evidence is an intellectual object (a witness' testimony), then the fact is the content of or assertion made within the oral testimony. The use of the term 'evidentiary fact' to describe the fact that serves to prove the principal fact further confuses the issue, by seeming to equate 'evidence' with 'proof' rather than formulating evidence as the inferential basis of the process of proof. Such confusion may result from trying to read too much into Bentham's theory of evidence.

⁵³ John Henry Wigmore, *The Principles of Judicial Proofs as Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials* (Boston: Little, Brown and Company, 1913), 3-4, quoted in Twining, *Theories of Evidence*, 119.

⁵⁴ John Henry Wigmore, *Evidence in Trials at Common Law*, ed. and rev. by Peter Tillers, vol. 1 (Boston: Little, Brown and Company, 1983), 14-15.

⁵⁵ Twining, *Theories of Evidence*, 125-26.

⁵⁶ David A. Schum, "Evidence and Inference about Past Events: An Overview of Six Case Studies," in *Evidence and Inference in History and Law*, eds. William Twining and Iain Hampsher-Monk (Evanston, Illinois: Northwestern University Press, 2003), 15.

⁵⁷ *Ibid.*, 17-20.

Chapter 3

¹ Brothman, 313.

² *Ibid.*, 335.

³ For a detailed discussion of this matter see pp. 26-30 above.

⁴ Luciana Duranti, "The Archival Bond," *Archives and Museum Informatics* 11 (1997): 214.

⁵ Raffel, 3.

⁶ *Ibid.*, 4.

⁷ *Ibid.*, 17.

⁸ Duranti, "The Archival Bond," 215.

⁹ Brothman, 334, 337.

¹⁰ Patterson, 876.

¹¹ For a detailed discussion of this matter see pp. 8-14 above.

¹² MacNeil, *Trusting Records*, 95.

¹³ *Ibid.*, 94.

¹⁴ Duranti, "The Archival Bond," 216.

¹⁵ *Ibid.*, 217.

¹⁶ *Ibid.*

¹⁷ Eastwood, "Towards a Social Theory of Appraisal," 73-74.

¹⁸ See *ibid.*, 71-89 and Duranti, "Concept of Appraisal."

¹⁹ Eastwood, "Towards a Social Theory of Appraisal," 81.

²⁰ Terry Eastwood, "Putting the Parts of the Whole Together: Systematic Arrangement of Archives," *Archivaria* 50 (Fall 2000): 93-94.

²¹ Ibid., 95.

²² Luciana Duranti, "The Origin and Development of the Concept of Description," *Archivaria* 35 (Spring 1993): 47.

²³ Ibid., 48.

²⁴ See *Rules for Archival Description* (Ottawa: Bureau of Canadian Archivists, 1990).

²⁵ MacNeil, *Trusting Records*, 90.

²⁶ Luciana Duranti and Heather MacNeil, "The Protection of the Integrity of Electronic Records: An Overview of the UBC-MAS Research Project," *Archivaria* 42 (Fall 1996): 48.

²⁷ MacNeil, *Trusting Records*, 96.

²⁸ Luciana Duranti, "Reliability and Authenticity: The Concepts and Their Implications," *Archivaria* 39 (Spring 1995): 5-10.

²⁹ MacNeil, *Trusting Records*, 101.

³⁰ Ibid., 102.

³¹ Schum, 15.

³² Patterson, 880.

³³ Schum, 15.

³⁴ Ibid., 11.

³⁵ Ibid., 16. One such form is *tangible evidence*, which includes objects, documents, images, measurements, and charts and which can be examined directly by the user in order to determine what event(s) it reveals. In regards to tangible evidence, the issue of credibility concerns the authenticity, accuracy and/or reliability of the evidence. Other forms of evidence include the different species of testimonial evidence (the credibility of which concerns issues of veracity, objectivity, accuracy and competence), missing evidence, and authoritative records (that is, the information extracted from records which is taken as accepted facts or matters which are accepted without further proof). These forms of evidence can occur in combination or in complex mixtures and therefore require complicated assessments of credibility. See *ibid.*, 17-19.

³⁶ Ibid., 20.

³⁷ In a similar attempt to better account for the whole range of potential archival material, Duranti highlights the main commonality between "manuscripts" and "records/archives." She writes: "Manuscripts are the natural, un-self-conscious, impartial, interrelated, and authentic residue of the performance of purposeful activity, and they have the same evidentiary nature as records/archives, if their properties are maintained intact." Duranti, "Concept of Appraisal," 341. In a footnote, she further argues that "if the nature of the material is determined by the purpose of its creation, there is no difference between what is called 'manuscripts' or 'papers' and what is called 'records.'" Ibid., n. 52. However, Duranti's argument emphasizes the common nature of archival material, whereas my discussion highlights the common nature of archival processes.

³⁸ Sue McKemmish's insights into the possible archival analysis of personal recordkeeping can be extended to a consideration of the analysis of relations between manuscripts or papers and personal events, according to an archival concept of evidence. She offers a broad working concept of 'personal events' as "our existence, our activities and experience, our relationships with others, our identity, our 'place' in the world." Establishing manuscripts or papers as matters of evidence involves the tracing and analysis of relations between these particular types of records and the personal events that produced them. Such analysis possibly includes study of the various socially assigned roles of a given individual and the particular activities related to each role, in connection with the records that result from such activities (e.g. diaries, working papers) and/or study of the personal and professional relationships between a given individual and others, in connection with the records that arise from such relationships (e.g. correspondence). McKemmish, "Evidence of Me...", 29-30.

Conclusion

¹ Terry Cook, "Archival Science and Postmodernism: New Formulations for Old Concepts," *Archival Science* 1 (2001): 4.

² Ibid., 5.

³ In my reading of it, Greene's argument for a resurgence of the 'archival paradigm' in place of the 'recordkeeping paradigm,' which he views as currently holding sway over contemporary archival discourse, is essentially an argument for replacing one set of ideas with another. In effect, the paradigmatic structure of

archival discourse would remain the same (that is, one set of ideas determining archival practice), while the content of that structure (the particular set of ideas) would change. I see this either/or form of argument as being in contrast to a postmodernist form of critique, which seeks to displace the very paradigmatic structure of one set of ideas determining archival practice, in order to open up space for the formulation and consideration of alternative sets of ideas. See p. 90, n. 43 and 45, and p. 91, n. 25 above.

⁴ Cook, 10.

⁵ Heather MacNeil, "Trusting Records in a Postmodern World," *Archivaria* 51 (Spring 2001): 45.

⁶ Ibid.

⁷ For a detailed discussion of this matter see pp. 52-54 and pp. 76-79 above.

⁸ Seigel, 995-1045. See also p. 96, n. 45 above.

⁹ Richard Rorty, "Pragmatism, Relativism, and Irrationalism," in *Consequences of Pragmatism (Essays: 1972-1980)* (Minneapolis: University of Minnesota Press, 1982), 162-65. See also MacNeil, "Trusting Records in a Postmodern World," 46-47.

¹⁰ Seigel, 1009-10.

¹¹ Rorty, 161-62.

¹² James Wilkinson, "A Choice of Fictions: Historians, Memory, and Evidence," *PMLA: Publications of Modern Language Association of America* 111 (January 1996): 80.

¹³ Seigel, 998.

¹⁴ Craig, 281. See also p. 92, n. 4 above.

Bibliography

- Bearman, David. *Electronic Evidence: Strategies for Managing Records in Contemporary Organizations*. Pittsburgh, PA: Archives and Museum Informatics, 1994.
- Bentham, Jeremy. *Rationale of Judicial Evidence*. Edited by J.S. Mill. Vols. 1-3. London: Hunt and Clark, 1827.
- Brothman, Brien. "Afterglow: Conceptions of Record and Evidence in Archival Discourse." *Archival Science* 2 (2002): 311-342.
- . "Orders of Value: Probing the Theoretical Terms of Archival Practice." *Archivaria* 32 (Summer 1991): 78-100.
- Cook, Terry. "Archival Science and Postmodernism: New Formulations for Old Concepts." *Archival Science* 1 (2001): 3-24.
- . "Beyond the Screen: The Records Continuum and Archival Cultural Heritage." Paper delivered at the Australian Society of Archivists Conference, Melbourne, 18 August 2000. <<http://www.archivists.org.au/sem/conf2000/terrycook.pdf>>
- . "Mind Over Matter: Towards a New Theory of Archival Appraisal." In *The Archival Imagination: Essays in Honour of Hugh Taylor*. Edited by Barbara Craig. Ottawa: Association of Canadian Archivists, 1992.
- Craig, Barbara L. "Selected Themes in the Literature on Memory and Their Pertinence to Archives." *American Archivist* 65 (Fall/Winter 2002): 276-289.
- Dibble, Vernon K. "Four Types of Inference From Documents to Events." *History and Theory* 3 (1964): 203-219.
- Duff, Wendy M. "Harnessing the Power of Warrant." *American Archivist* 61 (Spring 1998): 88-105.
- Duranti, Luciana. "Archival Science." In *Encyclopedia of Library and Information Science*. Edited by Allen Kent. Vol. 59, Supp. 22. New York: Marcel Dekker, 1997.
- . "Archives as a Place." *Archives and Manuscripts* vol. 24, no. 2 (November 1996): 242-255.
- . "The Archival Bond." *Archives and Museum Informatics* 11 (1997): 213-18.
- . "The Concept of Appraisal and Archival Theory." *American Archivist* 57 (Spring 1994): 328-44.

- , "Diplomatics: New Uses for an Old Science (Part I)." *Archivaria* 28 (Summer 1989): 7-27.
- , "Diplomatics: New Uses for an Old Science (Part II)." *Archivaria* 29 (Winter 1989-90): 4-17.
- , "Diplomatics: New Uses for an Old Science (Part III)." *Archivaria* 30 (Summer 1990): 4-20.
- , "Diplomatics: New Uses for an Old Science (Part IV)." *Archivaria* 31 (Winter 1990-91): 10-25.
- , "Diplomatics: New Uses for an Old Science (Part V)." *Archivaria* 32 (Summer 1991): 6-24.
- , "Diplomatics: New Uses for an Old Science (Part VI)." *Archivaria* 33 (Winter 1991-92): 6-24.
- , "The Origin and Development of the Concept of Description." *Archivaria* 35 (Spring 1993): 47-54.
- , "Reliability and Authenticity: The Concepts and Their Implications." *Archivaria* 39 (Spring 1995): 5-10.
- Duranti, Luciana and Heather MacNeil. "The Protection of the Integrity of Electronic Records: An Overview of the UBC-MAS Research Project." *Archivaria* 42 (Fall 1996): 46-67.
- Duranti, Luciana, Terry Eastwood and Heather MacNeil. *Preservation of the Integrity of Electronic Records*. Dordrecht, Boston: Kluwer Academic Publishers, 2002.
- Eastwood, Terry. "Nailing a Little Jelly to the Wall of Archival Studies." *Archivaria* 35 (Spring 1993): 232-252.
- , "Putting the Parts of the Whole Together: Systematic Arrangement of Archives." *Archivaria* 50 (Fall 2000): 93-116.
- , "Towards a Social Theory of Appraisal." In *The Archival Imagination: Essays in Honour of Hugh Taylor*. Edited by Barbara Craig. Ottawa: Association of Canadian Archivists, 1992.
- Forkosch, Morris. "The Nature of Legal Evidence." *California Law Review* 59 (1971): 1356-1383.
- Ginzburg, Carlo. "Checking the Evidence: The Judge and the Historian." In *Questions*

- of Evidence: Proof, Practice, and Persuasion across the Disciplines*. Edited by James Chandler, Arnold I. Davidson, and Harry Harootunian. Chicago: University of Chicago Press, 1994.
- Greene, Mark A. "The Power of Meaning: The Archival Mission in the Postmodern Age." *American Archivist* 65 (Spring/Summer 2002): 42-55.
- Hacking, Ian. *The Emergence of Probability*. London: Cambridge University Press, 1975.
- InterPARES Project. *The Long-term Preservation of Authentic Electronic Records: Findings of the InterPARES Project*, appendix 2. August 2002.
<<http://www.interpares.org>>
- Jenkinson, Hilary. *A Manual of Archive Administration*. London: P. Lund, Humphries, 1965.
- Joynt, Carl B. and Nicholas Rescher. "Evidence in History and Law." *Journal of Philosophy* 56 (1959): 561-77.
- MacNeil, Heather. "Providing Grounds for Trust: Developing Conceptual Requirements for the Long-Term Preservation of Authentic Electronic Records." *Archivaria* 50 (Fall 2000): 52-78.
- , *Trusting Records: Legal, Historical and Archival Perspectives*. Dordrecht: Kluwer Academic Publishers, 2000.
- , "Trusting Records in a Postmodern World." *Archivaria* 51 (Spring 2001): 36- 47.
- McCormick on Evidence*, 3rd edition. St. Paul: West Publishing Co., 1984.
- McKemmish, Sue. "Evidence of Me..." *Archives and Manuscripts*, vol. 24, no. 1 (May 1996): 28-45.
- Norton, Margaret Cross. *Norton on Archives*, ed. Thomas Mitchell. Carbondale and Edwardsville: Southern Illinois University Press, 1975.
- Parkinson, Jane. "Accountability in Archival Science." Master of Archival Studies Thesis, University of British Columbia, 1993.
- Partner, Nancy. "Making Up Lost Time: Writing on the Writing of History." *Speculum* 6 (1) (January 1986): 90-117.
- Patterson, Lyman Ray. "Evidence: A Functional Meaning." *Vanderbilt Law Review* 18 (1964-1965): 875-891.
- Petrucchi, Armando. "The Illusion of Authentic History: Documentary Evidence." In *Writers*

- and Readers in Medieval Italy: Studies in the History of Written Culture*. Edited and translated by Charles M. Radding. New Haven: Yale University Press, 1995.
- Raffel, Stanley. *Matters of Fact: A Sociological Inquiry*. London: Routledge and Kegan Paul, 1979.
- Rorty, Richard. "Pragmatism, Relativism, and Irrationalism." In *Consequences of Pragmatism (Essays: 1972-1980)*. Minneapolis: University of Minnesota Press, 1982.
- Schum, David A. "Evidence and Inferences about Past Events: An Overview of Six Case Studies." In *Evidence and Inference in History and Law: Interdisciplinary Dialogues*. Edited by William Twining and Iain Hampsher-Monk. Evanston, Illinois: Northwestern University Press, 2003.
- Shapiro, Barbara J. *Probability and Certainty in Seventeenth Century England: A Study of the Relationships Between Natural Science, Religion, History, Law, and Literature*. Princeton, New Jersey: Princeton University Press, 1983.
- Seigel, Michael L. "A Pragmatic Critique of Modern Evidence Scholarship." *Northwestern University Law Review* 88 (1993-1994): 995-1045.
- Twining, William. *Rethinking Evidence: Exploratory Essays*. Oxford: Blackwell, 1990.
- , *Theories of Evidence: Bentham and Wigmore*. London: Weidenfeld & Nicholson, 1985.
- Wigmore, John Henry. *Evidence in Trials at Common Law*. Edited and revised by Peter Tillers. Vols. 1 and 1A. Boston: Little, Brown and Company, 1983.
- Wilkinson, James. "A Choice of Fictions: Historians, Memory, and Evidence." *PMLA: Publications of Modern Language Association of America* 111 (January 1996): 80-92.