

Towards an Archival Concept of Evidence*

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RÉSUMÉ La valeur de preuve (« *evidence* ») est un concept important pour les archivistes; cependant, elle n'est pas facile à définir. Notre compréhension de l'expression « valeur de preuve » est souvent limitée par une supposition que cette notion est claire en soi (que l'on s'entend sur le même sens des mots sans les définir explicitement), ainsi que par une conceptualisation restreinte qui rattache inextricablement la valeur de preuve aux règlements légaux, à l'imputabilité et à la mémoire corporative. Depuis quelques années, on assiste à une remontée de l'intérêt envers la valeur de preuve et à une intensification du débat à son sujet, surtout depuis l'avènement des documents électroniques. Il est alors primordial que les archivistes clarifient et élaborent le concept de la valeur de preuve, afin d'arriver à en formuler une définition propre à l'archivistique. Ce texte tente justement de faire ce travail, en montrant que le concept de la valeur de preuve découle de la relation entre le document et l'événement (comme la conception légale de la valeur de preuve qui est une relation entre deux faits), en pesant les diverses affirmations émanant du concept de la valeur de preuve au sujet de la nature des documents et de certaines activités archivistiques, et en imaginant les applications et les implications possibles du concept comme un terme exprimant la pensée et la pratique archivistiques. Finalement, ce texte n'a pas pour but de présenter une seule et unique définition archivistique de la valeur de preuve, mais plutôt d'entamer un questionnement qui, on le souhaite, mènera à une meilleure compréhension de ce concept et à de nouvelles discussions portant sur quelques unes des idées-clés qui informent et qui forment notre travail individuel et collectif.

ABSTRACT Evidence is an important concept for archivists at the same time that it is a hard one to pin down in so many words. Our understanding tends to suffer from a general assumption that the notion is somehow self-evident (that we know what we mean without having to spell it out), as well as from a narrow conceptualization that inextricably links the notion with legal rules, accountability, and corporate memory. With the renewed interest in and debate surrounding the subject in recent years (espe-

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cially since the advent of electronic records), it is important for archivists to clarify and elaborate on our ideas of evidence and to work towards formulating our own concept with a meaning expressed and explored in archival terms. This paper seeks to do so by tracing an archival concept of evidence as a relation between record and event (drawn from legal conceptions of evidence as a relation between two facts), by considering the concept's various assertions about the nature of records and certain archival processes, and by imagining the possible applications and implications of the concept as a term of archival thought and practice. In the end, this paper does not seek to offer a singular archival meaning of evidence so much as to begin a line of inquiry that hopefully opens up our understanding of evidence and leads to different discussions of some of the key ideas informing and shaping our individual and collective practice.

What do we, as archivists, mean when we talk about evidence?

The complexities surrounding matters of evidence belie the simplicity of the question. Evidence is a term that is everywhere present in archival discourse, from the writings of Sir Hilary Jenkinson (in which he describes the ideal archivist as one who is committed to the "Sanctity of Evidence" and charged with the task of conserving "every scrap of Evidence attaching to the Documents" in his or her care)¹ to contemporary writings on electronic records (that foreground the notion of records as evidence and the importance of trustworthy records for corporate memory and accountability).² Archivists variously employ notions of evidence to refer to the nature, function, and value of records; to shape archival methods for treating records and (re)define the role of the archivist; to underscore the need for archival requirements for electronic record-keeping; and to provide a certain substance to archival ideas concerning the nature and purpose of the archival endeavour. Yet, in all the discourse on or surrounding *records as evidence*, what we mean by evidence is largely assumed to be self-evident. As a result, evidence has become a de facto term of archival practice without being directly addressed or fully explicated in archival terms.

Evidence is an important concept for archivists – both for its explanatory power (what it has to say about the nature and value of records, and about the purpose of the archival endeavour and the role of the archivist in society) and its normative power (how it contributes to shaping archival ideas of how to treat records and guiding practice). Yet, there is a distinct lack of clarification in our use of the term as shorthand for certain archival ideas about records. When talking about records as evidence, archivists variously assert that records *are* evidence, records *possess* evidence, records *provide* evidence, and records are important *for* evidence. While these sorts of statements may appear, on their surface, to be articulating the same general notion, it is quite a

1 Sir Hilary Jenkinson, as quoted in Terry Cook, "Archives, Evidence, and Memory: Thoughts on a Divided Tradition," *Archival Issues*, vol. 22, no. 2 (1997), p. 177.

2 Richard Cox, "The Record in the Information Age: A Progress Report on Reflection and Research," *Records & Retrieval Report*, vol. 12, no. 1 (January 1996), pp. 1–16.

different thing to conceive of records as evidence (where evidence is a metaphor for considering the nature and value of records, and the nature of the archival mission) and to assert that records are evidence (where evidence supposedly signifies a thing – a record – in and of itself); and it is a different thing still to assert that records are important for evidence (where evidence implicitly refers to the future use of records, the scope of which is often limited to demonstrating accountability, constituting corporate memory, and/or proving a fact in a court of law). It is worthwhile to clarify what evidence signifies in an archival sense and, in doing so, to be mindful of the potential differences in meaning, however slight, or else risk glossing over the complexities and nuances of evidence, as a concept and a term of archival practice.

While it is an important concept for archivists, evidence is also a hard concept to pin down in so many words. One reason for this may be that evidence is so basic to human understanding and the daily routine of individuals (in its broadest sense, forming the basis for any and all conclusions we draw about that which we do not directly observe or perceive, or of which we do not have firsthand knowledge or experience), that a great deal having to do with it simply goes without saying. Our ideas of evidence implicitly draw upon common definitions of the term as “that which manifests and makes evident.”³ For archivists (and users of archives), the assumption is that records are one such manifestation, more particularly a manifestation of facts about past events. Our ideas also draw upon a notion of “internal evidence,” that, as Ian Hacking explains, is the evidence of things as distinct from testimony and consists of one thing pointing beyond itself to another thing.⁴ The assumption, for most archivists, is that given their circumstances of creation and use, records are capable of pointing beyond themselves (as a whole) to the particular event that gave rise to them. Also at work in our ideas of evidence is a certain “metaphor based on visual perception,” that, as Nancy Partner explains, involves reading the visible traces of the past as “a manifestation, or ‘realization’ of something (event, process, thought)” and metaphorically transforming the present pieces (such as existing records) into a past whole (the event that gave rise to the records).⁵ However, these areas of concern remain largely unexplored and unexpressed in archival conceptualizations of evidence.⁶

Another reason for the difficulty in pinning down a concept may be that

3 *Oxford English Dictionary*, 2nd ed., s.v. “evidence.”

4 Ian Hacking, *The Emergence of Probability* (London, 1975), pp. 32–34.

5 Nancy Partner, “Making Up Lost Time: Writing on the Writing of History,” *Speculum*, vol. 6, no. 1 (January 1986), pp. 94, 105.

6 An exception to this can be found in the writing of Heather MacNeil. In *Trusting Records*, she introduces and explicitly engages with Hacking’s and Partner’s ideas in the context of examining the methods and rules of the legal, historical, and diplomatic disciplines for assessing record trustworthiness. Heather MacNeil, *Trusting Records: Legal, Historical and Archival Perspectives* (Dordrecht, 2000).

evidence is so specialized and specific to the disciplines that explicitly engage with and make use of it (such as law) that it can be difficult to say anything meaningful about the topic in a different context. Until recently, we have been content to borrow ideas of evidence, more or less wholesale, from other disciplines (a tendency most readily apparent in the use of the legal rules of evidence and their attendant concepts as an archival resource in various electronic records research projects).⁷ Recent writings (by those working outside the sphere of electronic records and organizational record-keeping, and by those exploring the ideas of postmodernism and their implications for archival thought and practice) have begun to question current conceptions of evidence and their predominance in archival discourse.⁸ However, rather than challenge what evidence means for archivists or re-think what it potentially signifies in archival terms, these discussions tend to draw a sharp distinction between records as evidence and records as memory, aligning one with the record-creator's perspective and the other with the record-user's perspective, in order to critique the extent to which archival discourse (with its increasing focus on accountability in the advent of electronic records) has shifted towards the evidence pole, and to highlight an "unresolved tension" between two sets of ideas.⁹ Yet, for all the questions they raise about evidence and its implications for the archival endeavour, these critiques do not shed any real meaningful light on what *evidence* (or *memory*, for that matter) means for archivists.

Thinking too narrowly in terms of binary oppositions (*either evidence or memory*) has not only contributed to the current evidence/memory divide in archival discourse, but has also kept us from fully considering the possible affinities between different, though not necessarily differing (in the sense of conflicting), archival ideas. On a superficial level, our understanding of both evidence and memory suffers from a general assumption that each notion is

7 The notion of the rules of evidence as an "archival resource" comes from Brien Brothman, "Afterglow: Conceptions of Record and Evidence in Archival Discourse," *Archival Science*, vol. 2, nos. 3-4 (September 2002), p. 318.

8 Such writings include, among others, Mark A. Greene, "The Power of Meaning: The Archival Mission in the Postmodern Age," *American Archivist*, vol. 65, no. 1 (Spring/Summer 2002), pp. 42-55, and the Brothman "Afterglow" article cited above.

9 Brothman writes of the "shift in the difficult equilibrium that archivists have always needed to establish between the two poles" of the record-creator's and record-user's perspectives. Brothman, "Afterglow," p. 327. Terry Cook discusses the "unresolved tension" between concepts of evidence and memory in "Archives, Evidence and Memory," p. 177. He further suggests that the concepts of evidence and memory exist (or could exist) in "creative rather than destructive tension," a point that I will discuss later in the paper. Terry Cook, "Beyond the Screen: The Records Continuum and Archival Cultural Heritage," paper delivered at the Australian Society of Archivists Conference, Melbourne, 18 August 2000; available at <<http://www.archivists.org.au/sem/conf3000/terrycook.pdf>> (accessed on 1 March 2005).

somehow self-evident and that we know what we mean by each without having to spell it out in so many words. On a deeper level though, our assertions about evidence and our conceptions of memory share similar assumptions about records and how they stand in relation to past events (the thoughts, actions, deeds, etc. that gave rise to them and the mental and/or business processes from which they stem). That is to say, when we speak of records as evidence *and* as memory, we always already assume a relationship between (existing) record and (past) event that enables us: 1) to conceive of records, regardless of the records creating or archives keeping environments, as being “about” the events that gave rise to them; and 2) to use records in order to gain an understanding of, or acquire knowledge about, certain events that have happened in the past and that are otherwise inaccessible to us.

The notion of a relationship between record and event is not a new idea for archivists. It grounds our most basic concepts of theory and methodology, and guides our daily practice of analyzing, selecting, and preserving records, making them accessible and rendering them intelligible to users. It also underpins our ideas about records as evidence and memory. In order to address the question of what archivists mean by evidence (or what evidence potentially means for archivists), it seems necessary to formulate an archival concept that makes explicit and gives expression to the record-event relationship – a concept that draws upon other disciplinary conceptions, but that articulates a meaning in archival terms.

This paper seeks to explore the possible shape and substance of an archival concept of evidence. Though there are many possible points of departure, I choose to begin my exploration with legal conceptions of evidence. (In light of the particular phenomenon of the legal rules of evidence often being used as an archival resource, this seems as good a place to start as any.) By taking a closer look at certain legal notions (apart from the rules of evidence) that inform Anglo-American evidence scholarship, I will trace a broader concept of evidence as a relation between two facts. I will re-formulate this concept, in archival terms, as a relation between record and event, positing that this particular relationship is the grounds for our many assumptions and assertions about the evidentiary capacity of records.¹⁰ I will then look at certain archival ideas and processes through this “conceptual lens” in order to clarify and elaborate on *what* we mean when we talk about evidence, and to re-imagine *what*, *how*, and *why* we do what we do when we treat (devise requirements for,

¹⁰ It is worth noting at this point that the following discussion will largely concern written records. I do not mean to suggest that these ideas do not (or could not) also apply to oral, artifactual, and other types of records, only that I have not yet had the opportunity to explore the specific ways in which they might.

select, preserve, and make accessible) records as trustworthy sources of evidence and memory.¹¹

A Closer Look at Some Legal Conceptions of Evidence

Legal terms and conceptions of evidence are familiar to many, if not most, archivists. They have, increasingly of late, entered the archival discourse through the findings, reports, and numerous articles stemming from the various research projects on electronic records (such as the UBC Project, the Pittsburgh Project, and InterPARES I, among others) that reference the legal rules of evidence to one extent or another.¹² The rules of particular interest to archivists are the rules of auxiliary probative policy (which are one category of the rules of admissibility) as they pertain to documentary evidence. These include: the rules governing reliability that are embedded in exceptions to the hearsay rule (particularly, the business records exception to the hearsay rule); the rules governing the authentication of documents; and the rule requiring the production of originals (the best evidence rule).¹³ In addressing the issues of the reliability, identity, and integrity of documentary evidence, the legal rules touch upon some of the key concerns of archivists who endeavour to ensure the trustworthiness of records created and maintained in electronic systems. Many of the rules and standards for trustworthy electronic record-keeping (devised by the various research projects) in effect aim to meet the pertinent requirements set out in the legal rules of evidence.¹⁴

As an archival resource, the legal rules provide archivists with a language

11 The notion of “conceptual lens” is drawn from Barbara Craig’s discussion 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*, vol. 65, no. 2 (Fall/Winter 2002), pp. 280–81.

12 Even though these types of projects also made use of authoritative sources from other disciplines – most notably the Pittsburgh Project, which also consulted the literature of the audit, records management, information technology, and medical professions for relevant customs, standards, and best practices related to records and record-keeping – for the purposes of this discussion, I am only concerned in highlighting the particular use of the legal rules of evidence.

13 MacNeil, *Trusting Records*, pp. 35–50.

14 For instance, Functional Requirement #3 of the Pittsburgh Project seeks to satisfy the business records exception to the hearsay rule (United States Federal Rules of Evidence, Rule 803) by calling for record-keeping systems to be “employed at all times in the normal course of business.” University of Pittsburgh Electronic Records Project, “Functional Requirements for Evidence in Recordkeeping,” available at <<http://web.archive.org/web/20001024112939/www.sis.pitt.edu/~nhprc/prog1.html>> (accessed on 16 March 2005). Similarly, in order to

of purpose for articulating the necessity of standards for record trustworthiness, as well as a set of specific requirements from which to formulate record-keeping standards. They also aid archivists in creating a very real incentive for organizations to manage their electronic and non-electronic records more effectively.¹⁵ However, the conceptions of evidence underpinning the legal rules tend to be narrow and rule-bound. In its most limited sense, legal evidence is merely that which satisfies the criteria set out in the rules and which is therefore admissible in a court of law. Several writers from the legal and historical disciplines offer reasoning for why this is the case. Carl Rescher and Nicholas Joynt suggest that the narrowness of legal conceptions of evidence derive from the specific purpose of law, which is primarily adjudicative and secondarily investigative (whereas other disciplines, such as history, are primarily investigative), and from the function of law, which is a matter of proving a given fact in the course of resolving conflicting claims and reaching a decision “beyond a reasonable doubt.”¹⁶ Morris Forkosch further suggests that this conceptual narrowness is linked to the jury system in common law jurisdictions that, as it evolved, necessitated the implementation of rules governing the admissibility of evidence. In this context, legal evidence has become a

ensure the reliability of records and support a circumstantial probability of trustworthiness, Rule A132 of the UBC Project requires the integration of business and documentary procedures. In order to ensure the authenticity of electronic records and to satisfy the legal rules governing the identity and integrity of documentary evidence, Requirement A.1 of the Benchmark Requirements for assessing the authenticity of electronic records developed by the Authenticity Task Force of InterPARES I prescribes the capture and preservation of certain metadata elements that explicitly express the record attributes and inextricably link these to the record. In order to ensure the integrity of the electronic system in which records are to be created and managed (thereby ensuring the integrity of the electronic records) and to satisfy the best evidence rule, Rule A131 of the UBC Project prescribes the design of a “recordkeeping and record-preservation system,” that adheres to specific rules and procedures. See Luciana Duranti, Terry Eastwood, and Heather MacNeil, *Preservation of the Integrity of Electronic Records* (Dordrecht, 2002) and 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, available at <<http://www.interpares.org>> (accessed on 1 June 2003).

- 15 The Pittsburgh Project’s concept of “literary warrant” touches upon this aspect of the legal rules as an archival resource. Wendy Duff describes “literary warrant” as authoritative statements that “describe or explain the requirements for records and recordkeeping systems,” one instance of which derives from the law. She argues for the archival use of “literary warrant” to highlight the connection between archival requirements and legal standards for record-keeping 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*, vol. 61, no. 1 (Spring 1998), pp. 88–105.
- 16 Carl B. Joynt and Nicholas Rescher, “Evidence in History and Law,” *Journal of Philosophy* 56 (1959), pp. 561–77.

special category of evidence specifically characterized by the rules of evidence that prescribe how evidence is presented and that determine *a priori* what classes of evidence are excluded.¹⁷ These observations, while perhaps not directly relevant to daily archival concerns, are relevant to broader archival considerations of evidence. They point to the inherent dangers in using the legal rules of evidence as an archival resource without being mindful of the nuances, particularities, and potential implications of the attendant concepts.¹⁸

While critiques of highly-limited conceptions of record and evidence abound in the recent archival literature, drawing upon legal conceptions of evidence need not place undue limitations on archival notions of record and evidence. The rules of evidence have their part to play in archival discourse, but there is also a broader field of evidence scholarship from which to draw further insights useful to archival thought and practice. In the big *legal* picture of evidence, the rules and their attendant concepts are components of a larger whole. In exploring an archival concept of evidence, it is worthwhile to take a closer look at other trends in Anglo-American evidence scholarship that explicitly seek to constitute a broader approach to the study of evidence.

Certain legal thinkers, William Twining foremost among them, critique the extent to which the law of evidence is conceived of as coextensive with the subject of evidence. As Twining argues, the almost exclusive concentration on the rules of evidence has placed artificial limitations on evidence scholarship, resulting in a tradition that is too narrow, atheoretical, and incoherent, and that, moreover, tends to distort key evidentiary issues and phenomena. Seeking a broader approach to the study of evidence, Twining sets out to develop a more coherent framework for the study of “evidence, proof, and fact-finding” within academic law. This approach, which he labels EPF, considers questions of fact and evidentiary matters beyond the rules of evidence (that only address questions of law), and serves to shift the emphasis from the rules governing admissibility (that are linked to only the most formal and public part of judicial processes) to questions having to do with the analysis and treatment of evidence in a legal context (that is, “questions about the collection, pro-

17 Morris Forkosch, “The Nature of Legal Evidence,” *California Law Review* 59 (1971), pp. 1356–83.

18 To avoid these dangers, it is necessary to continually ask ourselves: How well do the rules and their attendant concepts serve the broader archival endeavour? How well do they inform archival theory and methodology, and guide archival practice? How well do they take into account the whole range of archival material, from organizational records to personal papers? How well do they take into account the whole range of archival treatment, from prospective analysis to retrospective treatment of records? Whenever the answers to these questions (and others like them) are not satisfactory, we must re-visit the concepts themselves, re-thinking and re-working them until they fit our specific needs and purposes. This paper represents an attempt to re-think evidence in order to come up with more satisfactory answers to this particular set of questions.

cessing, presentation and weighing of information that reaches the decision makers”).¹⁹

Twining draws upon the writings of Jeremy Bentham and John Henry Wigmore in order to ground his approach in an “organizing theory” of evidence. (According to Twining, such a theory will provide coherence to the subject and study of evidence by mapping connections and developing a systematic, internally consistent overview.) Bentham’s theory of evidence (which integrates the logic, psychology, and philosophy of evidence) and Wigmore’s theory of proof (which integrates the study of logic and psychology of proof with the study of evidence) serve to situate the concept of evidence within a more generalized context. Moreover, these theories lend themselves to establishing 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.²⁰ Though highly-specialized, aspects of these legal theories deserve a closer look for the insights they provide on the possible shape and substance of a broader concept of evidence.

In his theory of evidence, Bentham is primarily concerned with the general nature of evidence and its role in how we construct our knowledge of the real world. Twining writes:

These ideas underlie [Bentham’s] theory of evidence: we form judgments 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.²¹

Also concerned to dissolve certain distinctions between legal and more general uses of evidence, Bentham rests his theory “on the idea that evidence in law turns on the same principles as evidence in all fields of human activity.”²²

In light of these ideas, Bentham works to make a case against all rules that govern the admissibility of evidence. In doing so, he necessarily conceives of evidence apart from such rules, as well as 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.” Moreover, he asserts that questions of evidence are not limited to forensic contexts of a legal, or even an historical, nature, but rather “are continually presenting themselves to every

19 William Twining, *Rethinking Evidence: Exploratory Papers* (Oxford, 1990), pp. 1–31.

20 *Ibid.*, pp. 27–28.

21 William Twining, *Theories of Evidence: Bentham and Wigmore* (London, 1985), pp. 19–20.

22 *Ibid.*, pp. 51–52.

human being, every day, and almost every waking hour, of his life.”²³ 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 endeavour 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 the course of dealing with 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*. He writes: “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. According to him, 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.²⁴

Bentham’s theory of evidence moves in the direction of formulating evidence as a relation between two different kinds of facts, and presents a much-needed alternative to rule-bound conceptions of evidence.²⁵ Wigmore clarifies and further expands upon this broader concept of evidence by considering the processes involved in analyzing evidence. In *A Treatise on Evidence in Trials at Common Law*, he writes:

Evidence is *always a relative term*. It signifies a relation between two facts, the factum

23 Jeremy Bentham, *Rationale of Judicial Evidence*, ed., J.S. Mill, vol. 1 (London, 1827), pp. 17–18.

24 *Ibid.*, pp. 17, 39–41.

25 Bentham also 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.” Bentham, pp. 53–57. However, these ideas are subordinate to his general theory of evidence, and it is at the level of his general theory that certain aspects can fruitfully be highlighted and applied to further considerations of the use and treatment of evidence.

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.²⁶

In this passage, Wigmore more clearly indicates just what evidence signifies. Whereas Bentham asserts that evidence refers to an evidentiary fact that relates to (that is, proves or disproves) a principal fact, Wigmore asserts that evidence more precisely signifies the *relation* between two facts – the fact to be proved (factum probandum) and the fact that proves (factum probans).

Building upon this concept of evidence as a relation between a proposition to be proved and a proposition that proves, Wigmore's theory of proof formulates the key notion that "analysis of evidence involves the study of *relations between propositions*." While this particular analysis takes place within a legal context, the principles applied in the analytical process are not legal per se. The philosophical assumption underlying Wigmore's theory of proof is that "[t]he 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, that in turn involves a straightforward application of ordinary principles of inductive logic. Such analysis is therefore based on common sense empiricism and results in judgments of probabilities.²⁷

The theories of Bentham and Wigmore (as applied by Twining in his EPF approach) serve to configure evidence as a relation between two facts and underscore the analytical processes involved in the use of evidence. These legal ideas provide a broader outlook on what evidence signifies, suggesting that it does not signify anything in and of itself, rather that it is always pointing or referring to something beyond itself (which resonates with Hacking's idea of "internal evidence"). They also provide a broader outlook on the use of evidence, suggesting that the very notion of evidence (a thing pointing beyond itself to something else) is inseparable from the use of a thing *as evidence* (as the basis from which to draw inferences about something else). In other words, they suggest that evidence is constituted by the very processes that make use of evidence in the course of proving a fact or acquiring knowledge about a past event.

These ideas of evidence, drawn from select readings of evidence scholarship, are of a very general sort. By considering them further in terms of

²⁶ John Henry Wigmore, *A Treatise on Evidence in Trials at Common Law*, ed. and rev. by Peter Tillers, vol. 1 (Boston, 1983), pp. 14–15.

²⁷ Wigmore, as quoted in Twining, *Theories of Evidence*, pp. 125–26.

records and the events giving rise to records, it is possible to begin mapping connections between a broader concept of evidence as a relation between two facts and certain concepts of archival theory and methodology, and to work towards formulating an archival concept of evidence.

Tracing an Archival Concept of Evidence

Brien Brothman's metaphor of the *afterglow*, that he introduces in his critique of the extent to which notions of record and evidence have become coterminous in archival discourse, provides a framework for formulating a broader concept of evidence in archival terms. About this metaphor, 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.²⁸

Brothman's concern is to re-characterize the relationship between record and evidence, by highlighting the elements of time and difference that necessarily exist within the record–evidence relationship, and to distinguish between “two social acts: the making and keeping of records and the gathering and making of evidence.”²⁹

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. (Conceptualizing an originary source is not the same

²⁸ Brothman, “Afterglow,” p. 313.

²⁹ *Ibid.*, p. 335.

thing as positing a singular point of origin. While we can question the possibility of knowing or gaining access to *the* origin of a record that is inevitably removed from us by time, space, and difference, we must still be able to imagine an event – action, process, thought – giving rise to a record in order for that record to have any meaning for us.) This re-working of Brothman’s metaphor shifts 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 relationships (such as that between record and evidence, as formulated by Brothman). Furthermore, in mapping connections from the previous legal discussion of a broader concept of evidence as a relation between two facts to this archival discussion, it becomes possible to configure evidence as a relation between event and record. In legal terms, 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* comprise matters of evidence. In archival terms, evidence signifies the various possible relationships between record and event.³⁰

Considering an archival concept of evidence against the backdrop of certain existing ideas as expressed in the archival literature will help to bring into relief some of its assertions about the nature (or evidentiary capacity) of records and the nature of the processes involved in treating and using records. In her paper on the archival bond, Luciana Duranti writes:

[E]vidence is not an entity, but a relationship. It is the relationship shown to the judge ... between the fact to be proven and the fact that proves it. This relationship can be found in a written document ... [T]he concept of evidence is at one time much broader than that of a record ... and much more specific, as it requires a specific relationship.³¹

The idea of evidence expressed by Duranti resonates, on a certain level, with that of an archival concept of evidence. However, she still maintains that this specific relationship is or can be contained within a record, whereas an archival concept of evidence asserts that evidence is a relationship that can be associated with a record, but that is not, and cannot be, contained within a record. A record is not so much a manifestation of the relationship that is evidence. It

30 An archival concept of evidence 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 evidence of an event. It remains to be worked out how the concept might pertain to records other than written ones.

31 Luciana Duranti, “The Archival Bond,” *Archives and Museum Informatics* 11 (1997), p. 214.

is instead a physical object that can potentially serve as one part of a possible relationship with a past event, the tracing of which establishes matters of evidence. Neither containing evidence, nor facts per se, a record merely refers to events (or facts) outside itself. The process of arriving at an understanding of the events to which the record refers is one of inference.

The sociologist Stanley Raffel, whose work is cited by Duranti among others, more fully explicates the record–event relationship in his discussion of the grounds for using records. According to Raffel, “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.” Highlighting the relation between record and event, and of 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.” 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.”³² This relationship (characterized in this discussion as evidence) is the necessary grounds for any and all potential uses of records; at the same time though, this relationship is always only a contingency, never a certainty.

Although not phrased in terms of evidence, Tom Nesmith touches upon another assertion of an archival concept of evidence when he writes:

A record is a meaningful communication, which means it consists of a physical object, plus an understanding, or representation of it. Some of what makes a record meaningful is inscribed within it, but often much of what makes it intelligible is not. Thus most of a record’s “recordness” lies outside its physical borders within the context of its interpretation.³³

Nesmith makes an important distinction between a record as a thing (a physical object) and an understanding of that thing, and further claims that a record’s “recordness” is not contained within the thing of the record but in the context of how it is interpreted (presumably, by creators, archivists, and/or users). As Verne Harris points out, “recordness” has become synonymous with “evidential value” in much of the discourse.³⁴ In light of this, Nesmith’s

32 Stanley Raffel, *Matters of Fact: A Sociological Inquiry* (London, 1979), pp. 3–17.

33 Tom Nesmith, “Still Fuzzy, But More Accurate: Some Thoughts on the ‘Ghosts’ of Archival Theory,” *Archivaria* 47 (Spring 1999), p. 144.

34 Verne Harris, “Law, Evidence and Electronic Records: A Strategic Perspective From the Global Periphery,” address delivered to the International Council of Archives Conference, Seville, August 2000, available at <<http://www.archivists.org.au/sem/misc/harris.pdf>>, p. 14 (accessed on 1 March 2005).

passage can be read as suggesting that our understanding of the “evidential value” of records (or records as evidence) does not arise from the records themselves, but from our interpretation of them (how we understand and represent them). By configuring evidence as a relation between record and event and not as something contained or inscribed within the record, an archival concept of evidence makes a similar assertion. It suggests that the capacity of records to serve as evidence stems not from the supposedly inherent nature of records, but rather from the very processes that treat and use records as evidence, that invariably involve the analysis and creation (more than mere identification) of relationships between records and events. Moreover, it suggests that the process of analyzing relationships is necessarily one of inference – that is, a process of inferring one thing (facts about a past event) from another (a record).

In making the assertions that evidence as a relationship cannot be contained within the record, that the capacity of records to serve as evidence stems from the analysis of relations between record and event, and that the analysis of relations entails inference, an archival concept of evidence serves to shift the focus of consideration from the nature of records to the nature of archival processes, and to underscore the inferential nature of certain analytical processes that underpin many, if not most, archival activities. In doing so, an archival concept of evidence provides a different, and perhaps more expansive, outlook on *what*, *how*, and *why* we do what we do when we treat (devise requirements for, select, preserve, and make accessible) records as trustworthy sources of evidence and memory. It has the potential to serve 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, as the next section will explore.

Possible Applications and Implications of an Archival Concept of Evidence

Signifying the record–event relationship, an archival concept of evidence gives more explicit expression to what is otherwise typically assumed by archivists and what effectively grounds some of our most fundamental concepts of theory and methodology, as well as our ideas about records as evidence and memory – namely, that there is a particular relationship between records and the event (action, process, thought) in which they participated that allows records to serve as the basis for drawing inferences about the past event. By making this assumption explicit and, moreover, characterizing this crucial relationship in archival terms, an archival concept of evidence helps us to clarify *what* we mean when we talk about evidence. When we talk about the value and meaning of records as evidentiary sources, we are not referring so much to any supposedly inherent nature or characteristic of the record

itself³⁵; rather we are referring to the relationship between record and event, or more precisely, to the complex of external and internal relationships between records and events, that allow us to regard and use records as evidence.

These ideas are not so much a departure from archival thought and practice as a re-reading of certain archival ideas and a slight re-characterization of archival practice. Archival conceptions of context and provenance take shape around the relationships between and amongst records, and between records and action, and archival ideas of how to treat records stress the importance of identifying these relationships in order to place and preserve records in context. So, it is nothing new to say that analyzing context and the internal and external structures of provenance is a matter of identifying, preserving, and ultimately communicating these relationships so that the records are accessible and intelligible to users, now and in the future.

However, through the lens of an archival concept of evidence, the analysis of context and provenance, which plays an important role in the range of archival activities, is precisely the set of processes that create, more than just preserve, records as evidence.

Broadly speaking, in each of the archival activities, from devising standards for electronic records to appraising, arranging, and describing records, archivists analyze context and provenance in order to safeguard the relationships that will enable records to be regarded and used as trustworthy sources of evidence. In devising standards for electronic records, archivists analyze, in part, the events that typically give rise to records, breaking them down into their component parts – that is, into functions and procedures, and then further into activities and processes – in order to develop methods for record-keeping that establish and preserve the crucial relationship between record and event. In appraising records for selection, archivists typically analyze the mandate, structure, and functions of the creator (that are among the elements comprising the event), and the procedures generating records, in order to evaluate the creator and/or function and, based upon the relation established between the event and the records arising from it, to identify records for selection and preservation. In arranging and describing records, archivists analyze the creator, the contexts of records creation and use (that is, how the creator organizes and structures its activities and how it creates and maintains records), and the records themselves in order to identify the external and internal structures of provenance and to both preserve and represent these relationships in the final arrangement and description. Across the spectrum of archival activities, archival analysis of context and provenance constitutes analysis of the relations between record and event. Based upon our understanding and assessment of

35 The question for me is not so much whether or not a record has, or can be said to have, an inherent nature, but rather whether we, as archivists and users, are ever really able to know or access that supposed nature with any certainty.

these relations, we make decisions that have a lasting impact on the records and that ultimately shape their meaning(s) for users. An archival concept of evidence helps us to understand that, at a very basic level, the archival treatment of records effectively constitutes records as matters of evidence, that, in identifying, preserving, and communicating the relationships between records and events, archivists select, shape, and situate records such that they can be regarded and used as documentary sources that are capable of serving as evidence of past events. In light of this understanding, we come to view the archival treatment of records as a set of foundational activities that effectively make possible any and all future uses of the records.

Not only does an archival concept of evidence provide archivists with a broader outlook on the impact we have upon records, but also sheds a closer light on some of our own processes in carrying out archival activities. Through this “conceptual lens,” we can begin to re-consider the role and nature of archival analysis in the treatment of records. More than just characterizing the analysis of context and provenance as the analysis of relations that create, more than just preserve, records as evidence, an archival concept of evidence also raises issues of how archivists identify the relationships between records and events, and how archivists generate the particular understanding necessary to carry out archival treatment. Archival treatment (from devising standards to creating a finding aid) constitutes a set of actions taken upon a body of records. Each action entails some sort of decision, made by the archivist in large part on the basis on his or her understanding of the context and provenance of the records. So the questions we must begin to consider include: How do we come to understand and implement the concepts of context and provenance in the course of safeguarding and making accessible a selection of trustworthy records? How do we make sense of the relationships between and amongst records, and between records and events, so that we can arrive at certain decisions for treating a body of records?

Archival analysis plays a central role in archival decision-making and treatment. But it is not enough to say that this process merely involves the analysis of context and provenance, and the identification of particular relationships. According to an archival concept of evidence, these sorts of relationships do not reside within the record nor do they necessarily already exist in order to be discovered (or identified) by the archivist. Therefore, an archivist cannot identify these relationships and come to an understanding of the context and provenance of a particular body of records merely through a study of the records and/or documentation about the creator as sources from which to glean important contextual information. Rather, archival analysis involves a further process of using the gathered information to infer facts and draw conclusions about context and provenance. An archivist’s understanding of context and provenance does not derive from the primary and secondary sources used (that is, from the records themselves and other documentation), but rather from the

inferences drawn from the information gathered from those sources.³⁶ Likewise, in the course of analysis, the archivist does not so much identify as help create (*make sense of*) the complex of internal and external relationships between records and events. In casting a closer light on archival analysis, an archival concept of evidence highlights the use of records and other documentation and the role of inference, and touches upon the speculative nature of the analytical process and the decisions and activities it underpins.

It is possible to further trace some broader implications of an archival concept of evidence. In shifting the focus from the nature of the thing that serves as evidence (in our case, the record) to the nature of the process that uses (or treats) the thing as evidence, space opens up for considering different types of records and archival activities that are usually excluded from discussions of evidence that rely too heavily on legal concepts and the rules of evidence. By positing that the evidentiary capacity of records stems from archival treatment rather than from the supposedly inherent nature of the records themselves, an archival concept of evidence serves to dissolve certain conceptual distinctions between public and private records, organizational records and personal papers, and textual and non-textual records, and provides a means to better account for the whole range of possible archival material. This shift also opens up space for considering prospective and retrospective notions of evidence, and for potentially reconciling the two. By highlighting the inferential nature of archival analysis and the speculative nature of certain archival processes, an archival concept of evidence configures *before the fact* and *after the fact* activities as similar in nature (both are matters of inferring and tracing relationships between records and events) and as constituting different, rather than opposing or mutually exclusive, approaches to the consideration and treatment of records. (Prospective analyses proceed, more or less, from hypothetical event to future record, and retrospective analyses proceed from present record to past event.) In doing so, an archival concept of evidence provides a means to better account for the whole range of possible archival activities.

But perhaps the most significant implication of an archival concept of evidence is also its simplest – the extent to which it provides a possible framework for reconciling, or at least re-thinking, the “unresolved tension” between the concepts of evidence and memory in archival discourse. Terry Cook probes this problematic area when he writes:

Evidence and memory. Are they an irreconcilable dichotomy? Or perhaps they exist as

36 My thinking here is influenced by Lyman Ray Patterson’s discussion of the distinction between proof and evidence, in which he writes that the process of proof (or 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. Lyman Ray Patterson, “Evidence: A Functional Meaning,” *Vanderbilt Law Review* 18 (1964–1965), pp. 875–91.

two sides of the same archival coin, in creative rather than destructive tension, each worthless without the other despite the fundamentally contrary implications they have for the archival endeavor? Without reliable evidence set in context, to be sure memory becomes counterfeit, or at least is transformed into forgery, manipulation, or imagination. Without the influence of and need for memory, evidence is useless and unused.³⁷

Verne Harris's response to these sorts of questions and concerns relative to evidence and memory is to argue "against the binary opposition and the either/or. It is in the both/and, the holding of these apparent opposites in creative tension, that there is *liberation*."³⁸ An archival concept of evidence provides a possible way around the seeming dichotomy and towards a more "creative tension" between the two ideas. It suggests that the idea of evidence is no longer tied specifically to the accountability function of records (as it has become in so much of the discourse on electronic records), but to their more general function of potentially serving as the basis from which to draw inferences about past events (within and, importantly, beyond the organizational context). It suggests that all uses of records (whether in the course of demonstrating accountability or writing a family history) assume a relation to a past event and involve analysis of that relationship (or network of relationships), entailing the use of records as things that point beyond themselves. It suggests that there is more in common between certain ideas of evidence and memory than we typically realize, and it is to our benefit, as individual practitioners and as a profession, to explore the possible areas of convergence, rather than get too entrenched (in our thoughts and practices) in their seeming differences. To paraphrase and expand upon what Barbara Craig has written about memory, both evidence and memory are apt analogies for archivists, but, perhaps surprisingly, most of the details of these comparisons have yet to be worked out.³⁹ Whether we want to re-configure evidence and memory as two sides of the archival coin or as overlapping areas of the "archival heartland," there is still much to explore and say on both counts. By providing a different perspective on evidence, an archival concept of evidence also provides a different perspective on memory, and hopefully marks the beginning of a different discussion of both.

With the renewed interest in, and debate surrounding, evidence, it is important for us to work out what we, as archivists, mean by evidence in so many words, and to further work towards creating our own meaning(s), in our own

37 Cook, "Beyond the Screen," p. 5.

38 He writes further: "For me, it is in this liberation that we find 'the heartland'. The heartland-in-general. And it is here that we find the archival heartland ... something which is both always with us and something for which we are always, and will always be, reaching." Harris, "Law, Evidence and Electronic Records," p. 18.

39 Craig, "Selected Themes in the Literature," p. 278.

terms. An archival concept of evidence as a relation between record and event imagines one possible (though by no means definitive) meaning, drawn from other disciplinary conceptions and articulated in archival terms. Perhaps more importantly, this discussion of the concept and its possible applications and implications marks the beginning of a particular line of inquiry into the nature of our ideas and assumptions about records and the nature of certain processes involved in treating and using records. Pursuing this inquiry further is necessary for clarifying and elaborating on the ideas that shape our thought and practice, for deepening our understanding of the archival endeavour (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.