

Human Rights and Archives:  
Lessons from the Heiner Affair

by

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## Abstract

While much has been written about how archives as records and as institutions support historical accountability, or how they can be used long after the fact to hold governments or other parties to account for past injustices, this thesis is concerned with how archival practices employed much earlier on in the history of the records can be used to protect human rights. Archives cannot prevent injustices, which will always occur, but they can be important tools in support of accountability that, collectively and over time, offer the possibility for greater respect for human rights. Archives, if viewed narrowly as cultural institutions only, often are not thought to have any explicit role in the production or use of records as a means to protect people's rights in the short term. If an injustice does occur, in the more distant past, such as cases in Canada of Aboriginal residential schools or Japanese-Canadian forced relocation, archival records in this traditional model are important evidence to address that injustice.

This thesis, however, situates archives and archival theory earlier on in the life cycle of records, within the context of government accountability for and citizen rights in contemporary or very recent cases of human rights abuse. Although its focus is on producing records that protect citizens in these cases, the thesis recognizes that the creation of accountable bureaucracies through good recordkeeping focused on transparency will ultimately serve to produce better historical archives in the long term.

The first chapter explains how records derived their importance through their long associations with power structures in Western society. The chapter then outlines how archival records have been used for purposes of accountability and redress of injustices around the world. The second chapter examines the interaction between governments and their citizens and how modern bureaucracies serve, through their records, to act as tools of transparency and accountability. Furthermore, the chapter demonstrates how the evolution of archival theory has situated archivists as potential defenders of human rights within the context of the modern state. The state, in this chapter is examined through the prism of how archivists over time have interacted with the state and its records.

Against this background, the Australian example of the Heiner Affair, presented as an extended case study, chronicles the failure of archives and the lack of formal recordkeeping processes to protect citizens from the abuses of their own government. The lessons from this case study may be applied in any jurisdiction that has the will and resources to transform its bureaucracy to include proper records management in tandem with archival authority over records destruction that cannot be corrupted easily by special interests, timid bureaucrats, ad hoc processes, or self-serving politicians. Having good recordkeeping and destruction-control processes integrated deeply and transparently in public and bureaucratic processes lowers the possibility for interference that leads to (or covers up) human rights abuses.

This thesis demonstrates that the actions of archivists matter in the short term as well as providing long-term resources of societal memory.

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## Introduction

This thesis was informed by Henry Shue's philosophical argument concerning basic rights.<sup>1</sup> Shue argued that a basic right is a right that if threatened undermines all other rights. Of course, Shue was not writing about archives or bureaucracy; he was concerned with questions of security and life, the protection of which is necessary for all other rights to be attainable. According to Shue, security and life are basic because the removal of either nullifies the enjoyment of any other rights. His basic rights are those rights that are rarely threatened in the First World realities of countries such as Canada and Australia that are the central concern of this thesis. However, his argument that rights are dependent on other rights to be effective is instructive to archivists and records managers. Without the traces that records leave, accountability for human rights abuses would be virtually impossible to achieve within the context of the Western legal tradition. Recordkeeping, this thesis will argue, is basic to human rights.

This thesis will not attempt to define or justify human rights, since that has already been addressed in detail in the philosophical literature of rights. Rather, this thesis maintains that rights are a "given" in Western society, if open to contestation and interpretation. As such, however, these rights may be defined (which is beyond the scope of this thesis), and once

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<sup>1</sup> Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton UP, 1980), 13-34.

articulated constitute an obligation by society to ensure their protection. Protection of a right is more than the proclamation of a right; protection implies that the necessary institutions, policies, and procedures be created to ensure that protection is a normal part of society's governance.

Shue, in dealing in the extreme examples of security and life, argues that society has certain obligations for rights like these to succeed. In the case of security for example, he argues that a society needs to provide policing. If we are to accept that the right to security of a person from harm is a right, then society must do more than merely create laws against assault or murder. Society has a duty to ensure the right is protected since the majority of people are incapable of ensuring their own security. Nor is it desirable that they attempt to do so by setting up private police forces or armies. Shue, therefore, is writing about the average citizen who depends on these rights and the obligation of society to ensure them. After all, if these rights were not an obligation, the powerful would still be able to secure *their* rights through affluence or influence or force. In order to ensure that rights are equitable and universal, effective institutions must be created and maintained by society, even if certain groups may object to their existence.

Where these institutions sanction and enforce rights, actively or passively, society is obligated to fund them and train their staff. In his argument, Shue uses the example of police forces, which must be more than merely citizens furnished with handguns who are allowed to patrol the streets at night. If society demands, and is capable of providing, "well-trained, tax-supported, professional police in adequate numbers, then the right has not been socially guaranteed until the police candidates have in fact been well-trained, enough public funds budgeted to hire an adequate force, etc."<sup>2</sup> Shue's example draws the distinction between making

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<sup>2</sup> Ibid., 17.

a law or proclaiming a right and providing the conditions for the maintenance of that right. Shue concedes that, in some circumstances, the obligation by society may not imply the creation of police forces because “well-entrenched customs, backed by taboos, might serve better than laws – certainly better than unenforced laws.”<sup>3</sup> However, in most Western societies, the moral or basic rights of freedom from assault or murder need active protection from standard threats.

Standard threats are particular to a specific right and liable to modification as the situation changes. However, within particular contexts, standard threats seem obvious. For example, the threat of malaria in certain regions of the world would be a standard threat against the right to life, implying that society has a duty to mitigate the threat. This does not mean that if a child dies of malaria, society has somehow undermined that child’s rights. It simply means that society has an obligation to recognize standard threats and do its best to protect its people. If a society does nothing to protect its population from malaria, even though it is within its power to do so, then that society has effectively undermined the people’s right to life. Shue recognizes the imperfection of the world where rights reside. In order to make the protection of rights more realistic, he creates a special group of rights called basic rights that need protection before other rights.

The protection of basic rights is necessary for all other rights to exist. Shue restricts basic rights to security and subsistence because without these rights, all other rights are threatened. He does not imply that rights, such as the right to education, are somehow less important from a human or moral point of view, but he recognizes that the right to education is meaningless if the student is shot on the way to school. Thus, if one had to make a choice between protecting

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<sup>3</sup> Ibid. 16.

education or providing security, the reasonable choice would be providing security. Security, therefore, is a basic prerequisite to education.

Shue's argument is simple and prone to being used in a reductive manner. Simply stated, the argument for a specific right is as follows:

1. Everyone has a right to something.
2. Some other things are necessary for enjoying the first thing as a right, whatever the first thing is.
3. Therefore, everyone also has rights to the other things that are necessary for enjoying the first right.<sup>4</sup>

The argument is prone to endless regress since one may argue that the things that are necessary to enjoy the first right are also supported by other obligations, which are further supported by other obligations and so on. However, the basic argument is useful for conceptualizing archives and records management in the context of state accountability in the Western legal tradition.

This thesis does not argue that the maintenance of rights-based bureaucratic principles based in archives and records management are basic rights, but it does draw a parallel argument that records and the processes that create them support the citizen's right to government accountability, and to justice, should their basic rights be violated, and therefore are rights, because the protection of records and processes is a necessary prerequisite to that accountability. Furthermore, this thesis does not argue that the Universal Declaration of Human Rights (UDHR) of the United Nations or any other such declarations have articulated the final set of human rights, but instead views human rights declarations as expressions of conceptions of human rights that are imperfect, always evolving, and open to contestation for many reasons, but nonetheless once such rights are implemented, even marginally, there is a demand for accountability through bureaucratic systems that good records management and archival authority can provide.

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<sup>4</sup> Ibid., 30.

In developing this argument, the following thesis is divided into three chapters, plus this introduction and a short conclusion. Chapter One argues that records initially reflected and perpetuated power structures through their use by rulers to record laws, debt, and the obligations of the governed. Through this historical association of records and power, records gradually became instruments of democratization, accountability, and then human rights in Western society. The chapter also provides examples from secondary literature of the archival record's use in the redress of human rights abuses.

Chapter Two explores how archives have become an important location of government accountability through the evolution of its practices and theoretical base. This chapter shows how archivists, as records professionals, have responded to a records-centered world to modify their practices and provide a more comprehensive record of society within a milieu of both documentary abundance and scarce resources. Furthermore, the gradual shift in perception and activity from archives as repositories of state sources to archives as societal or public goods has situated records managers and archivists at the forefront of rights protection in a records-based society. Archives are shown to occupy the same space as Shue's basic rights insofar as they are necessary within the Western recorded and rights tradition for the creation of accountable government.

Finally, Chapter Three explores how standard threats to the record undermine the ability of the citizen to hold the state accountable. Using the example of the Heiner Affair, where the State of Queensland government in Australia destroyed records to halt legal proceedings that were on the cusp of exposing grievous human rights abuse that would embarrass the government, the chapter illustrates how the absence of records management processes and clear archival authority can lead to the destruction of documentary evidence, undermining rights to good

governance and accountability, as well as fundamental justice and the rights of abused citizens. The Heiner Affair demonstrates the hypothesis of the thesis in the negative: when good records management processes are not in place, illegal records destruction occurs, the citizen's ability to achieve restorative justice or to hold governments' to account are significantly undermined.

This thesis is concerned with an event that took place literally on the other side of the earth from Canada. This has necessitated using a research base derived from secondary sources and primary documents posted on the web. Fortunately, the notoriety of the Heiner Affair has made finding such digitized primary sources easy from the reports of multiple enquiries posted on government websites. The Queensland Senate has made available online all documents pertaining to the Lindeberg inquiry and also Senate Hansard. So, too, has the Australian National Parliament. Thus, the method by which this thesis was researched involved consulting the human rights and archival literature to set the context of the relationship of archival records and human rights, and then broadly researching the Heiner Affair itself on the web, and through the published primary writings of some of its key participants. From these sources, the following argument unfolds.

## Chapter 1

### Rights and Records: The Historical Evolution of Records Power and their Use in Redressing Abuse

Human rights are based on a philosophy of the organization of society and its rules, which argues, “all individuals, solely by virtue of being human, have moral rights which no society or state should deny.”<sup>1</sup> As stated in the introduction, the actual list of human rights is contested, dependent on the societal context, and incomplete and ever evolving, but if they are to be protected, they demand records to hold abusers accountable. Thus, a well-functioning and transparent bureaucracy based in the protection of rights becomes a human right itself. Archives, acting as the memory of the state, are a necessary part of the bureaucracy that supports human rights declarations, be they national or international. While the above formulation of rights is associated with the major declarations of the nineteenth and twentieth centuries, it is the power of the record that has enabled the assertion of human rights in Western society. This chapter will demonstrate the ability of records and archives to protect rights through legal redresses. Furthermore, it will briefly show how records gained their position of authority within the Western world.

While the philosophical development of rights empowered people, their internalization was made possible by power structures that favoured codification through

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<sup>1</sup> David Sidorsky, “Contemporary Reinterpretations of the Concept of Human Rights,” in *Essays on Human Rights: Contemporary Issues and Jewish Perspectives*, David Sidorsky, Sidney Liskofsky and Jerome J. Shestack, eds. (Philadelphia: Jewish Publication Society of America, 1979), 89.

records creation and maintenance. Records were initially given power through their association with religious and monarchical authority in ancient times, and then, through their democratization, gradually shifted Western society towards a more egalitarian philosophical base, a base anchored by rights that would seek popular acceptance in a tradition that valorized the record. To observe the power of the record (or at least its inscription) in the Western tradition, one need only look at the types of records created from the most ancient times. Mesopotamia, commonly thought to be the cradle of Western civilization, produced the first rudimentary written records that were primarily used for trade and recording debt.<sup>2</sup> Ancient cuneiform tablets were important records for keeping track of commerce. They would allow people to interrelate economically, serving as evidence of economic transactions, as well as recording status and therefore power. Once these abstract symbols evolved into stable writing systems, they moved beyond simple expressions of financial transactions and accountability to serve as evidence of other power structures in society, religion and law.

The codification of written laws, derived from religious inspiration or doctrine, solidified the record's position as a purveyor of power early in history. The act of writing or inscribing laws reveals that the early rulers viewed the record as a tool of control through communication, even though it is likely that few people were literate. The inscription of laws, the recording of debt, and the enumeration of military service through records, all created a reciprocal relationship between the rulers that created records, the records themselves, and power. Records derived power from their association with the elites who could afford to produce and keep them and from the legal, religious, or

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<sup>2</sup> Denise Schmandt-Besserat, "From Accounting to Written Language: The Role of Abstract Counting in the Invention of Writing," in B.A. Raforth and D.L. Rubin, eds., *The Social Construction of Written Communication* (London: Ablex Publishing, 1988).

economic continuity and sustainability they provided. Generally, record creation was restricted to those in positions of authority; thus that authority became associated with records, regardless of their efficacy.

In the Western world, larger organizations such as the Catholic Church or courts or governments of absolute monarchs could control the message through their almost complete monopoly over the creation and distribution of information. As witnessed in the shift from oral to literate societies during the Middle Ages, the record was also increasing its importance in the larger society, no longer merely recording title and debt among elites.<sup>3</sup> Perhaps it is no coincidence that the Magna Carta was brought to force in 1215 during this time of increasing literacy in Europe. Even though that famous charter only extended certain rights to the aristocracy, it afforded the first instance of a monarch having restrictions put on his power by others who could not claim divine rights to rule. As a document, Magna Carta was the first limiter imposed on a ruler in the Western tradition and would initiate the secular historical process that led over the centuries to the British Bill of Rights, the American Declaration of Independence, and the French Declaration of the Rights of Man and the Citizen; these in turn were the key statements that foreshadowed human rights as they are recognized in the middle of the twentieth century by the United Nations. As these various charters and declarations evolved, the protection of rights broadened to include coverage of more classes of male citizens, women as well as men, and other groups often discriminated against by “mainstream” society. That process of definition and coverage continues today.

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<sup>3</sup> M.T. Clanchy, *From Memory to Written Record: England, 1066-1307* (Cambridge: Harvard University Press, 1979). Clanchy’s study is restricted to the English context and production of written materials was still largely restricted to elites.

The creation of modern states such as France and the United States in the late eighteenth century was influenced by an emerging philosophy of governance that had been percolating through Western political thought over the previous two hundred years. Based on the inversion of the previous authoritarian model, the new rights-based national constitutions declared, in France, “In respect of their rights men are born and remain free and equal”<sup>4</sup> and in the United States, “all Men are created equal, that they are endowed, by their Creator, with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”<sup>5</sup> Admittedly, the application of these declarations was biased towards the emerging commercial class and white men; however, the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen, from which those two statements are taken, are generally viewed as the “two documents most responsible for modern legal formulations of human rights.”<sup>6</sup> These documents were the also products of the history of the record, which derived increasing power from its integration with systems of societal power such as law and commerce.

Once the philosophical foundations of human rights gained acceptance through the revolutions of the United States and France, leaders of Western nations could not stop the inevitability of contemporary rights overtaking the inequalities of human history. As the rule of law evolved and gained power, recorded cases made it inevitable that individual rights would extend to traditionally excluded groups. Unfortunately, the racial prejudices of the Western world would persist, preventing some groups like the Jews or

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<sup>4</sup> *Declaration of the Rights of Man and the Citizen* (trans.), 1789, first article. Original reads “Les hommes naissent et demeurent libres et égaux en droits”

<sup>5</sup> *United States Declaration of Independence*, 1776, Preamble.

<sup>6</sup> Micheline Ishay, *The History of Human Rights from Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004), 88.

homosexuals from full inclusion in most states until more recent times.<sup>7</sup> A vicious example of this in recent memory has been the Nazi program of eradication of Jews from Germany and conquered parts of Europe. The holocaust proved, in the most negative fashion, the power of bureaucratic records and efficient recordkeeping, since the sheer organization required to identify and gather the Jews into concentration camps during a total war on two fronts, was made possible through the synthesis of vast population data on Hollerith machines.<sup>8</sup>

The Second World War was a turning point in the articulation and dominance of human rights in international relations. In response to the brutality of two world wars in the span of half a century and the Nazi genocide of the Jews and attempted extermination of other groups, the United Nations (UN) was created to control the escalating nationalism in an era of nuclear weapons that seemed to threaten the very existence of humanity itself.<sup>9</sup> Previously, the ravages of war were contained to the region of the world in which they erupted. The global character of war necessitated a global organization to facilitate peace.

The UN was created in 1945 in an effort to meet that need. Its mandate was stated clearly:

1. To maintain international peace, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

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<sup>7</sup> Lynn Hunt, *Inventing Human Rights: A History* (New York: Norton, 2007), 189. Also see William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (New York: Touchstone, 1981), 937-994. Shirer's book was based on the confidential archives of the Nazis.

<sup>8</sup> Edwin Black, *IBM and the Holocaust: The Strategic Alliance Between Nazi Germany and America's Most Powerful Corporation* (New York: Three Rivers Press, 2001).

<sup>9</sup> Hunt, *Inventing Human Rights*, 181-186.

2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion...<sup>10</sup>

These lofty principles, however, were subject to the major qualification that “nothing contained in the present Charter shall authorize the United Nations (UN) to intervene in matters which are essentially within the domestic jurisdiction of any state.”<sup>11</sup> This stipulation asserts and thereby ironically perpetuates the state nationalism that helped fuel both world wars. However, this caveat in the inaugural UN Charter was most likely crafted to get member states to agree to sign it, but it was also a way of preventing invasions of states based purely on domestic matters offending or threatening the invader.

Three years later, the modern definition of human rights was officially written as the Universal Declaration of Human Rights (UDHR). It was a non-binding declaration that set out in thirty articles what constituted human rights. The creation of the document was not without controversy, which tended to highlight the ongoing disputes between the socialist and the more libertarian perspectives. Ultimately, the Soviet Union, Byelorussia, Czechoslovakia, Poland, Yugoslavia, South Africa and Saudi Arabia abstained from signing the treaty because the predominantly individualist UDHR would “challenge the sanctity of domestic jurisdiction guaranteed by the UN Charter.”<sup>12</sup>

The non-binding nature of the UDHR made it necessary for further covenants to be drafted, making human rights compulsory for member states. These covenants

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<sup>10</sup> *United Nations Charter*, 26 June 1945.

<sup>11</sup> *Ibid.*

<sup>12</sup> Ishay, *History of Human Rights*, 223.

reflected the compromises made in the drafting of the UDHR by dividing the protection of rights along the ideological lines of the East and West. More to the point, one covenant specifically protected civil and political rights, and the other protected economic, social and cultural rights. Civil and political rights reflected the libertarian predispositions of the West while economic, social and cultural rights were more agreeable to the socialist countries of the Soviet block. The rights were officially divided because “though equally fundamental and therefore important, economic, social, and cultural rights formed a separate category of rights from the civil and political rights in that they were justicable rights and their method of implementation was different.”<sup>13</sup> Civil and political rights could be justicable insofar as all signatures to the UDHR could ensure that rights to life, liberty and security of person were protected through law,<sup>14</sup> but rights to social security<sup>15</sup> and paid vacations<sup>16</sup> were not particularly feasible in Third World countries. When the two covenants were drafted and signed in 1966, the United Nations International Covenant on Civil and Political Rights was differentiated from its sister covenant through the stipulation that it be implemented immediately. The United Nations International Covenant on Economic, Social and Cultural Rights would only need to be progressively realised as programs were developed.

Human rights exist in a world that is far more complex than the UDHR tends to assume. Human rights philosophy constantly seeks out new rights that are supported by the foundations upon which past rights were built. Mainly, human rights protect all people equally based on their shared humanity and they protect the aggregate just as the

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<sup>13</sup> Eleanor Roosevelt, *Courage in a Dangerous World: The Political Writings of Eleanor Roosevelt*, ed. Allida M. Black (New York: Columbia University Press, 1999), 164.

<sup>14</sup> Article 3, Universal Declaration of Human Rights.

<sup>15</sup> Article 22, Universal Declaration of Human Rights.

<sup>16</sup> Article 24, Universal Declaration of Human Rights.

individual would want to be protected. However, human rights are not infallible. They are not universally accepted since they are justified through a philosophical system that is based on an Occidental pedigree that manifests itself through individualist foundations. However, their fluid and evolving nature allows them to address this problem through the constant writing and rewriting of what constitutes a right. Important to the understanding of the diversity of human rights is the obligation of states to their citizenry. Ultimately, a human right is hard to define and cannot truly be contained within the pages of a document like the UDHR (and is certainly outside the scope of this thesis);<sup>17</sup> however, the documentation and codifying of the UDHR by an international community was the natural progression of records power. From ancient times to the present, the creation of records solidifies ideas and codifies rights, empowered through access to records, and disempowered through their obscurity or secrecy. The rise and spread of human rights in Western society, and later the world, were facilitated through the access and dissemination of those ideas through records.

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The rise of human rights as a foundational set of accepted rules in the Western world was facilitated by the record. Although the prestigious, landmark declarations of human rights outlined briefly in this chapter seem removed from the daily bureaucratic records production of government, they helped over time to imbue documents with authority. Great declarations, charters, and philosophical arguments not only served as

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<sup>17</sup> Hunt, *Inventing Human Rights*, 214. Hunt writes of the ambiguity of human rights stating that, “you know the meaning of human rights because you feel distressed when they are violated.”

historical foundations and justifications for human rights, they also perpetuate a basic assumption within society that records carry power. That power extended from the great foundational documents themselves to the records that drove the bureaucratic machinery of the state. This elevated position of the record, initiated by the first clay inscriptions in Mesopotamia and manifested now on digital storage devices, has created obligations to create records that are transparent and accessible by governments that take the rights of their citizens seriously. Therefore, the mundane records, created by the daily interactions between government and the governed, form a major bulwark of the protection that can be used by the weak to assert their human rights.

The use of records in the defence of human rights includes their use in redressing past wrongs. Archives play a pivotal role in this regard, holding documents that were once part of the normal business of government, but used later to reveal flawed and discriminatory policies. In Canada, there have been a number of examples over the past twenty years of use of the archival record to provide redress to groups that have been unfairly targeted by government policies. One such case was the redress that Japanese Canadians received for their mistreatment during the Second World War.

After the bombing of Pearl Harbour in 1941, the Canadian government forcibly relocated Japanese-Canadian citizens to “interior” camps away (especially) from the British Columbia coast and confiscated their belongings under the *War Measures Act* and the *Trading With the Enemy Act*. Japanese Canadians, the majority born in Canada, were viewed as a threat to Canadian security during the war, a possible fifth column that might aid a Japanese coastal invasion. However, the move was most likely motivated by the racist politics of British Columbia at the time rather than true national security

concerns.<sup>18</sup> Whatever the motivations, the relocation resulted in Japanese Canadians receiving little compensation for their belongings and in some cases they were deported to Japan after the war, regardless of their country of birth.

This incident, although traumatic and ever-present in the Japanese-Canadian experience, was rarely discussed in public and soon forgotten by the general population. However, the centennial celebrations of the first Japanese immigrants to Canada in the 1970s produced an interest in Japanese-Canadian history. Furthermore, the 1970 evocation of the *War Measures Act* to contain the Front de Libération du Québec raised concerns about the extent to which the government can use its powers to subvert the rights of citizens.<sup>19</sup> This renewed interest caused the National Association of Japanese Canadians (NAJC) to open a committee to examine the possibility of reparations, as had been done in the United States.<sup>20</sup>

The government's creation of good records during the war and their subsequent protection in the then Public Archives of Canada facilitated research on the matter. The proliferation of writing on Japanese-Canadian internment during the 1980s and 1990s demonstrates the power of the archive to help people remember and reconstruct the actions and policies of the government. Archivist Judith Roberts-Moore cited no fewer than forty-six entries from the catalogue of the then National Library of Canada that pertained directly to the internment of Japanese Canadians during the Second World War. Most of these books used the records in the Public/National Archives for sources, as well

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<sup>18</sup> Ann Gomer Sunahara, *The Politics of Racism: The Uprooting of Japanese Canadians During the Second World War* (Ottawa: Ann Gomer Sunahara, 1981), cited in Judith Roberts-Moore, "Establishing Recognition of Past Injustices: Uses of Archival Records in Documenting the Experience of Japanese Canadians During the Second World War," *Archivaria* 53 (Spring 2002), 66.

<sup>19</sup> Roberts-Moore, "Establishing Recognition of Past Injustices," 69.

<sup>20</sup> Roy Miki and Cassandra Kobayashi, *Justice in Our Time: The Japanese Canadian Redress Settlement* (Vancouver: Talon books, 1991), 61-64, cited in *ibid*.

as those found in other institutions.<sup>21</sup> However, these archival records were not only used to raise awareness of the subject as an important, if heretofore overlooked dimension of Canadian history, they were also used to hold the government accountable for its previous policies.

The NAJC's suit against the federal government sought "an apology from the government, individual compensation, a community development fund, abolition of the *War Measures Act*, and the establishment of a human rights foundation to study racism and make recommendations on how to foster human rights."<sup>22</sup> The government acknowledged the injustice in 1988, and granted the claim of \$21,000 individually to those who suffered the internment and \$12 million to the NAJC to undertake human rights initiatives and education for the community.<sup>23</sup> This win for Japanese Canadians opened up avenues for other immigrant groups that had been treated unfairly during the first half of the twentieth century.

An apology and approximately \$20,000 each for survivors and their spouses was given by the Government of Canada to Chinese Canadians in 2006 for the imposition of the Chinese Head Tax and Exclusion Act. This resulted from pressure from the Chinese-Canadian community, which viewed the redress offered to Japanese Canadians as an opportunity to expose racist immigration policies also imposed on them. Similarly, Ukrainian Canadians sought redress for their classification as enemy aliens and internment in Canadian concentration camps during the First World War from 1914 to 1920. Although the Ukrainian-Canadian Foundation received \$10 million from the

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<sup>21</sup> Ibid., 65.

<sup>22</sup> Roy Miki and Cassandra Kobayashi, *Justice in Our Time*, 97, cited in Roberts-Moore, "Establishing Recognition of Past Injustices," 70.

<sup>23</sup> Roberts-Moore, "Establishing Recognition of Past Injustices," 71-72.

government in 2008 to redress the internment, the money was merely a way for these communities to force the Canadian public to “reconcil[e] the past with modern notions of human rights and justice for past transgressions”<sup>24</sup> Both of these groups would not have been able to pursue the redress if not for the records created by government departments and their preservation in Canadian archives.

In the above cases, the archives were instrumental in providing evidence for court actions that sought redress for historical injustices. Similarly, First Nations have fought a protracted battle with the Canadian government over disputed land claims and treaty rights, which were unfairly negotiated and unjustly administered, sometimes going back centuries. The history of European settlement and First Nations is rife with inequity, but the relationship between the Government of Canada and First Nations changed when, in 1969, the Trudeau government sought to abolish the *Indian Act* and shift the responsibility for administering First Nations issues to the provinces. The move was strongly opposed by Native groups, who understood the *Indian Act* to be a colonial document, but still recognized its value in making the relationship between First Nations and the Crown clear. Essentially, the document recognized First Nations’ relationship with the Crown, in which the First Nations’ autonomy superseded the provincial governments after Confederation.<sup>25</sup> Instead of repealing the Act, First Nations wanted to amend it to provide a “framework for ‘Indian Government by and for Indian people’ within Confederation. Such an Indian governing structure would be parallel, not

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<sup>24</sup> Ibid., 74.

<sup>25</sup> James Morrison, “Archives and Native Claims,” *Archivaria* 9 (Winter 1979-80), 17.

subordinate, to provincial government.”<sup>26</sup> This stance led to a claims process in 1969 that would highlight archival documents being used in a decades-long process of determining the extent of Aboriginal lands across Canada, their past uses and character, and their administration (and mis-administration) by government.

In reality, the land claims process continues to this day, and has illustrated in many instances, the limitations of the archive as an instrument when researching a colonized people. As evidence, the archive tends to support the point of view of the documenters and their bureaucracy. This is especially true when relying on documents that record the interactions between historically distinct oral societies and Western bureaucratic empires. However, the postmodern turn in academic history has allowed archival sources to be read in different ways to tell the story of the colonized rather than the colonizers. Elizabeth Vibert’s book *Traders’ Tales* is one such example, using the colonial writings of British Columbian pioneers to allow pre-literate West Coast First Nations to find a voice in historical writings. Vibert found her sources in the British Columbia Archives, Hudson’s Bay Company Archives, and National Archives of Canada, among others.<sup>27</sup>

The treatment of First Nations children in residential schools resulted in intensive use of Canadian archives to address a specific human rights abuse. Residential schools were part of a protracted initiative by the Government of Canada to force Aboriginals to adopt Western standards. The schools date back as far as the early 1800s, when Protestant missionaries created residential schools in Upper Canada with the objective of

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<sup>26</sup> Marie Smallface Marule, "The Canadian Government's Termination Policy: From 1969 to the Present Day", in Ian A.L. Getty and Donald B. Smith, eds., *One Century Later: Western Canadian Reserve Indians Since Treaty 7* (Vancouver: University of British Columbia Press, 1978), 103-116.

<sup>27</sup> Elizabeth Vibert, *Traders’ Tales: Narratives of Cultural Encounters in the Columbia Plateau, 1807-1846* (Norman: University of Oklahoma Press, 1997), 325.

teaching agriculture and Christianity to Aboriginals. However, the federal Department of Indian Affairs made school attendance mandatory in 1920, which led to the forced removal of children from their homes to attend residential schools. What happened in the schools is subject to much debate, but the objective to assimilate First Nations into the mainstream is generally accepted and noted in early policies, such as the *Act to Encourage the Gradual Civilization of Indian Tribes in this Province, and to Amend the Laws Relating to Indians* in 1857. This policy has been characterized as cultural genocide due to the schools' focus on removing children from their parents, not allowing them to speak their native language, and forcing them to practice a religion not of their choice, to say nothing of the physical and sexual abuse of students by teachers, the full extent of which is still being investigated. The repercussions of this policy have been written about in great detail. Increased alcoholism, suicide, and a host of other social problems appear in greater rates among First Nations, and particularly residential schools survivors.<sup>28</sup>

Archives have been a powerful tool for First Nations to hold the Government of Canada accountable and instrumental for residential school survivors, who have won a \$1.9 billion common experience payment. Additionally, archives have been important for survivors to prove their residency so that they can receive their portion of the payment, but more importantly, the money is tacit recognition by the government that the

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<sup>28</sup> John S Milloy *A National Crime: The Canadian Government and the Residential School System* (Winnipeg: University of Manitoba Press, 1999); Suzanne Fournier and Ernie Crey, *Stolen From Our Embrace: The Abduction of First Nations Children and the Restoration of Aboriginal Communities* (Vancouver : Douglas & McIntyre, 1997); James Roger Miller, *Shingwauk's Vision : A History of Native Residential Schools* (Toronto: University of Toronto Press, 1996). These are but three books among many on the subject of residential schools that outline the negative social effects of the residential schools. Library and Archives Canada has a bibliography of sources on the subject that can be found at [www.collectionscanada.gc.ca/native-residential/index-e.html](http://www.collectionscanada.gc.ca/native-residential/index-e.html) and the Assembly of First Nations has a resources page on their website at [www.afn.ca/residentialschools/resources.html](http://www.afn.ca/residentialschools/resources.html), both accessed on 3 January 2010.

recipients' human rights have been abused and that Canada's past policies towards First Nations were wrong. As powerful as the archive can be, however, it is limited in their scope when dealing with these situations because oppressed groups like First Nations rarely have a direct voice within the documentation.<sup>29</sup> In order to correct that imbalance, the Government of Canada sought to give a voice to First Nations through other means.

The settlement also set aside \$60 million for a truth and reconciliation commission to restore balance to the record of the residential schools found in government and church archives and to allow survivors to tell their own stories directly rather than indirectly. Truth and reconciliation commissions are new in the Canadian context, but they have been used in places such as South Africa to give voice to oppressed people who have little representation in the official records of government. Verne Harris, a South African archivist and noted international archival theorist, worked on the archives of the South African Truth and Reconciliation Commission (SATRC). He says the SATRC conducted the "largest survey of human rights violations undertaken anywhere in the world,"<sup>30</sup> but also explains how archiving information by a truth and reconciliation commission can be problematic.

Harris identifies problems related to the overall objective of archiving the SATRC, but also to archiving in general. Specifically, do archives help society to remember events such as apartheid, thus allowing the oppressed to seek justice, or are these archives created to allow people to forget, and not press on to reform society now

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<sup>29</sup> Jeannette Allis Bastien, "Whispers in the Archives: Finding the Voices of the Colonized in the Records of the Colonizer," in *Political Pressure and the Archival Record*, eds., Margaret Proctor, Michael Cook, and Caroline Williams (Chicago: Society of American Archivists, 2005), 25-44. Bastien writes that the voice of the colonized must be read through the colonizer, much like Vibert's *Traders' Tales*.

<sup>30</sup> Verne Harris, "Contesting Remembering and Forgetting: The Archive of South Africa's Truth and Reconciliation Commission," in his *Archives and Justice: A South African Perspective* (Chicago: Society of American Archivists, 2007), 291.

as a priority, knowing that the information still exists for future generations, if needed?

Ultimately, the purpose of SATRC was “to promote reconciliation through the bringing of light to dark spaces through the exposing of hidden pasts,”<sup>31</sup> but Harris recognizes the uses of archives in the forgetting that Jacques Derrida observes:

[T]he archive – the good one – produces memory, but produces forgetting at the same time...perhaps this is the unconfessed desire of the Truth and Reconciliation Commission. That as soon as possible the future generation may have simply forgotten it...Having kept everything in the archive.<sup>32</sup>

Derrida recognizes the unintended consequence of archiving for the public sphere, which mirrors the objective of writing such things as personal notes to self in the private sphere. These are written so that one can forget the note’s content until needed at some future date. However accurate Derrida may be in this observation, conceiving of archives as a place of forgetfulness leaves people open to cultural genocide through the destruction of archives as was the case in the former Yugoslavia during the 1990s.<sup>33</sup> Derrida does not view archives as locations of permanent amnesia, but rather safes where memory can be accessed and not actively remembered. The destruction of an archive is doubly horrific because the historical memory of a people may be totally lost, but also those who have stored such things as Truth and Reconciliation documents lose the very location and

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<sup>31</sup> Ibid., 300.

<sup>32</sup> Jacques Derrida, “Seminar on *Archive Fever*,” in *Refiguring the Archive*, ed. Carolyn Hamilton, Verne Harris, Jane Taylor, Michele Pickover, Graeme Reid, and Razia Saleh (Dordrecht: Kluwer Academic Publishers, 2002), 54. Also see Jacques Derrida, *Archive Fever: A Freudian Analysis* (Chicago: University of Chicago Press, 1995).

<sup>33</sup> George Mackenzie, “From Solferino to Sarajevo: Armed Conflict, International Law, and Archives,” in *Political Pressure and the Archival Record*, Eds., Margaret Proctor, Michael Cook, and Caroline Williams (Society of American archivists; Chicago, 2006), 241-242; András J. Riedlmayer, “Crimes of War, Crimes of Peace: Destruction of Libraries during and after the Balkan Wars of the 1990s,” *Library Trends* Vol. 56, Num 1 (Summer 2007), 110-112; Society of American Archivists, *Resolution on the Systematic Destruction of Archives in Kosovo and War-Caused Devastation of Archives Throughout Yugoslavia*, April 14, 1999, found at [www.archivists.org/statements/kosovo\\_resolution.asp](http://www.archivists.org/statements/kosovo_resolution.asp), accessed on 9 January 2010.

proof of official recognition of wrongs they suffered. Hence, they are forced to actively remember and relive their trauma.

Harris recognizes the role of forgetting in archives, but also argues that these archives are problematic by the nature of their composition. The government's secrecy and processes for records destruction leading up to the end of apartheid sought to undermine the idea that records of the state could hold the state accountable. Furthermore, secrecy acts protected intelligence and military departments from scrutiny because the bureaucratic rules required destruction of records that hid evidence of their actions.<sup>34</sup> The creation and destruction of records in South Africa mirrored other oppressive regimes, where the bureaucratic machine was designed to absolve individuals of "any and all personal responsibility for any possible violations of the rights of others."<sup>35</sup> Furthermore, the records of the SATRC, although wide-ranging and comprehensive, are subject to an archival system that did not have the professional capacity to make the records available for long-term research.<sup>36</sup> However badly processed these records were, they still have value because their preservation ensures that a debate about apartheid and the process of remembering apartheid in South Africa will be a meaningful one. The preservation of the SATRC records and records about the SATRC ensures that South Africans can inform themselves about the power structures of the apartheid government, even if the records are problematic.

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<sup>34</sup> See also Verne Harris, "'They Should Have Destroyed More': The Destruction of Public Records by the South African State in the Final Years of Apartheid, 1990-1994," in *Archives and Justice*, 305-336.

<sup>35</sup> Bruce Montgomery, "The Iraqi Secret Police Files: A Documentary Record of the Anfal Genocide," *Archivaria* 52 (Fall 2001), 69-99.

<sup>36</sup> Verne Harris, "Contesting Remembering and Forgetting," in *Archives and Justice*, 296. Harris reveals "inadequate professional processing...limits their usefulness."

Part of what makes the records created in truth and reconciliation commissions problematic is the creation of the record after the abuse has taken place. Records on both sides, the oppressor and the oppressed, are more likely to be inaccurate, incomplete or exaggerated when created from memory long after the fact, and often in new political circumstances and shifting values. Records created as an integral part of the normal course of ongoing business are likely to be less prone to gaps, which is why operational records are so highly prized for juridical purposes of all kinds. In cases such as the official government files of the Anfal Genocide in Iraq, which were captured by Kurdish rebels and moved to the United States for analysis and safe keeping, the records were created by the Iraqi secret police as they went about their established routines and chronicled the oppression of the Kurds during the 1980s. The records described the genocide there from 1987 to 1989.<sup>37</sup> The records were complete and reflected the efficiency of a totalitarian bureaucracy that has been observed in other regimes, including Nazi Germany and the Khmer Rouge.<sup>38</sup> This efficiency is useful in redressing human rights abuses when records are captured, because the records can be remarkably complete and well organized. But there can be difficulties in holding those governments accountable when they are given time to implement massive records destruction, or when information comes to light only after the main perpetrators are failing or dead. For example, despite evidence of a highly sophisticated bureaucracy at the Tuol Sleng and Krang Ta Chan prisons in Cambodia, little documentation exists from the genocide years. In fact, the majority of the documentation that has been collected “originated after the genocide when the Cambodian government surveyed Cambodians concerning the loss of

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<sup>37</sup> Montgomery, “The Iraqi Secret Police Files,” 90.

<sup>38</sup> Ibid., 72. Also see Dawn Adam, “The Tuol Sleng Archives and the Cambodian Genocide,” *Archivaria* 45 (Spring 1998), 5-26

relatives and family members.”<sup>39</sup> Even though this documentation was produced after 1979, it has been invaluable in understanding the “demographic dimensions of the genocide and the ideological preoccupations of the Khmer Rouge.”<sup>40</sup> In fact the “Million Documents”<sup>41</sup> would have been far more effective as evidence if the total record of the bureaucracy itself had been preserved. That said, the Tuol Sleng records have served as a foundation for the creation of the museum that has recently been added to UNESCO’s Memory of the World Register, demonstrating the usefulness of collecting records that, although incomplete, can be used in future redresses or recognizing human rights abuses.

Collecting records for the purpose of historical redress is a valuable use of archives in the fight for global human rights. This sort of active collection policy, however, demands that the archivist become an activist, seeking out and saving records that can be used to prove abuse and be used in future redress proceedings. Furthermore, the ad hoc nature of records collection leaves protection of the rights of those who have been suppressed to the chance possibility that this sort of evidence will exist when they seek redress. This thesis does recognize that in many contexts records creation and collection by people external to the bureaucracy is necessary in order to prove abuse and support such redress, as well as aid in healing and reconciliation. Governments that abuse their citizens are less likely to turn over incriminating documentary evidence to international courts. Thus, non-governmental organizations (NGOs) need to document abuse or collect records from government bureaucracies when the opportunity arises.

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<sup>39</sup> Bruce P. Montgomery, “Human Rights: A Survey of Archival Sources in the United States and Canada,” *Human Rights Quarterly* 23 (2001), 441.

<sup>40</sup> Ibid.

<sup>41</sup> “The Million Documents” is the name used by Documentation Centre of Cambodia to refer to the survey information discovered in 1995 that substantiates the deaths of over a million people during the Khmer Rouge genocide.

Unfortunately, NGOs are rarely staffed by professional archivists who can work with records creators to preserve documents so that they can be used as evidence in court proceedings.<sup>42</sup>

This thesis does not concern itself with the collection of records by external parties with the objective of protecting human rights, without at all denying the often-laudable results of such work, or the graphic illustration thereby of the power of the records and the archive. Instead, the thesis focuses on the creation of accountable bureaucracy and the position of archives within those bureaucracies. Archives, therefore, become powerful buttresses against the erosion of human rights within Western liberal democracies because they help to create conditions in which governments cannot easily hide corruption. Good recordkeeping in such bureaucracies thus gives citizens fruitful avenues for legal redress. Although liberal democracies are not generally associated with human rights abuse, the example provided in the third chapter demonstrates that rights-based societies can be subject to corruption, if only hidden better than the dictatorships mentioned above.

Human rights are often defined, or at least viewed, through the lens of their practical historical evolution or of abstract philosophical or political theory. While this chapter offers a brief summary of the broader context, this thesis makes no pretense to extend this discussion of the fundamental nature of human rights, either historically or philosophically. One theme that emerges, however, is that human rights are intricately connected with the use, abuse, and containment of power, both as a means for the powerful to exercise and maintain their hegemony over time, and for others to challenge

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<sup>42</sup> Louis Bickford, "Human Rights Archives and Research on Historical Memory: Argentina, Chile, and Uruguay," *Latin American Research Review* 35 (2000), 160-182. Bickford's article demonstrates the lack of knowledge most NGOs have when they seek to preserve documents for human rights purposes.

the powerful when that power is exercised unfairly or illegally. That challenge foregrounded archives in the past three decades especially, as places where victims may find evidence of their abuse by power in the past, and may both hold the abusers (or their legal successors) to account and find some sense of restoration and reconciliation. The thesis now turns, against this general background, to examine records, and recordkeeping, within the power of modern Western bureaucracies and the archival response.

## Chapter 2

### Rights and Bureaucracy: Protection Through Process

The history of archival theory and its subsequent application to the administration of government records have, intentionally or unintentionally, aided the general public to hold the world's governments accountable for their actions. The changes in archivists' articulation of professional standards in response to various external factors have created an institution with great potential for allowing the citizen to peer into the mechanisms and practices of the state. This is especially true in the complex bureaucracies of the modern world where massive amounts of documentation are necessary for the proper administration of the social-welfare state. Bureaucracy leaves its documentary residue in the offices of government whose records managers and archivists preserve it for their own accountability and historical reasons. That residue, that documentary trail, is the information that reveals corruption, abuses of power, and denials of citizens' human or other rights, as well as affirmation and evidence that these rights are being respected and implemented. The absence of that documentary trail can often be just as incriminating as its presence. Moreover, the official records of business and government are not a sacrosanct preserve nor locked in time; their ability to provide evidence over time has

been magnified, reflecting the postmodern sensibilities of the late twentieth and early twenty-first centuries.

The perceived infallibility and power of the record have varied in different times and places. This chapter will examine the changing treatment of the archival record as evidence and bureaucratic power after the French Revolution, through the modern age, to its current conception within postmodernism. It will be restricted to the Western European tradition, which then spread to North America and some former European imperial holdings. Ultimately, the chapter will argue that archival records have moved from positions of positivist authority of unbiased “truth” wielded by large bureaucracies to fragments of the larger picture that cannot be trusted without first understanding previously ignored contexts surrounding the records. Finally, it will argue that archives have evolved as institutions through their intellectual orientation from passive receivers to active partners in the creation of records.

The modern evolution of archives mirrors the development of modern bureaucracy.<sup>1</sup> The very word bureaucracy has its origins in the merger of the French “bureau” (office) and the Greek “cracy” (govern or rule) to mean rule by the office. The first official definition of bureaucracy, in the fifth edition of the *Dictionnaire de l'Académie française*, simply cites the word as “power and influence of chiefs and assistants in administration.”<sup>2</sup> It is not until the next edition of the dictionary, some thirty-seven years later, that the negative connotations of the word are revealed. The

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<sup>1</sup> For the purposes of this thesis, modern will denote the period after the French Revolution up to the emergence of postmodern thinking in the archival literature in the late 1980s.

<sup>2</sup> *Dictionnaire de l'Académie française*, 5<sup>th</sup> Ed., 1798, 767. Found at <http://colet.uchicago.edu/cgi-bin/dico1look.pl?strippedhw=bureaucratie> on 29 May 2007. “Pouvoir, influence des Chiefs et Commis de Bureau dans l'Administration.” Translation mine. This thesis does not locate the emergence of bureaucracy with the new French Republic. Bureaucracy existed at the emergence of the first written records, but the formal articulation of modern bureaucracy.

dictionary then states that the word is hardly used except to describe abusive influence committed by administrative officials.<sup>3</sup> This shift in meaning implies an attitude shift in French culture towards the nature of bureaucracy.

Perhaps the positive or neutral definition of the term “bureaucracy” in the fifth edition can be attributed to the historical circumstances of the years preceding the dictionary’s publication in 1798. The euphoria of the destruction of the Ancien Régime and its replacement by the First Republic over the previous nine years witnessed the rise of a new patriotism in France that would have been expressed through support of institutions of the fledgling state and the rejection of the previous order. For certain, a bureaucratic regime existed before the Revolution and obviously before the very word was invented, but the bureaucrats did not administer the kingdom for the people during the rule of the monarchy. Instead, the bureaucracy served the monarchy’s need to prove its inherited rights, administer its territory, and keep track of debts and landholdings. The French Revolution radically changed that notion so that the bureaucracy of a nation now existed to serve, in principle, the broader public, not a centralized authority or small power elite.<sup>4</sup>

The rise of an official bureaucracy that was intended to serve the populace required the creation of a system of recordkeeping that could be used to hold government accountable. A functioning bureaucracy of course needs good records to track its

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<sup>3</sup> *Dictionnaire de l’Académie française*, 6<sup>th</sup> Ed., 1835, 1:239. Found at <http://colet.uchicago.edu/cgi-bin/dico1look.pl?strippedhw=bureaucratie> on 29 May 2007. “Ce mot nouveau ne s’emploie guère que dans la conversation, pour exprimer l’influence abusive des commis dans l’administration.» Translation mine.

<sup>4</sup> This generalization includes early Greek and Roman societies, which were largely made up of slaves ruled by small, but powerful elites. This statement does not imply, however, that the French Revolution was unique or the first move away from absolutist monarchical control. It was, however, the first where the rights of the public to access the records of public servants was formulated as outlined in section 15 of *Déclaration des Droits de l’Homme et du Citoyen*, 1789. Found at [http://fr.wikisource.org/wiki/D%C3%A9claration\\_des\\_Droits\\_de\\_l%27Homme\\_et\\_du\\_Citoyen](http://fr.wikisource.org/wiki/D%C3%A9claration_des_Droits_de_l%27Homme_et_du_Citoyen) accessed on 21 June 2007

activities for its own purposes, which may be myriad and particular to its business functions. This thesis does not argue that the bureaucracy that emerged in post-revolutionary France fulfilled accountability goals as part of its deliberate intention, but it does suggest that the emergence of a functioning bureaucracy with good records systems would allow accountability in government to emerge later. In fact, the interplay between the archive and bureaucracy during and after the French Revolution initially undermined the ability of the French to hold the Ancien Régime accountable.

After the French Revolution, France entered into a campaign of national reconstruction that sought to erase from the record all evidence of past servility of citizens to the monarch.<sup>5</sup> The new government thus systematically destroyed many of the records of the old aristocracy and monarchy. Specifically, the revolutionaries targeted the records of title and privilege that upheld positions of elite members of the Ancien Régime in French society. The state was creating a new historical reality in order to discredit the old system and normalize the new democracy. As such, the archives of post-Revolutionary France fulfilled the same role as the archives in pre-Revolutionary France. They were tools of control rather than liberation. That control was predominantly economic in nature since the new state did not destroy records that undermined the economic interests of the bourgeoisie whose members would become the primary benefactors of the new organization of society.<sup>6</sup>

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<sup>5</sup> Judith M. Panitch, "Liberty, Equality, Posterity?: Some Archival Lessons from the Case of the French Revolution," *American Archivist* 59 (Winter 1996), 30-47.

<sup>6</sup> It is important to understand that pre-twentieth century state archives were predominantly repositories of official documents and contracts. Most pre-revolutionary records were instruments of economic power through land title and contracts by the Monarchy over the greater society. While culturally significant documents were bound to exist in these archives, their principal original purpose would have been to record obligations of subjects to the Monarchy and Church, and obligations of subjects among themselves.

Important to understanding the power of the record, and by extension the archive, was the belief that records could threaten the emerging French nation. This reveals the belief that the records themselves were the location of power, not necessarily the monarchy that had originally created them, and that destroying the evidence of subservience to the Crown (or aristocracy), would erase that history from the minds (and legal obligations) of the French. This belief in the power of the record was more pragmatic than modernist assertions that the record and the archive are natural, neutral accumulations that simply present facts for understanding historical truths. Perhaps the emerging modern age had not fully taken hold and the lessons of Machiavelli were still present in the minds of the new rulers of the First Republic of France. However, that archives could be places of national identity was evident from their very opening to the public after the Revolution, even if the government itself understood that the archive was simply one version of the truth that would dominate all others due to its permanence and context of creation.

In government, the context of records creation was the increasingly complex bureaucracies that spread across Europe, Great Britain, and their respective imperial holdings after 1800. These bureaucracies were in many cases holdovers of the replaced (or reduced to “constitutional” status) monarchies, but were now repurposed to serve the emerging “democracies” of the day. They were intended to serve the citizenry within a democracy and, as such, they had to be transparent insofar as citizens should have access to their records in order to hold government to account. The French Law of 7 Messidor

Year II (1794) proclaimed “the right of citizens to have access to public archives.”<sup>7</sup> This right of access to archives was specifically an adjunct to Article 15 of the 1789 Declaration of the Rights of Man and the Citizen, which stated that the “society had the right to request an account of the public administration from any civil servant.”<sup>8</sup> Thus, early in the history of modern archives and citizen rights to information, through a public declaration of governing principles, archives became a primary instrument of democratic accountability to ensure and protect citizen rights through access to evidence in records of government action (or inaction).

The linkage of archives to public administration was slowly solidified as the Napoleonic Empire spread across Europe. Recognizing the need for archives to remain a living institution, Napoleon in 1808 “initiated an important series of regulations on transfers by publishing a circular ordering the regular transfer of the documents of the Public Works Division of the Préfectures to the newly-created Archives départementales.”<sup>9</sup> The policy had the effect of solidifying the importance of archives within the state bureaucracies of Europe through the nineteenth century and up until the first widely accepted formal articulation of archival principles and practice in 1898, the *Manual for the Arrangement and Description of Archives*, was written by the Dutch trio of Samuel Muller, Johan Feith, and Robert Fruin.

The “Dutch Manual” was a landmark and influential text, translated into several different languages. It codified already accepted procedures for archival management,

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<sup>7</sup> M. Duchein, “Requiem pour Trois Lois Défuntés,” *Gazette des Archives* 104 (1979), 12-15, cited in Michel Duchein, “The History of European Archives and the Development of the Archival Profession in Europe,” *American Archivist* 55 (Winter 1992), 17.

<sup>8</sup> *Déclaration des Droits de l'Homme et du Citoyen*, 1789. “La société a le droit de demander compte à tout agent public de son administration.” Translation mine.

<sup>9</sup> Duchein, “History of European Archives,” 18.

which had been accumulating in the various schools and institutions in Europe over the previous century. More a collection of rules and procedures than of theory, the Manual was institutionally biased through its focus on the administrative or bureaucratic record, rather than personal or private records. Original order<sup>10</sup> and provenance<sup>11</sup> became core principles of the archival profession with the Manual's widespread acceptance. These important principles ensured that records in archives did not merely reflect the subject-based or thematic idiosyncrasies of individual archivists or of contemporary interests of researchers, but rather were organized and described according to consistent structuralist perspectives reflecting the bureaucracies that created them.<sup>12</sup> Ultimately, by the rules, and the mindset they reflected, the archive was entering a closer association with the institutions it was trying to document. In creating a codex of archival practices, archives were themselves becoming bureaucratic institutions within the wider network of their respective government bureaucracies.

Max Weber, the German political economist and sociologist, identified the major characteristics of modern administrative bureaucracies. Even though many of Weber's

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<sup>10</sup> "Original order is a fundamental principle of archives. Maintaining records in original order serves two purposes. First, it preserves existing relationships and evidential significance that can be inferred from the context of the records. Second, it exploits the record creator's original mechanisms or finding aids (file classification manuals, index cards, and so on) to access the records, saving the archives the work of creating entirely new access tools.

Original order is not the same as the order in which materials were received. Items that were clearly misfiled may be refiled in their proper location. Materials may have had their original order disturbed, often during inactive use, before transfer to the archives.

A collection may not have meaningful order if the creator stored items in a haphazard fashion. In such instances, archivists often impose order on the materials to facilitate arrangement and description. The principle of respect for original order does not extend to respect for original chaos." Richard Pearce-Moses, *A Glossary of Archival and Records Terminology* (Chicago; Society of American Archivist, 2005), available on the web at <http://www.archivists.org/glossary/index.asp>, accessed on 11 February 2008.

<sup>11</sup> "Provenance is a fundamental principle of archives, referring to the individual, family, or organization that created or received the items in a collection. The principle of provenance or the respect des fonds dictates that records of different origins (provenance) be kept separate to preserve their context." Ibid.

<sup>12</sup> Terry Cook, "What is Past is Prologue: A History of Archival Ideas Since 1898, and the Future Paradigm Shift," *Archivaria* 43 (Spring 1997), 21.

theories have been challenged,<sup>13</sup> his ideas are still valid when conceptualizing ideal bureaucratic types, how organizations and governments grow, and how individuals are valued within those institutions. David Beetham, a political theorist in the area of Marxism and the analysis of fascism, and an authority on Weber,<sup>14</sup> reduces the characteristics of Weberian bureaucracy to hierarchy, continuity, impersonality, and expertise.<sup>15</sup> The characteristic of impersonality is important in order to understand the archival affinity with bureaucratic principles and the resulting articulation of archival principles. Impersonality, according to Beetham, meant that “the work is conducted according to prescribed rules, without arbitrariness or favouritism, and a written record is kept of each transaction”<sup>16</sup> so that any bureaucrat, and not just the author of the record or transaction, could continue to administer the issue. Closely linked to impersonality is the characteristic of expertise, which Beetham notes, occurs when “officials are selected according to merit, are trained for their function, and control access to the knowledge stored in files.”<sup>17</sup> Although archivists would have a long way to go before they could be considered a professional group within a bureaucracy, the Dutch Manual was an important step towards that end. Its codification of archival practice was an attempt to remove the idiosyncrasies of the individual archivist and set out a professional standard by which people could operate archives.<sup>18</sup>

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<sup>13</sup> Richard Brown, “Macro-appraisal Theory and the Context of the Public Records Creator,” *Archivaria* 40 (Fall 1995), 132-135.

<sup>14</sup> “Retirements,” *The Reporter*, Issue 478, 4 March 2002, <http://reporter.leeds.ac.uk/478/beetham.htm> accessed on 11 February 2008.

<sup>15</sup> David Beetham, *Bureaucracy*, 2<sup>nd</sup> ed. (Minneapolis: University of Minnesota Press, 1996), 9.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> As will be seen in the postmodern criticisms of archival practices, the concept of impersonality is highly suspect in archival practice. Archivists such as Terry Cook and Gerald Ham criticize archival appraisal because it is often conducted through the lens of individual archivist’s research interests, leading to arbitrary decisions from an institutional point of view.

A quarter century after the Dutch Manual was published, Sir Hilary Jenkinson used it as the basis for his own writing on archival practices within the British Civil Service. Jenkinson's writings were much more theoretical, insisting that the neutrality of the archivist would ensure the truth-telling ability of the record. His main claim was that the archivists should not appraise or select archives, but instead leave this function to the bureaucrats who created them.<sup>19</sup> The archivist was to maintain a position of utter neutrality in relation to what came into the archives, keeping the received records as a group whole so that their original administrative context could be preserved. According to Jenkinson, this passivity was the only way that archivists could hope to become a "devotee of Truth,"<sup>20</sup> a goal that was still taken seriously in the first half of the twentieth century.

Jenkinson's stance informed the archives' position in relation to the larger government bureaucracy. Jenkinson's archive could not control records that were active due to restrictive access laws during their active phase. His preoccupation was primarily with records of the distant past that were not at the time useful for citizens gaining insight into the current workings of their government. Thus, the idea that archives could be used by citizens to hold the state accountable during Jenkinson's tenure is not plausible because restrictive access conditions to departmental records precluded anyone but government departments and senior officials from viewing active records. Furthermore, the archive that Jenkinson oversaw was well established, with regular transfers from departments but was not overburdened with large backlogs. While the bureaucracy still

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<sup>19</sup> Hilary Jenkinson, *A Manual of Archive Administration* (London, 1922, second edition 1937, reprinted 1965), 152.

<sup>20</sup> "Memoire of Sir Hilary Jenkinson," in J. Conway Davies, *Studies Presented to Sir Hilary Jenkinson, C.B.E., LL.D., F.S.A.* (London, 1957), cited in Cook, "What is Past is Prologue," 23.

produced copious amounts of records, the archives were not particularly overwhelmed, because the British Public Records Office had been established a century earlier and dealt primarily with materials from the medieval and early modern period, a less document intensive era.<sup>21</sup>

The legacy of Jenkinson is both positive and negative in relation to the evolving nature of archival theory and archivists' professionalization within bureaucracies. Ultimately, Jenkinson was trying to resolve the conflict between the archivist preserving and the archivist creating (or at least co-creating) history. He was concerned that without a set of prescriptive rules and a theory to validate them, the archivist would resort to selection based on sentimental, historical, or thematic reasons relating to current or anticipated research needs, when in fact the record should be "preserved for the value they possessed during their active use."<sup>22</sup> He was trying to remove the archivist from the decision-making process so that the records would tell the story, not the people who worked in archives. Unfortunately, his solution to the problem of archival history-making was to ignore the problem of records complexity, their impermanence, and their vast and exponential volume growth such that no archival institution, unlike for earlier periods, could ever keep all records for its jurisdiction, and thus the consequent and necessary shift of responsibility for making professional appraisal decisions within the already established bureaucracy.<sup>23</sup> In doing so, Jenkinson removed archivists from any important role in bureaucratic decision-making, reducing them to glorified file clerks or

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<sup>21</sup> The British Public Records Office was established in 1838.

<sup>22</sup> Hilary Jenkinson, "The Choice of Records for Preservation : Some Practical Hints," *Library Association Record* 41 (November 1939), 543-44, cited in Richard Stapleton, "Jenkinson and Schellenberg: A Comparison," *Archivaria* 17 (Winter 1983/84), 81.

<sup>23</sup> Gerald Ham, *Selecting and Appraising Archives and Manuscripts* (Chicago: Society of American Archivists, 1993), 9.

at best, scholars of ancient documents. Moreover, shifting responsibility for selection of records from archivists to departments gave a veneer of trustworthiness to the records since the archive seemed to be dedicated to preserving the truth that the record conveyed. However, with selection left to the creator, the records only reflected the truth that the creator wished to allow the archive to hold.

By the mid-twentieth century, T.R. Schellenberg, a senior manager at the then United States National Archives and Records Service, and recognized now as the “Father” of archival appraisal, tried to address the gaps in Jenkinson’s theory, moving the archives beyond the role of merely preserving (rather than choosing) evidence of transactions within institutions, with the goal for Schellenberg of better serving the historical community. He insisted that the archivist should no longer rely on the creating institution to determine what was archival. Schellenberg argued that records had primary and secondary values that changed as the record travelled through its life cycle.<sup>24</sup> The creating institution determined the primary value of a record, which focused on the administrative need for its creation and ongoing bureaucratic use of the record to address some issue or activity for as long as it was current. Secondary values, determined by the archivist at the end of the life cycle, were divided by Schellenberg into informational and evidential values to help determine future use of the records by scholars within the archives. Evidential values “reflected the importance of the records to researchers...in determining the functions, programmes, policies, and procedures of the creator,” while informational values were concerned with “the content of records relating to ‘persons,

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<sup>24</sup> T.R. Schellenberg, *Modern Archives: Principles and Techniques* (Chicago, 1956, reprinted Kansas Historical Society, 1996). Philip Brooks created the concept of the life cycle, but Schellenberg co-opted it into his appraisal theory. See Philip C. Brooks, “The Selection of Records for Preservation,” *American Archivist* 3 (October 1940).

corporate bodies, things, problems, conditions, and the like' incidental to 'the action of government itself.'"<sup>25</sup>

The concentration on archives as repositories for historical research and the de facto heavy reliance on informational values as the core of appraisal were the main weaknesses of Schellenberg's theory. Since the determination of a records' archival value was based on its perceived historical value, the archives often became a "weathervane moved by the winds of historiography."<sup>26</sup> Archivists could not systematically and logically justify their appraisal decisions in order to ensure that the archives kept all relevant records for uses beyond academic history. Furthermore, archivists could not ensure that they were maintaining their obligations to hold government accountable to society for its actions. The process of deciding what could be included in the archive had not been standardized, thereby allowing the individual archivist to make decisions about appraisal, which were often shown to be inconsistent even within the same institution. The appraisal decisions were even illogical from a historical standpoint because the selection process was "so random... [that it] often reflected narrow research interests rather than the broad spectrum of human experience."<sup>27</sup> Ultimately though, the selection of records based on secondary values undermined their provenance because it imposed criteria that were external to the record and its context of creation.<sup>28</sup>

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<sup>25</sup> Cook, "What is Past is Prologue," 27.

<sup>26</sup> F. Gerald Ham, "The Archival Edge," in Maygene F. Daniels and Timothy Walch, *A Modern Archives Reader: Basic Readings on Archival Theory and Practice* (Washington: National Archives Trust Fund Board, 1984), 328-29.

<sup>27</sup> Ibid.

<sup>28</sup> Cook, "What is Past is Prologue," 35.

Although Schellenberg's theories and practices of archival appraisal were flawed, they did address for the first time the reality of documentary over-abundance and took archivists a step closer to becoming specialists within the government bureaucracy. The type of documentary abundance that Schellenberg was forced to deal with was longstanding and particular to the American context. Since the National Archives of the United States of America was not founded until 1934, the initial transfer of records from the departments resulted in an instant 150 year backlog that accumulated ten million cubic feet of records.<sup>29</sup> Those records, in addition to the masses of records then being created during the Great Depression forced the National Archives and Records Service of the United States to deal with documentary abundance from its inception. While documentary abundance was the impetus that turned archivists towards records selection, the development of a theory of appraisal, no matter how convoluted, created a profession composed of people with a unique skill set that could serve the government bureaucracy. Schellenberg delivered archivists from the passivity of Jenkinson's curator of ancient manuscripts and provided them with an intermediary step to becoming active purveyor of an organization's memory. Even though this initially tasked the archivist with chasing trends of historiography, it went far in situating archivists as an active professional group that would later develop a more credible theoretical base for appraisal decision making. Schellenberg would not bridge the gap between archives and the active government bureaucracy, however, because he still operated in a context where the archives had no control over records during their active phase. Schellenberg's archives was essentially curatorial, accepting records from departments and making selections for archives, but

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<sup>29</sup> Richard Stapleton, "Jenkinson and Schellenberg: A Comparison," *Archivaria* 17 (Winter 1983-1984), 76.

not interacting with the bureaucracy to determine disposition beyond their archival mandate.

The theoretical base from which archivists would derive a more recognized professional status was in the development of functional analysis and the emergence of macroappraisal. Articulated at the start of the 1990s as a practice by Terry Cook of the then National Archives of Canada, macroappraisal was inspired by Hans Booms, a German archivist who published a seminal rethinking of appraisal theory in 1972.<sup>30</sup> This rethinking was a major leap forward in the formulation of appraisal theory because he abandoned Schellenberg's specialized users and Jenkinson's records creators as the determinant agents in appraisal, instead arguing that the values of society itself should determine archival value.<sup>31</sup> Booms sought an appraisal methodology that went beyond focusing on records content with anticipated future research uses and instead selected archives based on their "function in society or societal context of creation."<sup>32</sup> This research required a deep knowledge of the functions that records served in relation to each other in order to determine their value. However, the most important aspect of Booms' appraisal theory was the implicit recognition that while archives were historical in nature, historians (and historical research trends) would no longer determine their content.

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<sup>30</sup> Hans Booms, "Society and the Formation of a Documentary Heritage: Issues on the Appraisal of Archival Sources," *Archivaria* 24 (Summer 1987), 69-107, originally published as "Gesellschaftsordnung und Überlieferungsbildung: Zur Problematik archivarischer Quellenbewertung," *Archivalische Zeitschrift* 68 (1972), 3-40.

<sup>31</sup> Cook, "What is Past is Prologue," 30.

<sup>32</sup> Candace Loewen, "Pioneering Contributions from *Archivaria* to International Archivistic, 1980s and 1990s," *15<sup>th</sup> International Congress on Archives*, 2004. Found at [http://www.wien2004.ica.org/imagesUpload/pres\\_167\\_LOEWEN\\_Archivaria.pdf?PHPSESSID=ee818737a4b97f91404a0e59b8de0ad9](http://www.wien2004.ica.org/imagesUpload/pres_167_LOEWEN_Archivaria.pdf?PHPSESSID=ee818737a4b97f91404a0e59b8de0ad9), accessed on 31 July 2007.

Although general historical knowledge was the traditional basis of the expertise of the archival profession in Canada and its primary social purpose, Tom Nesmith noted widespread rejection of these roles and of the value of education for archivists in history by archivists in the 1960s and 1970s who argued they must replace much of it with knowledge of more rational appraisal and other archival work strategies and methods that could appeal to the growing number of new uses of archives by their sponsoring institutions and the society they served. He disagrees, however, that archivists needed to do so in order to create more rational appraisal policies or to address any other archival functions and uses. He maintained that there was a new need to orient their historical knowledge more directly in support of both improving archival functions and the new uses, rather than diminishing their commitment to historical knowledge. This thesis builds on that view to argue that the uses of archives are ultimately enriched by a concentration on appraisal based in rigorous attention to the functional context of records and their accountability, which will ultimately provide richer historical record in the long term. At its core, macroappraisal was a recognition that archivists need to be experts of the functional contexts of the record and its creation rather than the subject content of the record and its anticipated use by historians. Cook moved the archivist into contact with the bureaucracy by recognizing that “a more rational, legitimate, and comprehensive archival documentation of the past may be obtained by a determination of archival value according to a contextual understanding of the systematic functions and transactive processes responsible for the *creation* of records.”<sup>33</sup> In addition, Cook recognized the danger of creating an appraisal methodology that recorded only the ideas and actions of bureaucracy while neglecting the citizens and society. Within the government context of

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<sup>33</sup> Brown, “Macro-appraisal Theory and the Context of the Public Records Creator,” 128.

macroappraisal was the core recognition that archival records were those that best captured citizen/state interactions.

The political context that created the conditions for rethinking Canadian appraisal practices was the Deschene Commission, which was set up in response to the destruction of immigration records that were thought to contain information that could implicate Nazi war criminals who secretly immigrated to Canada. The then National Archives of Canada (NAC) was vindicated by the Commission, which found that the necessary steps have been taken and the archivist in charge had adhered to the processes mandated by the institution. However, the Commission caused NAC to rethink its practices and how they were perceived by the public.<sup>34</sup> The Deschene Commission did not vindicate the archives because the previous appraisal regime of NAC was unassailable, but rather because the archives had not deviated from the scripted bureaucratic processes beyond an easily accounted-for delay in the destruction process. Furthermore, macroappraisal was not the result of the Deschene Commission, but the new focus on justifying decisions in a more rigorous way would foster an environment where changes to the practices of the archives such as macroappraisal could find acceptance. Cook argued during the commission's aftermath that archival appraisal strategies in North America were "unplanned, taxonomic, random, and fragmented,"<sup>35</sup> which led to a diminished role of the archives in asserting their own priorities. The appraisal process prior to 1991 at NAC depended on the good will of federal institutions, which would prepare records schedules at their own

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<sup>34</sup> Robert J. Hayward, "Working in Thin Air": Of archives and the Deschenes Commission," *Archivaria* 26 (Summer 1988), 131.

<sup>35</sup> Terry Cook, "Mind over Matter: Towards a New Theory of Archival Appraisal," in Barbara L. Craig, ed., *The Archival Imagination: Essays in Honour of Hugh A. Taylor* (Ottawa: Association of Canadian Archivists, 1992), 41.

initiative, resulting in an inefficient and time consuming process.<sup>36</sup> Although the archives had the final word on destruction of records, their lack of consultation in the initial records scheduling left them outside the primary decision-making process and therefore outside the active bureaucracy. Macroappraisal by contrast demanded front-end consultation that would insert the archives within the recordkeeping bureaucracy in a way that would cause a major rethinking of archival practice globally.

As stated, Cook was inspired by the work of Booms, but the move in archival theory towards more active participation in the larger government bureaucracy was made possible by a historical trend towards internal professionalization of archivists and external influences such as the Deschene Commission causing archivists to reassess their relationship with the records producers. However, the trend away from Schellenberg's practices of archives was not restricted to Canada and the origins of the shift are not particularly clear due to the interconnectedness of the archival world.

Ham's critique of archival appraisal gained an audience in the United States as well, inspiring archivists to rethink the process of records selection, both in public and private institutions. Most notable was Helen Samuels who, like Cook, found her inspiration in the socially oriented theories of appraisal.<sup>37</sup> Samuels recognized that archives are institutions meant to record what has happened in society, but the increased complexity and interconnectedness of records creation by public and private institutions necessitated that archival institutions create documentation strategies to understand the larger context of records creation. Essentially, Samuels was advocating a top-down

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<sup>36</sup> Catherine Bailey, "From the Top Down: The Practice of Macro-Appraisal," *Archivaria* 43 (Spring 1997), 96-97.

<sup>37</sup> Riva A. Pollard, "The Appraisal of Personal Papers: A Critical Literature Review," *Archivaria* 52 (Fall 2001), 148.

approach, which recognized that archivists needed to understand the larger “information universe ... rather than a bottom-up, empiricist analysis based on the search for ‘values.’”<sup>38</sup> Recording the larger context demands archives and other records-collecting institutions to co-operate in order to cross institutional boundaries and contribute to documenting “central themes, issues and functions in society.”<sup>39</sup> Samuels asserted that cooperation among institutions is necessary because once archives are “cut off from one another, archivists view their collections as self-sufficient, but this is an illusion.”<sup>40</sup>

Beyond the recognition of Samuels’s documentation strategy that archives needed to understand and situate their collections within the larger societal context, the approach forced archives to articulate clearly what materials they were interested in collecting. This meant that archives needed to develop an appraisal and acquisition mandate before records presented themselves in order to circumvent the archival compulsion to collect for the sake of collecting, or to collect more of what they had always collected, or to collect the records most likely to satisfy the most powerful or influential researchers. Samuels argued that “[d]ocumentation strategies...do not start with surveys of available material. They begin with detailed investigations of the topic to be documented and the information required. The concern is less what exists than what should exist.”<sup>41</sup> However, this focus on targeting what should exist within the macro-societal context does little to change the notion that archivists choose what information is preserved in archives. Documentation strategy simply rationalizes those decisions, taking the researcher out of the equation and making the archivist an active co-creator of the

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<sup>38</sup> Terry Cook, “Documentation Strategy,” *Archivaria* 34 (Summer 1992), 186.

<sup>39</sup> Pollard, “The Appraisal of Personal Papers,” 148.

<sup>40</sup> Helen Willa Samuels, “Who Controls the Past” *American Archivist*, Vol. 49, No. 2 (Spring 1986), 123

<sup>41</sup> *Ibid.*, 120.

historical record. This articulation of proposed collecting strategies may only be the formalization of what had already been taking place among smaller archives. The agreement to cooperate amongst smaller institutions makes sense given their limited resources, both in vault space and money, and in order to avoid creating redundancies of materials. Furthermore, the choice of functions selected under Samuels's strategy seems abstract and subjective, rather than derived organically from the institution's mandate, policies, and actual activities.<sup>42</sup>

Unlike macroappraisal, Samuels's documentation strategy does not require the archivist to interact with recordkeeping bureaucracies in a meaningful way beyond collecting records based on functional lines.<sup>43</sup> Samuels' theory does not require the same sort of commitment from both the records management and archival sides of the bureaucracy in order to determine the organically derived functions of an institution. Conversely, Cook's functional analysis requires intensive cooperation between the archive and an organization's internal operations in order to determine its structure, activities, culture, communication patterns, and recordkeeping technologies and then determining which records best reflect this organizational context and citizens interaction with it, independent of the personal whims of individual archivists. Such records become archives. This is not to argue that macroappraisal is somehow immune to subjectivity and has delivered archivists to the point of impartiality that Jenkinson envisioned. All systems that seek to capture documentation for accountability or historical reasons are doomed to be imperfect due to the inability of people, be they working in groups or alone, to fully grasp all the contexts presented to them, and the personal, educational, and

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<sup>42</sup> Cook, "Documentation Strategy," 187.

<sup>43</sup> Cook, "What is Past is Prologue," 33.

other filters every appraising archivist brings to the task. What macroappraisal offers is a coherent method of records creation and collection, based on intensive research into how a government department or other bureaucracy conducts its business. The goal is not to derive functions from what the archivist thinks is some abstract schema of how society operates, but instead to perform an analysis of what is there and take those records that best reflect the activities of the organization based on its interaction with its citizens. The result is a methodology within the constraints of human fallibility, but one reflective of society and its values.

As archivists started to form closer associations with records managers, it became clear that the lines between the two professions were starting to blur. Nowhere was this more evident than in Australia where the National Archives of Australia had been moving away from the traditional custodial role since the 1960s.<sup>44</sup> The unique set of historical circumstances that surrounded the archives systems of Australia and perhaps a particular culture of mistrust in central authorities allowed for more regional control of records and impotence on the part of the National Archives of Australia (NAA) to compel departments to transfer records into its holdings. This resulted in NAA taking control of the records intellectually in its various regional offices, knowing full well that they may never take actual physical custody of the record.<sup>45</sup> Consequently, archivists developed an extremely close relationship with records managers so that they could properly describe records. This helped Australian archivists to assert themselves into the various bureaucracies as experts in records management and eventually provide a value-added

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<sup>44</sup> Steve Stuckey, "Keepers of the Fame?: The Custodial Role of Australian Archives – Its History and Its Future" in *The Records Continuum: Ian Maclean and Australian Archives' First Fifty Years*, Sue McKemmish and Michael Piggott, eds. (Clayton, Australia: Ancora Press in association with Australian Archives, 1994), 44.

<sup>45</sup> *Ibid.*, 42-43.

service to these government departments in the form of off-site storage space. This relationship developed slowly from the 1950s to the 1970s, and eventually culminated in a national *Archives Act* in 1983.

The ability of the new *Archives Act* to deliver true authority and accountability powers for archives is debatable, but it was a tacit recognition that the archivist was a full member the government's bureaucracy. The *Archives Act* ensured that records were transferred to the archives within a twenty-five year disposition period and gave control over the destruction of records to the archives' directors. Although these new powers could not be described as truly post-custodial, the groundwork had been laid for an almost full integration of the archives with the records management functions of the government. Archivists had moved beyond the idea that their *raison d'être* was to serve the research interests of historians, but instead were recognizing their value as instruments of accountability and efficient record keeping.

This is not to argue, however, that archives and archivists have not retained their ties to history and historians. Indeed, despite archivists' closer association with the bureaucracy and its accountability functions, they remain close to the historical profession for a myriad of reasons, not the least of which is the fact that historians are concerned with evidence, like those interested in providing accountability functions to institutions or the public.<sup>46</sup> Since this supporting evidence must be reliable, the records collected by archives must be demonstrably authentic and trustworthy by being situated in the context of their creation and use. Thus, the context of creation, the "origins,

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<sup>46</sup> John M. Dirks "Accountability, History, and Archives: Conflicting Priorities or Synthesized Strands?," *Archivaria* 57 (Spring 2004), 31.

original purposes, and organic characteristics of documentation,”<sup>47</sup> must be studied and articulated by archivists for the record’s value to be understood.

The provenancial approach, advocated by Nesmith<sup>48</sup> and reflecting the rationalizing of complex administrative contexts central to macroappraisal, has demanded that archivists possess a greater understanding of the history of records on through to current records management systems or how and why records have been created. Since under macroappraisal the archivist must be able to identify records that best reflect the functions and services of their creators, and the interaction of those creators with citizens and groups (“society”), they must have specific and detailed institutional knowledge of those creators and a broad knowledge of records management. Eventually, the relationship between the archivist and the bureaucracy resulted in the archivist shifting from records collector to records co-creator. Although archivists did not become active creators of documentation within the bureaucracy, they became architects of the records-keeping systems by asserting functional analysis and records scheduling through acts that gave archives power to determine which records were of long-term value and which were not. In Australia, this close association with records management functions and an increasingly rich corpus of international archival literature bred a unique archival system in which the records manager and archivist became more fully integrated and the archival function became another term for permanent retention within the larger bureaucratic “recordkeeping” framework. Archivists and records managers alike increasingly referred to themselves and their increasingly common profession as “recordskeepers.”

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<sup>47</sup> Tom Nesmith, “Archival Studies in English-speaking Canada and the North American Rediscovery of Provenance,” in Tom Nesmith, ed., *Canadian Archival Studies and the Rediscovery of Provenance* (Mutechen: Scarecrow Press, 1993), 1.

<sup>48</sup> Ibid., 1-28, among his other works.

Australian archival educator Frank Upward rationalized how records interacted in the bureaucracy and how they eventually travelled to the archives through his continuum approach, in which he essentially rejected the previous custodial model of the life cycle.<sup>49</sup> The continuum model requires the “sharing of responsibility between archival authorities and government agencies over the totality of government record activity, regardless of the age of the records.”<sup>50</sup> Thus, “records managers and archivists [are seen] as belonging to the broader profession of recordkeeping specialists”<sup>51</sup> that recognizes the influences both fields have on each other throughout the records-creation process. The model asserts the priorities of the archive into the realm of the records manager, thereby bringing the archivists’ influence into the active phase of the record’s life cycle. In fact, the continuum model rejects the idea of active and inactive phases that designate the importance of the record to different user groups along different moments of the records life cycle. Instead, “continuum thinkers ... see the recordkeeping profession as being concerned with the multiple purposes of records. They take current, regulatory and historical perspectives on recordkeeping simultaneously not sequentially.”<sup>52</sup> This simultaneous perspective focuses on accountability within an organization, be it corporate, democratic, or historical. The model recognizes that although history may not be written for many years, it starts at the point of records creation and that the evidence

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<sup>49</sup> Frank Upward, “Structuring the Records Continuum - Part One: Postcustodial principles and properties,” *Archives and Manuscripts*, Vol. 24, No. 2 (1996), and “Structuring the Records Continuum, Part Two: Structuration Theory and Recordkeeping,” *Archives and Manuscripts*, Vol. 25, No. 1 (1997).

<sup>50</sup> Livia Iacovino, “Recordkeeping and Juridical Governance,” in Sue McKemmish, Michael Piggott, Barbara Reed and Frank Upward eds. *Archives: Recordkeeping in Society* (Wagga Wagga: Charles Stuart University, 2005), 259.

<sup>51</sup> Sue McKemmish, “Yesterday, Today and Tomorrow: A Continuum of Responsibility” published in *Proceedings of the Records Management Association of Australia 14th National Convention, 15-17 Sept 1997* (Perth: Records Management Association Australia, 1997).

<sup>52</sup> Ibid.

value of documents, preserved through contextual metadata, supports the records' immediate and broader uses by organizations and society.

Upward further recognized that records do not travel from creation to final disposition through a linear cycle, but instead the entire recordskeeping system acts upon itself in both space and in time. Upward was synthesizing the post-custodial theories and practices that had been previously advocated by Cook's macroappraisal, with an understanding that the current sequential "life-cycle" models were not going to address the emerging threat of digital records archiving. The new powers and closer association of archives within the records management functions of government had given the archivist influence over records at their very creation. Indeed, the very existence of archives in a custodial world implies that records would be created differently than if the need to archive never existed. Archivists themselves do not need to influence the creation of records for the continuum model to have applicability, for the model recognizes that the drive to archive and remember an institution's activities in the long term affects the creation of records. However, beyond these theoretical postmodern sensibilities, the continuum model had real-world policy implications for the formal relationship between active and inactive recordskeepers. While the Australian context seemed ready for an integration of the archival and records management functions of government, most of the rest of the Western archival world would need another imperative to insert the archive into the records management structure. That imperative would present itself through the threat of "front-end" born-digital or computer-generated records and their undermining, until brought under control, of the archive's very ability to continue to provide long-term accountability of the state's activities.

Electronic records management and its long-term preservation represent the greatest challenge and opportunity for archives to demonstrate their importance and assert their position as partners within government bureaucracies. Although it has been argued to this point that the archives has established itself within the records management functions of government through legislative acts and an intellectual re-positioning within the profession, this does not mean an absence of resistance from the records managers and archivists to this blending of professions. Because electronic records become obsolete and unreadable in a relatively short amount of time, they require archival intervention upon (or before) their creation in order to survive long term and be usable in an archival context.<sup>53</sup> This widely recognized fact has not necessarily inserted the archivist into records management roles in all contexts, but it has forced the records managers to consider the same things that preoccupy archivists in terms of long-term preservation. Especially when considering active records with long-term dispositions, the same problems regarding obsolescence and unreadable formats are applicable in both realms.<sup>54</sup>

This ongoing evolution of archival theory, which has in many cases been a reaction to forces external to the profession such as revolution, documentary abundance, intellectual or philosophical currents, and electronic records, has now placed the archivist

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<sup>53</sup> David Bearman, *Electronic Evidence: Strategies for Managing Records in Contemporary Organizations* (Pittsburg: Archives and Museum Informatics, 1994), 3. The idea that electronic records must be targeted for preservation at the beginning of the life cycle, necessitating an archival orientation towards continuum thinking, was repeatedly advocated at the 2008 Conference of the Association of Canadian Archivists. For example, the Provincial Government of Alberta has taken steps to include the Provincial Archives of Alberta in the creation of a long-term digital preservation strategy, which has its foundations in the continuum approach as presented by both Wayne Murdoch and Lori Podolsky Nordland in their session at the conference on Digital Preservation in the Government of Alberta.

<sup>54</sup> I will not address the specific challenges regarding electronic archives, as it is too large a topic to consider in this thesis, beyond stating the obvious that these types of records have put demands on the archival profession to realized that a post-custodial orientation in archives is the only way archivists will be able to preserve digital records.

in a position to be able to provide access to knowledge about the workings of the state. As recognized by the French at the end of the eighteenth century, access to the records of the state increased the power of the individual within the state. However, the archives as a protector of rights two hundred years ago was not the same as it can potentially be today. The assertion of archival priorities within the realm of records creators, and for that matter the codification of records management principles, have rationalized and made more transparent the activities of the state. This is not to argue, however, that the professionalization of records management and archives has made it impossible for states to abuse their citizens. In fact, as discussed in the last chapter, effective records-keeping regimes can sometimes be used to undermine human rights, since they allow greater efficiencies in tracking citizens and their allegedly subversive activities. Although records management may be used to monitor citizens for nefarious reasons, it is also potentially effective for holding the state accountable, at least in democracies with freedom of information legislation, strong media, and good auditing and whistle-blowing conventions.

This thesis does not argue that records management and archival control as it has evolved is a panacea for the maintenance of human rights. It maintains, however, that the absence of rationalized practices in regards to records management and archives certainly undermines the ability of citizens to protect their rights in the face of complex bureaucracies. Archives are repositories of information that can serve injustice as much as tolerance, human rights supported as well as abused. However, rights are better protected when there is an archival process defined in theory and put into practice that seeks to document the functions, programs, and activities of the state, and citizen's

interaction with it, at all levels, for good or ill, with positive or negative outcomes. In this way, human rights are protected when government processes have archiving as an integrated, integral, embedded activity, rather than archives positioned solely as a sort of cultural frill or heritage sideshow.

## Chapter 3

### Heiner and Queensland: A Case Study of Human Rights Abuse in the Absence of Bureaucratic and Archival Control

The power of the record is its ability to affect society. Archivists understand this power, especially as the record impacts the historical memory of a nation or group of people. As a powerful tool for government accountability, archives stand at the nexus between the citizen and the state. Records function as reminders to the bureaucracy of their mission and as tools for the citizen to peer into the workings of their governments. The selection of records for archival value is tied to memory and historical accountability, which has a profound influence over how people perceive themselves through national and regional identities. However, as archives become more closely associated with the bureaucracy and elected officials, they must create processes that prevent them from becoming vulnerable to interference from individuals or groups that seek to consolidate their own power within government and hide activities that may undermine that power.

This chapter illustrates the use of archives in perpetuating the power of state through the example of the “Heiner Affair” of Queensland, Australia. Arguably, the power of the government archive is centered in its full and transparent integration inside

all bureaucratic processes, that when codified in law and regulation, cannot be manipulated by individuals who wish to destroy records that may be embarrassing or shameful to them. As will be demonstrated in the Queensland example, the absence of proper records management, appraisal and scheduling processes at the departmental and archival level led to political interference in the disposition of sensitive records, despite a modern archives law in place prohibiting destruction of government records without the authorization of the State Archivist. The resulting records destruction was a fundamental affront to human rights, and their protection through recorded evidence, and has left a lingering sore of injustice on the Queensland body politic.<sup>1</sup> The human right this thesis refers to is not the right to records that are produced and preserved in an environment that respects accountability. The injustice this chapter refers to is not the rape of children, but the inability of the citizen to prove, through records, that the rape happened. This Queensland case of injustice did not happen in a vacuum, however, but within a local context of government corruption that stretched back decades.

Queensland historically stands out in the Australian context as a state commonly typified by less educated and cultured people and dominated by open racial prejudice and harder class barriers.<sup>2</sup> While corruption existed, its spread was restricted during the 1940s and 1950s by the lack of affluence in the society. However, as Queensland increased its wealth, corruption that had previously been accepted as a petty annoyance, but still part of the fabric of society, asserted itself into institutions such as the police force, and on a

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<sup>1</sup> As recent as June of 2008, the opposition at the Parliament of Australia have characterized the Heiner Affair as “a serious blot on public administration in this country and a stain on the reputations of those who have obstructed getting to the bottom of it.” Anthony Abbott, Parliament of Australia, Hansard (25 June 2008), 95.

<sup>2</sup> G.E. Fitzgerald, “Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct,” *Report Of A Commission Of Inquiry Pursuant To Orders In Council* (Brisbane, 1989), 30.

grand scale among public officials. The extent of the corruption that spawned investigations such as the Fitzgerald Inquiry in 1987 is not definitively known, but conditions existed that allowed government to operate without oversight from external organizations. Most notably was the absence of Freedom of Information legislation that limited the ability of the public to hold government administration to account.<sup>3</sup> Without such legislation, government agencies were able to operate unfettered by considerations of accountability and the spread of corruption. The 1989 findings of the Fitzgerald Commission remarked on the lack of government transparency in Queensland, tying it to corruption, stating, “in an atmosphere of secrecy or inadequate information, corruption flourishes. Wherever secrecy exists, there will be people who are prepared to manipulate it.”<sup>4</sup> Indeed, the Fitzgerald Inquiry uncovered police corruption at the highest levels, including connections to the ruling National Party of Australia. The inquiry resulted in the prosecution of the Police Commissioner, Terry Lewis, and an unsuccessful perjury trial of the former Premier, Joh Bjelke-Petersen. However, the damage had been total for the political party itself, which had ruled in Queensland since 1957. The scandal allowed the Labour Party to come to power in 1989 under the leadership of Wayne Goss, who symbolized not only the prospect of “clean” government, but the new, prosperous, modernized Queensland of booming high technology industries and world-class tourism. The “Deep South” regressive stereotypes of the earlier era largely disappeared; the progressive Labour Party has, not surprisingly, remained in power ever since.

Australian political change through scandal has not been limited to Queensland. The state of Western Australia experienced a similar situation when it was revealed that

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<sup>3</sup> Ibid., 359.

<sup>4</sup> Ibid., 124.

successive Australian Labour Party governments throughout the 1980s colluded with various corporations to secure government contracts in return for political donations and corporate approval. During the stock market crash of 1987, the losses to the taxpayers were over \$600 million. The resulting WA Inc Royal Commission resulted in the then Premier of Western Australia, Peter Dowding, being prosecuted and serving a jail term. Not only was this a historically political moment, this inquiry was also important to the development of archives in Australia. The 2000 page report's recommendations included the creation of an independent archival authority in Western Australia to facilitate open and transparent government.<sup>5</sup> This recommendation was based on the creation of accountable records management that would be administered by an archival authority.

This structure of recordkeeping was to serve two purposes:

First, it is a prerequisite to effective accountability. Without it, the end purpose of FOI legislation can be thwarted. Without it, critical scrutiny by the Parliament, the Auditor General and the Ombudsman can be blunted. Secondly, records themselves form an integral part of the historical memory of the State itself.<sup>6</sup>

In addition to these principles of accountability and historical memory, the report stated that Western Australia was the only jurisdiction in the country that lacked such authority.<sup>7</sup> Although this legislation was necessary and might help to prevent government corruption, archival authority and good recordskeeping have been shown to have little affect when not implemented, respected, and followed by the larger government bureaucracy.

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<sup>5</sup> Geoffrey Kennedy, Ronald Wilson, and Peter Brinsden, "Royal Commission to inquire into whether there has been (a) corruption; (b) illegal conduct; or (c) improper conduct, by any person or corporation in the affairs, investment decisions and business dealings of the Government of Western Australia or its agencies, instrumentalities and corporations, Part II," *Western Australia Commission of Inquiry* (12 November 1992), 4.3.4.

<sup>6</sup> Ibid., 4.3.2.

<sup>7</sup> Ibid., 4.3.4.

The Nordlinger Affair is an Australian example of such limits of archival authority. The story began with the improper destruction of notes taken during the dismissal interview of a senior bureaucrat, Robert Nordlinger. Chris Hurley, the State Archivist of Victoria, Australia, in 1990, learned of improper records destruction and, as was the practice, sent a memo to the Chairman of the Victorian Public Service Board, Maurice Keppel, asking for an explanation. Hurley explains that it was common practice for the State Archivist to write to offending departments when he learned of improper records destruction and remind them of their obligations under the Public Records Act.<sup>8</sup> In 1990, a federal law provided for archival authority, which was supplemented by State laws that stipulated that records cannot be destroyed without the authorization of the State Archivist. The explanation received from Keppel was inadequate, leading to an exchange of correspondence that eventually led to Hurley being summoned to the office of the head of the department in which the Public Records Office operated and told to take the issue no further because it was potentially politically embarrassing for the government.<sup>9</sup> As a matter of discretion, Hurley did not pursue the issue until after the ongoing election, at which time he sent another letter to Keppel. Hurley was summoned once again to the department head's office to be told that he could not correspond with outside departments without it being first vetted by his superiors. This was an obvious move to prevent the archives from asserting independent authority while maintaining the illusion that the authority still existed.

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<sup>8</sup> Chris Hurley, "The Role of Archives in Protecting the Record from Political Pressure," in *Political Pressure and the Archival Record*, Margaret Procter, Michael Cook, and Caroline Williams, eds. (Chicago; Society of American Archivists, 2005), 152.

<sup>9</sup> Ibid., 153.

Hurley was motivated to research the frequency of breaches to the act, and gathered evidence that illegal records destruction tended to happen regularly. He argued to his peers that if “everyone went on effectively ignoring the reported breaches of statutory obligations then everyone, the Minister, the Keeper, and they themselves would be open to blame.”<sup>10</sup> Feeling the time was right to bring his observation to the forefront, he drafted a report to the Public Records Advisory Council, a statutory body charged with discussing such matters, and sent it without the requisite vetting. As a result of performing his statutory duty to the archival authority and under the law, but challenging the political authority, he was removed from his position as State Archivist and Keeper of Records and transferred to the token job of Chief Archivist, one especially created for him and never filled again after he left.<sup>11</sup>

The Nordlinger Affair demonstrates that even in a rich and positive regulatory environment, archival authority can be undermined, even with a courageous archivist willing to report offenders under state record laws. Chris Hurley was removed from his position for making a principled stance that could not be enforced through the standard practices of the Victorian Public Records Office. Hurley admitted that the detection of breaches to the Act were ad hoc and often brought to his attention by outside sources such as newspapers. Due to that ad hoc process of discovering breaches, the responses to them could not be systematic and carried no consequences. Ultimately, the lesson learned from this case reinforces the pattern that archival authority in the absence of a bureaucratic process for directing the archivist’s responses only leaves the archivist open to personal attack. This allowed those who objected to his actions to see him as an

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<sup>10</sup> Ibid., 154.

<sup>11</sup> Ibid., 155.

individual actor outside the larger bureaucracy. In the presence of a predetermined response, wrapped in a bureaucratic reporting system, Hurley would have been able to point to those policies, arguing that they tasked him with enforcing the archival authority and not doing so would have been a breach in itself.

The Nordlinger Affair, WA Inc Royal Commission and the Fitzgerald Report taken together demonstrate a weak regulatory environment in Australia in relation to recordkeeping and archival authority. However, they also reveal an understanding of the importance of records in transparent government and represent a turning point in Australian recordkeeping thinking, where archives were increasingly seen as instruments of government accountability to its citizen stakeholders. The recognition that archival authority was an essential ingredient in that accountability was a major step, but as will be seen in the Heiner example, much like the Nordlinger Affair, ad hoc decision-making processes tend to undermine archival authority, even when it is well and carefully legislated.

The destruction of the Heiner documents by the Labour Party government of Queensland in 1990 exploited weaknesses in archival authority and records management processes intended to properly administer records destruction and the state government designed in part to hold institutions accountable. The sensational elements of the case revolve around the alleged gang rape of an under-aged girl who was under state control in a state-run juvenile care facility, but this thesis explores that the parallel threat to human rights of blocking the victims' right to redress through records and of the right to accountable bureaucracy through archival authority. Although such rape is horrible and an obvious affront to all interpretations of human rights, government secrecy through

records destruction and opaque bureaucracy that covers up the rape is an important human rights issue as well. In an accountable bureaucracy, the rape of a child in government custody is likely to be a singular incident. When records are destroyed to protect the image of government workers and bureaucrats, abuse is less likely to be addressed and can become systemic. In order to understand the Heiner Affair's affects on human rights, this chapter will provide a short history of the events before and after the records destruction.

Characterized as “one of the worst scandals in 20th century recordkeeping,”<sup>12</sup> the Heiner Affair undermined one of the core principles of Western society, which values the transparency of government and the freedom of the citizenry to hold government accountable, and holds sacrosanct the principle of equality before the law where governors and governed alike are bound to respect the law or suffer the consequences of not doing so. In reality, the Heiner Affair is an example of a breakdown in governance and the rule of law. Politicians were able to influence the civil service in order to protect themselves from public scrutiny and to obstruct a lawsuit from a manager of a youth detention centre to gain access to records for legal purposes and justice.

The Heiner Affair began in 1989, when it was alleged that children<sup>13</sup> were being abused at the John Oxley Youth Detention Centre (JOYC) of Queensland. In October of that year, the abuse was made public when Ann Warner, a state government opposition spokesperson, cited specific incidents of alleged child abuse in *The Sunday Sun*, a

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<sup>12</sup> Terry Cook, “Three Little Words,” on the television program *Australian Story*, 17 May 2004, found at <http://www.abc.net.au/austory/content/2004/s1111173.htm> accessed on 27 November 2007.

<sup>13</sup> The number of children was not disclosed, but the House of Representatives Standing Committee on Legal and Constitutional Affairs report, *Crime in the Community: Victims, Offenders and Fear of Crime*, vol. 2 (Canberra: House of Representatives, 2004) suggests that the abuse of children at JOYC was institutional and part of the culture of the detention centre.

newspaper from Brisbane.<sup>14</sup> The following month, the government Department of Family Services (DFS) established an investigation into “specific written complaints against Mr. Coyne, the manager JOYC, and on other matters touching JOYC security and treatment of detainees.”<sup>15</sup> This investigation was to be conducted by Noel Heiner, a retired Stipendiary Magistrate. Among other things, the investigation was to determine the facts of the abuse, but also if any criminal misconduct had taken place by the facility manager, Peter Coyne. However, once Coyne became aware of the investigation, he requested access to all related documentation gathered by Heiner in order to defend himself and possibly launch a defamation case against his accusers.<sup>16</sup> In response to Coyne’s concerns, Kevin Lindeberg, a union organizer for the Queensland Professional Officers Association Union of Employees (QPOA)<sup>17</sup>, was called upon to defend Coyne’s interests and protect his rights as a union member.

Central to this case are the documents that Heiner accumulated in his investigation. Coyne’s request to view the documents and any complaints made about him were met with resistance. After the investigation had commenced on 13 November 1989, Coyne made an unofficial request to DFS staff to see all records documenting the complaints made about him. Perhaps to protect the privacy of the inquiry’s witnesses, he was only given a one-page summary, but not the originals that were held by the department. Unsatisfied with the summary, Coyne officially requested to see the original

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<sup>14</sup> Proof Committee Hansard, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Reference: Crime in the Community* (Brisbane, 18 June 2004), LCA1789.

<sup>15</sup> Parliament of Australia Senate, *Submission 1 to Select Committee on the Lindeberg Grievance*, 28 May 2004, 78.

<sup>16</sup> Kevin Lindeberg, “The Heiner Affair,” in *Proceedings of the Seventeenth Conference of the Samuel Griffith Society* (Coolangatta: The Samuel Griffith Society, 2005), found at <http://www.samuelgriffith.org.au/papers/html/volume17/v17chap1.html>, accessed on 29 July 2008.

<sup>17</sup> At the time, the four unions operating within JOYC included QPOA, the Queensland Teachers Union (QTU), the Queensland State Service Union (QSSU) and the Australian Workers’ Union (AWU).

complaints made against him along with any transcripts of evidence collected by the Heiner inquiry. At the same time, he informed DFS that in his opinion the inquiry was illegal and he would sue for defamation if the investigation damaged his career. To this point, Coyne was not aware of the extent of the investigation and was motivated to protect his own career from disgruntled factions within JOYC that sought to undermine his authority and remove him from his position.

Coyne had good reasons to worry about staff seeking his removal since JOYC was, at that time, a poisoned working environment, rampant with factional tensions between the four unions represented. This is supported in a later investigation by the Queensland House of Representatives' Standing Committee on Legal and Constitutional Affairs, entitled *Crime in the Community: Victims, Offenders and Fear of Crime*,<sup>18</sup> initiated in 2002 and delivered in August 2004. The *Crime in the Community* inquiry identified the possibility that the Heiner inquiry had been used as an opportunity by staff to remove Coyne, in stating that “[i]t would be plausible to suggest that staff took the opportunity arising out of the Heiner inquiry to air grievances about Coyne’s management style which may have threatened *their* careers.”<sup>19</sup> Michael Roch, a Training Officer at JOYC, testified to the Committee that he “detested the man [Coyne] and he was detested by 98 percent” of his staff, at least in Roch’s opinion.<sup>20</sup> In interviews given to the inquiry, the shortcomings of JOYC management were revealed in detail. In particular, the promotion of a culture of fear by Coyne was evident through such actions as creeping around the detention centre at night to catch staff sleeping or keeping staff in

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<sup>18</sup> Hereafter referred to as the Crime in the Community inquiry.

<sup>19</sup> *Crime in the Community*, 77.

<sup>20</sup> Michael Roch, *Hansard – Standing Committee on Legal and Constitutional Affairs* (House of Representatives; Brisbane, 16 March 2004), 1639.

his office for hours until they signed false statements about certain events.<sup>21</sup> Coyne's unpopularity among some of his staff was worsened by the fact that his critics were often unqualified for youth detention work, and in many instances, acted unprofessionally in the workplace. Roch, for example, a pilot, had no prior experience in youth detention centres.<sup>22</sup> With this tense internal JOYC climate in mind, it was reasonable for Coyne to assume that his career was in danger from an unsatisfied and unqualified workforce. Initially, it appears that he did not suspect that there could also be possible criminal charges against him.

On 11 January 1990, Heiner revealed that a possible criminal aspect of the investigation may exist during a one-day interview with Coyne. However, Heiner indicated to Coyne that he did not hold the originals of the complaints and that they were in the custody of DFS. In response to this knowledge, Coyne requested access to the documents through an official memorandum pursuant to Public Service Management and Employment Regulation 65 of 1988 that states "an officer shall be permitted to peruse any departmental file or record held on the officer."<sup>23</sup> Coyne specifically requested through his solicitor on 8 February 1990 access to all records under two headings:

- (1) State of allegations made to the Department by employees appertaining to complaints against our clients and which may be the subject of Heiner's inquiry; and
- (2) Transcripts of evidence taken either by Mr. Heiner or in respect of the complaints which specifically refer to allegation or complaints against our clients.<sup>24</sup>

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<sup>21</sup> Proof Committee Hansard, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Reference: Crime in the Community* (Brisbane, 18 June 2004), LCA1632.

<sup>22</sup> Leneen Forde, *Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions*, 31 May 1999, 164.

<sup>23</sup> Parliament of Australia Senate. *Submission 1 to Select Committee on the Lindeberg Grievance*. 55.

<sup>24</sup> *Ibid.*.

Furthermore, Coyne and his representatives gave notice of their intent to initiate legal proceedings on multiple occasions in February and March, which by law would have necessitated the retention (while any legal proceeding is underway or anticipated) and disclosure of the documents. The DFS stalled the process of disclosure until May when the last of the records were destroyed. Through these actions, the department seemed determined to keep the contents of the records secret from both Coyne and his union representative, Kevin Lindeberg.

When Lindeberg was made aware of Coyne's dispute with DFS, Lindeberg was primarily concerned with the professional interests of his union member. He was unaware at that time of the content of the Heiner inquiry documents, but fully understood that Coyne had the right, according to Regulation 65, to consult the records in order to defend his career. DFS was concerned enough by the prospective release of these documents that Ruth Matchett, the Acting Director General of the department, organized an informal meeting with Lindeberg and QSSU Industrial Relations Director Janine Walker to inform them that she had a "major problem."<sup>25</sup> Sue Crook, the Principal Departmental Industrial Officer, also attended the meeting as a witness. At the meeting, Matchett informed them that the Heiner inquiry was to be summarily closed before its work was completed and that she had taken possession of the documents, which had not yet been officially filed.<sup>26</sup> Lindeberg responded to Matchett by informing her that his union member still wanted access to the records and that there would be no more "off the record" meetings in the future.<sup>27</sup>

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<sup>25</sup> Ibid., 80.

<sup>26</sup> Ibid..

<sup>27</sup> Ibid..

Shortly after the meeting with Lindeberg and Walker, DFS secretly transferred the documents to the Office of Cabinet in order to secure Cabinet privilege, and thus protect the records from any further access requests from either within the DFS itself or otherwise.<sup>28</sup> This tactic was rejected by Crown Solicitor, Kenneth M. O'Shea, who advised Cabinet on 16 February 1990 as follows:

the documents cannot attract "(i) Cabinet privilege" as they were brought into being for a departmental purpose not a Cabinet one; (ii) should civil proceedings commence and Writ issued, the documents could not be successfully withheld; (iii) he now takes the "...better view..." the Heiner documents were, and were always, contrary to his original opinion ... "public records" within the meaning of section 5(2) of the *Libraries and Archives Act 1988*; and (iv) permission to have them destroyed must be first obtained from the State Archivist.<sup>29</sup>

However, DFS was undeterred in its efforts to protect the documents from any access requests, stalling their release by insisting that the department was awaiting advice on the matter. At that time, Lindeberg and Coyne were unaware that O'Shea had already advised the department of its inability to deny the documents' release. Instead, Matchett responded to Coyne's request by asserting that she was still seeking legal advice and that the materials that he requested were not on his personal file.

In an effort to prevent access to the documents, Public Service Management and Employment Regulation 65 was interpreted contrary to how the regulation was written. Instead of allowing Coyne to view all departmental records collected or created in the investigation, DFS was intent on restricting his view to only those records that were accumulated and held on his personal file. Since the records of the investigation were not on Coyne's file, his request under Regulation 65 precluded his procuring the relevant

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<sup>28</sup> G.E. Fitzgerald, "Commission of Inquiry," 358. The Fitzgerald inquiry revealed the propensity of cabinet secrecy to be used to prevent the disclosure of information unfavourable to the Government with illegitimate and undisclosed considerations being taken into account.

<sup>29</sup> Parliament of Australia Senate. *Submission 1 to Select Committee on the Lindeberg Grievance*. 81.

information for his defence. This interpretation was challenged on 18 April 1990 by the Crown Solicitor, who stated:

[w]hile it may be argued that the statements are not part of a Departmental file held on Coyne, it would appear artificial to say that they are not part of a Departmental record held on him as all but one of the statements specifically identified Coyne by name and position.... Therefore if a decision is made not to destroy the statements Coyne would appear to be entitled to read them.<sup>30</sup>

By now, it appeared that DFS was stalling the release of the documents through a “re-interpretation” of “personal file,” in order to secure permission from the State Archivist for their destruction. By DFS’s interpretation, records that were not directly attached to his personal file fell outside the scope Regulation 65.

Since the government could not deny Coyne access to all Heiner records that mentioned him based on Crown Law’s faulty advice or Cabinet privilege, the Cabinet decided to have the documents destroyed before any legal proceeding actually commenced that would require the release of the relevant documents. O’Shea’s advice that the records could not be withheld if a Writ of judicial proceedings was commenced became the central issue. Even though Coyne, his solicitors, and Lindeberg had requested the documents both orally and in writing, they had not officially started legal proceedings against DFS. Therefore, the department sought to stall the disclosure long enough to get formal permission from the State Archivist for the records destruction.

The Cabinet’s request for the destruction of these records was based on its assumption that the records were not of historical importance, nor permanently required for government itself. Cabinet was aware that prior approval for their disposal was required from the State Archivist under the terms of the recent *Libraries and Archives Act*. It appears that there may have been a belief that the State Archivist would agree,

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<sup>30</sup> Ibid., 85.

and so only needed to give a quick pro-forma approval of their destruction. Of course, historical importance is debatable for almost any set of documents, because what constitutes an historical document is subjective and generally determined once the records are consulted by researchers after they have become archival, traditionally decades after their actual creation. However, the subjectivity of the order to destroy based on historical grounds seemed defensible from a lay perspective, simply because after the destruction nobody would know the actual content of the documents. This ignorance of the documents' content was maintained by Matchett who had the documents sealed in the presence of Heiner; they were never opened by DFS.<sup>31</sup> This intentional invoking of complete ignorance of the contents of the records served a double purpose. DFS could not be seen to be "taking into account the evidence presented to Heiner in...future dealings with [staff at JOYC],"<sup>32</sup> but also it gave DFS plausible grounds to deny charges of intentionally destroying evidence of official misconduct. Of course, the extent of DFS's ignorance of the records' content is disputable. At the very least, DFS officials would have had to have read the documents to discern which ones related to Coyne, and therefore should be removed and sealed in this manner.

The lengths to which DFS went to deny Coyne access to the records suggested that they contained information more damaging than the biased or defaming testimonies of disgruntled staff against their boss, a mere mid-level bureaucrat. The idea that the Heiner inquiry was designed to create an opportunity to fire or at least shift Coyne away from JOYC is plausible since, in a report to the House of Representatives' Standing Committee on Legal and Constitutional Affairs, it was argued that factional tensions

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<sup>31</sup> Ibid., 16.

<sup>32</sup> Ibid..

between the four unions were a major factor in the shredding of the Heiner documents.<sup>33</sup>

Beyond the obvious politics that would be present in an institution with so many competing unions, JOYC had a particular problem because the AWU held a disproportionate amount of political power, as former Minister for Family Services Beryce Nelson contends, for having been the “leading faction in the election of the Goss government and certainly was the powerful force within that government.”<sup>34</sup> This was all the more important because an AWU representative was implicated in the physical abuse of children at JOYC,<sup>35</sup> which would have been an embarrassment for that union, and the new, progressive, left-wing government of Premier Goss. Des O’Neil, an executive member of the QSSU, made the connection between the AWU and the Goss government through an early speech delivered by “Mr Goss (as future Premier) to delegates at the AWU union conference that his door (as Premier) will always be open to union delegates of that union.”<sup>36</sup> However, Nelson was more overt, characterizing the relationship between the union and the Labour Party as collusion.<sup>37</sup> Thus, one of the theories behind the rationale for destroying the Heiner documents focused on the relationship between the union and the government. The records presented a danger to an AWU member who had been implicated in the physical abuse of inmates at JOYC, and whose union was a leading contributor to the Goss government. It is therefore reasonable to ask whether the union pressed DFS to destroy all documents with evidence that would incriminate the Goss government.

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<sup>33</sup> *Crime in the Community*, 80-82.

<sup>34</sup> Beryce Nelson, *Hansard – Standing Committee on Legal and Constitutional Affairs* (House of Representatives; Brisbane, 18 June 2004), 1785.

<sup>35</sup> Des O’Neill, “Submission 172,” *Standing Committee on Legal and Constitutional Affairs – Crime in the Community* (27 October 2003), 3.

<sup>36</sup> *Ibid.*, 4.

<sup>37</sup> Nelson, *Hansard*, 1785.

The Goss government denied the union collusion theory as the explanation of its decision to prevent the release of the documents through their destruction. Instead, the Goss government asserted that the real reason was the Heiner inquiry had simply gone beyond its scope, and opened Heiner to possible litigation against himself personally.<sup>38</sup> In essence, the inquiry was created in order to investigate and report to the Minister and Director-General on the following terms of reference:

1. the validity of the complaints received in writing from present or former staff members and whether there is any basis in fact for those claims.
2. compliance or otherwise with established Government policy, departmental policy and departmental procedures on the part of management and/or staff.
3. whether there is a need for additional guidelines or procedures or clarification of roles and responsibilities.
4. adequacy of, and implementation of, staff disciplinary processes.
5. compliance or otherwise with the Code of Conduct for Officers of the Queensland Public Service.
6. whether the behaviour of management and/or staff has been fair and reasonable.
7. the adequacy of induction and basic training of staff, particularly in relation to the personal safety of staff and children.
8. the need for additional measures to be undertaken to provide adequate protection for staff and children and to secure the building itself.<sup>39</sup>

Points seven and eight at least seem to cover the abuse of children, since evidence received by the inquiry of a gang rape or other serious sexual and physical abuse of children would imply, to put it mildly, that staff were not properly trained to handle these situations and additional measures were needed to protect the children. However, point one makes the investigation into abuse explicit because claims of abuse through excessive handcuffing at JOYC were a matter of public record, being reported in the

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<sup>38</sup> Paul Ransley, "Queensland's Secret Shame," Interview with Anne Warner on *Sunday* (March 1990), found at [http://sunday.ninemsn.com.au/sunday/cover\\_stories/transcript\\_304.asp](http://sunday.ninemsn.com.au/sunday/cover_stories/transcript_304.asp), accessed on 26 September 2008.

<sup>39</sup> *Crime in the Community*, 68-69.

newspaper and even publicly acknowledged by Anne Warner.<sup>40</sup> Even Heiner himself was confused and sought clarification as to whether the investigation related to the management of the facility or to the mistreatment of the children.<sup>41</sup> However, he stated afterwards that if abuse was not within the scope of the inquiry, he would still have noted its existence. Yet thirteen years later, he could not remember anyone telling him about the alleged gang or pack rape during the course of his inquiry.<sup>42</sup> By contrast, Roch indicated during his interview with the Committee on Legal and Constitutional Affairs that he did speak to the inquiry about the rape of a girl and about Peter Coyne's management of the situation.<sup>43</sup> Although Heiner did not remember interviewing Roch, he also did not remember interviewing Coyne, who initiated official requests to see the records based on a full-day interview with Heiner. Furthermore, Heiner only remembered interviewing twelve to fifteen people, while the subsequent Forde Inquiry<sup>44</sup> put the number of interviewees at thirty-five.<sup>45</sup> However unreliable Heiner's memory may have become in later years about the specifics of the interviews, his recollection was solid concerning the way in which the inquiry was set up, its scope, and his and the interviewees' grant of full legal indemnity for participating. According to Heiner, the scope of the project was not the issue, but there were questions about the liability of those who participated.

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<sup>40</sup> "Teens Handcuffed: MP," *The Sunday Sun*, 1 October 1989, found at <http://www.gwb.com.au/gwb/news/goss/index.html#warner>, accessed on 14 September 2009.

<sup>41</sup> Noel Heiner, *Hansard – Standing Committee on Legal and Constitutional Affairs* (House of Representatives; Brisbane (18 May 2004), 1686

<sup>42</sup> *Ibid.*, 1687-1688.

<sup>43</sup> *Ibid.*, Michael Roch, *Hansard*, 1635.

<sup>44</sup> The Forde Inquiry's formal title is *The Report of the Commission of Inquiry into Abuse of Children in Queensland Institutions*. It was formed in response to ongoing criticism of Queensland's system of youth centers.

<sup>45</sup> *Ibid.*, Noel Heiner, *Hansard*, 1695.

Heiner's contention, also supported by the government, was directed towards the previous government that had not established the Heiner inquiry properly. Specifically, the inquiry was not a commission of inquiry. If it were a commission of inquiry, Heiner and his witnesses would have received immunity from private-defamation lawsuits. Anne Warner, a former union official who was the Minister of Family Services at the time of the shredding, maintained that the Heiner documents were shredded to protect staff from such possible defamation suits.<sup>46</sup> This was a reasonable conclusion since Coyne himself had already threatened legal action against the department and the witnesses on just such grounds. According to Heiner, however, the investigation was protected by Cabinet even though he did have early concerns about the indemnity of the people who volunteered to participate.<sup>47</sup> Heiner even went so far as to write a letter to Matchett refusing to proceed unless indemnity for himself and the inquiry's respondents were assured. This was granted by the Goss Cabinet, and then verbally conveyed to the JOYC witnesses by Matchett on or about 11 February 1990, along with an order to terminate the inquiry and return all materials collected to DFS.<sup>48</sup>

The question of confused indemnity seems extremely weak, or even a red herring to blur key issues, due to the simple fact that witnesses could not be sued for defamation if they were honest in their testimony to the inquiry. Witnesses to the inquiry "did not need 'protection' unless the information showed they were (apparently) guilty of impropriety."<sup>49</sup> Even in the event that the witnesses were not protected by the

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<sup>46</sup> Paul Ransley, "Queensland's Secret Shame," *Nine Network Sunday Programme*, 28 March 1999, found at [http://sunday.ninemsn.com.au/sunday/cover\\_stories/transcript\\_304.asp](http://sunday.ninemsn.com.au/sunday/cover_stories/transcript_304.asp), accessed on 26 September 2008.

<sup>47</sup> Noel Heiner, *Hansard*, 1681.

<sup>48</sup> *Ibid.*, 1681-1682.

<sup>49</sup> John Craig, email to Kevin Lindeberg, "Red Herring and the Heiner Documents: More on 'Official Misconduct the Fitzgerald Inquiry Missed,'" *Towards a Professional Public Service for Queensland* (27

government, they were certainly protected by the law that will not award damages to a litigant who is making specious claims of slander. Furthermore, if witnesses *were* making false statement about Coyne, they should not have been protected by the government, as it was indeed Coyne's right to hold them to account. Therefore, considerations of indemnity and scope should not have factored into the destruction of the records because both were protected by other mechanisms. Furthermore, alleged serious abuse of children at JOYC should have superseded these considerations since protecting employees or even the magistrate in charge of the inquiry was surely less important than getting at the truth over alleged sexual or physical abuse of minors in state custody. However, the Goss Cabinet's claim that in shredding the documents it was merely acting to prevent people suing each other after indemnifying the witnesses is false because its indemnification guarantee made the Queensland Government an active player in any such putative legal action.

The Heiner documents contained questions to staff about the conduct of JOYC, but also about possible instances of abuse that may have been happening to children at the institution. The incident that preceded the Heiner inquiry involved a 14 year-old girl who was taken on a sanctioned field trip and left alone with several boys who raped her. The incident first came to public light through a whistleblower at JOYC who reported that a 15 year old female had been raped while on an outing.<sup>50</sup> However, reports from that time are rife with inconsistencies concerning the girl's age and the actions taken when she returned to the centre. Craig Sherrin, a future Minister of Family Services, was

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May 2007), found at [http://cpds.apana.org.au/Professionalism/Chamberlin\\_27\\_5\\_07.htm](http://cpds.apana.org.au/Professionalism/Chamberlin_27_5_07.htm), accessed on 25 June 2009.

<sup>50</sup> *The Sun* "Rampage at Teen Jail," 16 March 1989 Front Page, quoted in *Submission 1 to Select Committee on the Lindeberg Grievance*, 53.

quoted at the time in the *Independent Monthly* stating that “the 15-year-old female inmate who claimed to have been raped...had been 17 and that no charges had been laid.”<sup>51</sup> Moreover, the government maintained that the girl had been invited to lay charges but declined. On the surface, and in light of the facts as presented at the time, nothing more could have been done since she was above the age of consent. This was proven to be false since departmental files show that the girl in question was only 14 years old at the time and, as a minor, “not legally capable of consenting to sexual intercourse, and wanted the alleged rapists charged but, after being intimidated for 2 days, declined to proceed when police first arrived some four days after the incident.”<sup>52</sup> Beyond the seriousness of a 14 year-old girl being gang-raped while in state custody, the handling of the affair in the succeeding days demonstrates the ineptitude of the institution and its manager, Peter Coyne, and the department itself at all relevant times, especially in misleading its minister and public about the rape victim’s real age.

The centre’s response to the rape was slow, suggesting a desire from all involved, with the exception of the girl, to suppress the incident rather than correct an obvious wrong that had been perpetrated not only by the attackers, but by the staff counsellors who allowed it to happen in the first place by an ill-supervised outing. Of course, this suppression itself created a third wrong: one that Lindeberg contends is a systematic cover-up of abuse. This seems even more plausible considering the history of the institution and other events of molestation and abuse that would come to light after the inquiry was completed. Bruce Grundy, an investigative journalist and Associate Professor at the School of Journalism and Communications at the University of

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<sup>51</sup> Bruce Grundy and Susann Kovacs, “New Twist in the Mysterious Rape Saga,” *The Independent Monthly* (March 2004), 3. Found at [www.gwb.com.au/gwb/news/gross/rape.pdf](http://www.gwb.com.au/gwb/news/gross/rape.pdf), accessed on 13 November 2008.

<sup>52</sup> *Submission 1 to Select Committee on the Lindeberg Grievance*, 53.

Queensland, who has long covered the Heiner issues, reported on another rape case of almost the exact same nature in 1991, where a girl was taken on an excursion to Wivenhoe Dam and raped by a youth worker.<sup>53</sup> Upon returning to JOYC, the girl was “assaulted by several other female residents whom she claims were sexually involved with the youth worker in question. When her complaints were taken to JOYC management, the youth worker was offered the opportunity to be sacked or resign.”<sup>54</sup> The girl chose not to press charges, much like the first gang-rape case in 1988. However, in this case, handwritten death threats from fellow inmates were preserved and published, which make it plain that the girl was coerced into not reporting the rape after the fact.<sup>55</sup> This pattern of failure to report immediately serious incidents of abuse seems to be present at JOYC, and allowed fellow inmates or staff to convince or intimidate the girls not to press charges.

In the case of the 1988 rape, Peter Coyne did not get the police involved until three days after the incident. In fact, he did not even speak to the girl about the incident until the following day. Instead he left her to go to sleep, taking no action to preserve evidence that could be used to verify whether or not she had even had sexual contact with the boys. The girl expressed a desire to press charges on the second day, but instead of calling in the police, he made all the staff involved prepare reports of the incident. By the

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<sup>53</sup> Bruce Grundy, “Another John Oxley victim tells of rape,” *The Independent Monthly* (July 2004), 1. Found at [www.justiceproject.net/content/files/documents/September1.pdf](http://www.justiceproject.net/content/files/documents/September1.pdf), accessed on 19 January 2009.

<sup>54</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Crime in the Community: Victims, Offenders and Fear of Crime*, vol. 2 (Canberra: House of Representatives, 2004), 63. The youth worker resigned.

<sup>55</sup> Bruce Grundy, “Shreddergate scandal: The death-threat letters... Some questions that arise,” *The Independent Monthly* (August 2004), 2, found at <http://www.docstoc.com/docs/4694277/NEWS-Shreddergate-scandal-The-death-threat-letters-Some-questions>, accessed on 20 January 2009.

fourth day after the rape, the girl reversed her decision to press charges, citing “abuse from some of the boys”<sup>56</sup> as her reason.

In reality, her decision not to press charges was moot because no physical evidence would survive four days to then be collected in order to substantiate her claim.<sup>57</sup> The only medical attention the girl was given before contacting the police was by the JOYC doctor, who was solely concerned with providing contraceptive pills in order to prevent a pregnancy. She did receive an examination three days after the rape, but evidence of the crime would not have existed by then. In this, and the other case mentioned, there seemed to be an absence of procedures at JOYC. Bruce Grundy stated that the protocols in cases of sexual assault were unknown at the time, but an earlier Police handbook was clear:

Upon receiving a complaint of rape for investigation, bear in mind that swift, accurate, tactful and thorough handling is required. Indispensable evidence may be irretrievably lost if time is allowed to drag; the alleged offender must be located as soon as possible, and speedy examination of the persons of both complaint and assailant may produce vital evidence.<sup>58</sup>

Thus, by concerted action or by incompetence, JOYC and its management undermined the victims’ ability to seek justice in both incidences, and violated her human rights.

In reality though, the rapes and other serious JOYC abuse of children in Queensland’s care (chaining children outside all night to a fence for punishment), alarming as they are, distract from the related issue of accountability. Certainly, children should not be abused, but the conditions that led to the suppression of that abuse are also very disturbing from a societal standpoint, because they affect the broadest spectrum of

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<sup>56</sup>Bruce Grundy, “What They Did to a Girl in Care (One),” *The Justice Project: The Abuse of Children in Care* (7 May 2002), at <http://justiceproject.net/content/WhatTheyDid.asp>, accessed on 5 November 2008.

<sup>57</sup> Ibid..

<sup>58</sup> Ibid..

its stakeholders. The ability of government to destroy records that embarrass it undermines good governance and accountability, and jeopardizes the ability of the citizenry to enter into good-faith negotiations with public bodies. Even such innocuous dealings as public contracts become suspect under records management regimes that allow elected officials and bureaucrats to simply send records to the archives for destruction when they become embarrassing or difficult. While the rape cases that had become so intertwined with the Heiner Affair are obviously important, by their sensational nature they do draw the public's attention away from the systemic issues of corruption in government and the inability of citizens to prove its existence through recorded evidence. The rapes of the girls and the physical abuse of other children in the centre's care are the most emotionally charged aspects of this particular case. Yet the fact that nobody has been held accountable for these crimes seems to be the reason this case continues to agitate Australians almost twenty years after it first came to light. Tied to the lack of the Queensland government's ability (or accountability) to punish the offenders is the much less sensational aspect of the case - the shredding of the documents and how it was allowed to happen.

The records in the Heiner inquiry would have most likely documented the 1988 rape and provided evidence of a systemic problem within the youth criminal justice system. Instead, the lack of document control and a powerless or weak State Archivist allowed for the records' destruction, which were needed to prove most conclusively that the abuse was actually happening. The Heiner Affair demonstrated how governance breaks down and how politicians can influence the bureaucracy and therefore undermine the ability of the citizen to participate in the proper running of the state. In this case, the

records should have ensured that justice was done, but instead their destruction proves a point about the ultimate power of the record: the record is only as powerful for citizens as the quality of the processes that create it, manage it, and destroy it.

At the time of the destruction of the Heiner documents, the archival appraisal and records disposition policy could best be described as ad hoc, lacking structured disposition schedules, leaving appraisal decision-making on a case-by-case and reactive basis.<sup>59</sup> Chris Hurley, that former Keeper of Public Records for the State of Victoria, Australia mentioned earlier, who has also written on the Heiner Affair, believes such an ad hoc appraisal strategy is “professionally indefensible because it is not accountable to stakeholders with different or even conflicting interests in retention of the material.”<sup>60</sup> In fact, an ad hoc “strategy” is not a strategy at all, but a complete abrogation of archival responsibility to stakeholders, who can never know or question what documents will be held by the archives, and which ones will be authorized for destruction and why.

Archival appraisal and destruction policies that are based on careful consideration of the records produced within departments in context are legally and morally defensible and tend to preserve documents that serve the widest interest to society. In Canada, a case of controversial record destruction of immigration files was defended in the mid-1980s due to the fact that the destruction was carried out under a formal routine that had been vetted by both records management and archival authorities. Certain groups thought that the National Archives of Canada (NAC) had authorized the destruction of evidence that could have identified Nazi war criminals, leading to a royal commission of

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<sup>59</sup> Parliament of Australia Senate. *Submission 2 to Select Committee on the Lindeberg Grievance*, 28 May 2004.

<sup>60</sup> Chris Hurley to Jonathan Nordland, email, 21 October 2007. The email was a response to my statement that “there seem to have been no real rules at the time as to the proper retention periods in the normal course of business that should have been followed.” He responded “I think you are right.”

inquiry to delve into the practices and processes of the NAC. Since records management and archival practices were well articulated internally, the destruction of the records was explainable to stakeholders. Furthermore, the existence of a formal appraisal process protected the documents that might have led to the identification of Nazi war criminals in Canada. In the Canadian example, archivists recognized that archives were not merely cultural repositories of accumulations of records acquired through dispassionate bureaucratic processes, but “active agents of political accountability, social memory, and national identity.”<sup>61</sup> With this in mind, the NAC recognized the importance of a coherent appraisal strategy based on research in government functions, programs, activities, and citizens’ interactions with same, as the core research activity by archivists, with records disposal schedules as the practical means for its implementation.<sup>62</sup>

The Canadian example is instructive because the processes that were followed at NAC and within the larger federal government bureaucracy created a means by which the public could examine the destruction of records and hold its government to account. Even though the destruction was successfully defended by the NAC, the ability of archivists and records managers to defend that decision was facilitated by the structured processes by which disposition schedules are determined. There was nothing ad hoc or informal about it. This was not the case in Queensland, where the ad hoc destruction of records implies that no such strategy or formal appraisal methodology existed.

A government archival appraisal strategy implies that the archivist has determined which records are archival well before the date of their disposition. In order for archivists

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<sup>61</sup> Terry Cook, “‘A Monumental Blunder’: The Destruction of Records on Nazi War Criminals in Canada,” in *Archives and the Public Good: Accountability and Records in Modern Society*, Richard J. Cox and David A. Wallace eds. (Westport: Quorum Books, 2002), 38.

<sup>62</sup> *Ibid.*, 62.

to formulate that plan, a records management process has to exist within all departments of the government, where records are created with fixed operational retention schedules that state how long each is to be kept by the agency and their disposition by transfer to the archives or by destruction. Such a process would make clear that no record could be destroyed, regardless of archival value, or its retention period, if that record was needed for actual or anticipated legal proceedings. Such a policy and process would negate the efforts of individual actors to destroy or retain records at will or whim. Furthermore, records created by a department should be retained or controlled by that department according to this process and not subject to confiscation outside the parameters of the retention schedule. As will be seen in the case of the Heiner documents, all these principles were not followed, leading to the eventual destruction of the records, a perversion of justice, and a festering unresolved violation of human rights in Australia.

The first instance of a lack of records control was revealed in the confusion expressed by Heiner over the indemnity he and his interviewees would be provided. Heiner was not sure if it was Cabinet or DFS that had initiated the inquiry and he did not even get confirmation in writing that indemnity had been provided. When questioned about the institution of the inquiry, Heiner responded, “I thought I was acting in an inquiry on behalf of Cabinet ... I found out – or thought I found out – that it was an appointment through the Department of Family Services.”<sup>63</sup> Heiner was sending his taped interviews back to DFS, but was unsure who was actually in control of the documents after that or even who had the authority to create the very inquiry he was conducting. Furthermore, Heiner relinquished the totality of his inquiry’s documentation

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<sup>63</sup> Noel Heiner, *Hansard*, 1675.

based on a phone call from an unspecified person at DFS.<sup>64</sup> To compound the problem, the Crown Solicitor advised Matchett on 23 January 1990 that the records were the property of Heiner even though they were created under the auspices of a departmental inquiry.<sup>65</sup> It is thus obvious that no consistent records management structures were in place, including basic control over the scheduling and disposition of records.

After the records were transferred from Heiner's control to DFS, they were transferred one more time to Cabinet in order to secure privilege. This privilege allowed Cabinet to shield records created by Cabinet from access to (or freedom of) information requests, and thereby prevent Coyne or Lindeberg from gaining access to them on the pretext that they were not held by DFS. One could be charitable and assume that the transfer was a result of incompetence rather than a concerted effort to block access. After all, the poor records management and lack of awareness over who actually owned the records could not have been solely restricted to Heiner. Indeed, it could be argued that the Cabinet and its lawyers actually believed that the records belonged to Cabinet since the investigation was revealed to be a commission of inquiry initiated, or at least later protected, by Cabinet. Considering the poor legal advice in regard to Coyne's request to see the original complaints made about him, it is not an indefensible argument that the Queensland government was rife with incompetence (or inexperience, having been newly elected) from the DFS records clerks and Crown Law advice right up to the ministers and premier setting the tone of government around the Cabinet table. However, generosity aside, Cabinet knew of Coyne's desire to initiate a defamation suit against the inquiries

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<sup>64</sup> Ibid., 1681.

<sup>65</sup> *Submission 1 to Select Committee on the Lindeberg Grievance*, 80.

witnesses,<sup>66</sup> but chose instead to proceed with the destruction of the requested records based on a legal technicality. The government's knowledge of the legal limits of records destruction as they pertain to inquiry proceedings does not suggest incompetence at all, but rather an in-depth understanding of how to manipulate the weaknesses of the system for the government's own ends. Furthermore, the inconsistent application of the law about the destruction of records needed as legal evidence suggests that the government cynically reviewed the law as designed to serve politicians and the bureaucracy, not protect the citizenry.

As mentioned earlier, the basis of the government's argument that it could destroy the records was a contrived loophole that formal legal proceedings had not yet commenced. If such proceedings had started, or could be reasonably anticipated to be starting soon, then the destruction of any records relevant to those proceedings was unequivocally forbidden by law. Section 129 of the Queensland Criminal Code, reads:

Any person who, knowing that any book, document, or other thing of any kind, is or may be required in evidence in a judicial proceeding, wilfully destroys it or renders it illegible or undecipherable or incapable of identification, with intent thereby to prevent it from being used in evidence, is guilty of a misdemeanour, and is liable to imprisonment for 3 years.<sup>67</sup>

The law is clear that records cannot be destroyed should they be required in evidence, or even anticipated that they "may" be required. This is also supported by other legal opinions. Alastair MacAdam, a Senior Lecturer in Law and Barrister of the Supreme Court of Queensland, argued that the wrong interpretation of the law had been applied

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<sup>66</sup> Michael Barnes, "Senate Select Committee on Unresolved Whistleblower Cases," *Queensland Senate Hansard* (29 May 1995), 655.

<sup>67</sup> The Queensland Senate, "Report," *Senate Select Committee on the Lindeberg Grievance* (November 2004), 13. The current Queensland Criminal code is more direct, stating "A person who, knowing something is or may be needed in a judicial proceeding, damages it with intent to stop it being used in evidence commits a misdemeanour." Furthermore, the maximum penalty has been increased to seven years imprisonment.

and that the government repeatedly defended that decision through the subsequent Senate investigations into the Heiner matter.<sup>68</sup> Furthermore, the Morris-Howard Report agreed with MacAdam that the Crown Solicitor had misinterpreted the law.<sup>69</sup> Indeed, the courts themselves agreed that the law could be interpreted to mean that an investigation does not need to be underway in a formal legal sense, but only anticipated or likely to be pending. The very same Queensland Government responsible for the destruction of the Heiner records prosecuted Douglas Ensbey, a pastor who destroyed evidence of sexual improprieties by one parishioner with a teenage girl before the related judicial proceeding was conducted. The Ensbey case was resolved in 2004 when Ensbey was found guilty and punished, thereby calling into question the consistency of the application of the law in materially similar circumstances. The two cases reveal an obvious double standard when the law is applied to ordinary citizens and to politicians.<sup>70</sup> Incredibly though, the Queensland Ombudsman and Information Commissioner, David Bevan, defended the decision to destroy the 1991 records of JOYC, in light of the Ensbey case, because there was a lack of case law at the time of the Heiner Affair.<sup>71</sup> He argues the ambiguity surrounding the interpretation of Section 129 of the Criminal Code shows that it is open to more than one interpretation.<sup>72</sup> Yet there is no ambiguity in Section 129 of the Criminal Code. The misinterpretation at the highest level was to shield potential friendly or insider defendants from prosecution. Indeed, misinterpretation of laws and regulations was a hallmark of the Heiner Affair.

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<sup>68</sup> Alistair MacAdam, "Senate Select Committee on the Lindeberg Grievance," *Queensland Senate Hansard* (11 June 2004), 70.

<sup>69</sup> A. Morris and E. Howard, *An Investigation into Allegations by Mr. Kevin Lindeberg and Allegations by Mr. Gordon Harris and Mr. John Reynolds* (Queensland; Department of the Premier, 1996), 92. Hereafter referred to as the Morris-Howard Report.

<sup>70</sup> "Three Little Words," *Australian Story*.

<sup>71</sup> David Bevan, *Correspondence to Select Committee on the Lindeberg Grievance* (3 August 2004), 2.

<sup>72</sup> *Ibid.*, 3.

The misrepresentation of Regulation 65 and the subsequent denial of access to Coyne to the complaints made against him may be interpreted as either the Family Services Department receiving poor legal advice or employing a stalling tactic until a more permanent solution could be found. One must conclude that DFS was using the bureaucracy to its advantage to slow the process of access with the excuse of considering different legal advice on how to proceed. It seems very unlikely that Peter Coyne was the first employee to try to access documents pertaining to himself or herself in the history of the DFS and that the department would not have had some sort of procedure for dealing with such requests. After all, the very existence of Regulation 65 would suggest that employees bargained to have this right, which implies that they, if not regularly, did request this type of information.

The DFS procedures that were in place mirrored the quality of the state archives disposition policies. Both were ad hoc and subject to individuals who could influence the outcome, including politicians. In such an environment, the ability of an employee to compel the release of the records, in the way Coyne needed, would have been a challenging and long process. Coyne's only recourse was to his union representative, Kevin Lindeberg, who would later become the key crusader and principal whistleblower against this type of government corruption, demonstrated in the Heiner Affair.

The lengthy process of obtaining legal advice and counter legal advice before the records were actually disposed took four months. Coyne made his first informal request to see the documents on 27 November 1989, but, as discussed, he did not get the access he needed. This initial refusal may be viewed as a department erring on the side of caution and taking the view that the protection of other people's privacy was more

important than Coyne's legal request for access. Although perhaps reasonable, it was wrong and was challenged the next month when Coyne put in his official request to Ruth Matchett. In response, Matchett waited until 2 January 1990 to find out where the documents were.<sup>73</sup> This move by Matchett indicated that she and the department knew where the original complaints were. The subsequent moves to restrict Coyne's request under Regulation 65 only to his personal file and her claim that "she [was] not aware of any other departmental file containing records of the investigation that he was seeking"<sup>74</sup> reveal a predetermined concerted effort to prevent Coyne from accessing the documents. This could only happen in an environment with little records control or separation of powers between the bureaucracy and elected officials.

The lack of official records control is demonstrated through Matchett's ability to collect the relevant Heiner documents relating to Coyne and not place them in his official personal file.<sup>75</sup> Her desire to keep the records in "limbo"<sup>76</sup> further illustrates the ability of the Director General of a Queensland government department to undermine the records management process. As well this situation suggests that the records management regime of the time had little control over its own documents, and lacked clearly articulated policies and procedures for their filing, access, use, management, and proper disposition. While Heiner did indeed retain possession of the documents in order to conduct the investigation, he sent the recorded interviews back to the department for transcription. The transcripts were then returned to him and the originals retained.<sup>77</sup> Heiner was always an agent of the Queensland Crown, and as such, he generated public

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<sup>73</sup> *Submission 1 to Select Committee on the Lindeberg Grievance*, 80.

<sup>74</sup> *Ibid.*.

<sup>75</sup> *Ibid.*.

<sup>76</sup> *Ibid.*.

<sup>77</sup> Noel Heiner, *Hansard*, 1684.

records as he worked. Thus, the records were in the possession of the department from the very beginning of the investigation, but unregistered and uncontrolled. In a proper records management regime, the transcripts would be indexed so the transcripts and the recorded interviews may be intellectually connected and not lost in an unmarked file. Matchett's belief that the documents could simply disappear by remaining in a state of limbo, coupled with the poor records management, underlies a systemic failure of the Queensland Government.<sup>78</sup>

The fact that this was all revealed to Coyne and Lindeberg at an "off the record" meeting on 19 January 1990 further reveals Matchett's desire to suppress potentially embarrassing records creation that related to the meeting itself (no minutes, no summary, no report), and thereby to undermine Coyne and Lindeberg's ability to hold her personally accountable. However, the meeting had the opposite result. Instead of causing Coyne to end his pursuit of the documents, it caused Lindeberg and Coyne to make it clear that all interactions from then on would be official and therefore a matter of public record.

The response by Matchett and the department was to commence the process of destroying the records or by use of other methods, such as secretly transferring them from DFS to Cabinet, to prevent access to them. This entailed finding legal opinions that supported their decision. Crown Law initially advised DFS on 23 January 1990 that the records were the property of Heiner, and so could be destroyed immediately, as long as no legal proceedings had commenced that would require the documents. As discussed, the Crown Solicitor, Kenneth O'Shea, advised Cabinet on 16 February 1990 that the

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<sup>78</sup> *Submission 2 to Select Committee on the Lindeberg Grievance*, 11. The Australian Society of Archivists (ASA) describes the relevance of the Heiner documents as evidence of a "systematic failure in government."

documents belonged to the department, but the message that they could still be destroyed in the absence of legal proceedings remained, despite the crucial changing of the legal status of the Heiner Inquiry documents themselves. The advice was based on the idea that under the circumstances of routine records management, many scheduled records are destroyed and their use in legal proceedings cannot always be predicted. When records are scheduled and destroyed according to formal schedules and not “for the intention of preventing litigants from obtaining justice,”<sup>79</sup> the administrative unit is protected by its bureaucratic processes.<sup>80</sup> However, the Heiner documents were not destroyed according to any form of a routine records management schedule. Added to the fact that the request for their destruction was from a very senior level, the Acting Cabinet Secretary on direction from the Cabinet, implies that a large degree of political pressure was being brought to bear on the State Archivist. Furthermore, those records were destroyed with the intention of preventing litigants from obtaining justice because Cabinet had knowledge of impending legal proceedings. Therefore, even if the records were scheduled properly, they could not legally have been destroyed in light of Section 129 of the Queensland Criminal Code, no matter what the State Archivist authorized.

Cabinet pressure on the State Archivist was a major factor in the corruption of the bureaucratic processes in this case. In the absence of consistently applied records management practices, the always unequal power dynamic between the State Archivist and Cabinet was even further skewed in favour of Cabinet. Certainly, an archivist at any level has little power in relation to elected officials and their senior bureaucratic advisors; however, even politicians are subject to the law and cannot completely overturn well-

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<sup>79</sup> Chris Hurley, “Recordkeeping, Document Destruction, and the Law (Heiner, Enron, and McCabe),” *Archives & Manuscripts*, vol. 30, no. 2 (November 2002) 30, 2, 6-25.

<sup>80</sup> Cook, “A Monumental Blunder,” 50.

established processes designed to ensure accountability. When archivists, even with the backing of policies, procedures, processes and rules, challenge the authority of elected officials, they may sometimes pay a steep personal price.<sup>81</sup> However, when archivists challenge authority in the absence of formal archival disposition and records management practices, they will always pay a price, or simply be scorned or ignored. In a rules-driven bureaucracy, the ability of individual actors to influence the outcomes is greatly diminished because decisions are impersonal. In the absence of impersonality, where the State Archivist had adopted an ad hoc system of appraisal, she had no way of disputing the government's argument that the records needed to be destroyed, beyond her personal opinion, and no grounds (due to the absence of a proper records schedule) to counter the government's demand for an instant decision authorizing that destruction. In short, the State Archivist had no formal policy or procedures to back up an alternate appraisal decision to justify the retention of the records.

The decision to destroy based on the assertion that the records were not of historical importance seems extremely short-sighted, ignoring state responsibilities to its citizenry in regards to accountability. However, the archival mandate of the time was ambiguous, leaving it open to individual interpretations depending on the focus of the current government's and archivist's interpretations. Section 52 of Queensland's *Libraries and Archives Act* obliges public authorities to:

- (a) Cause complete and accurate records of the activities of the public authority to be made and preserved; and

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<sup>81</sup> Chris Hurley, "The Role of the Archivist in Protecting the Record from Political Pressure," in *Political Pressure and the Archival Record*, eds. Margaret Proctor, Michael Cook, and Caroline Williams (Chicago: Society of American Archivists, 2005), 155. Hurley recounts, as mentioned earlier, being shuffled out of his post as Keeper of Public Records for Victoria for trying to enforce archival authority in the unauthorized destruction of certain records that may have been embarrassing for elected officials.

- (b) Take all reasonable steps to implement recommendations of the State Archivist applicable to the public authority concerning the making and preservation of public records.<sup>82</sup>

While the inclusion of documents pertaining to accountability may seem obvious when creating a complete record of the activities of a public authority, the widespread assumption that archives were institutions exclusively focused on heritage, history and culture may have made the mandate less clear. If the State Archivist was under the assumption that her job was to preserve a complete and accurate historical record, the Heiner documents may have been excluded due the possibility that they reflected routine, repetitive matters of a current investigation and not the actions of the state from the larger historical perspective.

The Council of the Australian Society of Archivists bases its guidance for archivist's appraisal decisions on "international professional best practice,"<sup>83</sup> which recognizes the role of archives in supporting state accountability. Unfortunately, international best practices do not carry the weight of law within a local jurisdiction, but instead offer only a set of suggested procedures to a profession. The fact that the State Archivist consented to the destruction, based on the rationale provided by Cabinet, with only a cursory examination of the records, demonstrates a lack of independence, but it does not prove that she would have made a different independent appraisal decision based on other considerations such as the documents' use for accountability purposes. In fact, the State Archivist knew that defamatory material was contained in the documents, but still authorized the destruction, suggesting that she was in agreement with Cabinet

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<sup>82</sup> Office of the Queensland Parliamentary Counsel, *Libraries and Archives Act 1988 (QLD)*, section 52, cited in *Submission 1 to Select Committee on the Lindeberg Grievance*.

<sup>83</sup> Council of the Australian Society of Archivists, *Australian Society of Archivists' Position Statement on the Heiner Affair* (18 March 1999).

and its erroneous legal opinion that it had the right (and indeed need) to destroy them.<sup>84</sup>

After all, there is no dissenting opinion on file from the State Archivist to suggest that she disagreed with the destruction or the opinion that her mandate was solely restricted to the capture of historical records. If this is the case, then she could transfer the blame for the destruction of records needed to the records managers, who would determine retention of records for operational needs, reducing the archivist to a rubber-stamp for destruction of records that are deemed “non-historical.” Unfortunately though, the full truth of this case may never be known because the documents are gone and the remaining witnesses to the case have been tainted by perceived biases of public officials or their fading memories or their desire to cover-up their role in violating the Criminal Code’s Section 129.

The Heiner Affair demonstrates the failure by the state to protect the human rights of its most vulnerable citizens. But it also reveals a more generic insight into the absence of strong records management and archival authority. The sole reason this case was ever discussed, let alone still discussed after twenty years, is due to the activism of Kevin Lindeberg, who was fired from his position as a union representative shortly after the records were destroyed. Not even Coyne would pursue the case farther, since he was given a payment of \$27,190 in return for his silence.<sup>85</sup> In response to his dismissal, Lindeberg has worked tirelessly for more than nineteen years to receive justice for both the victims of the sexual abuse and for himself. While his efforts are truly monumental and inspirational, they also sadly demonstrate the power of the state to defend its failure

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<sup>84</sup> Kevin Lindeberg, “The 1997 Lindeberg Declaration Revisited in 2002 Second Reading Debate Public Records Bill 2001 (Qld): The Shredding of the Heiner Inquiry Documents and Related Matters,” *Public Records Bill* (Queensland; Legislative Assembly, 17 April 2002), 7.

<sup>85</sup> Senate Select Committee on Unresolved Whistleblower Cases, *The Public Interest Revisited*, 146, cited in William DeMaria, *Deadly Disclosures: Whistleblowing and the Ethical Meltdown of Australia* (Kent Town; Wakefield Press, 1999), 146.

to fulfil its duties, and its continuing refusal to admit to past wrong doing and its subsequent cover-up.

If there had been no Kevin Lindeberg, this case would have likely long ago disappeared along with the documents. The human rights injustice would have been localized to the Aboriginal girls who were raped and the workers involved in the case would have continued unhampered in their corruption and possibly additional criminal acts. Relying on the activism of a Kevin Lindeberg and Bruce Grundy for human rights protection is fragile, however, because their activism begins and ends with their own individual actions. If Lindeberg decided to stop or had not even started his campaign, for whatever reasons, the state would have won.

Rather, the bureaucratic system should be set up to be the activist, the driver and protector of rights through effective and transparent processes. The bureaucracy's focus should be the creation of records for accountability and the establishment of systems that are always beyond the reach of individuals to corrupt. In this way, the external activist's role would be to point to the records that prove corruption or, in the absence of records, point to the gaps as evidence of tampering to hide corruption. Thus, the process would hold equal power with the record. However, strong bureaucratic processes that are based in accountability leave multiple traces even when the primary records have disappeared. Those traces, those absences, can be the proof of corruption that supports the rights of citizens in a society. The transparent bureaucracy of the state thus becomes an important foundation on which human rights rest, making these processes rights in and of themselves. The Heiner Affair proves this conclusion, if sadly in a negative rather than positive way. Rights rest fundamentally on records and their creation, on their effective

management, on their disposition according to accountable, traceable, and auditable processes, on appraisal values based on societal functions and needs, and on archives as an integral part and driver of the entire recordkeeping regime.

## Conclusion

The history of the Western world chronicles the rise of the written record as the final arbiter in almost all situations relating to memory, history, and law. As demonstrated in Chapter One, the authority of written declarations has a long history, dating back to the first cuneiform tablets of Mesopotamia. From their first use, records were associated with power, through debt and law. Their limited use, by virtue of the challenge of their production and the ability to decipher, left them within the domain of kings, clergy and the rich for the majority of Western history. This association created power for records beyond their initial or original usefulness and imbuing credibility to written documents independent of their veracity. The association was reciprocal for those that controlled records, perpetuating the power of records and the ruler until eventually the record became democratized through technology and the spread of literacy in the West.

The later records were created in Western history, the less attributable they became to an individual. Even personal texts, written by individuals, exist in a tradition that assumes that individual contributions to a field of study are made possible by standing on the shoulders of those who came before them. Records gradually shifted from being the objects of a person to being the objects of a society, beyond the sole influence of any single person. The power of the record as an object beyond individual influence is best revealed through the creation of modern

laws, which are proposed by committees, responding to external pressures, that no one individual can hold in total control. Furthermore, records use shifted over time from instruments of control by a small minority to instruments of accountability for the majority. As described in Chapter One, archives act as instruments of records preservation and dissemination for citizens in liberal democracies to use in redressing historical abuses. However, in Chapter Two and Chapter Three the thesis addresses the use of archives in mitigating human rights abuses and government secrecy through better articulation and development of archival authority.

The supremacy of human rights as a foundation for Western society and their expression through the record is carried over to Chapter Two, which sought to describe how archivists and archives have evolved over the past two hundred years to become increasingly instruments of transparency and accountability in the modern state. The chapter describes the movement of archives from passive to active institutions that serve larger purposes than cultural and heritage concerns, thus demanding deeper, more rational justifications of their practices. Essentially, the contemporary archive of government and similar “public” institutions is described as an instrument in state bureaucracies by which citizens may glimpse into the workings of their government. Such archives are furthermore described as part of the bureaucracy and its records management regime, giving them power to influence the entire life-cycle of records production, use, and long-term preservation.

Contemporary archivists, especially those working in archives responsible for government records, have greater demands placed on them for professional transparency. They are part of a system with responsibilities to their government and citizenry. The question of loyalty to one’s employer becomes the implicit problem of the thesis. Indeed, how do archivists maintain the lofty ideals of transparency in government when they are entrenched within the very

bureaucracy they are charged with policing, or at least monitoring and documenting for others to police? Since this thesis has already argued in Chapter One that the Western concept of the modern state theoretically situates government in subservience to the citizen, with human rights as the foundation from which that subservience is derived, archivists and records managers work within a milieu that implicitly – and recently, much more explicitly – accepts the idea of bureaucratic transparency. After all, without transparency in government, there can be no accountability to the citizen. Archivists, therefore, are important instruments by which citizens may access and hold their government accountable because archivists (read as “citizens”) are charged with the selection, and preservation, or destruction, of the state’s records. Furthermore, the move towards continuum thinking in records management situates archivists as the sole group of records professionals that can steer records from creation to destruction or archival preservation. Thus, the confluence of the ascendancy of human rights, the power of records in society, and the professionalization of archivists, in response to records abundance, has created in archives a focus where citizens can ensure that government serves the interests of the people.

The case study of Chapter Three is a cautionary tale of what may occur when there is an absence of strong records management and archival authority. The Heiner Affair demonstrates the weakness of archives in the absence of applied professional standards based on transparency and accountability. Weak processes led to the corruption of the records management system by bureaucrats and politicians, who understood the relative position of weakness of the State Archivist. Without established disposition schedules firmly in place and codified internal practices to point to, any decision by the State Archivist to defy the ad hoc request from powerful government officials for her authority to destroy records would have most likely resulted in her employment being terminated or at best her transfer out of her position.

Her decision to destroy the records seems unacceptable from the point of view of an idealist or activist, but from the position of a pragmatist it seems less surprising. It may never be known what the exact motivations were for the destruction of the records by government and what rationale was applied to the records final disposition at the archives, because the effective advocate of the citizen, the bureaucracy, was perverted. The impersonality of bureaucracy discussed in Chapter Two serves as the best advocate for the people, passive though that system may be. When all records authority was centralized in one person, without proper bureaucratic processes in place, that impersonality did not exist. The distinction must be made between processes and laws in regards to archival control. Queensland did have a Library and Archives Act that charged it with control over the preservation and destruction of records. This is why the government had to obtain permission to destroy the records from the State Archivist. However, the weakness of the bureaucratic process that allowed the State Archivist to act without following a well-defined script or a designated set of internal rules regarding steps to records appraisal and destruction was the main problem. She designated archives according to her own judgment, which may have been influenced by politics, a decision that cannot be ascertained by the surviving records because none exist, and she had steadfastly remained silent about her decision. The lack of a solid rationale behind why the records were destroyed remains the murky core of the Heiner Affair. Unless an independent prosecutor, charged with investigating the Heiner Affair, can compel all key players to testify under oath (not unlike for example the process of the Watergate hearings), that murky core is not likely to become clear, nor the human rights abuses themselves met with justice.

This thesis leaves room for further research into similar situations that are not restricted to Australia. Heiner Affair equivalents have the potential to present themselves in any

government or organizational context where records management rules and procedures are weak and the executive has the ability to unduly influence the documentary traces of the establishment. However, this case in particular raises questions about the intersection of Western recorded memory and traditional cultures. One aspect of the Heiner Affair that is rarely mentioned is that the girls raped and abused under state care were Aborigine and the state was able to silence them through the destruction of records, an established Western form of evidence, and their oral testimony was ignored. The neo-colonialist and racist assumptions in the case are worthy of additional research. Would this case have had a different outcome if Aborigine memory systems, such as oral culture and storytelling, were given equal weight in court proceedings, or if the police services interviewing the victim were sensitized to Aborigine perspectives on the shame surrounding rape? This raises questions about bureaucratic equivalents in traditional societies and how human rights might be protected in those contexts. How do largely illiterate oral cultures preserve memory and what are the friction points between Western justice, dependent on the physical and usually written or photographic records, and those that either reject Eurocentric concepts of bureaucracy or do not have the capacity to institute them?

At first glance, this thesis has all the elements of a compelling story; however, the motives behind the shredding of the Heiner documents are inconclusive, leading to extreme views of government tyranny from one perspective, and mad conspiracy theories from another. The abuse of children and the corruption of government seem like gripping topics to examine, but the lack of a clear motivation in the cover-up – although many have been suggested – may leave the reader wondering if all this is in fact a non-issue being dragged on by a bitter ex-employee named Kevin Lindeberg, or a genuine whistle-blowing story of courage and endurance, by the same Kevin Lindeberg.

This thesis, however, is not concerned with the underlying motivation behind the original destruction, or even the abuse of children, tragic as that is, or the reasons why this festering issue remains unresolved in Australia after nearly twenty years. Rather, the thesis is interested in the potential of systemic abuse when the bureaucratic system does not control its records in both effective and transparently accountable ways. This thesis is concerned with the absence of process, which while not as compelling as government corruption and child abuse or conspiracies and cover-ups in high places, is the lynch-pin of transparency in government and therefore of protecting human rights.

Since the institution of processes that protect transparency and accountability of government represent trouble-free political gestures to a public that already expects these systems to be in place, a bureaucracy founded on such standards should be impossible to resist. While it is conceivable that unscrupulous bureaucrats or politicians may still seek to illegally destroy records in much the same way as described in Chapter Three for the Heiner Affair, the creation of a system of bureaucracy that is designed to ensure records are controlled and made available to the public would make any such destruction clearly illegal and more challenging to undertake without detection. In such a situation, an archivist deciding to protect records from destruction would at least have the rules, processes, and procedures set out by an impersonal bureaucracy, to back her decision, and to insist that normal processes be followed, rather than a decision rushed through, outside this process homework, for matters of political expediency. In such a records appraisal and disposition regime, she could reply to improper requests for destruction authorization by hiding behind the bureaucracy, thus turning the table on the government stereotype that citizens often point to when dealing with bureaucrats. She could tangle the politicians in their own web of red tape. That human rights may be better protected by

such pragmatic record-keeping processes and bureaucratic procedures, rather than grand declarations and charters, may be ironical, or very archival.

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