APPRAISING LEGAL VALUE: CONCEPTS AND ISSUES

By

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ABSTRACT

Historically, legal records were the main focus of archival preservation, and archives served primarily as arsenals of law—instruments for control and management of the State. Today, archives have many different values and uses, and legal value is only one criterion considered during the archival appraisal process. It is an important criterion, though, since archivists have an obligation to preserve not only those documents needed to understand society and its culture, but also those required to protect the rights and interests of society, its institutions, its citizens, and its heirs. Unfortunately, little has been written in the archival literature about what constitutes documentary legal value nor how this value can be recognized and evaluated.

This thesis draws on literature from archival science, sociology, records management, diplomats, law, and jurisprudence in order to define legal value and to identify its components. Since the study focuses on North American archives, the legal literature consulted pertains to the English legal system and its particular manifestations in the United States and Canada.

To begin with, the thesis examines the document-event relationship and the relationship of this unit to a society's juridical system. This analysis illustrates the functions that documents play in society, and aims to provide an understanding of the capacity of documents to protect society and to serve as legal evidence. It is then proposed that the presence of a relationship between a document and a juridical event (one in which the society's legal system has an interest) be considered the first component of legal value. Perhaps the most important and most useful of the documents having relevance to events with legal significance is the class identified in this thesis as "legal records," consisting of those documents that execute or constitute written evidence of acts and events which directly affect legal rights and duties.

Exploring the first component further, the thesis makes a distinction between actual and potential legal value based on whether the relationship of the document to a juridical event is direct or indirect, and whether the event currently has juridical relevance.

Determining the strength of potential legal value involves consideration of the second and third components of legal value, which are related to the use of documents as
legal evidence. These two components are admissibility and weight (in the sense of a document's effectiveness as a representation of facts). External factors, such as retention regulations, may play a role in determining this aspect of legal value, and some of these factors are discussed. More often though, the archivist will need to search for indications of reliability and completeness in the documentary formation process and in the elements of form intrinsic to a type of document. The thesis identifies many of the internal factors that contribute to legal value and proposes some criteria and a methodology for appraisal of legal value.

Appraisal of legal value is not a mysterious process. With the exception of some diplomatic analysis, much of the information and analysis needed to determine legal value is fundamental to any appraisal process. In a society governed by law in all its aspects, determining legal value is a central part of any archival appraisal.
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INTRODUCTION

Records are the means by which public officials in a democracy are accountable to the people. They are tools of administration, the memory of an organization, the embodiment of experience, protectors of legal rights and sources of many kinds of information.¹

Documents, in whatever form, are an integral part of human society. Throughout history, societies have usually found a way to document transactions between individuals and relations between government and citizens. Documents may authorize or direct action, supply information or explanation, or provide entertainment. The clay tablets of ancient Babylon, Egyptian murals, inscriptions on papyrus scrolls, and the quipu ropes of the Incas all bear witness to society's propensity to, and reliance on, record keeping.² Documents can be a valuable resource, and their preservation and transmittal to the future is a great responsibility--one that society often entrusts to archivists, the "keepers of the record."

However, while every document is potentially useful to someone at sometime, many documents do not have sufficient enduring value to warrant the time and resources needed for an archivist to preserve them and make them available for
use. In addition, the volume of documents produced in modern society threatens to overwhelm anyone who wishes to use them. Earlier this century, the British Public Record Office noted that "even the most convinced advocates of conservation in the historical interest have begun to fear that the Historian of the future dealing with our own period may be submerged in the flood of written evidences." There is a danger that knowledge will become lost in information, and that documents will cease to serve society.

To be of use to society, worthwhile information must not only be retained, but must also be easily retrievable. If the worthwhile information is buried in a mass of other information and cannot be accessed upon request, then it has no real value. Thus, it is essential to have some process by which the overabundance of information available today can be winnowed down to form a socially relevant documentary record that is humanly usable.

One way of forming such a vital and usable body of documents is through the archival function of appraisal—the process of establishing the value of archival documents, qualifying that value, determining the value's endurance, and thereby deciding the disposition of the documents. The Society of American Archivists' (SAA) Committee on Terminology defines appraisal as:

the process of determining the value and thus the disposition of records based upon their current administrative,
As this definition indicates, the value of archival documents derives from the nature of their creation and use. That is, documents are created to serve a particular purpose or function; therefore, they are evidence of a plan, an intent, or an activity. They also contain information. It is these intrinsic properties that archivists look for when appraising documents.

In general, documents are assessed according to five categories of value: administrative, legal, fiscal, evidential, or informational. These values relate to the possible uses of the document. For example, documents with fiscal value may support financial statements and provide an audit trail for subsequent verification. Documents with evidential value illustrate the "organization, functions, policies, decisions, procedures, operations or other activities" of their creator, while documents with informational value contain factual data about persons, places, and events.

Another approach to documentary value is that proposed by American archivist T. R. Schellenberg in the 1950s. Schellenberg defined two types of values: "primary value"—the value of records to their creator for the implementation of its functions; and "secondary value"—the value that
records have for persons other than their creator. The emphasis here is on the value of the documents to the user, rather than on their use.

Documents may also have an intrinsic value that exists independently of their possible uses or users. Intrinsic value is linked to the formal aspects of documents and includes artifactual and symbolic values. For example, illuminated documents, and records with gold seals, have artifactual value, while the original forms of the Magna Charta and the Canadian Constitution have a symbolic value that transcends their legal, evidential, and informational value.

Some documents may have more than one value, and some may have different values at different times. Some documentary values will be temporary, while others will be long-lasting. It is the archivist's responsibility to determine which values a document has and to identify those documents which are sufficiently valuable to be preserved indefinitely in an archival institution. But how do archivists carry out this responsibility? How do they determine existing and potential values? What are the criteria for choosing some documents for preservation and refusing others? Who establishes and legitimizes those criteria?

These questions have been the subject of much debate over the years. For example, English archivist Sir Hilary
Jenkinson argued that the administrator, as the creator of the documents, was "the sole agent for the selection and destruction of his own documents," based on the needs of his own practical business. By contrast, Schellenberg argued that selection was the responsibility of the archivist, who should be primarily concerned with assessing the secondary values of documents for reference and research uses. The problem with these two viewpoints is that each may create an unbalanced documentary heritage. Administrators are apt to concentrate solely on their practical business needs and fail to recognize longer-term secondary values in their documents. On the other hand, if archivists only focus on research value, they are likely to be influenced by current research trends, the needs and interests of strong research groups, or personal research interests and biases.

English archivist Felix Hull advocates a third approach to appraisal: the "principle of movable responsibility." This approach recognizes that administrators, or perhaps records managers, know how records stand in relation to administrative needs and therefore should have a say in appraisal. Over a period of time, though, the creator's interest should give way to that of the archivist, who is "more fully capable of objective assessment." Hull claims that the archivist stands in a central position between the administrator and the scholar, and has a duty to be familiar with the needs of each and to determine the disposition of
documents in consultation with each. The archivist makes the final appraisal decisions because he/she is in a position to see the whole picture, not just one part of the picture.12

The key point that all three archivists recognized is that knowledge, impartiality, and responsibility are essential factors in the appraisal process.13 Appraisal ultimately shapes the character of a society's documentary heritage, and it is important that present and future generations have an accurate and objective record that reveals the whole picture of society. Those who do appraisal therefore need a source of appraisal criteria that will allow them to balance the needs of administrators and the interests of researchers while still meeting their obligations to society.

A possible source for appraisal criteria has been suggested by German archivist Hans Booms in his article "Society and the Formation of a Documentary Heritage: Issues in the Appraisal of Archival Sources." Booms argues that the principles of appraisal should be drawn "directly from the social process to which we [archivists] are responsible."14 Public opinion should be the force which legitimizes the appraisal process:

The public and public opinion, as a constitutive element of modern society, sanctions public actions, essentially generates the socio-political process, and legitimizes political authority.
Booms is recommending that, in order to form an accurate picture of a society, archivists should not arbitrarily choose standards of documentary value, but should strive to understand the values of the society that created the documents. Appraisal is then a process of identifying the documents that reflect the values that characterize a society. In this way, issues that were significant to a society will be documented, while the absence of documentation on other issues is evidence of their relative insignificance to that society. Thus, the needs and interests of society provide the criteria for an objective evaluation process.

What are the needs and interests of society? In general, it may be said that society is most concerned with its own preservation and development. In order to continue to function, understand itself, and operate creatively in the future, society is obligated to keep those sources which are vital to the survival of its administrative, legal, patrimonial, political, and moral structure. An essential component of these sources is the body of documents that records and protects the rights of society, its institutions, and its individual citizens.
As the Consultative Group on Canadian Archives noted in its Report to the Social Sciences and Humanities Research Council of Canada, the protection of rights is an ancient role for archives: "since the first clay tablets were formed, over 5000 years ago, archivists have preserved the records necessary to document the rights of government, corporate bodies and individuals within society." Québec archivists Carol Couture and Jean-Yves Rousseau point out in The Life of a Document that, in the Middle Ages, records such as government orders, judicial decisions, and charters were preserved solely for their legal value. Couture and Rousseau claim that it is only since the mid-nineteenth century that records have begun to acquire secondary values in addition to their legal value.

Although legal value has historically been an important factor in the preservation of documents, there is little discussion of it in the archival literature. As archivist Margaret Cross Norton remarked in 1945, "I discovered that although we [public records archivists] are spending our lives caring for legal records, practically nothing has been written by American archivists on philosophical aspects of the subject of legal aspects of records." In many respects, little has changed since 1945. Archivists list legal value as an important appraisal criterion, but no one has clearly defined what legal value is or how it is to be recognized. A few archivists and historians have written
about the research value of "legal records," and the
problems presented by solicitor-client privilege in
providing access to these archives, but no one has defined
"legal records." Often, the term seems to be used loosely
to refer to court records and the records of law firms and
lawyers.

One field that is beginning to look at the legal
aspects of documents is records management. Traditionally,
records managers have been concerned about legal retention
requirements and legal liability with respect to document
destruction. Recently, questions about the admissibility
and use of electronic records in court have prompted
research and discussion about the reliability and security
of automated information systems. As a result, some records
managers have started to look at how they can control the
formation process of records in order to meet the legal
requirements for admissibility of documents. This
examination is a recent development, however, and tends to
focus on electronic records.

Despite its neglect in the literature, a study of the
legal aspects of documents is essential for archivists. As
Canadian archival educator Terry Eastwood points out in his
article "Nurturing Archival Education in the University,"
modern society is governed by law in all its aspects. He
quotes Ronald Dworkin on this subject: "We live in and by
the law. . . . We are subjects of law's empire, liegemen to
its methods and ideals, bound in spirit while we debate what we must therefore do."²² If all actions in a society have, or may have, legal significance, it follows that the documents that arise out of those actions will also have legal significance. And, as the documentary heritage formed from these documents, archives will consequently be suffused with and by the law.

As evidence of actions, documents may also have an important role to play in legal proceedings. How well they fill that role depends to a large extent on whether the documents meet the requirements of evidence established by the English legal system. The legal value of documents therefore derives from the fact of their creation in a society governed by law, and from their potential to be used as evidence in legal proceedings. Archivists have a responsibility to understand this legal nature of documents and to incorporate an assessment of legal value into the appraisal process.

This thesis aims to define the archival concept of legal value and to propose some criteria for appraising legal value in documents.

Chapter One explores the general nature of documents—what they represent, and how they are related to happenings in the world. This study establishes the background for exploring how different activities affect the character and uses of the documents they produce. The concept of
juridical relevance is introduced in relation to both activities and documents, and a definition of "legal records" is developed from this discussion.

Chapter Two investigates the concept of legal value, drawing on Chapter One's discussion of the relationship between documents and law, and also on an examination of the requirements of evidence established by the English legal system. Three components of legal value are identified, and a distinction between actual and potential legal value is proposed.

Chapter Three outlines the factors, both external and internal, that contribute to the legal value of documents and to their quality as documentary evidence. Suggestions are made as to what archivists should know about laws that affect documents and what intrinsic documentary elements need to be examined to assess legal value.

Finally, Chapter Four presents some guidelines for appraising legal value, based on the concept of legal value developed in Chapter Two and the factors discussed in Chapter Three. The proposed appraisal criteria take into account both actual and potential legal value. This chapter also discusses the reasons for appraising documents for legal value and considers the issue of whether documents can have permanent legal value.

As Margaret Cross Norton observed, archivists have written very little about the legal aspects of documents.
Consequently, although published works of archival science were examined for their discussion of appraisal theory and the general nature of documents, this thesis has drawn heavily from a number of allied disciplines. The analysis of documents in Chapter One—of what they are and how they are related to occurrences in the world—is based on studies of the historical development of document-based societies, and on an inquiry by sociologist Stanley Raffel into the sociology of knowledge and its representation in recorded form.

Works in jurisprudence and diplomatics were the two principal sources of information for the discussion of juridical relevance and the relationship between documents and law. Jurisprudence (the science or philosophy of law) explores such issues as the definition of law, what law and justice are based on, and the role of law in society. Works of jurisprudence therefore provided valuable information about which facts and actions have legal significance, where they derive that significance from, how that significance is affected by circumstances, and how its endurance can be determined. This analysis was used in conjunction with diplomatics to establish the relationship between documents and law, and to explore the legal nature of various classes of documents.

Diplomatics is the discipline that studies "the genesis, forms, and transmission of archival documents and
their relationship [both] with the facts represented in them and with their creator, in order to identify, evaluate, and communicate their true nature. Diplomatic analysis was used to identify internal factors that contribute to legal value in documents.

The examination of the legal concept of evidence, and of the rules of evidence as they apply to documents, was drawn from legal texts on evidence and from a study of the Canada Evidence Act, R.S.C. 1985, c. C-5. Records management literature provided information for the discussion of external factors affecting legal value.

Since this thesis focuses on archives and documents in North America (Canada, in particular), the legal literature consulted pertains to the English legal system and its particular manifestations in the United States and Canada.

The objective of this study is twofold. First, it seeks to determine the nature of the document-event relationship, a subject that has not received much attention in archival literature. An exploration of this document-event relationship will illustrate the functions that documents play, in their creation and use, as an element in the structure of societies and in the development of events. This understanding might lead to a greater appreciation not only for the historic value of documents, but also for their legal nature—-their capacity to protect society and to serve as legal evidence.
The second objective of this thesis is to emphasize archivists' obligation to give relevant consideration to the legal nature of documents in the appraisal process. Part of the social responsibility inherent in appraisal derives from the archivist's duty to identify and preserve documents that will protect the rights of society, its institutions, its citizens, and its heirs. Therefore, it is necessary to know what comprises legal value and how to identify documents with sufficient legal value to warrant their preservation for that purpose.

Given the volume of modern documentation and the need to choose a documentary heritage from that volume, it is important that archivists have some standard criteria for appraisal and an understanding of those documentary values that are most essential to the continued functioning and development of society.
In seeking to understand the relationship between documents and law, and how this relationship can be evaluated in the appraisal process, it is useful to begin by exploring the nature of documents in general—what they are, what they represent, why they are created and how they are made. The findings of such an exploration will reveal the relationship between documents and the world, between the inside (the document, the word) and the outside (what the document reports). The nature of this relationship necessarily influences the values and characteristics of documents and therefore is an important factor in determining the legal value of documents. This chapter will examine the relationship between document and world, and will also consider whether there are different kinds of relationships that produce different kinds of documents. Specifically, it will investigate whether there is a type of document that can be called a "legal record" and, if so, what circumstances or characteristics distinguish legal records from non-legal records.

A document is the most fundamental unit of recorded information. Indeed, the Society of American Archivists'
(SAA) Committee on Terminology establishes fairly minimal criteria for identifying a document, requiring only the presence of some data and a medium on, or in, which the data are recorded. Considered taxonomically, "documents" form the general class that describes all recorded information. Documents are the genus, which can be broken down into a number of species and, sometimes, sub-species. Unlike the scientific classifications developed for plants and animals, the genus "documents" can be classified in a variety of ways, depending on the particular documentary characteristics that one chooses to study. In some cases, there will be a correlation between the species of different classifications. That is, the characteristics that categorize a document as a particular species within one classification may affect how the document is categorized in another classification. There is rarely a direct one-on-one relationship between classifications, however, and species cannot be interchanged between classifications. Thus, a term used to identify a species within one classification has a distinct definition and context and will only be used in that sense in this thesis. When a reference is made to recorded information in general, the term "documents" will be used.

The first classification of documents to be considered in this thesis is represented in Figure 1. This classification identifies documents according to the type of
FIGURE 1
CLASSIFICATION BASED ON GENERATING ACTIVITY

DOCUMENTS

Administrative Activity  Personal Activity

RECORDS

LEGAL RECORDS  NON-LEGAL RECORDS

MANUSCRIPTS
activity that generated them. The focus on generating activity rather than on creator, recording method, or any of a variety of factors involved in document creation, provides a useful base from which to explore the relationship between communication and events in history. This classification will therefore be examined in some detail.

Two species are named in Figure 1: records and manuscripts. The SAA's Committee on Terminology defines records as "all recorded information, regardless of media or characteristics, made or received and maintained by an organization or institution in pursuance of its legal obligations or in the transaction of its business." Records are distinguished from documents in general by the stipulation that records be created and maintained as a means or an instrument to accomplishing a purpose.

Although the SAA definition appears to be very specific about the kinds of circumstances that create records (legal obligations and activities related to the transaction of business), there is some question about what purposes are pursued in carrying out business transactions. Since purpose is essential to the definition of records, further clarification is needed.

In many European countries, the term "archives" refers to both active and inactive records. In North America, the terms archives and records are often used to identify two different periods in the record life cycle, records being
current, active documents, and archives being the non-current records that are preserved for their long-range value. However, since the two terms refer to essentially the same documents, this discussion about records will draw from studies of both records and archives.

At this point, one can turn to the writings of Italian archivist Eugenio Casanova and English archivist Sir Hilary Jenkinson, both of whom addressed the issue of purpose in their respective studies of archives. Casanova defined archives as:

the orderly accumulation of documents which were created in the course of its activities by an institution or an individual, and which are preserved for the accomplishment of the political, legal, or cultural purposes of such an institution or individual.  

Similarly, Jenkinson defined archival documents as those drawn up or used in the course of an administrative or executive transaction (whether public or private) of which [the documents themselves] formed a part; and subsequently preserved in their own custody for their own information by the person or persons responsible for that transaction and their legitimate successors.

According to these definitions, the purpose of records-creation is to facilitate the accomplishment of intentional and organized activities intended to manage the interests of an institution or individual, whether those interests be
political, legal, financial, or cultural objectives. Records are necessary to the functioning of their creator and are maintained by the creator for this reason.

An important idea reflected in these definitions is that records are not merely about something, but rather are a vital part of the operations of an individual or institution. They arise in the course of an activity. Therefore, they are primarily significant in relation to activity and only secondarily in relation to subject. Records have value because of the dynamic role they play in activities; the factual data of their content provide an complementary value.

This dynamic aspect of records is highlighted in a recent definition of records proposed in a report on policy guidelines for electronic records published by the United Nations' Advisory Committee for the Co-ordination of Information Systems (ACCIS). In this report, it is argued that traditional definitions of records and archives emphasize the need to recognize the official action that generated a record. It is pointed out that, with electronic records, it is not always possible to determine the source and function of an item or document. Indeed, it can even be difficult to determine these facts when working with textual records. The report therefore proposes a "more operational definition" of records as "recorded transactions, . . ."
information, communicated to other people in the course of business, via a store of information available to them."

The concept of recorded transactions clearly distinguishes records as a sub-set of documents: records are not just recorded information, they are conveyed information. The purpose of their creation is to facilitate interaction between physical or juridical persons. There is an intention to pass on information, an intention to affect or influence someone else in some way. Thus, a note to remind oneself to do something is not intended to be communicated and hence, is not a recorded transaction. Likewise, the draft of an official document and various revisions of it are not meant to be sent out to anyone. Even if a draft or a revision were sent out, it would not be able to produce the consequences desired by the document creator since it is not complete. The draft and its revisions cannot be considered to be records. On the other hand, documents need not be physically "sent" in order to be recorded transactions. It is sufficient that there be an intention for others to receive the information at some time. For example, making a "memo to the file" or an entry in a bookkeeping journal is creating a record because the purpose of making the entry is to transmit a fact to others who will use the file or journal at a later date.

Defining records as recorded transactions establishes several criteria for identifying records. Specifically,
there must be an intention to communicate information, and that communication must be needed for the purposes of managing one's business affairs. The document must be able to achieve some effect or consequence related to those purposes. Essentially, then, records are tools of administrative endeavour. A brief look at history confirms that records have always met these criteria and that administrations require some form of recorded transactions to carry out their functions.

Records have existed in some form since the time that humans first began to gather together in societies and to interact with one another. Interaction requires people to identify their needs and wants, both individually and as a society, and to act to protect and achieve those needs and wants. Rules and regulations are formulated, goods and services are exchanged, and society seeks to develop by building upon past events and experiences. The need for memory arises naturally in these circumstances as information—that which is known—becomes the basis for present acts and decisions. Memory is the means by which this information can be stored and accessed. Thus, even non-literate societies have ways of creating and preserving "records" of their activities. In ancient Greece, business affairs were transacted before a mnemon, a "memory man," who registered the proceedings mentally and who could be called upon to testify orally that a particular transaction had
indeed taken place. The native societies of North America's Northwest Pacific region constructed totem poles whose symbols held the memory of events, transactions, and experience—information that was also passed to succeeding generations through a strong oral tradition. In pre-literate England, important transactions took place before witnesses whose oral testimony at a later date would be sufficient to establish the truth of the event or transaction which they had seen and heard. The spoken word was the legally valid record. Historian M. T. Clanchy notes that in twelfth-century England, the verb "to record" meant to bear oral witness. Similarly, the Latin root of the word "record" means "to remember, to call to mind," thus emphasizing the aspect of record as memory rather than defining record as a particular form of memory.¹¹

As societies grew, and the task of administering them became increasingly complex, there arose a need for a direct, tangible, enduring, and reliable method for keeping track of administrative activities. At first, events were depicted in pictorial form, but by the third millennium B.C., the Sumerians had invented an alphabetic script as a response to the recordkeeping needs of their active political and economic life. The development of writing was not the result of a whimsical desire for creative expression, but rather the result of a practical administrative need to keep records.
The importance of records to organized society is also indicated by the fact that the earliest preserved writings are the clay tablet records of Assyria, Babylonia, and the Hittite Empire from the third millennium B.C. to the Christian Era. Inventories of the ruler's property, records of offerings made or taxes collected, contracts with seasonal workers, and documents concerned with the renting of fields and gardens are just some of the records these bureaucratic societies used to control material, people, and man-made installations. Furthermore, because records served immediate administrative needs, they were not preserved in remote places; depositories tended to be established at centres of political, economic, and religious activity.¹²

The creation and use of records in society thus has a long history, and archivist Ernst Posner has noted that there are certain constants in this creation and use. In his study of archives in the ancient world, Posner identified six basic types of records which appear in the archives of most bureaucratic societies throughout history, regardless of the nature of the governmental, religious, and economic institutions of the society. These types include:

1. The laws of the land.
2. Records consciously created and retained as evidence of past administrative action (ex: daybooks, registers, chancery rolls).
3. Financial and other accounting records needed to help the ruler or other authority administer his domain and its resources.
4. Records of the ruler or other authority which assure his income from land and persons not belonging to his immediate domain (ex: land surveys; tax assessments; land records establishing ownership).

5. Records facilitating control over persons for purposes of military service, forced labour, and the payment of a capitation or personal tax.

6. "Notarial" records of state agencies or state-authorized persons that safeguard private business transactions between individuals.¹³

These records all have the characteristics of recorded transactions as described earlier. They arise from a need and an intention to convey information for the purposes of administrative endeavour. They are created in the course of business in order to "get things done" and are meant to have a practical effect. These "constants in record creation" therefore lend the support of history to the concept of records as recorded transactions. The definition applies not only to electronic records, but also to traditional textual records and other forms of records.

Returning to Figure 1 and the documentary classification it represents, one notes a second species of documents: manuscripts. Unlike records, which arise from administrative activities, manuscripts arise from personal activities. They are not intended to achieve results essential to accomplishing a person's practical activities. They are often ends in themselves, meant to explain, inform, or entertain. For example, poems and correspondence between
friends are two kinds of manuscripts. Their creation is not required by any legal or administrative obligations; their forms and content are not governed by procedures; they may convey information, but they are not created to accomplish administrative goals. They arise from activities and intentions whose nature embodies a significant measure of individual freedom, and their forms, content, and purposes all reflect that freedom.¹⁴

Both records and manuscripts are shaped and influenced by the external world. The nature of the relationship between documents—which can endure through time—and the facts that appear in documents—events and acts that can only occur in a specific time and place—needs to be closely examined.

First, it is essential to define some terms, beginning with "fact." The word "fact" derives from the Latin factum, meaning deed, act, a thing done. A fact is "an action performed or an incident transpiring; an event or circumstance; an actual occurrence."¹⁵ Facts are not limited to what is tangible or visible; therefore, they may be either physical or mental. In jurisprudence and diplomastics, facts are divided into events and acts. Events are that which happen, or may happen, in the course of nature (as distinguished from a thing which exists) and are not directly determined by intentional human intervention.¹⁶ Acts, on the other hand, are "effect[s] produced in the
external world by the exercise of the power of a person objectively, prompted by intention, and proximately caused by a motion of the will." An act results from an intention on the part of the human will to produce the effects or consequences which are known or expected to follow from a particular action. It is this exercise of the human will with respect to foreseen effects that distinguishes an act from an event. Transactions are a type of act in which a body administers its affairs in relation to other bodies; there is an added intention to create a relationship with another body(ies). In the following discussion, the terms "fact" and "event" will be used interchangeably to refer to any happenings, whether they arise from a natural cause or as a result of the exercise of human intervention. The terms "act" and "transaction," though, will only be used in the strict senses defined above.

The relationship between documents and events has been explored in some depth by sociologist Stanley Raffel. Raffel claims that the essential element for document creation is that the world is composed of discrete facts, witnessable events, to which observers can testify and which can be described by symbols. Documents cannot occur without events. However, events may or may not produce documents; that is, events can occur and remain unrecorded. In social science, though, any event that goes unrecorded is
not communal property; it is not knowable by society. Without a record, only those present at an event will know of its occurrence; no one else can ever access it. For example, suppose a child trips in the street. If the child does not bruise himself/herself, if no one sees the accident, and if the child forgets about the event, then there is no record of it. No one will ever know that it happened. On the other hand, if someone sees the accident and takes a picture of the fallen child, then others can look at the picture and see what happened. The constitutive act performed by the document is that of naming the event, thereby socializing it and making it accessible to society. Documents are important because they embody events and make them knowable.\(^{20}\)

In addition to socializing an event, the record is also needed to ensure the event's survival. Since only the present can be known, some device is required for freezing the observed present before it slips into the past. The document, as an embodiment of the event, converts the present into the permanent.\(^{21}\) As George Orwell observed in 1984, "past events, it is argued, have no objective existence, but survive only in written records and in human memories."

For an event to be documented, an observer must be present in time and space to bear witness to the event when and where it appears. However, in order for the document
to be evidence of the event rather than of the observer, it must be unencumbered by the observer's opinion. Thus, the observer must objectively record only what the event reveals about itself, which is all that the observer can truly know. Raffel uses medical records to illustrate the boundaries of what an observer can know. Medical records may include a "history" of the events leading up to a patient's illness. In this case, the record-writer will be careful to note that the history is hearsay. Since the record-writer was not present at the previous events, he/she can only know what the patient says happened. For the record-writer, the event is not what is related by the patient; rather, the event is the dialogue between the patient and the record-writer.\textsuperscript{22}

A good record is self-sufficient and reliable, and allows the event to speak through it; that is, events can be re-experienced through use of the record. This characteristic of records is what makes them useful to administrators and bureaucrats, who cannot be present at all the events about which they need to know. They must rely on records to access those events.

There are two ways in which bureaucrats can achieve usability of records. In the first method, the bureaucrat ensures that the record-writer is reliable through various controls, and therefore is able to identify him/herself with the writer. The record-user (the bureaucrat) then becomes
the observer at the event and can proceed to administer his/her affairs through the record. 23

In the second method, the bureaucrat ensures that the record is reliable by judging its completeness—whether the record possesses various bureaucratically necessary forms, whether all the parts of a form have been filled in and, if required, whether there are the appropriate signatures. If the record is complete, the bureaucrat considers it to be a visible fact in itself and approaches it as an event which is currently present and can be known. Since the complete record embodies the original event, the bureaucrat can achieve what he/she needs—presence at the event—through use of the record. 24

In either method, the record lets the event speak for itself, thereby providing a way for the record-user to achieve presence at the event after it has happened. Hence, records are an instrument through which events survive and can be re-experienced. Records are not merely "about" events, they are a means of access to events.

This relationship between records and events is illustrated in historian M. T. Clanchy's study of the development of literacy and the use of written records in day-to-day business in England. As Clanchy traces the shift from memory to written record between A.D. 1066 and A.D. 1307, one can see that non-literate forms of record had a direct and specific relationship to events and that the role
of these non-literate records was gradually absorbed by the written record. Although Clanchy's study focuses on twelfth- and thirteenth-century England, this shift to written records occurred in many other societies, in both older and more recent times, and involved similar adjustments in people's thoughts and actions. Therefore, while the examples may be specific to England, the concepts and conclusions of Clanchy's study are more broadly applicable.\textsuperscript{25}

As mentioned earlier, transactions in pre-literate England took place before witnesses who heard and mentally recorded the words uttered by each party in the transaction. Often, a transaction was symbolized by the transfer of an object such as a horn, finger rings, or silver cups. Knives were traditional symbols for conveyances, although a turf from the land might be used in a land grant, and a gift of horses from one person to another might be symbolized by an ivory whip-handle.\textsuperscript{26} The transfer of the object was important in two ways: it indicated that both parties accepted the transaction, and it formalized the moment of action—the moment at which the ownership of the land or the horses actually passed from one party to the other. In addition, the object held a memory of the transaction and was a tangible supplement to the record preserved in people's living memories.
The importance of objects is evident in a story related to Edward I's *quo warranto* proceedings in the thirteenth century. In this story, the Earl Warenne appears before the king's judges, produces an ancient and rusty sword from the Norman Conquest (instead of a written charter), and claims "This is my warrant!" As Clanchy points out, there are many inaccuracies and inconsistencies in the story, but the story remains valuable for what it tells about pre-literate customs. Warenne's ancestors had acquired land through their participation in the Norman Conquest, and the sword was a logical symbol of that acquisition. The sword had been part of the event and therefore served as a non-literate form of property title for Warenne.27

As written records were introduced into everyday life, it would have seemed logical for charters and other records to supersede both the transitory actors witnessing a transaction and the symbolic objects transferred between the parties. However, change occurred slowly, and many contemporaries continued their pre-literate habits. For a long time, the spoken word remained the legally valid record, a record far superior to any written representation. Clanchy points out that when wills were first enroled in London around A.D. 1258, the formula of probate put emphasis on the witnesses who had seen and heard the transaction. It was only in the 1290's that these rolls began to omit the names of the witnesses, thereby indicating that the validity
of the will depended upon its being in a correct documentary form rather than upon the verbal assurances of witnesses. In another example, conveyances were often written on symbolic objects, which continued to be transferred between the parties. In addition, records were drafted in the past tense, implying that records were merely an adjunct to, and confirmation of, the physical ceremony surrounding a transaction.

By the latter half of the thirteenth century, records had become commonplace in England. Lingering pre-literate habits were accommodated through the use of seals which were attached to records as a form of authentication. The seals replaced the symbolic objects used in the traditional ways of recording transactions and made the writings seem impressive enough to hold the memory of an event. Gradually, the record was accepted as the sole instrument of an event, replacing both the witnesses and the ceremony which had traditionally socialized the event and had indicated the moment of action. In many cases, the record became both the act and the memory of the act. People continued to indicate their awareness of this relationship between record and act until early this century, when it was still customary in signing a legal instrument to place a finger on the little red spot (the vestigial seal) and declare "this is my very act and deed."
In the examples given so far, the record of an event consists of a single document which leads the record-user directly from the document to the entire fact generating it. For instance, the Earl Warenne's sword led directly to the fact of his ancestors' participation in the Norman Conquest and their subsequent acquisition of land. In today's society, though, many bureaucratic acts are the result of a procedure which requires the prior completion of several related but autonomous acts, each of which may create its own documents. As a consequence, there are many cases where no single document embodies all of the partial acts necessary for the accomplishment of the final act. To understand the significance of the final event, it may be necessary to access the procedure, which is only possible by considering the chain of documents involved. For example, an insurance claim for damages arising from an automobile accident will initiate a procedure that requires police reports, receipts for towing the vehicle to the garage, an assessment of the extent of damage, contact with the other driver involved in the accident, and so on. The cheque which is ultimately issued to the claimant is the final act, the objective of the procedure. However, the cheque contains no indication of the many intermediate acts that preceded it. On its own, the cheque is merely a record of money paid by the insurance company to the claimant. The record of the fact of the claim is the case file, which
contains the records of all the intermediate acts and of the final act. As a unit, then, the case file can be considered a record and has all the typical characteristics of a record.

A review of the ideas explored thus far shows that whether the record is a single document or an aggregation of strictly interrelated documents, the relationship between documents and happenings in the world is direct and dynamic. Documents cannot exist on their own. They arise out of acts and events and give body to them, thereby making them knowable by others and also ensuring their survival. Documents play many roles in events. They always have a part in an event as a witness to it, and may also be agents in the event. Records, which are conveyed information, establish relations between people and are able to achieve effects desired by their creators. Documents are not merely about facts, they are an integral and active part of facts.

One result of this relationship between documents and the world is that documents can be differentiated according to the act or event from which they arise, and according to their role in that act or event. Therefore, one must have some understanding of acts and events before proceeding any further.

In both jurisprudence and diplomacy, a major distinction is made between acts and events which are juridically relevant, and those which are not. This
distinction is based on whether or not the consequences of a fact are recognized by the legal system in which the fact occurs. That is, while all facts produce consequences, no legal system is interested in all the possible consequences that may arise from all possible facts. Rather, the law selects a few consequences as being material to its concerns and considers all others to be irrelevant and without legal significance. Those facts whose consequences are recognized by the law are called juridically relevant facts, or juridical facts; those whose consequences are not recognized are called juridically irrelevant facts. In the English legal system, the law is concerned with the rights and duties of persons (whether physical or juridical)\textsuperscript{32} and has therefore chosen to recognize those acts and events which affect rights and duties. Within this particular context, a juridical fact may be more narrowly defined as any occurrence or act which creates, modifies, transfers, maintains, or extinguishes a right or a duty.\textsuperscript{33}

Exploring the concept of rights and duties further, one finds that the rules of right or justice in a juridical system exist to protect the interests of humankind.\textsuperscript{34} The rules also establish the extent to which a person may act to further those interests. Not all interests are protected by law, but those which do receive recognition and protection are called rights. Natural and moral rights are conferred by rules of nature or moral justice. Legal rights are those
rights recognized and protected by the legal system. Every right, whether natural or legal, has a correlative in a duty, since the existence of a right implies respect of that right by others. This respect is called a duty and is an obligatory act. For example, a person who owns land has the right to exclude others from the use of the land. The correlative of this right is the duty of others to refrain from trespassing. A right is therefore a right-duty relationship between two or more persons, and both the right and the duty must be invested in some person or persons. An ownerless right is an impossibility; there must be someone in whom the right inheres and to whom others owe a duty.

Every right that a person has requires a "title," or source, from which the right is derived. In some cases, rights are inborn, or arise automatically from events which the law has specified as giving rise to certain rights and duties. For example, when a child is born, there are generally accepted reciprocal rights and duties of parent and child which come into being. In other cases, a movement of the human will is required for a right to come into existence. For example, the act of catching fish creates an original title (a source) for the right of ownership. If someone then buys those fish from the fisherman, the right of ownership passes from the fisherman to the purchaser. The act of purchasing the fish is considered a derivative title to the right of ownership (derivative because it does
not create a new right, but merely transfers an existing
right to someone else). Similarly, the title to a debt
exists in a contract or other transaction made between the
lender and borrower. Thus, a title is equivalent to a
juridical fact as defined earlier—a fact or combination of
facts which creates rights and duties.\(^{35}\)

Regardless of whether an act or event is juridically
relevant or not, in order for it to exist, it must be
externally manifested and, consequently, be perceived or be
perceivable. Although this manifestation may take either an
oral or a written form, this thesis is only interested in
those acts which take a written form, since they produce
documents. The term "written" is used to mean any method of
recording or capturing a fact on a lasting medium. Thus, a
"written document" may refer equally to a letter, a
photograph, or a cassette tape.

At this point, a second classification of documents can
be introduced (see Figure 2). This classification is based
on the written form of the document and is comprised of two
species. The first species includes those documents whose
written form is required by law or convention, either to put
an act into effect or to serve as evidence of the act's
occurrence. An application for university entrance is an
example of a required written form. The university will not
consider a student for admittance unless it receives a
written document. The second species of the classification
FIGURE 2
CLASSIFICATION BASED ON WRITTEN FORM OF DOCUMENT

DOCUMENTS

WRITTEN FORM REQUIRED

DISPOSITIVE

PROBATIVE

WRITTEN FORM DISCRETIONARY

SUPPORTING

NARRATIVE
encompasses those documents whose creation is discretionary. That is, the document is a result of a choice to record the act in written form rather than to manifest it orally. For example, someone may choose to write to a friend instead of phoning him/her. The resulting letter is a discretionary written form.36

Each species may be further subdivided according to the purpose of the written form. With respect to the first species, where the written form of an act is required, the document produced may be one of two types. If the act is of such a kind that it can only come into existence by means of a document, then the document is dispositive. If the act takes place orally or physically, but requires a document to constitute evidence of its occurrence, then the document is probative. In the first case, the document is the act; in the second case, the document refers to the act. An example of a dispositive document is a conveyance; the transfer of land ownership does not legally occur until both parties have indicated their consent by signing the document. The moment of action occurs in the completion of the record. An example of a probative document is a marriage register; the act of marriage occurs in a ceremony that has immediate effects and is recognized by the law, but the marriage register must be signed to serve as written evidence that the act took place. The moment of action occurs prior to, and independently of, the document.37
With regard to the second species, when the written form is discretionary, the documents produced refer to an act or activity, and may also be divided into two types: (a) supporting documents—those constituting written evidence of an activity which does not result in a juridical act, but which is itself juridically relevant; and (b) narrative documents—those constituting written evidence of an activity which is juridically irrelevant. An example of the first type of document is a professor's lecture notes. Giving lectures to students does not result in a juridical act; it does not establish legal relations with anyone, nor does it produce legal consequences. Nevertheless, lecturing is part of the professor's teaching function and is juridically relevant to the extent that it is an integral part of fulfilling the professor's responsibilities. While the lecture notes are neither probative nor dispositive documents, they do provide evidence of an activity with juridical significance. An example of narrative documents is correspondence between two scientists comparing their research results. The consultation between the two colleagues is a juridically irrelevant act as it is in no way required of either scientist, nor is it intended to produce any legal consequences.

Returning to the first species in this classification, a careful study of probative and dispositive documents

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reveals that these documents are recorded transactions, as defined earlier: they are intended to convey information for the purpose of administering a person's interests. Furthermore, it may be noted that probative and dispositive documents are usually created in connection with juridical acts. Their written form is required because they either refer to an act which is legally recognized as affecting rights and duties, or they put such an act into effect. Since a right can only exist as a relationship between two or more persons, probative and dispositive documents can be considered a special type of recorded transaction: the embodiment of information which must be conveyed to others in relation to a right or duty. Thus, probative and dispositive documents are a sub-set of records and may be called "legal records" because of their direct relationship to rights and duties.

Archivists and records managers often use the phrase "legal records" to refer to the provenance of the records. All records from a court, law firm, lawyer, or jurist are called legal records in much the same way that records accumulated by a church are called church records or religious archives. However, these records may include the accounting records of the law firm's Finance Department, the personnel records of the Human Resources Department, and so on. Many of these records may have no direct legal significance. This usage of the term is of little help in
this thesis, which is concerned specifically with the legal nature of records, regardless of their provenance. For the purposes of this thesis, therefore, "legal records" will be defined as:

those records which either execute or are written evidence of acts or events which create, transfer, modify, maintain, or extinguish legal rights and duties.

Legal records are distinguished from records in general in that they are expressly created for the purpose of affecting legal rights and duties.41

In contrast to legal records, supporting and narrative documents are not intended to have a direct connection with legal rights and duties. They are non-legal documents. They convey information, but do not establish a legal relationship between the parties involved. For example, Sarah may send a letter to her friend accepting her friend's invitation to dinner. By stating her acceptance, Sarah is promising her attendance at the dinner. However, no legal agreement has been created; the friend does not have a legal right to demand Sarah's attendance or to seek compensation if Sarah should fail to appear at the dinner. The acceptance is a transaction only in the philosophical sense of being an act which mutually affects or reciprocally influences two or more parties. It is not a transaction in

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the legal sense of establishing legal relations between the parties. Hence, the letter is a non-legal document.

As mentioned at the beginning of this chapter, there is sometimes a correlation between the species of different documentary classifications. Such is the case with the two classifications presented here, where the purpose of the document and the activity that generated it may be related (see Table I). For example, because dispositive and probative documents must be created to convey information about rights and duties (an administrative concern), they will always be recorded transactions, or records. On the other hand, since manuscripts, by definition, are not intended to achieve results essential to a person's continued functioning, they cannot have any direct relationship to legal rights and duties. Hence, they must be either supporting or narrative documents. A supporting document will be a record if it constitutes evidence of a juridically relevant activity and also conveys information for an administrative purpose, such as correspondence that sets the framework for an agreements between two parties. A supporting document will be a manuscript if it arises from a personal activity or is not meant to be communicated in its written form, such as the professor's lecture notes cited earlier. Narrative documents can never be born as records, since they constitute evidence of a juridically irrelevant activity.
### TABLE I
CORRELATION BETWEEN TWO CLASSIFICATIONS OF DOCUMENTS

<table>
<thead>
<tr>
<th></th>
<th>DISPOSITIVE</th>
<th>PROBATIVE</th>
<th>SUPPORTING</th>
<th>NARRATIVE</th>
</tr>
</thead>
<tbody>
<tr>
<td>RECORDS</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>MANUSCRIPTS</td>
<td></td>
<td></td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>
This chapter has shown that the relationship between documents and the facts that appear in documents is a reciprocal one. Documents embody facts, transmitting them through time and protecting their memory. On the other hand, the type of fact determines the nature of the document and its role in an act. For instance, acts which are manifested in written form and which affect rights and duties produce a type of record that will be called legal records. However, legal records are not the only type of document that may be affected by law, or that may have some effect in law. The next chapter will examine more closely what constitutes legal value in general and how that concept relates to documents.
Legal value is often listed in archival and records management literature as one of the various values that a document may have. Unfortunately, the term is usually only vaguely defined, offering little guidance to the archivist seeking to determine whether or not a particular body of documents has legal value. For example, the International Council of Archives' Dictionary of Archival Terminology defines legal value as "the value of records/archives for the conduct of current or future legal business and/or as evidence thereof," while the Maedke, Robek, and Brown records management manual defines legal value as "value inherent in records that provide legal proof of business transaction[s]." The problem with these definitions is that they offer no explanation of the concepts of legal business, evidence, or proof—key elements to understanding legal value. This chapter will explore these concepts, drawing upon the discussion of juridical facts developed in the last chapter and also upon the rules of evidence developed by the English legal system over the centuries. As a result of this examination, the chapter will identify the main components of legal value. Intrinsic to this
discussion is a consideration of whether legal value exists independently of context, or whether it is determined by circumstances; whether legal value can be acquired or lost over time; and whether potential legal value is an identifiable entity. Finally, this chapter will consider whether legal records automatically have legal value, and whether it is possible for non-legal documents to have legal value.

As discussed in the previous chapter, activities that affect rights and duties are called juridical acts and have legal significance within the juridical system in which they took place. If such acts are expressed in written form, the resulting documents (dispositive or probative records) necessarily also have legal significance. They embody a juridical act and are recognized by the law as providing direct access to that act. Thus, they have legal value. In this case, the legal value of the record derives from the juridical nature of the fact it represents, supported by the direct relationship between the fact and the record.

Non-legal documents do not have this direct relationship with juridical facts. They are not produced under the requirement of, or with the intention of, embodying a juridical fact. Rather, they are produced for various administrative, fiscal, cultural, historical, or sentimental purposes. Nevertheless, they may have an indirect link with a juridical fact. For example, an author
whose book is being published will correspond with the publisher about a variety of matters. The letters are classified as supporting documents created for administrative purposes. They do not themselves produce a juridical act; they do not alter any legal relations between the author and publisher. However, while not directly related to a juridical act, the letters are part of an activity that leads to a contract and to publication. If the final contract with the publisher—a dispositive record—were accidentally destroyed, the letters could serve as evidence of the contract terms that were being negotiated between the author and publisher. The letters would gain legal value at that point. Thus, the first component of legal value is a relationship, whether direct or indirect, between a document and a juridical fact or facts.

Circumstances can play a major role in determining whether a document has a legally significant link with a juridical fact. In the example mentioned above, the letters gain legal value because no other documents survive. If the contract were available, it would provide proof that an agreement between the author and publisher had been reached, and the letters would not be needed. Circumstances may also change the nature of a fact from one which is juridically irrelevant to one which is juridically relevant. Jurist Sir Frederick Pollock provides an excellent example of this situation in his First Book of Jurisprudence for Students of
the Common Law. Sir Frederick begins by stating that the falling of an apple from a man's own tree on his own ground has no legal import. No one's rights are affected in any way, and the law does not care whether the owner picks up the apple or not, or whether he eats it or not. However, if the apple falls from a branch projecting a metre beyond the owner's property boundary and lands on a neighbour's land, many questions of legal import arise. Does the apple still belong to the owner of the tree? Is he free to retrieve it from his neighbour's land, or must he ask the neighbour's permission? Does it belong to the neighbour? If so, does the neighbour owe any compensation to the former owner, the owner of the tree? If a trespasser comes and takes the apple, whom has he/she wronged?

In the above example, a small change in circumstances transformed an irrelevant event into one with potential legal importance (potential because the apple may rot before either man concerns himself with it, or because neither man may wish to make an issue of the event and the question of ownership may be settled without either man realizing that it ever was an issue). Similarly, a document may originally embody a juridically irrelevant fact and therefore have no legal value. If a law changes, though, and the fact becomes one which affects somebody's rights, then the document gains legal value because it is now linked to a juridical fact. Changing circumstances may also affect legal records in a
like manner; although they already have legal value, they may gain additional value for legal purposes other than those for which they were originally created.

The first component of legal value is dependent upon some context. First, juridical facts are such only within a juridical system that recognizes their consequences. Without this context, they would not have juridical relevance. Second, historical conditions, such as changes in laws, may create or destroy the juridical quality of facts. The circumstances of an individual event, such as one apple falling in a different place than usual, may also affect the juridical relevance of a fact. In each case, the legal value of the documents that embody those facts will be affected.

Time can also be a factor that affects this first component of legal value. For example, the owner of a new stereo system may be required to register the fact of his/her ownership and the date of purchase with the manufacturer in order to be covered by the manufacturer's five-year warranty on the parts of the system. The owner's copy of the registration form has legal value as it provides evidence of the owner's right to have parts fixed or replaced if something goes wrong. Once the five year period expires, though, the form no longer has that particular legal value since the warranty between the owner and the manufacturer has ended. The expired warranty, however, may
have legal value for other purposes. For example, it is proof of the fact of expiry, another juridical fact. It could also be used as proof of the date of purchase, which the owner may need even after the warranty's expiry. The point is that time has changed the value of the document.

As another example, a sum of money may be held in trust under a will for a beneficiary until he/she reaches the age of twenty-one. On his/her twenty-first birthday, the beneficiary has the immediate right to possess and spend the money however he/she pleases. After receiving the money from the trustee, the beneficiary becomes its absolute owner and the will ceases to have legal value for the purpose of establishing the beneficiary's interest in the trust money. Thus, legal value is not always static. Some documents may have long-term legal value, while others may gain or lose it over time.

In a sense, all documents have potential legal value since one cannot predict what time or circumstances may do to create legal value in a particular document. Realistically, though, a narrower approach to legal value and potential legal value is required if the concept is to have any usefulness for archival appraisal. Hence, legal records can be said to have actual legal value when they are linked to an existing juridical fact. Documents without current legal value (whether they are non-legal documents, or legal records whose value has expired) may be considered
to have potential legal value if they are directly or indirectly related to a juridical fact, and if they are likely to be required as evidence of that fact. Potential legal value exists only when there are foreseeable circumstances that may affect the legal value of the document. For example, it may be known that other records are not available, or the documents may relate to an issue that will soon be investigated by a government commission. The fact that the documents may gain legal value in some unforeseen time and place does not give the documents potential legal value.

The relationship between a document and a juridical fact is only one component of legal value. Other components of legal value relate to the use of documents as legal evidence. In general, evidence may be defined as the means by which an event is demonstrated. Legally, it is the means by which a fact in issue may be either established or disproved. One fact is relevant or circumstantial evidence of another when it tends in any degree to render the existence of that other fact probable. Black's Law Dictionary defines evidence as "any matter of fact, the effect, tendency, or design of which is to produce in the mind a persuasion of the existence or nonexistence of some matter of fact; ... that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other." Evidence is thus
a relative term, signifying a logical relationship between two facts: the proposition to be established (the "factum probandum") and the evidentiary fact (the "factum probans"). From the evidentiary fact, the existence or non-existence of the proposition may be inferred. Depending upon the nature of the dispute, any specific fact may be either a proposition or an evidentiary fact. For example, a contract of sale may be either the fact at issue in a court case (the proposition), or a fact which provides evidence of the sale (an evidentiary fact) within the context of another issue.

In the law of evidence, an allegation of fact is said to be proven when the trier of fact (jury or judge sitting without a jury) is convinced of its truth. This conviction may be based on a single evidentiary fact or on an accumulation of such facts. A single evidentiary fact does not need to prove a proposition in order to be considered relevant as evidence. That is, the inferences that may be drawn from the evidentiary fact need not be conclusive, but merely worth consideration in the investigation of some proposition. If many evidentiary facts are required to produce the degree of conviction called proof, then each of the facts is relevant and has probative value.

Evidence may take many forms. Most commonly, evidence may be presented through the testimony of witnesses, documents, or real evidence. More specifically, documentary
evidence is defined as evidence supplied by writings or "derived from conventional symbols (such as letters) by which ideas are represented on material substances." This category of evidence therefore includes all documents as defined in the previous chapter.

In the English legal system, all forms of evidence, and documentary evidence in particular, are governed by the law of evidence. These rules prescribe the manner of presenting evidence, the procedures for examining evidence, and the classes of things that cannot be received as evidence. The development of these rules is usually attributed to the rise of trial by jury in England. A brief history of the evolution of these rules will help to show their purposes.

The old forms of trial common in England between A.D. 700 and A.D. 1200 often sought to prove facts not by examining evidence of the facts, but by subjecting the accused to trial by ordeal or by battle. In these trials, the accused declared the facts at issue and then underwent some test of fire or water, or met the accuser in combat. Success in the ordeal or the battle was considered to prove the truth of the declaration. Another form of trial at this time was trial by witnesses. This form focused more on the facts at issue and was based on the requirement that certain transactions had to take place before previously appointed witnesses. In the case of controversy, the oral testimony of these witnesses, sworn with all due form before
the court, decided the issue.12 The only rule of evidence needed, though, was the form of oath for the witnesses. There was no question of who could present evidence or what could be presented: it was accepted that only those who had been present at the transaction could give testimony and that they would speak the truth about what they had witnessed.

In the eleventh century, the Normans introduced a new form of trial into England: the inquisition. In this form, the judge summoned a number of members of the community who had personal knowledge of the facts in question and asked questions of them. Gradually, trial by jury developed and the people who had been called from the community for an inquisition became the jurors in a trial. As in the inquisition, these people were relied upon to have first-hand knowledge of the facts and therefore did not need to seek information from other witnesses. As society developed and became more complex, however, it was not always possible to have a jury with personal knowledge of the facts. By the sixteenth and seventeenth centuries, the chief source of information for English juries had become the sworn testimony of witnesses, and it was assumed that the jury only knew that which was publicly stated in court. At this point, questions arose about what the jury should hear. There was a general belief that, in the interests of a fair and impartial trial, the jury should be protected from false
testimony, hearsay, and prejudicial evidence. Rules of evidence were therefore devised to bar evidence that was untrustworthy, irrelevant, confusing, prejudicial, or a waste of the court's time. The rules also established practices for attesting witnesses, oaths, and some documentary originals. These rules, developed by the judges, became the common law rules of evidence (i.e., they were not established by statute). In the nineteenth and early twentieth centuries, the English Parliament enacted legislation embodying various forms and alterations of these rules. The law of evidence in England has since formed the basis of the laws of evidence in most English-speaking countries, but each jurisdiction, including England itself, continually modifies the law to meet changing social needs.13

Documents were widely accepted in common law as evidence only from about the mid-nineteenth century. Historically, the major objection to documentary evidence was that documents could be forged or inaccurate, and could not be subjected to cross-examination. There had to be some other means of assuring the court that the documents in question were accurate and reliable, some way of proving their trustworthiness. For this reason, the earliest documents to be accepted in evidence were sealed public records. The official nature of the record was considered to be an indication of its reliability, and the seal served
as a recognized form of authentication. As business procedures became standardized, legislatures enacted business records provisions in their Evidence Acts that enabled the courts to accept certain kinds of records as proof of business transactions, provided that the records met specific criteria of admissibility. Gradually, documents of various kinds were used to supplement oral testimony and then, in many cases, they came to supplant it. Today, the rules of evidence govern the admissibility of any document that a party may wish to present on his/her behalf.¹⁴

The rules of admissibility for any form of evidence are designed to ensure that the court will only hear that which is pertinent and useful to the case under consideration. The responsibility for determining admissibility is a matter of law, and is decided by the trial judge. At this point, the judge only considers whether a matter offered as evidence passes all the admissibility tests. He or she makes no other judgment about the evidence.

The value of the evidence in establishing a proposition is called "weight." Unlike admissibility, which is a matter of law, weight is a question of fact and is determined by the jury during the course of the trial (in a trial by judge alone, the judge acts in two different capacities to determine both admissibility and weight).¹⁵
The first criterion for admissibility is that of relevancy. Any matter offered in evidence must be logically relevant to a material issue in the case. If the matter is relevant, then it is admissible, subject to whatever rules of evidence exist for particular kinds of evidence. For documentary evidence, the three main exclusionary rules are: best evidence, authentication, and hearsay.

The best evidence rule applies when the court is interested in the contents of a document, rather than in its form or the fact of its existence. The rule is based on the assumption that the fineness of detail in a document can be distorted in a copy, and that the original document is the most reliable source of what the document contains. The rule therefore requires that the original document, or a duplicate, be produced whenever possible. If the original is unavailable, and the party offering the document can account for its unavailability, some form of secondary evidence (such as a copy) will usually be accepted. The original may be unavailable due to its form (for example, an electronic record or a document written on a wall) or to the fact that it was lost or destroyed. In this latter case, the original may not have been lost or destroyed with the consent of either party; there cannot be any suspicious circumstances surrounding the loss or destruction. Express exceptions to the best evidence rule are sometimes found in statutory provisions. Due to the quality of modern copying
processes, the best evidence rule is not as important as it was historically. However, its main purpose remains valid: it is intended to secure the most reliable information available as to the contents of documents.17

The rule of authentication is the second exclusionary rule. It requires that, whenever the contents of a document are offered as evidence, the party offering the document must introduce some evidence outside the document itself to demonstrate that it is genuine and is what it purports to be.18 Methods of authentication vary according to the type of document. Judicial documents and many government records are authenticated by statute. Other records may be authenticated by a qualified officer from the office of creation, by the custodian of the records, or by some other qualified witness who can testify that the record is one which is ordinarily kept by the office or the institution.

The third exclusionary rule is the hearsay rule. Hearsay has been defined as "a statement offered in evidence to prove the truth of the matter asserted, but made otherwise than in testimony at the proceeding in which it is offered."19 The elements of hearsay are: first, a statement which was not made under oath; second, it cannot be tested by cross-examination; and third, it is offered as evidence to establish the truth of what is contained in it. Thus, all documents that are offered as evidence of the truth of their contents are hearsay and are only admissible
as evidence if they fall within an exception to the hearsay rule. In the English legal system, most of the exceptions to the hearsay rule are based on two principles: necessity, and the existence of some circumstantial guarantees of trustworthiness. The first principle, necessity, refers to the fact that often a document is the only convenient way to put the information in question before the court. The second principle allows the court to accept the circumstances of a document's creation as an adequate substitute for the traditional safeguard of cross-examination.  

The various exceptions to the hearsay rule for documentary evidence are beyond the scope of this thesis; however, the general circumstances of creation which are accepted as an indication of the reliability of records can be considered. The requirements state that the records must be created at, or near, the time of the event, by someone having personal knowledge of the matter being recorded, and who is under a duty to make the entry or the record in the regular course of business.

These requirements ensure reliability in several ways. First, a record made contemporaneously with the event ensures a fairly accurate recollection of details since the human memory has not had time to be affected by other events, interpretations of the original event, or forgetfulness. Second, personal knowledge requires the
record-creator to have actually participated in, or observed, the event. In some cases, there may be a procedure for someone with personal knowledge of an event to relate that information to someone else who is responsible for creating the written record (this is called "second-hand hearsay"). In either case, the event speaks through an eyewitness, someone who was present when the event occurred.22

Third, it has been argued that a duty to make a record implies a duty to make an accurate record. In addition, an inaccurate record means that the record-creator failed in some degree to fulfil his/her duty and therefore he/she risks censure from his/her employer. Usually, a record is regarded as being made under a duty when the nature of an office or a function "fairly requires or renders appropriate" the making of a record. The concept of duty is not limited to the narrow meaning of statutory or public duty, but includes acts required by a person's professional duty. Preliminary or personal notes made in the course of performing a duty, though, are not admissible because their creator is not accountable to anyone for their accuracy. On the other hand, documents that are necessarily created in the fulfilment of a duty that produces a different record may be admissible. For example, in order for a heart specialist to fulfil his/her duty to report on a patient's condition to the referring physician, the specialist must
take electro-cardiograph pictures to gain information. These pictures are essential to the performance of the specialist's duty and therefore must be accurate and reliable.\textsuperscript{23}

The fourth requirement—that a record be made in the regular course of business—ensures that the record is not a casual or isolated event. Rather, it is created and maintained because the organization requires it in order to function properly. Furthermore, since the record is required for the organization to function, errors or inaccuracies are almost certain to be noticed by those dealing with the record. In short, if the government and the business world are prepared to rely on the accuracy of their records, and in effect rely on the standards of accuracy that they have imposed on their employees (the record-creators), then the courts should also be able to rely on those records.\textsuperscript{24}

Non-records (i.e., manuscripts) cannot be authenticated in this manner since they are not a result of a regular business activity and their circumstances of creation are not controlled. The rules of admissibility for manuscripts therefore require that the document be authenticated by the testimony of a witness who signed the original document, by the testimony of witnesses who saw the execution of the document, or by opinion testimony as to the handwriting of the person who signed the document. These methods focus on
witnesses to the individual document as an event rather than on the circumstances of the document's creation. Documents that have been notarized or properly recorded in a public office are presumed to be authentic because the courts accept the reliability of the witness to the document (the notary public or public official) rather than the reliability of the document.25

Authentication of both records and manuscripts requires someone to testify as to the document's execution or to identify the handwriting on the document. However, the courts have traditionally recognized that after a lapse of time, there will be no witnesses left to provide such testimony. Consequently, the category of "ancient documents" was established: documents older than twenty or thirty years (depending upon the jurisdiction) are presumed to be authentic, provided that they come from a natural place of custody. The documents must be shown to meet the age requirement, and their place of custody must be one where it would be natural and reasonable to find such documents.26 For archival documents, deeds of gift, retention and disposition schedules, and accurate records of transfer all serve to justify the archives as a natural place of custody for the documents in its care.

In summary, the rules of admissibility which apply to documents are: relevancy, best evidence, authentication, and hearsay. While relevancy ensures that documents that
are admitted to court are pertinent to the matters at issue, the rules of best evidence, authentication, and hearsay are all concerned with the reliability of the document. The guarantee of reliability is sought through requirements as to the form of the document (best evidence), the circumstances of its creation, its age, and its custody, in addition to other, more specific requirements not discussed here. Reliability as a requirement for admissibility may therefore be considered a component of legal value.

As mentioned earlier, the admissibility of documentary evidence is separate from the weight of that evidence. While the judge may decide that a document passes all the required tests for admissibility, the jury may find that the quality of the evidence is poor and therefore not worth much consideration. Or, criticism of the trustworthiness of a document may detract from its weight. For example, a judge may determine that there is sufficient evidence of reliability for a reasonable jury to accept that an accounting ledger is what it purports to be. However, the opponent in the trial may have evidence that some part of the recordkeeping process is unreliable. The ledger is still authentic and may be admitted to court, but the jury may choose to largely disregard its contents on the basis of the criticism raised by the opponent. In another example, a document which is admitted to court may not contain a complete memory of an event. It may omit details that the
jury considers important to the matter at issue and therefore it will not be of much help to the jury. Thus, it is not sufficient that a document meet all admissibility requirements; to have significant legal value, the document must also be effective as evidence of the facts it reports.

Unlike admissibility requirements, there are no laws or rules of evidence that govern the determination of weight. In court, the trier of fact considers the particular document on its own and in the context of the other evidence in the case, adds some common sense, and then decides the document's worth as evidence in that individual case. Weight as an element of legal value is therefore difficult for anyone to evaluate outside of a specific court case or investigation. Nevertheless, it is possible to make some general judgments about a document's worth as an embodiment of facts. In particular, archivists can evaluate that part of a document's evidential quality that derives from intrinsic documentary elements and is not affected by circumstances. For example, there may be aspects of the relationship between the document-creator and the facts, the nature of the document's creation, or the completeness of the document's forms that do not affect its admissibility, but that do contribute to its value by enhancing its representation of an event. Consequently, weight—in the narrow sense of a document's objective evidential quality—can be considered the third component of legal value.
It has been seen that, like the first component of legal value, the second and third components are affected by changes in circumstances. Indeed, the same document may be admitted as evidence in one case, but rejected in another, depending upon the specifics of each case. These circumstances cannot be controlled or predicted by the archivist. Hence, the archivist can only appraise those elements of admissibility and weight that are independent of circumstances: the intrinsic guarantees of documentary reliability, and the completeness of the document's forms.

Legal value is not exclusive to a particular documentary species. Rather, any document—whether record or manuscript, legal or non-legal—can have actual or potential legal value if it possesses the three components of legal value identified in this chapter. By definition, legal records automatically have actual legal value as long as the juridical fact they embody exists. Apart from this situation, however, documents must be appraised for legal value in the light of the three components defined here.

To review, the three components of legal value for documents are (1) a relationship between the documents and juridical facts, (2) the ability of the documents to pass the rules of admissibility for use as legal evidence, and (3) the weight of the documents (their evidential quality). The first component is always necessary for a document to have legal value or potential legal value—the document must
have some relation to a juridical fact. Legal records therefore have legal value. Non-legal documents, however, must have both the first and second components. Because non-legal documents do not directly affect the rights and duties of others, their only legal significance is as evidence of juridical facts. If a document fails to meet the admissibility requirements, it will not be admitted to court, will not be considered as evidence, and therefore will not have any value to the legal system. The third component—weight—helps to determine the degree of legal value that a document has. If the document is not worth much attention as evidence of what it contains because of certain inadequacies, then its legal value is weak.

When appraising documents for legal value, the archivist should look for these three components. If the documents have all three components, they have strong legal value (whether existing or potential) and must be preserved for that value. If one or more of the components is missing, then the legal value is weakened. If there are other documents that relate to the same juridical facts, have stronger legal value, and are scheduled for retention or are likely to be retained, then the weaker documents under consideration need not be preserved on the basis of their legal value (although they may be preserved for other values). These three components of legal value arise from the formation process of documents, their inherent
characteristics, and some external factors, all of which can be evaluated by the archivist. The next chapter will discuss the factors and characteristics which contribute to these components.
CHAPTER THREE

FACTORS CONTRIBUTING TO LEGAL VALUE

Legal value may derive from characteristics intrinsic to a document as the embodiment of a fact, or it may arise from factors external to the document and its formation process. The place of custody, for example, is an external fact that may play a role in the authentication of a document. Most commonly, though, externally imposed legal value is a result of statutory provisions or rules and regulations that affect records, either by requiring their creation and/or retention, or by establishing their status as evidence. While many of the requirements for creation and retention are more directly the concern of records managers than of archivists, archivists should nevertheless be aware of what impact these provisions have on the nature of the records and, in particular, on their legal value. Some of the important external factors affecting legal value will therefore be reviewed in this chapter. A great many documents, however, are not governed by any legislation. Their legal value derives from internal documentary elements and inherent guarantees of reliability. These elements can best be evaluated by analyzing the genesis and forms of the documents being appraised. This chapter will outline what
the archivist should look for, and explain how various elements contribute to documentary legal value.

The existence of statutes and regulations that govern the creation, forms, maintenance, and retention of records implies that the legal system has determined that a particular type of relationship or transaction is sufficiently significant to warrant the formality of a written record. By definition, then, the relationship or transaction is a juridical fact, and the records that embody that fact are legal records. Thus, statutes and regulations do not affect supporting and narrative documents, whose creation and use are at the discretion of the private individual. Rather, they are directed exclusively toward legal records.

In some cases, statutes and regulations apply generally to all businesses or to a kind of relationship or transaction. Examples of this type of requirement are found in the Canada Business Corporations Act (CBCA), the Income Tax Act, the Canada Pension Plan Act, and the Unemployment Insurance Act.¹ These acts contain records-creation provisions that affect broad categories of record-creators, such as corporations incorporated under the CBCA, persons carrying on business in Canada, or employers of people engaged in "pensionable" or "insurable" employment. In other cases, regulations apply specifically to regulated industries, such as banks or public utilities, or to
specific records of particular businesses. An example of the latter type is the Pharmacists Regulations (sections 2 and 3) in the *Excise Act*, which require pharmacists licensed under that act to keep specified records pertaining to the spirits that the pharmacists receive from distillers. All of these requirements create legal records, and the archivist must be able to recognize them as such. If the organization creating the records does not have an existing records management program which has already located the relevant statutes and regulations, then the archivist should identify these laws and determine their scope, their applicability to the particular organization, and the specific records which are affected. Once this process has been completed, and the relevant records have been identified, the archivist must preserve the records for the specified retention period.²

The creation of legal records by statutes and regulations raises the question of what happens to the status of the records when their required retention period expires. A specified retention period indicates the length of time that the law is interested in the events that appear in the records. Once the law ceases to be interested in the event, the event is no longer a juridical fact, and its records lose that component of their legal value. Whether a record continues to have legal value for other purposes depends largely on the record's internal characteristics.
Archivists should be aware of this situation when they appraise records with legally required retention periods, and should evaluate the records for possible preservation beyond the legally required period. The records may have elements that contribute to potential legal value, or they may have other, non-legal values. On the other hand, it may be that the only substantial value of the records is their imposed legal value. These factors can usually be determined at the time of the original appraisal, thereby avoiding the need to reappraise the records when the legal retention period expires.

Difficulties with legislation arise when statutes and regulations require the retention of records but do not state a specific retention period. A similar problem occurs with statutes of limitations, which prescribe a time period during which an organization or an individual can sue or be sued on a matter, or a time period during which a government agency can investigate or audit. Statutes of limitations do not prescribe a records retention period. What is the legal status of the records that fall into these two areas? The records are unquestionably legal records since they pertain to juridical facts in either case, but their retention is not legally required. The question then becomes one of degree: do the records have sufficient legal value to warrant their retention for that value?
A decision regarding the degree of legal value will involve a risk-benefit assessment. That is, the risks associated with either retention or disposal of the records must be weighed against the costs of maintaining the records or the advantage of having them, respectively. For example, if records are not available when they are required by a federal agency or are needed in litigation, the organization may be subject to fines, penalties, and other loss of rights, or it may not be able to support its claims in court. On the other hand, it may be expensive for an organization to provide long-term storage for records that are unlikely to be needed to support a case and that have little value for the organization. The records manager or archivist needs to consult with legal counsel to consider what the chances of litigation are and which party would have the burden of proof. It could also be useful to survey the company's recent history to determine at what point in a statute of limitations period most of the law suits or legal problems arise. These questions help to establish the risks associated with records retention or destruction. Records that are relevant to pending or foreseeable judicial or administrative proceedings must be preserved. Records whose destruction would put the company in a high-risk situation in terms of fines, penalties, or ability to support the company's claims should also be preserved for their legal value. Conversely, records with low-risk
destruction, but moderate to high-cost maintenance, probably
do not have sufficient legal value to justify the costs of
preservation beyond their period of operational use.
Ultimately, each organization must develop its own strategy
for handling indefinite or unspecified retention periods and
statutes of limitations periods. The business managers or
the senior management of the organization should be involved
in developing this strategy since the decisions have the
potential to affect the welfare of the whole organization.
Thus, while specific retention requirements clearly
establish strong legal value in a record for a definite
period of time, unspecified retention periods and statutes
of limitations merely establish certain records as legal
records. They do not indicate the degree of legal value
that those records have. Determining the degree of value
involves consideration of a number of complex external
factors and should include consultation with legal counsel
and with management.

In addition to requiring the creation and retention of
certain records, legislation may also affect the legal value
of records by defining their status as evidence. As
mentioned in the previous chapter, statutory provisions may
authenticate certain classes of records or provide express
exceptions to the best evidence rule. In effect, this type
of statutory provision provides an external guarantee of the
records' admissibility (the second component of legal
value). Laws may also exclude certain documents from admissible evidence, thereby depriving them of the second component of legal value. Regardless of whether the law bestows or denies the second component of value, the consequence is that the status of the record is determined by a factor outside the intrinsic characteristics of the record. Once again, the archivist must be aware of all relevant legislation when appraising government or business records in order to accurately identify the components of legal value that the records have. Unlike specific retention requirements, though, statutory provisions that affect the second component of legal value do not oblige the archivist to preserve a particular set of records.

In some cases, the archivist must be aware of how external factors impact records other than those being appraised. For example, the admissibility requirement that certain records come from a "natural place of custody" calls for some knowledge of the custodial history of the records. If there are records available that document the transfer of a particular body of records from one office to another, those records should be preserved to support the legal value of the original body of records. Furthermore, archivists' records, such as deeds of gift and accession registers, can be vital to establishing ownership of, and responsibility for, records acquired by an archival institution. Thus, an external factor such as place of custody may require the
preservation of supplementary information, and the archivist has a responsibility to be aware of such requirements in order to avoid actions or decisions that could impair the legal value of the documents.

Overall, external factors can play an important role in the appraisal of legal value. Legal retention requirements create an obligation for record preservation. Unspecified retention periods and statutes of limitations periods identify legal records whose value is best determined through a risk-benefit assessment of legal issues related to the organization's business. Statutory provisions which affect the admissibility of records can also be a significant factor in evaluating the degree of legal value. The archivist has a responsibility to ensure that all relevant legislation has been located and considered during the appraisal process. Knowledge of external factors will help direct the archivist in identifying legal value in records and in identifying ways to support that legal value if necessary.

This aspect of legal value is often mentioned in archival appraisal literature. For example, in his manual on appraisal, Maynard Brichford includes a paragraph about statutory provisions that affect records. In Life of a Document, archivists Carol Couture and Jean-Yves Rousseau stress the importance of being aware of legal retention periods. American archivist Francis Blouin discusses
records-creation and retention regulations in his article on appraising business records, and the recent ACCIS report on electronic records lists legal requirements as an appraisal consideration. It would seem from these examples that archivists are conscious of this element of legal value and of their responsibilities with respect to it.

Despite the importance of external factors, they affect only a small proportion of the documents that archivists are called upon to appraise. Archivists must have other means of determining legal value if they are to fulfil their responsibility to society. Fortunately, documents have many intrinsic characteristics that can contribute to their reliability and potential legal value. Identifying these internal sources of reliability requires a study of the genesis and forms of the documents—a diplomatic analysis—in conjunction with a knowledge of the legal criteria for admissibility.

Studying the genesis, or formation process, of records can reveal much about the reliability of the records. As recorded transactions, records are created by a procedure—a body of written or unwritten rules that constitute the formal steps to be undertaken in carrying out an operation or transaction. Procedures establish a routine for the performance of a task, thereby removing the need for decisions to be made about the steps involved, or the sequence in which they are to be performed. For example,
many organizations establish procedures to govern the creation and forms of their records. These procedures identify the information that the organization needs for different types of functions and transactions, and prescribe the appearance and arrangement of the recorded data. In effect, standard procedures are a method for controlling both the construction of a record and the one who constructs it. When there is no scope for the record-writer to make choices or decisions, there is no need for the writer to participate in the record. The writer is free to observe the event and then let it speak through the forms of the record. Likewise, when the forms of the record are familiar, the record-user can let the event speak for itself, without trying to interpret the manner in which it was recorded or otherwise participating in the record. As discussed in Chapter One, when an event is allowed to speak clearly through a record, the record is a reliable embodiment of it and can be used without reference to the original event.

The formation process of records created by either public persons or private persons of a corporate nature tends to be the same. This process usually includes the iussio, compilation, validation, registration, calculation of taxes, and delivery. The iussio is the order given to compile the record. The memory of this order may appear in the record, as can be seen in many colonial proclamations.
that contain the phrase "By His Excellency's Command." The
_iussio_ is regularly omitted when the record is personally
subscribed by the author of the action, since the signature
implies that the author commanded the creation of the
record. In other cases, the order to issue a type of record
may be expressed generically and permanently in the
regulations that establish a particular office and its
functions. However the _iussio_ is expressed, it is useful
for the archivist to know the source of authority for
different types of records within an organization. Records
whose creation is not required or authorized by the
organization may not be as reliable as those whose creation
is required, since they will probably fall outside of any
organizational controls on records creation.

The next step in the formation process is the
compilation of the record. This step involves the act of
gathering the necessary data and recording them on some
medium. The record may then be validated. Depending on the
system being used, the validation may confirm the accuracy
of the document as the embodiment of an act or will; or it
may guarantee the regularity of the formation and forms of
the document; or it may confer solemnity on the document.

In some organizations, certain types of documents may
need to be registered, or entered in a list or record (known
as a register or registry). Sometimes, a tax or fee may be
required before the record will be issued to the addressee.
(the recipient of the action or the document). For example, the government will not issue a driver's license until the appropriate fee has been paid.

The final step in the process is the delivery of the record to the addressee. Records that are not delivered are not effective. That is, they cannot produce the consequences desired by their creator. Indeed, by definition, records are **conveyed** information; delivery is an essential part of the record. The type of record will determine what type of delivery is necessary. Some records must be sent to the addressee, while others must be filed in a place where they will be accessible to those who need the information in the record.

In cases where the final document is not the result of the authority's own direct initiative, but is solicited by other physical or juridical persons, the *iussio* will be preceded by a procedure that may produce a variety of interlocutory documents. This procedure will include an introductory phase, which is the solicitation for action. This solicitation may be a petition, a claim for damage, a proposal for a new housing development, or some other type of request. It will be followed by an inquiry phase that is constituted by the collection of information related to the request. Opinions and advice are then gathered during the consultative phase. In the deliberative phase that follows, the information, opinions, and recommendations are
considered and a decision is made about the action to be taken. Sometimes, the deliberative phase is followed by a controlling phase, in which some person or body checks that the proper procedures have been carried out and are correct. Once the appropriate approvals have been given, the publication phase begins. This phase involves the execution of the final document, as described above.

The above steps can be seen in a procedure for providing financial assistance to Prairie farmers. This procedure involves a number of records, such as an application for assistance (solicitation), a calculation of drought periods and market prices to assess the extent of hardship (inquiry and consultation), an official approval or rejection of the request (deliberation), and a notice of this decision sent to the applicant (publication). The record of this procedure is a case file which must contain all of the above documents in order to provide evidence that all of the steps of the procedure were performed. If any of the records are missing, the record-user can only guess at the facts that the missing record(s) may have embodied. In this case, the entire event cannot speak for itself.

This conceptualization of the formation process provides a framework for the analysis of different types of records created by public persons and private persons of a corporate nature. It is important for the archivist to identify which elements of the formation process apply to a
specific type of records, and whether the process is
governed by formal rules. This information can help the
archivist assess the reliability of the documents. Records
that do not arise from a standard formation process are
inherently less reliable than those that do. There is no
guarantee that the record-creator knows what type of
formation process is relevant to a type of record, nor is
there any guarantee that necessary procedures will be
executed. On the other hand, when records arise from
established procedures, the archivist can evaluate both the
reliability of the procedures, and the reliability of the
records. Procedures can be assessed for the degree of
control they impose over records creation; for their
effectiveness in identifying and capturing the elements
needed to accomplish an act; and for the types of
accountability and security they require for records
creation and maintenance. This assessment will indicate
whether the procedures are likely to produce reliable
records. If so, generalizations can be made for the type of
record that is governed by the procedures (these records are
called "records of procedure"). Then, if necessary,
individual records can be assessed for their reliability in
relation to the procedure. That is, the archivist can
examine an individual record to see if the procedures had
been followed. Usually, however, the archivist will not
appraise individual records, but types of records.
Due to the elements of control imposed by a procedure, records of procedure usually fall within the business documents exception to the hearsay rule, which is based on the presumed accuracy of a recordkeeping system, rather than the actual reliability of the individual entrant. Established procedures for record creation imply that such records are regularly prepared in the ordinary course of business, and decrease the possibility that the records were created especially for use in litigation. Ideally, procedures should be documented in an organization's records management manual, and regular audits should be performed to ensure that procedures are followed. If such manuals and audits exist, the archivist can use them to identify the records whose creation process is controlled and which therefore have a degree of trustworthiness. These records need not be exclusively textual records, though. Procedures can apply to records of any form, including records made or kept by a computer. If a recordkeeping system uses computers instead of clerks, then the computers are programmed to make records in the routine of business (in an analogous manner to a clerk's duty to create records), and those records are used and relied upon by the organization. As long as records arise out of normal operating procedure, they have an inherent quality of dependability, regardless of medium.
In some cases, the reliability of a document may be derived from the reliability of the record-creator rather than from that of the recordkeeping system. Even here, though, procedures have a role to play. For example, two common ways to foster reliability in record-creators are (1) by restricting the "privilege" of records-creation to professionals or semi-professionals, and (2) by making a number of tasks concurrent with other tasks (for example, a record created to meet bureaucratic requirements could be used for other purposes such as making a report to a different audience). Organizations that use either method will probably have a procedure that enumerates the records to be created in this manner and identifies who is to be considered a professional record-creator. Information about these procedures can guide archivists in identifying records created by reliable record-writers.

The practice of restricting record-writing to professionals has a long history. In ancient Rome, documents were written by notaries, who identified the documents they created by appending their name and an individual signum to them. Because the number of such professional scribes was limited, uniform standards for the production of documents could be imposed, and the credentials of the notaries could be regularly checked. It was assumed that a reliable scribe would produce reliable records. The same principle applies today when
administrators choose to restrict the creation of certain kinds of records to persons who can be expected to be reliable because of their professional or public commitments. In hospitals, for example, only doctors and nurses are permitted to make entries in medical records. Similarly, businesses often assign bookkeeping and accounting functions to a separate accounting department rather than adding them to the duties of a secretary. The law of evidence considers public officials to be reliable record-creators because they have a public duty to be accurate in their work; they are accountable to society for their actions. Usually, records created by professionals will be signed, and the signature will be followed by a "qualification of signature" which states the official title of the subscriber, thereby indicating his/her status as a professional. If the archivist knows which records can only be created by professionals, and can identify those records by their type or by the qualification of signature, then he/she can attribute a degree of reliability to them.

Another strategy for controlling the reliability of record-writers and the dependability of their records is to make the record-writer's professional and bureaucratic tasks coincide, so that the same record is meant to serve a variety of users. In this way, the size of the audience increases and the writer cannot tailor the record to any particular group. Since the record must meet all needs, the
writer is more likely to let the event speak clearly through the record, rather than trying to use the record to express his/her own interests. For example, a heart specialist uses the same report to fulfil both the duty to inform the referring physician of any findings and the duty to produce a record for the files. The record must be accurate to meet the physician's needs, and must be complete and in the correct form to meet the bureaucratic standards for the file. A fact cannot be hidden from one group of users without also affecting the information available to the other group. Thus, there is an inherent guarantee of trustworthiness in this procedure. The archivist benefits from knowing the records-creation procedures of an organization because such procedures can help indicate which records are likely to be reliable and for what reason(s).

Knowledge of records-creation procedures can also aid the archivist in identifying original documents, as required by the best evidence rule. Legally, the original is the version of the document that was accepted by any parties to it as being the version upon which they agreed to operate. It is not necessarily the first version created, but is the version which expresses the final agreement of the parties. It is usually signed by all parties. The signatures of the parties serve to confirm that the record corresponds to their will(s). This concept of an original fits closely with the diplomatic definition, which identifies three
necessary elements for an original: primitiveness, completeness, and enforceability. The original is the first document to be issued in a particular form, which is also complete and able to produce the consequences desired by the document's author. A draft of a letter—a working form of the document—is not an original because it lacks a signature and therefore cannot produce any consequences; it is not enforceable. On the other hand, a copy of the final version of the letter may contain a copy of the signature and therefore may be viewed as complete and enforceable. However, the copy lacks the quality of primitiveness. Because it does not have all three elements, it is not an original.

There are cases where two or more originals of the same document may exist. In contracts and treaties where there are reciprocal obligations, each party has its own original. With photographs, both the negative and the first print to be produced from the negative may be considered originals. The negative is the first to be created, and may meet the photographer's need for an accurate representation of some scene or event. If the intent of the photographer, though, is to have pictures to display, then the negative cannot satisfy this purpose; the print is the version that is enforceable. If the two forms are considered to be different documents, it is possible to say that there is both an original negative and an original print, each being
the first to be issued in that form, and the first to be complete in that form. Which form is enforceable depends on the photographer's purposes. A similar argument can be advanced for machine-readable records. If an electronic message is meant to be accessed by computer, or if it can be sent by electronic mail, then the electronic record is complete and enforceable. If, however, the message is directed to someone who does not have access to a computer, then a print-out of the message is the enforceable version. Thus, both the electronic record and the print-out may be considered originals. Identifying originals involves analysis of the forms and purposes of the document, and may vary from case to case. Established records-creation procedures may indicate which version is the record to be acted upon, thereby identifying the "original".18

Drafts of documents fall into the category of "documents of process", as do rough notes and calculations. A process is distinguished from a procedure as being a series of motions, or activities in general, carried out to set oneself to work and to go on towards each formal step of a procedure. A procedure is a method of conducting a transaction; a process consists of the creative activities which flesh out the skeleton of the method. Documents of process are preparatory and incomplete. They are necessary to set the stage for the performance of a formal procedural step, but are not themselves meant to be communicated.19
Hence, documents of process are not recorded transactions (records), and their formation process is not controlled by any standards. In fact, the formation process of these documents, and of all non-records in general, tends to be atypical and individual; it lacks the elements of regularity and accountability that procedures provide. Therefore, the reliability of manuscripts cannot be generalized from an analysis of their formation process.

Whether appraising records or manuscripts, archivists should look beyond the formation process and also assess the forms of the documents. Forms can provide valuable information about both the reliability and the weight of documents. The best approach to assessing forms is to evaluate their completeness. Completeness is a diplomatic concept that refers to whether the forms of a document include all the elements necessary (1) to make the document enforceable, and (2) to provide access to the event that the document embodies. The elements required will vary according to the type of document. For example, letters require an address in order to be sent; receipts require dates to show when the transfer of ownership became effective. Sometimes, the precise form of a record is established by law, regulation, or bureaucratic standards to ensure that legal or administrative needs are met. Whatever the forms may be, what is important about completeness is not that individual documents have all the proper details,
but rather the fact that they should have such details. That is, the archivist should appraise a type of document for completeness, not individual documents.

When a document is of a type that has well-defined forms governed by established procedures, then either a complete or an incomplete form will provide information to the user. If the forms have been respected, then the user can accept the document as an adequate embodiment of an event and can use the document to know about the event. If the forms are not complete, then the document-creator has failed to adequately mirror the event. In this instance, the document does not provide access to the event, but it does provide information about the document-creator. The user will know that a particular document-creator is unreliable. An incomplete document may also constitute evidence of a procedure that was not properly executed, and this fact may cause the final act to be cancelled. Thus, incomplete documents may have as much value as complete documents, depending on what the user wants to know.

When the forms of a document are not governed by well-established procedures, it is difficult to determine the reliability of that type of document. Each document may be different from the others of its type, subject to the individuality of the document-creators. Neither the archivist nor the user will know for certain what details would constitute a complete document. Consequently, it may
be difficult to ascertain whether details are missing and, if so, whether those details are missing because they were not revealed by the event, or because the document-creator is unreliable. In other words, the user cannot be sure whether the document provides information about the document-creator, the documentation procedures, or the event reflected in the document. Such documents are therefore less reliable than documents created according to a procedure.

Once again, the archivist is well advised to examine the relevant document-creation procedures. Government and business records are often governed by procedures that identify what types of records are to be produced, and what the forms of those records should be. To appraise the weight of a type of record, the archivist should evaluate whether the prescribed forms capture sufficient information to convey the intent of the author, to make the records enforceable, to provide access to the events in the records, and to indicate the reliability of the individual records.

Common elements that lend reliability and weight to a record include: entitling and/or superscription; date (chronological and/or topical); address; and signatures. The entitling in modern documents is usually a letterhead. This element gives the name and address of the physical or juridical person issuing the record, or the corporate body of which the author is an officer. The superscription
identifies the author of the document, or the action, or both. The entitling and superscription indicate the source of authority for the record, and the person responsible for the action. This information provides a context for the record and tells the user who may be contacted for further information, if necessary.

The date indicates when and where the record was compiled. It may also indicate the time and place of the action (this is always true in dispositive records). Keeping in mind that observers can only know what is revealed to them when they are present in time and space, the mention of the chronological and topical date can be important because it serves to localize the event and to establish the relationship between the observer and the event. Mention of the date supports the implicit claim that the record-writer was present at the event. The date of the record may indicate whether it was created at, or near, the time of the event (an admissibility requirement), and whether it was created before controversy arose about the truthfulness of the facts contained in it.

The address identifies the recipient of the action or the record. All records will have an addressee, since actions must always be directed to someone. However, the addressee may not always be stated explicitly. In some types of records, such as dispositive records, it is essential that the addressee be stated explicitly in order
for the record to be delivered (and therefore be enforceable). In probative records, on the other hand, the address is often absent, particularly when the person to whom the record is issued is not the one to whom the record is directed. For example, driver's licenses and birth and marriage certificates are issued to the driver, or to the persons born or married. These persons are the recipients of the action of certification. The addressee of the record, though, is whoever has to read it. This person may be a policeman requiring proof of one's permission to drive, or a public official requiring proof of citizenship or marriage in order to grant a pension or other benefit. The archivist must therefore identify the type of document to know whether the address should be explicitly stated or not.

The presence of a signature is another important part of a record's completeness as it is usually a means of validating the record. If the signature is that of the author of the action, or of the parties to the document, then it declares that the record corresponds perfectly to the will and intention of the author or the parties. It validates the record as an accurate representation of the event. If the signature is that of a records officer, a secretary, a registrar, or someone responsible for controlling the creation of the record, then it is a guarantee of the regularity of the formation and forms of the record. It indicates that all the steps of the
appropriate procedure were followed, and that the record is complete. In both of these cases, the one who signs the record takes responsibility for it and for its completeness. In law, a valid record is one which is fully operative in accordance with the intent of the parties--one which has legal strength or force and has been executed with proper formalities. The function of validation performed by the two types of signatures discussed above meets this legal definition of validity. These signatures therefore contribute to a record's reliability.

Records may also contain the signatures of witnesses to the enactment or to the subscription. In records created by public persons, these signatures merely give solemnity to the record because the authority of public officials is such that their actions do not need to be validated by witnesses. In records created by private persons, though, the signatures may be either a validation or an authentication. They are a validation of the record if their purpose is to verify that the action or event actually took place. If the witnesses confirm only the subscriptions of the parties involved, then their signatures are an authentication of the subscriptions. Whether the signatures constitute a validation or an authentication, they indicate that an identifiable person has declared that the record is accurate.
and has accepted responsibility for all or part of the record.

This discussion has demonstrated that the forms of a record can enhance a record's reliability. Some of the elements may contribute to the record's admissibility, but many are not required by the law. Elements of form and the concept of completeness are most useful for assessing the record's weight. If the forms are comprehensive, they will be a good reflection of the events they represent. If the forms are governed by a well-established procedure, then any record of that type will provide some kind of information to the record-user. These aspects of the record's evidential quality are intrinsic to the record and do not depend on the circumstances of any particular case. These are the aspects of weight that the archivist can appraise, and they are a relevant part of a record's overall legal value.

As mentioned earlier, manuscripts are not usually governed by procedures. As a result, their formation process cannot be analyzed for indications of reliability. Notwithstanding this irregularity of the formation process, the forms of private documents tend to be as typical as those of government and business records. Society finds it easiest to follow conventions and, in a society which is increasingly dominated by bureaucracy, people have become accustomed to the forms of business records. Whether consciously or unconsciously done, people have adopted those
forms when pursuing their own affairs. Thus, when the
archivist appraises manuscripts for legal value, he/she can
look for many of the same elements of form discussed in this
section.

To review, admissibility and weight are largely based
on external and internal guarantees of document reliability.
While external guarantees usually arise from statutory
provisions, internal guarantees derive from the formation
process and forms of the document. Since a document's
formation process represents the link between the outside
world (the fact) and the document, an analysis of its
dependability reveals much about the value of the document.
For example, this chapter has shown that records of
procedure result from established rules (whether written or
unwritten) whose purpose is to create an environment in
which the record-creator records only what a fact reveals
about itself, and does so completely and precisely.
Trustworthy procedures and recordkeeping systems are likely
to produce trustworthy records. In addition to assessing
the formation process of a document, many elements of form
may be evaluated for their contribution to reliability.
Elements of form may indicate the document's status as an
original, draft, or copy; identify the author, addressee,
and time and place of an action; or validate or authenticate
the action or the document. The more of these components a
document has, the more useful it is as evidence of the
fact(s) it embodies. Appraising documents for the second and third components of legal value therefore requires knowledge of statutory and regulatory requirements, analysis of bureaucratic standards and procedures, and a study of documentary forms.
Equipped with an understanding of the three components of legal value, and of many of the external and internal factors contributing to legal value, it is possible to suggest some criteria, and a method, for appraising legal value. As in any area of appraisal, though, criteria for identifying legal value can never be applied mechanically; appraisal must be done in the context of a particular situation, and in conjunction with a healthy dose of common sense. To a certain extent, legal value exists as an independent component of a document, but a large degree of any document's legal value depends on circumstances. Whether a document will ever be required as evidence in court depends on a case arising for which the document has relevant information. And, whether a relevant document is admitted to court ultimately depends solely on the decision of a judge, who considers the facts of the case, the rules of admissibility, the exceptions to those rules, and previous decisions in previous cases (precedent). Furthermore, once admitted, the weight of the document as evidence depends not only on the quality of the document, but also on the facts of the case and on the other evidence
before the jury. The archivist appraising a body of documents for legal value has no way of knowing what documents will be required when, or what factors may influence a specific judge and jury in a specific case. Nevertheless, this thesis has proposed that there are some basic elements of legal value which can provide general guidance for the process of selecting and preserving documents of legal significance.

When appraising documents for legal value, common sense must play a role in the decisions that are made. It is simply not possible to preserve all the documents that modern society produces; some will have to be destroyed. In addition to common sense, appraisal decisions should be based on an understanding of why documents must be preserved for their legal value.

There are two reasons to appraise documents for legal value. First, archivists have a responsibility to identify and preserve sources that protect the rights of a society, its citizens, and its heirs. These sources are documents that have, or will have, some role in creating, transferring, modifying, maintaining, or extinguishing legal rights and duties.

Second, documents with legal value are products of a particular juridical system and reflect the values and functioning of that system. Even if they no longer have actual legal value, the documents show how the juridical
system governed and influenced the actions and reactions of people and institutions within the system; they reveal the role of law in society and indicate the extent to which law permeated the society. They are part of the society's documentary heritage. Furthermore, since a society's juridical system has a great influence on the activities and pursuits of the society, an understanding of the juridical system is essential to an understanding of the society in general. While it can be argued that these uses of the document fall under "research value," they are included in this discussion of legal value because the research value of these documents is directly linked to the legal nature of their creation and use. Archivists must therefore be able to identify the legal aspects of documents.

To form a documentary memory of a society's juridical system, it is useful to follow the advice of Hans Booms, who recommended that archivists measure "the societal significance of past facts by analyzing the value which their contemporaries attached to them." This method prevents the archivist from distorting the value of documents by bringing his/her interests to the appraisal process. It frees the archivist from becoming involved in calculating probable or possible future demands for the documents, or from being swayed by current research trends. In the case of appraising historical documents (those more than fifty years old), this method prevents the archivist
from applying current value standards to the documents. It helps to ensure that the documentary heritage formed by the archivist reflects the values of the society that created the documents. Thus, if the society in which the documents were created saw no legal use for some of its documents, that outlook should be respected by the archivist.

Following this principle, archivists will find that the documents that best reflect a society's juridical system are almost always legal records. Legal records are created for the express purpose of establishing legal relations between two or more entities. Their existence depends entirely upon the values of a particular juridical system. Their legal nature is therefore unambiguous, and they clearly indicate the rights and duties recognized by the system in which they were created. In contrast, documents with potential legal value are created for a variety of non-legal reasons; their relevance to the juridical system depends on circumstances. On their own, documents with potential legal value cannot reveal as much about a juridical system as legal records can. Furthermore, legal records are usually created according to established procedures, so they have an element of reliability and authority that may be missing in non-legal documents. Thus, a society's documentary heritage should include the society's legal records.

As mentioned earlier, this aspect of appraising legal value coincides with the appraisal of research, or
secondary, values. The archivist is acting as a cultural mediator, determining which types of records contribute to an understanding of the society and its culture. It is not necessary to preserve all of a society's legal records in order to form an adequate documentary heritage. Some legal records may have no significant value beyond their role in a legal transaction. For example, the archivist may decide that inactive parking tickets do not have sufficient archival value to warrant their preservation. In other cases, a certain type of legal record may have some research value, but exist in such great quantities that it is not possible, or useful, to preserve all of the records. In this situation, the archivist may choose to sample the records; that is, he or she may preserve only a representative part of the whole. The archivist's objective is to preserve evidence of the society's legal system, not to preserve all inactive legal records.  

Understanding a society's juridical system and identifying its legal records comprise only one part of appraising documents for legal value. The more difficult aspects of appraising legal value are associated with the archivist's responsibility to identify sources that protect society's rights. To fulfill this responsibility, archivists must be knowledgeable about the values of the juridical system in which they operate. They must also be aware of how these values shape their society's current and potential
legal needs. This knowledge and awareness must be brought to every appraisal, regardless of the age or origin of the documents being appraised.

The obligation to respond to society's current legal needs has implications for the appraisal of historical documents. Since documents can acquire legal value over time or in different circumstances, documents that had little or no legal value to their contemporary society may have great legal value to the archivist's present society. For example, old geological measurements of soil layers in a particular valley have no legal value on their own. However, if the archivist's society is concerned with erosion caused by logging and pollution, people may turn to these early documents to demonstrate what the valley's conditions were before industry entered the area. The citizens may be able to use this information to require certain types of industry to take actions that will prevent further damage to the environment. In this example, the geological documents play an important role in helping citizens to protect their rights and interests and should be preserved for that reason.

Appraising historical documents for legal value is therefore a two-step process. In the first step, the documents are appraised for what they reveal about the juridical system in which they were created. The archivist acts as a cultural mediator, forming the society's
documentary heritage. In the second step, the documents are appraised for their legal value to the archivist's present society. The archivist has a very different role: guardian of society's rights. In some respects, this situation constitutes an exception to the principle of appraising records only in the context of their original environment. Indeed, it is similar to the procedures in a records management programme that are designed to suspend normal records destruction in the case of foreseeable, pending, or actual litigation or government investigation. In other words, the responsibility to protect the rights of society is of prime importance, and can override usual procedures.

Despite the undeniable importance of preserving documents with legal value, archivists have received very little guidance in how to identify and evaluate such documents. Issues such as the duration of legal value, the need to apply current legal values to historical documents, and the criteria for identifying and qualifying potential legal value have rarely been addressed in archival literature.

Historically, legal value was the main reason for preserving records. During the high Middle Ages, the major institutions of western society (the Church and the State) produced and kept records mainly as evidence of legal title and political privilege. Identifying legal value in documents was not a problem because the only documents that
were created were legal documents. Archives in mediaeval society were not storehouses of information on past administrative transactions; rather, they were arsenals of law. That is, archives were "essentially treasuries of legal documents which, because they seemed to support and maintain the structure of society, retained their primary legal value regardless of their age or use." And their primary use was for control and management of the State.

As administrative bureaucracies grew and became more complex, they began to produce other types of documents in significant quantities. Records-keepers and administrators dealt with the increasing volume of documents through appraisal, usually applying arbitrary and utilitarian criteria to choose the documents to be kept and those to be destroyed. Political and administrative purposes began to be considered in the appraisal process, but no coherent body of appraisal theory was developed at this time.

The modern history of archives begins with the French Revolution. Appraisal was the foremost problem that confronted the archivists at the new Archives Nationales since most of the records from the Ancien Régime had lost their significance for administrative purposes. An appraisal board was appointed, and four categories of documents were identified. The first two categories were to be preserved, and included (1) "useful papers" (Papiers utiles), which were documents related to the administration
of property confiscated by the State; and (2) "historical papers" (Chartes et Monuments appartenant à l'histoire, aux sciences et aux arts). The last two categories, "feudal titles" (Titres féodaux), and "useless papers" (Papiers inutiles), were to be destroyed. One of the important consequences of this appraisal process was the emerging idea that, after a certain period of time, documents acquired "historical" values that were distinct from the values for which the documents were originally created. Documents became instruments of culture and research. Archives were no longer arsenals of law, but arsenals of culture. These ideas spread throughout Europe and influenced the future development of archives.

In England, legal documents had traditionally been considered "public records"—documents accessible to the public as "the people's evidences"—and were the focus of the Public Records Office's activities. It was a surprise, then, when a Select Parliamentary Committee established in 1836 to investigate the work of a series of Record Commissions appointed since 1800 criticized the Commissions for confining their work to "those offices where there are collections of records of ancient date, valuable for historical, antiquarian, genealogical, and topographical, rather than for legal purposes." Since the Record Commissions had been appointed to review the nature of public documents in the country and to select the most
valuable for publication, this criticism of their work indicates that legal value had declined in importance as a documentary value. The 1836 Select Committee lamented this development and proposed that documents be assigned value according to their usefulness for the public as a whole, not for the narrower historical interests of a few. Unfortunately, the Committee did not provide any guidance about how to judge the usefulness of documents, or how to identify "records valuable for legal purposes."

In North America, historians dominated early archival activity. The first archives were founded to preserve documents of historical value, and this historical focus remained the main motive of archival acquisition for many years. In 1930, American archivist Margaret Cross Norton became one of the first to speak out against the dominant view that archives should be administered primarily to serve the interests of historians. She argued that archives, and especially public archives, were essentially legal records that needed to be kept for important administrative purposes. However, while Norton identified the need to explore the legal nature of documents, she failed to define the components of legal value.

In 1946, American archivist Philip Bauer addressed the issue of archival appraisal in a National Archives Staff Information Circular, The Appraisal of Current and Recent Records. Bauer included some comments about legal value,
proposing first, that "an agency established to protect or regulate certain private interests ought, of course, to maintain appropriate records and preserve them as long as the interests primarily affected by them subsist," and secondly, that "a fair working principle for fixing the retention period of such records would be to consider them only in relation to those interests that fall within the jurisdiction of the agency creating or accumulating them and not in relation to all the limitless rights and interests that could be defended by their collateral use." Ten years later, in 1956, Schellenberg endorsed Bauer's conclusions in his bulletin, The Appraisal of Modern Public Records. The problem with Bauer's recommendations is that they only relate to current public records. No instructions are given for appraising historical documents, nor do the recommendations recognize that documents with legal value may be produced outside of regulatory agencies. The concept of potential legal value is ignored, as is the issue of what value the records have when the rights or interests they affect cease to exist. Furthermore, by recommending a retention period for such records based on the creating agency's interests, Bauer and Schellenberg seem to overlook the archivist's broader responsibilities to society. The complex questions related to appraising legal value remained not only unanswered at this time, but also unasked.
No questions or answers were forthcoming in the 1960s and 1970s, decades that witnessed a veritable dearth of new appraisal concepts in the North American archival community. The only major discussion of appraisal in this period was Maynard Brichford's *Archives and Manuscripts: Appraisal and Accessioning*, produced as one of the Society of American Archivists' basic manuals on archival theory. Although Brichford pulled together many ideas about appraisal, he offered little that was new with respect to archival values and to methods of identifying them. He pointed out that legal values were an important factor in the evaluation of documents, and that a major administrative value of archives was "their use to prove the legal or civil rights of individuals to citizenship, property, and employment benefits." He recommended that documents be preserved for legal value if their retention was required by statutory provisions or if they "explain judicial opinions or legal interpretations, document activities or events that may involve legal action, explain procedural rules, or serve as evidence of property ownership or legal obligations." This is a good list of the types of documents that may have legal value. Unfortunately, Brichford goes no further than providing the list. He does not indicate how archivists are to recognize these documents; he does not distinguish between potential and extant legal value; he does not discuss the characteristics that documents should have in
order to be accepted as legal evidence. Once again, the appraisal of legal value is dealt with quickly and inadequately.

Interest in appraisal revived in the 1980s, but the focus had shifted from evaluation of documentary values to discussion of "documentation strategy." The major proponents of this new concept were, and continue to be: Richard Cox, Larry Hackman, Helen Samuels, and Joan Warnow-Blewett. The rationale behind documentation strategy is the idea that "traditional collecting activities, shaped by the internal concerns of a single institution, no longer adequately respond to the challenges presented by modern records." The advocates of documentation strategy claim that "archivists must focus their sights on the full documentation of society, not merely the piecemeal evaluation of isolated records, for historical or other long-term value." Documentation strategies are therefore plans formulated to assure the adequate documentation of an ongoing issue, activity, function, subject, or geographic area. In these strategies, the logical goal of appraisal seems to have become the historical documentation of society rather than the identification of documents that will serve the needs of society.

As archivist Frank Boles comments, documentation strategy ultimately is not helpful for assessing quality of selection:
Documentation strategy will help archivists understand the document universe, and may even suggest useful material that currently does not exist inside that universe. But archivists will still have to select out of that universe what should be saved, whether it be an 'adequate documentary heritage' or some other idea.19

In other words, archivists still need to deal with documentary values. They still need to identify and define the values that make a document worthy of preservation. Indeed, even within a documentation strategy area, not all documentation can, or should, be preserved.

Another criticism of documentation strategy comes from Roy Turnbaugh, State Archivist of Oregon. Speaking from the point-of-view of a government archivist, Turnbaugh challenges the idea that the archival profession's first responsibility is to document society and to serve historians. He argues that "our primary constituencies as public records archivists are our parent governments, and beyond and above them, their sovereigns, our fellow citizens. Our obligations to these two constituencies are direct and immediate. Less directly, less immediately come all other constituencies--historians, scholars in general, genealogists, attorneys--groups which lack the imperative possessed by the state and its citizens." Archivists must ask themselves not merely "What do we care for?" but also "Whom do we care for?"20 These arguments imply that
archivists have a responsibility to meet the practical needs of society, not just the scholarly demands of one part of society. Documentation strategists seem to have overlooked this fact, leaving one to wonder if the interests and needs of society will be neglected in their documentation plans.

Documentation strategists are not the only archivists who seem to have forgotten about the legal value of documents, as evidenced in the only major article to be written about documentary values in the 1980s, "Exploring the Black Box: The Appraisal of University Administrative Records." In this article, archivists Frank Boles and Julia Marks Young attempt to "pull apart the elements and components of the [appraisal] process, to establish more precise definitions for them, and to analyze their interaction." Their goal is to build an appraisal model that incorporates "in a logical form all the significant parts of appraisal, both those traditionally acknowledged by archivists and those factors which are often unarticulated." The model proposed by Boles and Young includes three general categories of appraisal decisions: the value of the information, the costs of retention, and the political and procedural implications of the appraisal recommendations. Each category consists of several components which, in turn, are broken down into elements. Despite the seeming comprehensiveness of the model, and despite the archivists' stated goal to incorporate "all the
significant parts of appraisal," legal value is not mentioned anywhere in the article.

What, then, are the components of legal value, and what should archivists know in order to evaluate legal value? The first, and essential, component of documentary legal value is the existence of a relationship between the document and some juridical fact. The archivist should therefore begin the appraisal process by analyzing the mandate and functions of the document-creator to determine whether any of these functions involved the creation, maintenance, modification, transfer, or extinction of legal rights and duties. Some legal rights and responsibilities will arise from statutory provisions and regulations requiring records retention, others will result from the values of the juridical system in which the documents were produced. Yet others will arise from the values of the juridical system in which the archivist is working. Once all of the juridically relevant functions, activities, and facts have been identified, the next step is to examine the record series or documents that are related to them and to ascertain what kind of relationship exists between the documents and the juridical facts.

If the documents put a juridical act into effect (dispositive), or are required as proof of a juridical act (probative), then they are legal records. They have a direct link to existing juridical facts, and therefore have
actual legal value. This value may be only temporary, lasting until a transaction is completed or a time period expires, or it may be more long-lasting, such as the legal value of an act of incorporation for a company (the legal value exists as long as the company continues to exist). Examples of legal records include birth, marriage, and death records, which define the facts of a person's existence, identity, and marital status, and are essential in establishing important collateral rights such as rights to property, the privilege of citizenship, and social benefits. Police and court records document a person's obligation to make atonement for delinquency. Insurance policies, trademarks, and patents demonstrate an organization's rights to physical and intellectual property, while its obligations to its personnel are documented in its payroll, pension plan, and Workers' Compensation records. Often, an organization's legal records are identified as vital records—they are the records that will enable the organization to continue or to resume its legal status, operations, rights, and obligations during or after a period of crisis. Legal records are valuable because they embody facts that directly affect the rights and duties of physical and juridical persons, a primary concern of society.

Supporting documents, which include documents of process and documents related to ongoing juridical activities, have a different link with juridical facts.
These documents do not directly affect the rights of others, and their legal value usually depends on circumstances. Documents of process, for example, may relate to a juridical fact, but not in an enforceable form. A draft of a contract lacks the signatures necessary to make the document able to establish legal rights; it is therefore not a legal record. However, it does contain evidence of an intent to create legal relations between two persons and may be considered to have "potential legal value." If the original, enforceable version of the contract does not exist, then the draft version may be required as evidence of the intent to create legal relations. The draft version gains legal value when the law becomes concerned with the facts to which it bears witness.

Documents related to juridically relevant activities have a similar status to documents of process. They do not embody a juridical act, but they are produced in the course of carrying out a legal duty. For example, a professor is required to impart knowledge and to educate students. If the professor chooses to write lecture notes as a means of accomplishing this duty, the notes constitute evidence of the professor's attention to his/her duty, and therefore have potential legal value. Those notes may be needed in a wrongful dismissal case to show that the professor did indeed carry out his/her duty.
The key to identifying potential legal value is to consider all the circumstances that might affect the documents. Do stronger documents related to the juridical fact exist; are they in reasonably secure custody; are they likely to remain in secure custody? Is there a time factor that will change the nature of the relationship between document and fact? Is litigation involving these documents foreseeable? If it does not seem likely that the documents could ever be required as evidence, then they have only weak potential legal value. For example, if the original contract is readily available and in good condition, then the draft version has little legal value. If the professor has tenure and is near retirement, then it is unlikely that the lecture notes will be required as legal evidence of his/her performance. Potential legal value of supporting documents is therefore based on foreseeable circumstances in which the documents will be needed as evidence.25

Narrative documents, which constitute written evidence of juridically irrelevant activities, are the last category of documents to be considered. In some cases, narrative documents may be about events which will gain juridical significance in a different time and context, as has happened with the journals of early anthropologists and missionaries who observed and described traditional potlatch ceremonies on the West Coast. Among other purposes, these ceremonies served to establish property rights within the
context of the native juridical system, a fact that is now being accepted by some courts. These courts have examined the journals of the anthropologists and missionaries and accepted them as the only written evidence of the native ceremonies. The journals have gained legal value because of a change in circumstances (in this case, the courts' recognition of legal procedures within the native juridical system).26

In other cases, narrative documents may be an expression of a juridically irrelevant activity that eventually results in a juridical act. As mentioned in Chapter One, the correspondence between two scientists comparing research results produces narrative documents because the activity does not affect legal rights nor is it legally required for any purposes. However, if the scientists are working on a new counterfeiting process, their correspondence could result in the development of a printing process that is used in a criminal act. The correspondence could gain legal value as evidence of the scientists' involvement in the crime.

The potential legal value of the narrative documents in each of these examples depends a great deal on circumstances that are not easily foreseeable. Unlike supporting documents, which do not embody juridical acts but are at least related to juridically relevant activities, narrative documents are even further removed from a link with
juridical facts. In many cases, the archivist would not be able to anticipate a legal need for a narrative document unless he/she could see into the future, and it is not the archivist's responsibility to predict the future. Therefore, it is often difficult to attribute much, if any, potential legal value to narrative documents. On the other hand, since it is possible for narrative documents to acquire legal value, the documents may have legal value by the time they are appraised, or there may be compelling and immediately foreseeable circumstances that will affect the documents. Narrative documents must not be excluded from appraisal of legal value simply because they arise from juridically irrelevant activities.

Once the type of document has been identified, and the existence of actual or potential legal value has been established, the archivist can use the second and third components of legal value to determine the degree of that value. These last two components--admissibility and weight--are largely based on the reliability, completeness, and enforceability of the documents. Sometimes, external facts (such as statutes and regulations) will determine a document's admissibility. More often, though, the archivist will need to assess the formation process and forms of the documents to determine what they contribute to admissibility and weight.
Assessing the formation process of documents involves identifying the steps used to create the documents. Because government records and business records usually have a standard formation process, that process can be evaluated for what it indicates about the reliability of the records. Manuscripts, however, arise from individual and idiosyncratic processes; therefore, their formation offers no real guarantees of trustworthiness.

The formation process of government and business records usually includes steps that are formally incorporated into the creator's procedures for carrying out transactions and producing records. Thus, it is useful for the archivist to identify such procedures and to verify that they are/were regularly followed. Results of audits can provide this latter information, or the archivist can look at a sample of the records to see if they all conform to the standard procedure.

Records-creation procedures should be examined for what they reveal about who is responsible for creating different classes of records and how record-creators are accountable for their records. Records-creation procedures may also enumerate the records that are produced in the ordinary course of business, and outline the elements that constitute a complete record for each type of record. This information is valuable to the archivist because both diplomatics and law attribute an internal guarantee of reliability to
records created at, or near, the time of an event, by or from a person with knowledge of the event. This person must also be under a duty to make the records in the regular course of business.

Analysis of records-creation procedures has become increasingly important as office and information systems have moved toward compartmentalization of responsibilities, activities, and knowledge. As archivist Mark Hopkins has noted, "from the mail room at the start of the assembly line, paper moves across a series of desks where anonymous individuals carry out incremental processing activities," often without leaving any visible trace of who was involved with the document at what stage. The growing use of computers and electronic technology has exacerbated this problem. Examination of procedures, and of their reliability and security, is often the most useful way to evaluate the reliability of the records they produce.

After the archivist has studied the formation process of the documents, their forms can be examined. The elements of documentary form which are relevant to legal value include: mention of the author of the document or the action; mention of the date and place where the document was issued; identification of the addressee; signatures which are either a validation or an authentication (of the act, the document, or other signatures); and qualifications of signatures. The status of the document as a draft,
original, or copy may also be determinable from its forms. These elements are important because they set a document in a particular time and place, and indicate the authority of the document (eg., an original is enforceable, a draft is not). They also identify the persons involved in the event that the document embodies, and the persons involved in the document's creation. This information makes it possible for a user to evaluate the reliability and relevance of an individual document for a particular purpose. Fortunately, these elements often appear in standardized places in documents, a fact that can help the archivist quickly verify that the appropriate elements are present in a document or a type of document.

The elements that must appear in a document to make it complete and enforceable are determined by the purpose of the document, the nature of the fact(s) captured in it, and any established procedures that govern the formation and forms of the document. For example, letters (whether business or personal) require addresses in order to be sent, and contracts (dispositive records) require signatures to indicate that both parties have agreed to the action contained in the document; but neither addresses nor signatures are relevant to the completeness of accounting ledgers. Assessment of the forms and completeness of documents must therefore be done on the basis of type of document.
The point to keep in mind about completeness is that a document gains value not from the fact that it is complete, but from the fact that it is supposed to be complete. When a type of document must be prepared according to an established procedure and in a given form, the user will always have a record of some fact--either a record of the event (if the right forms are respected), or a record about the observer/record creator (if the forms are incomplete). An incomplete document may have as much weight as a complete document, depending on whether the user wants evidence about the recording activity, the record-creator, the document, or the event reflected in the document. Similarly, inaccurate or false documents may have legal value if they were used as genuine documents and produced consequences on that basis. Thus, the archivist need not examine each individual document for accuracy and completeness; rather, he/she should determine whether the document is of a type whose creation is governed by a well-established procedure. When a form is required for a type of document, the individual documents of that type are more likely to be useful as legal evidence than unregulated documents are. The result is that documents governed by procedure usually have greater potential legal value than those that are not so controlled.

If the record is a case file, then completeness must be evaluated at two levels. First, the archivist must identify the acts required to accomplish the final act, and must
confirm that documentation of those acts is regulated by procedure. That is, creation of the case file should be subject to established rules that specify what documents must appear in the file. Second, the records of each intermediate act, and of the final act, must be appraised for completeness as discussed above. Since file level or item level analysis is time-consuming if the archivist is faced with a large body of case files or documents, a random sample of the files or documents can be taken and examined for form and completeness. The archivist should be able to ascertain from the sample whether creation of the files or documents was governed by a procedure. Generalizations about the condition of the whole body of documents can be made from the analysis of the sample.

The factors which contribute to admissibility and weight are difficult to categorize as belonging exclusively to one component or the other. Elements that help documents meet admissibility requirements also strengthen the effectiveness of the documents as evidence of the activities embodied in them. For instance, when records are created according to procedure, they have an inherent guarantee of reliability that will be considered by any judge determining admissibility. The records are also likely to be an adequate representation of events since procedures and forms are designed to assist record-creators capture all relevant information about events. Because the two components are so
related, and because the archivist cannot know what factors will be relevant for admissibility and weight in any particular legal case, the best course of action for the archivist is to assess the overall credibility and quality of both the documentation process and the types of documents at hand. Evaluations of specific documents will be done by lawyers, judges, and juries within the context of particular cases.

In conclusion, the decision to preserve documents for their legal value should be based on a consideration of all three components of legal value. Active dispositive and probative records have actual legal value due to the nature of their link with juridical acts and, by definition, should also be complete and enforceable. Appraising legal records therefore requires knowledge of the rights and duties recognized by the juridical system in which the documents were created. Once the archivist has identified the records that document those rights and duties, the archivist can assess their overall reliability by analyzing the formation process and the forms of the records.

Another issue to examine is the duration of the legal value. Since legal value is linked to rights and duties, the archivist must be able to identify the life span of the legal relation to which the records relate. Some records are part of short-term contracts, and cease to have legal value when the terms of the contract are satisfied. Others
have longer-term value, such as the constitution of a company, which has legal value as long as the company exists. However, since all rights must be invested in a juridical person or persons, and since juridical persons rarely endure forever, it is fair to ask whether documents ever have permanent legal value. Some rights, such as land title, do exist for a long time. But even these rights are dependent on a juridical system that recognizes them as such. The important question, then, is whether archivists can justify preserving documents for their legal value if that value is not permanent.

This question can be approached in two ways. First, documents that once had legal value are an important part of a society's documentary heritage and should be preserved, in total or in part (as appropriate), for the reasons outlined earlier in this chapter. The second answer to this question lies in the concept of potential legal value. Theoretically, potential legal value is a permanent value, for the possibility always exists that a certain document or body of documents may be required as legal evidence at any time. Documents which had actual legal value in a juridical system are good candidates for preservation for possible future legal uses. Although their legal value has ceased to exist, such documents still retain the characteristics that originally gave them reliability and authority. These characteristics will contribute to the value of the
documents as legal evidence should they be required for litigation or investigations in the future. For example, the registration of a marriage ceases to have legal value when the marriage ends (either by divorce or upon the death of one of the partners). A descendent several generations later, though, may need proof of the marriage in order to claim an inheritance or to show a particular lineage. The marriage registration would probably be accepted as adequate proof in this situation, and would gain legal value for the descendent.

With respect to the duration of legal value, then, legal records must be preserved as long as they have actual legal value. That is, they must be preserved as long as the rights or duties to which they relate remain effective. Once those rights or duties cease to exist, the records should be appraised for their potential legal value. This appraisal of potential legal value could occur during a reappraisal of the records, or it could be considered during the initial appraisal. In either case, the archivist must be aware that most records do not have actual legal value forever, and some thought must be given to what will happen to the records when their actual legal value is extinguished.

Retention of documents with potential legal value is largely determined by the strength of the second and third components of legal value (i.e., admissibility and weight).
Since documents with potential legal value do not directly affect rights and duties, their legal worth depends on their usefulness as evidence in an inquiry or trial. If the documents are not likely to be admitted to court because they lack basic guarantees of trustworthiness, or contain hearsay, then their value as legal evidence decreases.

Because archival resources are scarce, there is little point in preserving documents that have potential legal value according to the first component, but are inadequate in terms of the remaining two components. In contrast, if documents have potential legal value that is supported by the necessary elements contributing to admissibility and weight, then they have sufficient value to warrant their preservation for potential legal uses.

Archivists must avoid being tempted to preserve everything on the basis of potential legal value. Selection decisions must be made, and the archivist must be willing to accept some risk in carrying out appraisal for legal value. It is not possible to preserve all documents and, inevitably, some will be destroyed that could have been useful to an unforeseeable future investigation. The best that the archivist can do is to identify and preserve those documents with current legal value and those that seem to have the strongest potential legal value, based on an assessment of all three components of legal value.
Finally, once the archivist has determined that certain documents warrant preservation for their actual or potential legal value, he/she then has a duty to protect the integrity of the documents so that their value is not impaired by careless processing, preservation, or access provisions.
CONCLUSION

Legal value is usually listed in archival literature as an important appraisal criterion, but little has been written about what constitutes legal value, how one recognizes legal value in documents, or how one determines the duration and strength of that value. With these questions in mind, this thesis set out to investigate the concept of legal value in documents and to consider how that value can be appraised by archivists. In this process, three components of legal value were identified, a definition of legal records was proposed, and some guidelines for appraisal were suggested. It is hoped that this investigation will prompt further inquiries into this important aspect of appraisal.

Since little has been written about legal value in the archival literature, this thesis explored the literatures of sociology, records management, jurisprudence, law, and diplomacy. The study started by analyzing the document-event relationship in order to gain an understanding of (1) the role that documents play in the development of events, and (2) the connection between events and the instruments that record them. It was seen that there is a reciprocal relationship between documents and events. Documents embody
events, enabling them to survive beyond the present, and making them accessible to society. On the other hand, the type of event determines the nature of the document, thereby influencing the values it has for society.

In particular, whether an event is juridically relevant or irrelevant is one of the determining factors of a document's legal value. Documents related to juridically relevant events—ones in which the society's legal system has an interest—have some degree of legal value. They are linked, directly or indirectly, to an event with legal significance, and therefore could have a role to play in protecting the rights or interests of those affected by the event. Documents that are not related to juridically relevant events do not have legal value on their own. They will only gain legal value if circumstances change such that the documents acquire some connection with a juridically relevant event.

The first component of legal value is thus the presence of a relationship between a document and a juridical event. Once this relationship has been identified, the document's legal value can be classified according to whether the relationship is direct or indirect. Documents that are directly linked to a juridical event, either by the nature of their creation or by circumstances, have actual legal value. That is, the legal system is directly interested in using the documents to ascertain the facts that it needs.
Probably the most important and most useful of these documents is the class identified in this thesis as "legal records"—those records that either execute, or are written evidence of, acts or events that create, transfer, modify, maintain, or extinguish legal rights and duties. These records are necessary to the enforcement and protection of society's rights. All documents with actual legal value should be preserved as long as the event to which they are related remains juridically relevant.

Documents that are only indirectly related to a juridical event may have potential legal value. However, potential legal value only exists when there are foreseeable circumstances in which the legal system may become interested in the documents. While any document can gain legal value in the right circumstances, archivists cannot become involved in predicting the future, nor can they preserve everything just because something might acquire legal value in an unusual case. Archivists must work with the narrow definition of potential legal value proposed here, and accept some risk. It is inevitable that some documents that could be useful in an unforeseeable situation will not be preserved. The best that archivists can do is to identify and preserve those documents with actual legal value for their society, and those with strong potential legal value.
To determine the strength of a document's potential legal value, the archivist must consider the second and third components of legal value, which are related to the use of documents as legal evidence. The second component, admissibility, is based on the rules of evidence that a judge uses to decide whether to receive a document as evidence in a particular case. While some aspects of admissibility are influenced by the circumstances of the particular case, others are associated with the reliability of the documents. This reliability derives from the trustworthiness of the documents' formation process and from inherent documentary characteristics.

The third component of legal value is weight. Unlike admissibility, weight is not governed by any formal rules of evidence. Rather, it depends on the document, the circumstances of the case, and the informational needs of the trier of fact. Nevertheless, some portion of a document's weight is related to its effectiveness as a representation of facts. This evidential quality of the document is composed of indications of reliability, enforceability, and completeness.

When documents have all three components of legal value, they have strong legal value (whether actual or potential), and must be preserved for that value. If one or more of the components is missing, or is weak, then the
legal value is weakened, and the document may not warrant preservation for its legal value.

Appraising legal value is not a mysterious process that can only be performed by those with highly specialized knowledge. Rather, legal value should be viewed as one of the many values that documents may have, and it should be evaluated in the normal course of appraisal. Much of the information and analysis needed to determine legal value is fundamental to any appraisal process. For instance, the SAA manual on appraisal states that "appraisal requires a familiarity with the history, objectives, and methods of the agency of origin and the relationships of records with each other. The archivist may acquire this special competency by reading administrative histories, reviewing statutes and administrative regulations governing office operations, studying the organizational charts and manuals, inspecting budget documents and published reports, and flow-charting procedures that result in the creation of records." This study of the agency's structure and functioning, of its records-creation procedures, and of relevant legislation is also needed for the archivist to identify legal records and legal value.

Another element of appraisal is impartiality. That is, the documentary heritage that is preserved must present a picture of society as its people experienced it in their day and age. The archivist must be aware of the culture and
prevailing values of the society, and should allow him/herself to be guided by the society's value system. Once again, this approach is applicable to the appraisal of legal value since it assists the archivist in determining what rights and duties were recognized by the society's juridical system. It also helps to identify the documents that society thought were important for the protection of those rights and duties.

Some aspects of legal value, such as elements of forms and the concept of completeness, require a diplomatic analysis of documents. Although such an analysis has not traditionally been a part of the appraisal process in North America, it has much to offer the archivist in the identification, appraisal, arrangement, and description of documents. Acquiring knowledge about diplomatic methods should therefore not be seen as a special requirement for appraising legal value, but as an opportunity to expand the archivist's understanding of, and appreciation for, the formation and essence of documents.

In a society governed by law in all its aspects, and absorbed by the uses and values of recorded information, identifying and preserving documents that directly or indirectly affect rights and duties is an important social responsibility. As "keepers of the record," archivists have a professional and ethical duty to preserve a documentary heritage that will help to protect society, its
institutions, its citizens, and its heirs. Appraising legal value is therefore a central part of any archival appraisal process.
NOTES

INTRODUCTION


13. Note that impartiality—in the sense of not showing favour to the needs of any type of document user—is an important factor only in democratic countries.


15. Ibid., 104.

16. Society may also desire to preserve records for a variety of cultural, ideological, religious, and sentimental reasons. However, these reasons are outside the realm of this thesis.

17. The view that archivists have a responsibility to protect the needs and interests of society was upheld by a decision of the United States District Court in 1979. In the case *American Friends Service Committee, et al. v. William H. Webster, et al.*, a group of social action organizations, historians, journalists, and others filed suit to stop the destruction of Federal Bureau of Investigation (FBI) records and to challenge an archival appraisal decision. The suit charged the defendants—representatives of the FBI, the National Archives and Records Service, the attorney general's office, and other officials—with "destroying on a massive scale unique, irreplaceable historical records of great legal, research, scholarly, and other value." The judge in the case ruled in favour of the plaintiffs, as did a U.S. District Court of Appeals judge, who stated that: "We do not disagree with the government's general point that the FBI may satisfactorily summarize such investigative data. But the summaries need to account in some reasonable fashion for historical research interests and the rights of affected individuals—not just the FBI's immediate, operational needs." (Susan D. Steinwall, "Appraisal and the FBI Files Case: For Whom Do Archivists Retain Records?" *American Archivist* 49 (Winter 1986): 52-63.)


CHAPTER ONE. EXPLORING THE NATURE OF DOCUMENTS

1. The SAA has defined a document as "recorded information regardless of medium or characteristics" (Evans et al., "Glossary," s.v. "document," 421).

2. Ibid., s.v. "record," 428.

3. Eugenio Casanova, Archivistica (Siena, 1928), 19, quoted in Schellenberg, Modern Archives, 12.


7. Ibid., 10.

9. Juridical person: an entity considered by the law as capable of rights and duties and therefore capable, or potentially capable, of acting legally. A juridical person is constituted by either a collection or a succession of persons. Examples may include "the State," "the Bureau of Criminal Investigation," the President of the United States, and so on.

It is interesting to note that one can have communication between physical persons or between juridical persons, but not between a physical person and a juridical person, because, when dealing with a juridical person, the physical person assumes a juridical role too.

10. ACCIS, Electronic Records Guidelines, 10.
Note that recorded information may not meet the requirements of a recorded transaction; hence, it is not a record. It is still a document, though, and may indeed be a significant document.


17. Black's Law Dictionary, s.v. "act".


20. Raffel, Matters of Fact, 10, 19.

21. Ibid., 41-43.


23. Ibid., 79, 84-87.

24. Ibid., 102-106; Duranti, "Diplomatics (Part II)," 11.

25. A similar pattern of thought and record development is described in Denise Schmandt-Besserat's study of the invention of writing in Sumeria ("From Accounting to Written Language," 119-130).

26. Clanchy, From Memory to Written Record, 202-207. Later archivists usually discarded such objects because "the language of memory which they expressed had no significance for literates" (Ibid., 207).

27. Clanchy, From Memory to Written Record, 21-24.

28. Ibid., 203.


30. Clanchy, From Memory to Written Record, 36, 207-208, 245; Clanchy, "'Tenacious Letters,'" 118.

31. Taylor, "'My Very Act and Deed,'" 459.

32. For a definition of juridical persons, see note 10.

34. A juridical system is "a collectivity organized on the basis of a system of rules. The system of rules is called a legal system." (Duranti, "Diplomatics [Part II]," 5). In other words, a juridical system is comprised of both a social group and a legal system.


36. Duranti, "Diplomatics (Part II)," 7.

37. Ibid., 7-8.

38. This distinction is proposed and developed by Duranti in "Diplomatics (Part II)," 9.

39. Indeed, the legal definition of "transaction" is "an act in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered." (Black's Law Dictionary, s.v. "transaction.")


41. In Edwin A. Thompson's *A Glossary of American Historical and Literary Manuscript Terms*, legal documents are defined as "documents of or pertaining to the law, arising out of or by virtue of the law, or included in, based upon, or governed by the law."

A careful analysis of this definition reveals a sense of legal documents which is the same, or closely related to, the definition of legal records proposed in this thesis.

The most useful part of this definition is Thompson's comprehensive list of examples of legal documents in the American juridical system:
- abstract of title
- act
- administrative bond
- affidavit
- agreement
- appeal
- appraisal
- articles of association
- authorization
- award
- bequest
- brief
- bylaw
- case
- case file
- casebook
- certificate
- certificate of incorporation
- certified copy
- charge book/sheet
- charter
- citation,
citizenship papers/records, claim, codicil, complaint, constitution, contract, corporation records, court-martial order, court-martial record, court order, court records, decision, decree, dedication, deed, deed of partition, deed of manumission, deed poll, deposition, digest, docket, engrossed bill, enroled bill, exhibit, guardianship papers, homestead and preemption certificate, indenture, injunction, judgment, judgment book, land scrip, land warrant, lease, lease and release, legal file, letters close, letters missive, letters of administration, letters of marque, letters patent, letters rogatory, letters testamentary, license, literary property rights, memorial, mortgage, mortgage bond, mortgage deed, mortgage loan, mortgage note, muniments, naturalization papers/records, nuncupative will, opinion, order, order of the day, partnership records, passport, patent, petition, plea, power of attorney, quitclaim, release, resolution, roll, schedule, seal, sentence, ship's papers, testimony, title, transfer, treaty, warrants, will, writ, and writ of certiorari. (Edwin A. Thompson, A Glossary of American Historical and Literary Manuscript Terms [Washington: Privately Printed, 1965], quoted in Couture and Rousseau, Life of a Document, 279.)

CHAPTER TWO: COMPONENTS OF LEGAL VALUE

1. The other values are administrative, fiscal, evidential, and informational.


4. Potential legal value exists in documents which do not currently have extant legal value, but which will probably acquire legal value due to foreseeable circumstances. Potential legal value is distinguished from the concept of documents acquiring legal value over time in that potential legal value depends on the existence of foreseeable circumstances that will affect the legal status of the documents. Almost any document can gain legal value given the appropriate circumstances, but when the circumstances are not foreseeable or predictable, they do not contribute to potential legal value. These concepts are developed later in the chapter.

5. Pollock, First Book of Jurisprudence, 141-142.


19. This definition appears in the proposed Uniform Evidence Act, and is cited by both Ewart and Sheppard in their respective works. (Ewart, *Documentary Evidence in Canada*, 14; Sheppard, "Records and Archives in Court," 198.)


Another factor contributing to reliability is the general requirement that the record must have been made before controversy arose about the truthfulness of the facts contained in it. After the dispute arose, people might have been tempted to make records favouring their own interest in the outcome of the dispute.


28. Completeness is a diplomatic concept that will be developed in the next chapter. It refers to whether a document's forms are sufficiently comprehensive to ensure enforceability and to provide adequate access to the facts. It also includes an element of predictability, so that either a complete or an incomplete form will provide information to the user.
1. See, for example, Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 19-22; 101; Canada Pension Plan, R.S.C. 1985, c. C-8, s. 25; and Unemployment Insurance Act, R.S.C. 1985, c. U-1, s. 58.


Manuals and guidebooks are available which identify statutes and regulations that have provisions concerning records. Among these references are: Ronald M. Anson-Cartwright, Robert T. Hollingshead, and J. Timothy Kennish, Records Retention: Law and Practice (Don Mills, Ontario: Richard de Boo Publishers, 1989); Records Retention and Destruction in Canada: A Guidebook (Willowdale, Ontario: Financial Executives Institute Canada, 1988); Federal Regulations Involving Records Retention Requirements for Businesses in Canada (Toronto: Association of Records Managers and Administrators Inc., 1986).


Some records managers, including Skupsky, also point out that records with little value to an organization may become a financial and legal disadvantage if they are subpoenaed and used against the company by an adverse party. On this basis, some records managers recommend that such records be scheduled for destruction once their most useful period has expired. Other records managers are uneasy about whether such a decision may be a subversion of justice. This debate reflects the difficulties of determining retention periods for legal records when the legislation is vague.


5. See, for example, Canada Evidence Act, s. 30(10).

7. Duranti, "Diplomatics (Part II)," 13; Kendal, Facts, 10; Raffel, Matters of Fact, 102-104.

8. For the purposes of this thesis, the diplomatic definitions of "documents created by public persons" and "documents created by private persons" will be adopted. A document is created by a public person when it is issued by a public juridical person (a body having jurisdiction in matters of a public nature, or the officers of such a body exercising a public function), or by his/her command or in his/her name, or according to a procedure imposed by a public person. Documents created by a private person are those created by a private person, or by his/her command or in his/her name.

9. The following discussion of the formation process of documents is drawn from the author's class notes for ARST 601-Diplomatics (class given by Luciana Duranti at the School of Library, Archival and Information Studies, University of British Columbia, September-December 1989).

10. This example is drawn from a presentation by archivist Victoria Blinkhorn to the ARST 601 class at the School of Library, Archival and Information Studies, University of British Columbia, 17 October 1989.


12. There are, of course, greater security problems with electronic records than with textual records since electronic records can be easily accessed and changed, leaving no trace of the change. This risk, however, does not alter the basic fact that computer records are still business records, with most of the same characteristics of traditional business records: controlled formation process, standard forms, capability to accomplish particular purposes, etc.

13. Raffel, Matters of Fact, 91.


18. Note, too, that procedures may also explain the unavailability of an original. If an organization has an established routine for microfilming certain classes of records and destroying the original paper versions, then this routine can be used to justify presenting microfilm copies of a record to the court.

For further discussion of drafts, originals, and copies, see Duranti, "Diplomatics (Part I)," 19-21.

20. Raffel, Matters of Fact, 94, 102-111.
22. Ibid., 110-111.
23. Salmond, Jurisprudence, 367; Black's Law Dictionary, s.v. "valid".

CHAPTER FOUR: APPRAISING LEGAL VALUE IN DOCUMENTS


22. Boles and Young, "Exploring the Black Box," 137.

23. Boles and Young, "Exploring the Black Box," 121-140.


25. It is important to remember that legal value is only one of the many values that a document may have. It is entirely possible that anthropologists' journals, professors' lecture notes, and scientists' correspondence will be preserved for their evidential or informational value and will therefore be available if circumstances arise in which the documents are needed for legal evidence.


**CONCLUSION**


2. Duranti, "Diplomatics (Part I)," 24, 27 n. 46.


*Canada Evidence Act.* Revised Statutes of Canada, 1985, c. C-5.


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Madan, K. D. "Governmental Records 'Explosion'—How to Contain It." Indian Archives 29 (July-Dec. 1980): 7-16.


