Literacy and the worth of liberty

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LITERACY AND THE WORTH OF LIBERTY

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Abstract: As one example of the third generation of literacy studies, this paper investigates the functional value of literacy in legal transactions. Based upon empirical evidence about mortgages and wills in two American counties in the 19th century, the article investigates the general legal theory and court practice regarding the participation of illiterate persons in contracts. In spite of a lingering fairness doctrine, illiterates were more and more disadvantaged in legal dealings.

During the past fifteen years, the compilation and analysis of quantitative data about the level and distribution of literacy skills in selected populations has allowed historians to describe and conceptualize the linkages among literacy, social structure, wealth, and demographic characteristics. The results have been fruitful in terms of quantifying the structural relationships among literacy and the several variables of occupation, wealth, ethnicity, nativity, sex, age, population density, indices of economic and social development, and schooling. They have offered, also, insights into the conceptual difficulties posed by literacy studies, including problems of definition, comparability of data, and direction of causation.(1) Some crucial literacy-associated issues, however, have gone relatively unexamined. Among these, for example, are the related problems of functionality, opportunity, and the effects of illiteracy on the liberties of illiterate persons.

We know little about functional levels of literacy skills as they relate to the performance of specified tasks, ranging from occupational requirements, to political participation, and the conduct of legal proceedings. Findings on the relationship of literacy to individual wealth and economic mobility are inconsistent. Though literacy operated as a significant influence on occupational classifications, according to Graff its impact on wages was far less: "With the exception of the lowest paid, ... literate workmen fared little better than their illiterate colleagues."(2) But my own recent work argues on the basis of nineteenth-century United States census data that literacy was "an important determinant of economic advancement during the individual's life cycle. ..." Though approximately 40 % of the illiterate male population in 1870 could still obtain a "fair beginning standard of living," these illiterates were concentrated among young adults. Among those aged 40-49 it was much more difficult for the illiterate to rise above the median wealth line.(3) Other studies on literacy in nineteenth-century England suggest that the demand for literate workers was rising in the latter part of the century and created a "positive expected premium" for literate workers.(4) While the inconsistency in findings for the mobility-literacy relationship derives in part from the differing contexts of the data, it may also suggest that the simple literacy/illiteracy dichotomy is too crude a measure and that finer distinctions among levels of literacy may be necessary.

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Questions of justice and the worth of liberty are also closely tied to the issue of functionality. At one level, this concerns distributive justice, because resources are limited and rules for their fair distribution need to be established. The case of the relationship between fair educational opportunity and economic opportunity is well known. The infrastructure of the distribution of benefits of schooling and the opportunity to acquire literacy skills may be an important factor in determining the fairness of the distribution of economic resources. Similar problems occur with the distribution of other benefits. It is obvious that if literacy skills are required to exercise voting rights, for example, the worth of liberty for the illiterate person is severely diminished.

The adoption of the secret ballot in the state of Ohio in 1891 led to several cases in which courts were required to face the issue of educational and literacy qualifications for voting. State ex rel. Weinberger v. Miller (1912) provided the basic argument for the constitutionality of Ohio statutes governing the secret ballot. In delivering its opinion the Court cited a precedent that identical ballots give equal protection to all and that inequalities inhere not in the law but in voters themselves. In State v. Sweeney (1950) the Court argued for "equal opportunities under the law," but added: "It is not possible for constitutions or legislation to make all men equal in understanding, intelligence and education. ...." State legislation tended in the direction of equality of education even to the point of "compelling the youth of our country to take advantage of these opportunities." But the Court acknowledged that "in every phase of our social and civic life the uneducated man is at a disadvantage." In commenting upon the use of a printed ballot, the Court concluded that the state was "powerless" to give the uneducated voter "further aid":

> Just so long as we are to have elections by written or printed ballot, just so long must be uneducated man find it a difficult matter to vote for the candidate of his choice.(5)

The casting of the ballot is but one example of the way in which injustice at the individual level results from legal principles which put the illiterate person at a disadvantage. Others readily come to mind and involve a broad spectrum of basic economic activities such as willing, deeding, and other two party or third party contracts. To convey one's meaning and intent to another party was and is seen as critical in making a contract successful. The ideal of contract, having achieved suitable recognition in law and in political theory in the seventeenth century, became pervasive in the eighteenth century in governing agreements among men. By the 19th century it was difficult to think of agreements in any other terms so that contracts became deeply embedded in American society. How did this contractual ideal and the practice of contractual agrreements affect the illiterate person?

Consent and Publicity in a Documentary Society

The proliferation and gradual standardization of documents in Anglo-American culture substantially changed the nature of governance and the rules of proof and evidence regulating property holding and contractual agreements. After the imposition of Norman rule in England the written word itself gradually became associated with reliability and durability. The idea of permanence became associated with written documents and, insofar as documents themselves were employed to convey rights or interests in property, they helped to protect these. Nonetheless, a gap between a person's intent and the meaning expressed in a written instrument did persist and, in this

sense, some ambiguity has remained characteristic of the written word as it has of the oral.(6)

The emergence of a documentary society and the broadening of literate discourse to include imaginative, technical, and scientific communication raised important issues about the relationships among literacy, opportunity, and justice. The linkages among these fundamental aspects of associated living, however, are not easily expressed and cumbersome to explicate. Philosophic questions of distributive and individual justice are compounded by the lack of empirical (qualitative and quantitative) evidence which would help describe and explain the degree of relationship(s). The meanings of literacy and its consequences for individual behavior and social organization have depended upon certain situational factors and structural constraints. Constitutionalism as a political and organizational ideal, for example, relies upon a contractual theory of governance and the principles of consent and publicity. Justice requires the opportunity and skills to access information needed to give consent and to enter into contract.

The problems deriving from the principle of free and rational consent occur with greater force when dealing with illiterate persons. Contract and covenant theories of government, whether inspired by natural law theory or a more general ideal of fairness, assume that those subject to political and legal constraints act as free, rational persons and willingly accept the demands and constraints placed on them. As a result they are morally obligated to control their behaviors in accordance with the constraints. Both obligations and expectations, however, are often second hand for the illiterate person. Obligation and rational, free consent imply capacity, ability and capability. It is the latter which is uncertain for the illiterate. Although there is little doubt that an illiterate person is capable of giving his consent, if by that term is meant the saying of "yes", there is considerable question that the "yes" would correlate well with the substance or text of the agreement.

In A Theory of Justice John Rawls cites the principle of "publicity", a condition whereby general principles of justice and governance are made explicit, as being essential for a society where the contractarian ideal prevails. Access to information is obviously limited for the illiterate person, so that even if "publicity" prevails, illiteracy makes it inoperative. To put it differently, the condition of illiteracy severely limits the opportunities for consent even when the principle of publicity is otherwise fulfilled by the free circulation of political and legal information. It is the intent of publicity to guarantee that common expectations will be recognized, and that all will know what limitations are placed on their behaviors and what to expect from each other. The guarantee, however, does not apply to the illiterate. The anticipation of legitimate expectations creates problems for the illiterate person in a documentary and contractual society. As a result there is an important distinction between the existence and the worth of liberty. While liberty in general refers to the "complete system of the liberties of equal citizenship, ... the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines."(7)

Participation of Illiterates in Legal Transactions

Depositions, wills, deeds, mortgages, and other types of contracts comprised the bulk of documents with which both literate and illiterate persons were involved. To treat in detail the degree of illiterate involvement over an extended chronological period is not the purpose of this essay. It is only

CHART 1

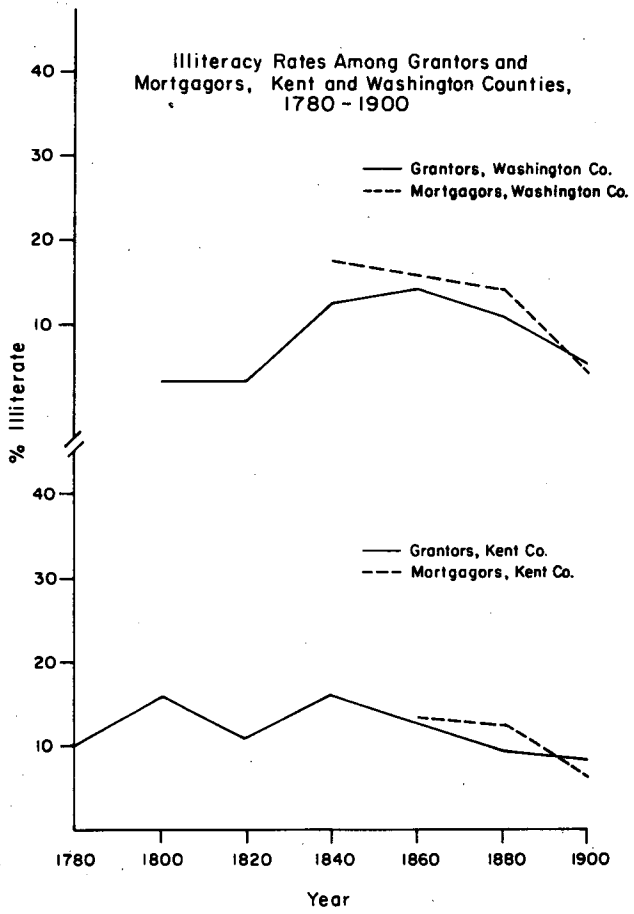
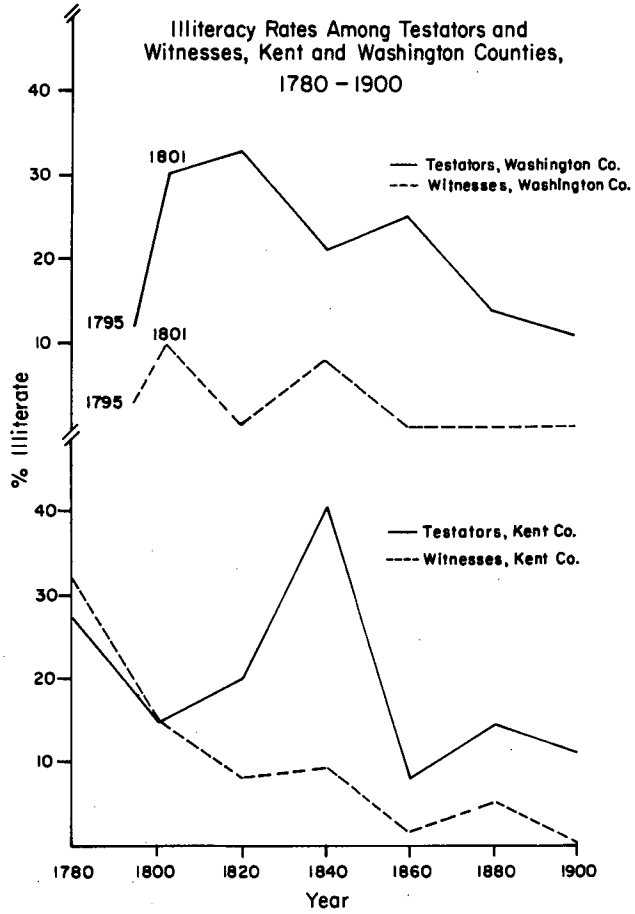


CHART 2



necessary to establish a baseline for the involvement of illiterate persons with the legal system before assessing the difficulties and restrictions to which illiterates were subject. Charts 1 and 2 show levels of participation in the basic activities of deeding and mortgaging for two counties in the states of Ohio and Delaware over the 120 year period between 1780 and 1900.(8)

Illiteracy rates among testators varied considerably over the years 1780-1900 and ranged from 8 to 41 percent. The average in Kent County, Delaware during these years was 13.4 percent; in Washington, Ohio illiteracy among testators was much higher and averaged 21 percent. Among witnesses to wills, illiteracy seldom rose above 10 percent and by the end of the century had dropped to zero. The low rate of illiteracy among witnesses to wills may have helped to reduce the amount of error and misinterpretation in this important method of disposing of property. For the entire period under analysis, 12.5 percent of the grantors and 9.7 percent of the mortgagors were illiterate in Kent County. In Washington County an average of 10 percent of the grantors and 11.4 percent of the mortgagors were illiterate.

The average value of land conveyances and degree of indebtedness among markers was far below that for those signing their names. This does not mean that investments by illiterate persons were less significant from a personal standpoint. We do not know the income of the literate and illiterate persons represented in the sample, but it might well have been that a greater sacrifice was required of illiterates to participate in deeding and mortgaging than for literates.

When values of deed transactions are cross-classified by literacy, the degree to which the average value of transactions among literates exceeds that among illiterates is expressed by their ratio (Avg. Value LI/Avg. Value ILL). In all years sampled literate persons had higher transaction levels with the ratios ranging from 1.2 to 3.4 and averaging 2.3 Thus, as a general guideline, the value of deed transactions among literates was about two and one-half times greater than among illiterates. The findings for literate and illiterate grantors are applicable to mortgagors as well. In all years sampled, the degree of indebtedness among literate persons exceeded that among illiterates, with the ratio varying between 1.3 and 3.0 (and an average of 1.9 in Kent County and 1.7 in Washington County). The degree of indebtedness among literate persons, then, was generally about twice as great as among illiterate ones.

Many illiterates were dependent upon literates to interpret written documents and give advice about their accuracy and intent. Such assistance was probably readily available if the illiterate transactor were a co-conveyer or co-mortgagor with a literate person. When the illiterate person was the sole participant or one of several illiterates to a transaction, then outside help was probably required. With what frequency did illiterate persons find themselves in situations where they had to seek advice from a literate person not involved with their transactions? Or conversely, to what extent were the problems of illiteracy minimized because the illiterate person was a co-participant in a transaction with a literate person?

Many illiterate transactors had literate partners to a deed or mortgage agreement. These cases ranged from 8 to 10 percent of the total separate transactions and usually involved husbands and wives. Most often the husband was literate and the wife illiterate, although this was true more so in the first half of the nineteenth century than in the second half. It may be presumed that questions of intent and accuracy could be clarified to some

Table 1.1 The Dependency of Illiterate Grantors and Mortgagors in Kent and Washington Counties, 1780-1900

County and Year	The Percent of Deed Transactions with		
	Single Illiterates	Two or More Illiterates but no Literates	Literates and Illiterates
Kent (1780-1900)	4	3	8
Washington (1790-1900)	2	2	8
	The Percent of Mortgage Transactions with		
	Single Illiterates	Two or More Illiterates but no Literates	Literates and Illiterates
Kent (1860-1900)	1	3	8
Washington (1840-1900)	2	4	10

Source: Subsamples of 844 and 1924 separate deed transactions from Kent County, Delaware and Washington County, Ohio and 463 and 701 mortgage transactions from the same counties, respectively. Repeated names have been omitted.

extent by the literate party. This would have been more convenient than seeking outside assistance, even though it was no guarantee of protection against duplicity. The success of such help would depend upon the level of literacy and the familiarity of the literate party with the proper forms of deeds and mortgages.

Agreements involving only illiterates were the most precarious. Overall, between 4 and 7 percent of the deeds and mortgages in the sample were made by grantors and mortgagors all of whom were illiterate. For those illiterate persons who had no literate partners to a transaction, the problem was surely more acute than for those with literate partners. The only sources of help for the former would be from an outside literate party - a neighbor perhaps or relative, or a lawyer. It is probable that the hiring of a lawyer by an illiterate was more difficult than for a literate person, for the majority of illiterate persons were to be found at the lower end of the wealth distribution.(9)

The Contractual Ideal

The frequent participation of illiterates in economic and legal activities involving lexical skills raises important questions about the relationship

between contract as a political, social, and legal construct and justice for both the illiterate and literate person. Problems of intent, consent, will, and reason were philosophic, legal, and behavioral all at once, and courts were obliged to wrestle with all three dimensions simultaneously. How could justice be achieved for both illiterate and literate persons? Clearly, illiteracy was not simply a problem for the illiterate person, for his/her contractual dealings affected numerous literate parties to a contract. Thus, the response of the legal system to the fact of illiteracy was significant for all parties involved.

The natural law tradition carried forward into the nineteenth century under the protection of constitutional jurisprudence provided a link between theories of social contract and the protection of private property by legal rules governing contractual relations of a more formal sort.(10) Natural law, the idea of social compact, and English experience were all brought to the defense of private property against legislative intrusion, and the inviolability of contract was expressly recognized by the United States Constitution.(11) Economic due process and freedom of contract have been hallowed principles guarded by the American constitution. Historically, due process of law as applied to contract has been taken to mean that a person's right to property cannot be abridged nor the property itself taken for the benefit of another without compensation.(12)

While contractual relations seemed necessary to good moral and social order and economic stability, the expressed link between property rights and social stability was found in a number of court decisions. Freedom of contract, a frequently heard phrase in disputes, was interpreted as a means to the goals of political and economic freedom in general. Self interest and social stability were not seen as antagonistic, but rather as mutually reinforcing elements in a contractually-based society. The idea of contract thus served the interests of both individual and society. "Solemn contracts", said the Court in Robinson v. Eldrigde (1823) were not to be set aside lightly for fear that grave social consequences would follow.(13)

The high regard for the inviolability of contractual relations was, of course, part of the deference paid to property in general. A series of cases decided by federal courts beginning with Dartmouth College v. Woodward (1819) had helped "to secure property interests, and to protect ownership and management rights from shifting, temporary winds of public opinion." Reformed recording practices and the appearance of a simple, standardized deed (warranty and quit-claim) forms also helped to assure that rights in property were secure. Under circumstances where land was a commodity in a mass market, old English common law forms for conveyancing were obstructionist. Moreover, land transactions were increasingly treated as contracts, as Friedman notes, and "were subjected to many general doctrines of contract law." Land law, as with other parts of the law, was "greedily swallowed up" by contract.(14)

The increasing use of the executory contract and the emergence of a "will" theory of contract were accompanied by the demise of principles of equity as applied to contractual relations. The theory of equitable limitations on contractual obligation prevalent in the 18th century had as its purpose the assurance that a fair exchange had taken place. In the nineteenth century it was superceded by a will theory of contract which judged contractual obligation by the "convergence of individual desires."(15) The emergence of a free market model for contract which stressed the assent of contracting parties did not vanquish all notions of fairness in contractual relations. But the banishment of an objective theory of value from the realms of theory did not

necessarily mean that courts were unsympathetic to fair dealings in individual cases. Friedman has remarked of the late nineteenth and early twentieth centuries that in the matter of fraud, mistake, and misrepresentation courts followed tendencies not rules. Throughout the nineteenth century courts were willing, as the situation warranted, to return to an eighteenth-century paternalistic mode to protect the weak and ignorant when their cases reached adjudication.

The market model highlighted the unencumbered will of the contracting individual, his ability to negotiate for his own benefit, and his responsibility to abide by the words (expressing his intent) of the contract. These features, in conjunction with the propensity of courts to formalism and literalness in judging intent ("the words speak for themselves") helped to give contractual relations the impersonal quality of the free market itself. Offer, acceptance, and consideration were the manifestations of intent. Consideration was evidence of a price freely fixed, of a willing seller and a willing buyer.(16) The doctrine of caveat emptor became increasingly powerful.(17)

In contractual matters many of the problems of intent are evidentiary in nature. Thus, the commission of fraud or misrepresentation is a matter of ascertaining what evidence ought to prevail in a particular context or with a particular document. Contracts are both a "meeting of the minds" and agreements representing self interest in the desire to get the best of a bargain. The application of the principle of "literalism" was often the only way to determine the intent of parties to a contract. Both the common sense meaning of a disputed instrument and its structure were thus guides to the intent of the parties. It was but a short step to saying that written expression was not simply symbolic of intent, but, in fact, was the intent itself of parties to a contract. Thus a will theory of contract was able to transform and disembody intent in the abstraction of written expression. Here it could be confirmed by signature or mark and judged by the principle of literalness.

In interpreting the meaning of contracts, courts searched for a meeting of the minds, which itself was presumed to be an objective reality capable of identification. Given the limits of probing the intent of parties to a contract, however, reality ususally turned out to be the document itself and the "plain meaning of the words." Where an expressed agreement existed, where stipulations to a transaction were stated, implied agreements running contrary to or substantially modifying these were not recognized. As was the case with land law and the law of negotiable instruments, contract law thus came to put its faith in the written word above all else.(18) A written contract was to conform to the intent of the parties, of course, but when it did not, the rules of law and language prevailed in its construction.

Contracts and Illiteracy

Contracts with illiterate parties were particularly troublesome. Illiterate persons were not, by virtue of their illiteracy, incompetent in the legal sense as were lunatics, idiots and drunkards. Nonetheless, mutual consent and an intelligent understanding of contractual terms were required of them if a valid contract were to exist. To determine whether such consent and understanding were present was not an easy task, especially when the fairness of the contract was in question.

Illiterates faced a wide range of difficulties when dealing with written instruments. Courts of law and equity were aware of these and often used

guidelines that had been developed centuries before. Thus the famous seventeenth case of Thoroughgood was the basis for a number of judgments involving illiterate parties to a contract:

> ... held, 1st, that a deed executed by an illiterate person does not bind him, if read falsely either by the grantee or a stranger; 2ndly, that an illiterate man need not execute a deed before it be read to him in a language which he understands; but if the party executes without desiring it to be read, the deed is binding; 3rdly, that if an illiterate man executes a deed which is falsely read, or the sense declared differently from the truth, it does not bind him; and that though it be a friend of his, unless there be covin.(19)

The British case of Carlisle and Cumberland Co. v. Bragg (1910), used the familiar analogy of blindness to define the problems of the illiterate. In one of the separate opinions to the case, Justice Buckley explained: "I know of only three ways in which a person can be informed of the contents of a document. It may be by the eye, or by the ear, or, in the case of blind man, it may be by touch, as under Braille's system. In this last case touch may be treated as equivalent to sight."(20) As important was the situation in which a party to a contract is dealing with an unfamiliar language. When the marks on a page convey no meaning because they cannot be understood (as in a foreign language) the equivalent of illiteracy is present. "It seems to me," said the Justice, "that the same doctrine applies to every person who is so placed as that he is incapable by the use of such means as are open to him of ascertaining, or is by false information deceived in a material respect as to, the contents of the document which he is asked to sign."(21)

Courts assumed that an illiterate person was, unless demonstrated otherwise, both competent and intelligent enough to enter into contractual obligations. This was true throughout a wide range of cases. The Court in Nathaniel Atwood v. James Cobb (1934) noted that when illiterate persons enter into contracts "... the intent of the parties ... ascertained, is to be the governing rule for carrying the contract into effect." Willard v. Pinard (1892) noted that the "parties sustained to each other the ordinary relation existing between an educated, honest, businessman and an ordinary bright and capable man, possessed of memory and judgment, but uneducated in knowledge of books, and the art of reading and writing, except to a limited extent."(22)

In making assumptions about literacy, competency and intelligence courts were helping to buttress a defense against what they perceived to be a threat to the stability of the written contract. Since the written contract itself had helped to achieve stability in contractual agreements, it was a matter of the highest priority to protect the integrity of written instruments. A written contract, said Justice Sanborn in 1897 "is the highest evidence of the terms of an agreement between the parties to it...." The contracting party "owes it to the public, which as a matter of public policy, treats the written contract as a conclusive answer to the question, what was the agreement?(23) To allow avoidance of contractual obligations by the plea that the contract had not been read nor understood, or to deny that a written contract expressed an agreement made would be to destroy the foundation of stable business and commercial dealings.

The obligation to read or to have read a contract to which one is a party was explained by Blackstone and compiled in the Commentaries. Most American judges of the early nineteenth century probably began with this formulation

as their reference when faced with the problems of illiteracy and the understanding of contracts. For the literate person, the issue was quite straight-forward. If the party to a contract had it within his power to understand the terms, but "reposed a blind confidence in representation not calculated to deceive a man of ordinary prudence and circumspection" then the "law affords no relief."(24)

For an illiterate person the issue of his understanding of a contract was considerably more complicated. Since verification of claims of ignorance without negligence is subjective, courts often operated in a gray area of evidence. Several nineteenth century cases (Seldon v. Myers (1857), Suffern and Galloway v. Butler and Butler (1867), Pennsylvania Railroad Co. v. Shay (1876), Green v. Maloney (1884), Chicago St. P., M. and O. Ry. Co. v. Belliwith (1897), and Bates v. Harte (1899) illustrate this point well.(25) The same difficulty was evident in cases of a third party for surety on a note. In Craig v. Hobbs (1873), for example, a note bearing the signature of the illiterate Hobbs, but actually signed for him by one Grissom, was held to be valid under the circumstances. The Court concluded that Hobbs had placed his confidence, "blind confidence" though it might have been, in Grissom and that "the act of Grissom in signing it was the act of Hobbs, so far as the act of affixing the signature is concerned."(26)

Seldon v. Myers was heard by the U.S. Supreme Court with Chief Justice Taney presiding. In filling a bill to obtain an injunction staying the sale of his property, Seldon claimed that when he had executed the note and deed, he could neither read nor write and "did not know that the whole of said property was included, and was under the impression that it conveyed only a portion of it." In delivering the opinion, Taney noted that Myers and Company were under the obligation

> to show, past doubt, that he [Seldon] fully understood the object and import of the writing upon which they are proceeding to charge him; and if they had failed to do so, the above-mentioned testimony offered by the apellant, as to the state of the accounts between them at the time, would have furnished strong grounds for inferring that he had been deceived, and hat not understood the meaning of the written instruments he signed.(27)

Clearly it was incumbent upon the literate party to make certain that the illiterate person understood the terms of the agreement. Testimony offered by a witness present at the negotiations supported Myers and Company, however, and could not be refuted by other witnesses called in Seldon's behalf. The Court had little faith in the "recollections" of other witnesses or in Seldon's memory. Typically, and in contrast to the assumption of the illiterate person's well-developed memory In the Matter of Cross (1895), the Court noted that Seldon's inability to read and keep accounts would most likely result in a "confused recollection of these conversations and might, without any evil intention, confound what had been said in relation to dealings subsequent to the note with conversations which passed in the time it was executed."(28)

In dealing with illiterate parties to a contract, courts generally required a fair reading of the written instrument. This would normally be a complete reading, but, at the least, it would include all the critical parts of the agreement. Reading the written instrument correctly was as material to its validity as was signing the agrrement.(29) If an illiterate party did not demand a reading of the written instrument, he was guilty of negligence. Neither law nor equity protected the negligent person.(30) The obligation to

locate a reliable person to read and explain a contract was one which lay with the illiterate party. By the late nineteenth century this principle became noticeably more forceful in decisions of the courts. Parol evidence was not admissable to invalidate a written contract, and, regardless of what an oral agreement might have been, the written contract was sacred unless fraud was perpetrated on one of the parties.

A similar attempt to protect the written contract is evident in the principle of negligence. Courts wished to avoid the use of negligent ignorance as an excuse to invalidate a contract. It was unnecessary to prove that an illiterate party actually understood the contract before signing or marking. Understanding was presumed in Green v. Maloney (1884).

> It is of course not necessary, in such cases of reading or explanation, to show that the illiterate did understand its contents and their nature; if, after a paper has been read or explained to him, he sign it, making no objection to it, nor request any explanation of it, he must, in all reason, be taken to have known what he was signing. And, in the absence of proof to the contrary, a paper read to a party and which he signed, is to be presumed to have been understood by him, and he will not be allowed ot aver against it, unless he can show to the satisfaction of a court and jury that the paper was falsely and fraudently read or explained, with intent to deceive and obtain the advantage of him.(31)

Both the parol evidence rule and the principle of negligent ignorance showed no diminution in twentieth-century cases. If anything, courts tended to state them with greater confidence and with explicit recognition that their observance was crucial to sound commercial dealings.(32)

The principle of negligent ignorance was easily applied when no question of fraud existed. When, however, fraud or misrepresentation were thought to be a possibility, the issue was not so simple. The presumption of fraud was not easily made and its presence usually had to be clearly established by proof. Despite the fact that this principle was elementary, it is interesting that courts found it necessary to reiterate it frequently. While fraud in a written instrument might be more observable than in an oral agreement, the difficulty was often the same, because oral interpretations were so crucial to the illiterate person.(33)

The case of Walker v. Ebert (1871) delineated the issue of fraud in terms of a will theory of contract. When a contract is falsely read to an illiterate person, "the mind of the signer (does) not accompany the signature," said the court.(34) The defendant in Walker v. Ebert was a German by birth, unable to read or write the English language. Ebert had entered into an agreement to be the sole agent for a "certain patented machine" and was to receive a percent of all the profits on his sales. He had signed what he thought to be a contract, orally agreed upon, but the instrument bearing his signature was, in fact, a promissory note. The action before the Court was on a promissory note by the holder, who claimed to have purchased it for full value, before maturity. A lower court had ruled that the testimony by the defendant was not admissable and the defendant had challenged this decision. In ruling upon the admissibility of evidence, the Court applied a basic rule of intent governing the validity of an illiterate's mark to a contract.

> It seems plain on principle and on authority, that if a blind man, or a man who cannot read, or for some reason (not implying neg-

> ligence), forebears to read, has a written contract falsely read over to him, the reader misreading to such a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper, which the blind or illiterate man afterwards signs, then, at least, if there be no negligence, the signature so obtained is of no force; and it is invalid, not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words, that he never intended to sign, and therefore, in contemplation of law, never did sign the contract to which his name is appended.

The signature was, therefore, no better than a "total forgery," and the defendant clearly had not intended "to endorse a bill of exchange." This was fraud in the factum, a trick or artifice having been perpetrated on the illiterate victim. Obviously no meeting of the minds had taken place in a general sense, although the immediate issue was one of a deliberate misrepresentation. Ebert, the Court concluded, was deceived both as to the "legal effect" of the instrument and its "actual contents."(35)

Since issues of consent, negligence, and fraud were closely related, their resolution was always determined within a particular context. The point was well made in National Exchange Bank v. Veneman (1887), a case heard in the Supreme Court of the State of New York. An illiterate German farmer signed what he believed to be a contract but which turned out to be a promissory note. Negligence was one of the issues to be resolved by the Court. Since Veneman could not read the instrument and feared it might be a promissory note, he had asked the agent negotiating the supposed contract for assurances that it was nothing but a contract. Veneman had also asked his wife to read the instrument, but "she informed him that she was unable to read it, and did not understand its meaning." There was, however, a boy tending the horse nearby. As it turned out, the boy was literate, but had not been asked to read the instrument. Thus, although it was clear that the agent had perpetrated a fraud, the issue of negligence still arose.(36).

In delivering its opinion, the Court focussed on the context of the negotiation. "It cannot be said," the Court observed, "that it was negligence per se not to seek his neighbors and learn from them the contents of the writing." Noting that the content of the instrument was not particularly complicated and could be easily expressed by a literate person, the Court reminded the parties that "the nature and character of the paper intended to be executed must always be considered in determining the question of the defendent's negligence, so far as it is based on the omission to inquire of others for the purpose of ascertaining from them the contents of the writing." Ultimately the Court concluded that "the question of negligence is not always one of law and often becomes a question of fact for the considertation of a jury."(37)

The determination of fraud was a highly subjective matter and depended in each case upon the "relative situation of the parties and their means of information." Where misrepresentation was obvious and a party to a contract accepted the terms, "with his eyes open[,] he has no right to complain." Likewise, when the "parties have equal means of information, the rule of caveat emptor applies...." When a false representation was a "mere expression of commendation, or is simply a matter of opinion, the parties stand upon equal footing, and the courts will not interfere to correct errors of judgement."(38) Knowing that fear might lead to cynicism and a degree of

caution that would make contractual activity extremely difficult, the Court gave the following practical advice to those engaged in business transactions:

> The law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract. There must be a reasonable reliance upon the integrity of men or the transactions of business, trade and commerce could not be conducted with the facility and confidence which are essential to successful enterprise and the advancement of individual and national wealth and prosperity.(39)

Legal Disadvantages of Illiteracy

The high priority placed upon the written word fundamentally altered the way men thought about proof and evidence as these applied to the many arrangements broadly construed as contract. Assumptions made about freedom, intent and assent in contractual relations were reinterpreted in light of a new literalism in the way business was transacted. Other things being equal (which they usually were not), the illiterate person was increasingly put at a disadvantage in conducting business, though principles of natural justice (equity) and a fairness doctrine functioned to mitigate the adverse effects of literalism for the unlettered person.

As offer, acceptance, and consideration came to be the validating criteria for contract, the tension between literalism and fairness became greater. Some of this may be attributed to technical difficulties in assessing a person's intent in a contractual arrangement, but a more basic difficulty resulted from differing estimates of the degree to which persons were free and rational in their behavior. Self-reliance was the cornerstone of utilitarian atomism in which the individual negotiated and assented to contractual arrangements in his own best interest. The written accord was taken to be the final expression of the individual's will, purpose, or intent. From this, there could be no appeal, barring fraud or misrepresentation. But there was also the question of fairness, of equity. Literalness in contract could be powerfully instrumental in confirming an unfair bargain, and, in the case of the illiterate person, the questions of accuracy in interpretation and expectations had to be raised. How free and self-reliant could the illiterate person be? Time and again, judgments had to be made upon a subjective consideration of this question.

The extenuating circumstance of illiteracy in a contractual agreement did not alter the general postulate that obligations had to be met and contracts fulfilled. Natural law theory, with its roots in Christian axiology, had long taught the moral obligation to perform a promise. Obligation to perform, too, had a utilitarian justification in the good order and welfare of society. Arguments for both moral order and social order were often brought to the defense of contract. Just as readily, however, contract could be defended in terms of flexibility. In the United States in the nineteenth century, economic growth and opportunities for profit easily justified business arrangements that would maximize mobility, freedom of decision, and economic self-improvement. Negotiation of a contract was often perceived as a process of attempting to win the race for pecuniary gain, the obstruction of which seemed contrary to the Protestant ethic itself.

Though it certainly implied a lack of education, illiteracy did not, in the eyes of the courts, usually imply a lack of intelligence or competence. Thus it was the presumption of courts that, in the absence of evidence to the contrary, illiterate persons ought to have the same responsibility and freedom in contracts as literate persons. The right to contract had been buttressed by constitutional decisions. Assumptions about the free will of the indivual and the natural law tradition, though they proceeded from different premises, both asserted the obligation to honor contracts. None of them could, however, resolve the problem of fairness. Mutual understanding was an essential element in the contractual ideal. In practice, form might overrule suppositions about mutual understanding, but it would not eliminate that understanding as an essential part of the contractual ideal. Nor could proper form eliminate considerations of fairness.

As a general rule it was to be presumed that a free, intelligent person would act in his/her own best interest. When grossly unfair bargains were made, therefore, it seemed appropriate to search for a cause. In the case of the illiterate person, that reason was readily apparent. Knowing that fraud, deception and misrepresentation were more easily practiced on the illiterate person, a doctrine of fairness made good sense in gauging the adequacy or inadequacy of price. The signing of a contract still implied understanding and assent, and negligence was not an excuse for invalidating a contract. Yet, in the name of equitable dealing for illiterates, courts were compelled to strike a balance between formal literalism on the one hand and fairness on the other. The balance was not always precise as economic expansion and concerns with individual justice competed for the attention of the courts and the loyalty of judges.

Fairness and legitimacy became complementary guidelines for conduct. Yet this perception has differed radically depending upon the accessability of information. This, of course, was and is the illiterate person's major problem, and it was the relative scarcity of information for the illiterate that affected decisions about promising, obligation, testimony, or the exercise of voting privileges, for example. At both the individual and general levels, it resulted in differing expectations and different perceptions of fairness, thereby affecting the degree of liberty under law available to the illiterate person. Varying levels of dependency and understanding on the part of the illiterate person may be found and this is true for the literate person, as well. Still, the fundamental difficulty persisted namely that liberties under law were and are circumscribed by the absence or misinterpretation of relevant information. Preserving the integrity of contracts was the first priority of the courts, and the measure of justice for the parties involved was generally the degree to which the intent of the parties was fulfilled. Where the written agreement represented that intent, or, as sometimes happened, was linked with it in an almost metaphysical way, the burden of illiteracy became quite clear. When the written word took on a life of its own, as often happened, the "worth" of liberty was considerably diminished for the unlettered person. The metaphor of incarceration was appropriate when in the absence of mutual understanding and a clear recognition of obligations incurred, the word became binding. In an ironic twist, the written word, so often adulated as the architect of imagination and freedom, became the instrument of misunderstanding, conflict, and bondage.

FOOTNOTES

1 See, for example, Kenneth Lockridge, Literacy in Colonial New England, New York, 1974; Francois Furet and Jacques Ozouf, Lire et ecrire, Paris, 1977; Egil Johansson, The History of Literacy in Sweden in Comparison with Some Other Countries. In: Educational Reports, Umea, No 12, Umea, Umea University and Umea School of Education, 1977; Daniel P. Resnick and Louren P. Resnick, "The Nature of Literacy: An Historical Explanation". In: Harvard Educational Review 47, (Aug. 1977): pp. 370-385; M.T. Clanchy, From Memory to Written Record, England, 1066-1307, Cambridge, Mass., 1979; Harvey J. Graff, The Literacy Myth: Literacy and Social Structure in the Nineteenth-Century City, New York, 1979; David Cressy, Literacy and the Social Order: Reading and Writing in Tudor and Stuart England, Cambridge, 1980; Lee Soltow and Edward Stevens, The Rise of Literacy and the Common School in the United States: A Socioeconomic Analysis to 1870, Chicago, 1981.

2 Graff, The Literacy Myth, p. 221.

3 Soltow and Stevens, The Rise of Literacy, pp. 179-180.

4 David Franklin Mitch, "The Spread of Literacy in Nineteenth-Century England,", Ph.D. diss., The University of Chicago, 1982.

5 87 O. S. 35-36; As in State v. Sweeney, 94 N. E. 2d 789, 791.

6 Cressy, Literacy and the Social Order, pp. 10-11. See, also, George W. Keeton, The Norman Conquest and the Common Law, London, 1966, pp. 201,214; M.T. Clanchy, From Memory to Written Record, 1066-1307, passim. For the persistence of the oral tradition see Harvey J. Graff, ed., Literacy and Social Development in the West, Cambridge, 1981.

7 John Rawls, A Theory of Justice, Cambridge, Mass., 1971, pp. 204-205.

8 The whole population of wills of Kent County between 1780 and 1900 and of Washington County between 1795 and 1900 was included. The deeds and mortgages sampled from the years 1790-1840 represent 100 percent of those documents filed in the Recorder's Office. For the years 1860 (1859 for mortages) and 1880, the sample includes 30 percent of the available documents and 15 percent of the documents for 1900, because of the increasing number of documents. Nonetheless, the sample sizes (N's) are still large. For the years 1860-1900 the method of sampling was systematic and free from personal bias. For the years 1860 and 1880, the sampling procedure began with the first page on which a deed or mortgage was recorded. Thirty pages were then sampled, seventy pages were skipped, and so on. This was thought to be preferable to sampling every third entry, since the recording of documents often took more than one page. A similar procedure was followed for the fifteen percent sample from 1900.
For each deed transaction the following information was recorded: (1) county, (2) year of transaction, (3) residence of grantor(s) (from 1790 to 1840), (4) type of grantor (individual, company or association, or government), (5) name(s) of grantor(s), (6) value of consideration, (7) sex of grantor(s), and (8) literacy or illiteracy of grantor(s). For mortgage transactions, the same information was recorded, except that residence of the mortgagor was not available, but the type of indebtedness was included. Each grantor or mortgagor was given a number indicating the order in which the name appeared. Thus, in the case of multiple grantors or mortgagors, it was possible to differentiate between the number of transactions and the number of transactors. Sorting alphabetically by name also made it possible to omit repeated names for certain types of analyses.

9 Soltow and Stevens, pp. 178-179.

10 1.U.S. (3 Dallas), 387, 391-392, also see Holden v. Hardy (1981).

11 Vanhorne's Lessee v. Dorrance (1795), 2 Dallas, 304; see, also Fletcher v. Peck (1810), New Jersey v. Wilson (1812), Dartmouth College v. Woodward (1819), and Ogden v. Saunder (1827).
12 169 U.S., 392.
13 Robinson v. Eldridge, 10S and R, 142.
14 Lawrence M. Friedman, A History of American Law, New York, 1973, pp. 174, 244. See, also, Lawrence M. Friedman, Contract Law in America, A Social and Economic Case Study, Madison, 1965.
15 Morton J. Horwitz, "The Historical Foundations of Modern Contract Law". In: Harvard Law Review 87, (March 1974), p. 923; The Transformation of American Law, 1780-1860, Cambridge, 1977; and "The Transformation in the Conception of Property in American Law, 1780-1860". In: University of Chicago Law Review, 40, (Winter 1974), pp. 248, 270. The Horwitz theory of the rise of executory contracts and a will theory of contractual obligations has been scathingly criticized by A.W.B. Simpson in "The Horwitz Thesis and the History of Contracts". In: University of Chicago Law Review, 46, (Spring 1979), pp. 533-601. This debate is not of immediate concern to this study, I am only interested in the contractual basis of the nineteenth-century social order, its dependence on a moral and legal norm of obligation, and the importance of a meeting of the minds for the illiterate person. See also, R. Randall Bridwell, "Theme v. Reality in American Legal History". In: Indiana Law Journal, 53,(Spring 1978), pp. 449-496.
16 Lawrence M. Friedman, Contract Law in America, p. 21
17 Horwitz, "Historical Foundations", p. 946. Atiyah notes that the principle of caveat emptor was never enforced "to the utmost rigor" (Freedom of Contract, pp. 471-475).
18 Friedman, History of American Law, p. 245.
19 Thoroughgood v. Cole, 2 Eng. Rep. at 9.
20 1 K. B. 495.
21 Ibid., 495-496
22 26 A. 68.
23 83 F. 439-440; also 202 P. 371.
24 258 S.W. 1017; see, also, Seldon v. Myers (1857), 20 Howard, 508-511; Suffern and Galloway v. Butler and Butler (1867), 18 N. J. Eq. 220; Craig v. Hobbs (1873) 44 Ind. 363; Pennsylvania Railroad Co. v. Shay (1876), 82 Pa. 198; Green v. Maloney (1884), 7 Del. Cas. 22; Chicago St. P., M. and O. Ry., Co. v. Belliwith (1897), 83 F. 437; Bates v. Harte (1899), 124 Ala. 427.
25 See, also Seeright v. Fletcher (1843), 6 Blackf. 318-382; May v. Johnson and Another (1852), 3 Ind. 450-451; Rogers v. Place (1868), 29 Ind. 577; Craig v. Hobbs (1873), 44 Ind. 363.
26 44 Ind. 366.
27 20 Howard 508-510.
28 Ibid., 511.
29 Suffern and Galloway v. Butler and Butler (1867) 18 N.J. Eq. 222.
30 Pennsylvania Railroad Co. v. Shay (1876) 82 Pa. 203.
31 7 Del. Cas. 26. See also, Chicago, St. P., M. and O. Ry. Co. v. Belliwith (1897), 83 F. 437 and Bates v. Harte (1889), 124 Ala. 427.
32 Furst and Thomas v. Merrit (1925), 190 N. C. 397. Illiterate and literate persons are on an equal footing with respect to their obligations to read the contract to which they are parties. Shores-Mueller Co. v. Lonning, et al. (1913), 140 N. W. 197; Burns v. Spiker, et al. (1921), 202 P. 370; Erickson v. Knights of the Maccabees of the World (1922), 203 P. 674; Furst and Thomas v. A.D. Merritt, et al. (1925), 190 N. C. 397; Standard Motor Company v. Samuel Peltzer (1925), 147 Md. 509; First National Bank of Sioux Center v. Ten Napel, et al. (1924), 200 N. W. 405; Gaetano Pimpinello, Respondent v. Swift and Co., Inc., Appellant (1930), 253 N.Y.