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JUDGMENT CALL: THEORETICAL APPROACHES TO CONTRACT DECISION-MAKING

CHARLES L. KNAPP*

By their scholarly papers prepared for this Conference, Professors White, Harrison, Linzer, and Spann have contributed greatly to our understanding of the present state of contract law, and where it may be heading. In considering how I might add some contribution of my own to the published proceedings of the conference, I was particularly affected by the final—and, in the dramatic sense at least, climactic—session of the conference, when Professors Spann and Feinman presented two complementary versions of how a critical legal studies perspective might be employed by judges, to which Judge Kaye responded with a vigorous declaration of her own inability to find anything useful there, even as thus explained. Although Judge Kaye is not the first to take issue with the CLS writers for their refusal to accept the notion that rules of law really constrain decision-makers,1 Professor White has reminded us that many of the legal realists shared this skepticism, in varying degrees.2 Of course it is true, as Professor Spann has pointed out, that—to paraphrase the NRA slogan—rules don’t decide cases, judges decide cases.3 Nevertheless, it may be that Judge Kaye is right in asserting that she and her fellow judges honestly do believe themselves to be constrained in their decision-making to stay within the “grazing room” that the rules appear to permit,4 with only occasional forays over the fence.

Despite the difficulty of knowing exactly how judges do what

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*Max E. Greenberg Professor of Contract Law, New York University School of Law. I acknowledge with gratitude the helpful advice and encouragement of my colleague Dean Nathan M. Crystal, and the able and enthusiastic aid of my research assistant, N.Y.U. Law student David Izhakoff.


they do, a lot of people who are not judges (including, I suspect, most of the participants at our Conference) nevertheless frequently pretend that they are. For the practicing lawyer, of course, this role-playing is simply a way of predicting the success or failure of one’s own advocacy: “If I were the judge, would I be convinced by this argument?” For law school professors, such judicial fantasizing is an attempt to increase our understanding of the subject matter we are teaching. Adopting a judicial pose in the classroom is frequently our method of teaching it, as well; this serves a valid professional purpose, although there may sometimes be a little self-aggrandizement involved. So it’s in a time-honored tradition that I now invite you to imagine yourself a judge, faced with a closely-balanced case, attempting to bring to bear on the decision of that case some of the theoretical approaches that the speakers at our Conference have explored. If, in your role as a judge, you honestly attempt to benefit from the broadening of perspective that the insights of legal theory afford, how might it affect either your decision-making process or the resulting decision itself?

I
THE CASE: J.N.A. REALTY CORP. V. CROSS BAY CHELSEA, INC.

In 1963, J.N.A. Realty Corp. (“JNA”) owned a shopping center on Shore Parkway, in the Howard Beach area of Queens County, an outlying section of New York City. At the end of that year, JNA leased to Victor Palermo and Sylvester Vascellaro premises in that center, in which Palermo and Vascellaro proposed to operate a restaurant. The lease consisted of a two-page standard printed form, to which was attached and incorporated by reference a typed twelve-page rider containing the terms of the parties’ agreement. In substance the lease provided for a ten-year term, with an annual rental escalating gradually from $10,000 for the first three years to $11,500 in the last year. The lease also


7. The lease and its rider were not reproduced as part of the Record on
provided that the tenant was to pay utilities and maintain liability insurance, and gave the tenant a right of first refusal in the event the landlord should entertain an offer to sell the building of which the demised premises formed a part. The lease contained a provision giving the tenant an option to renew for a further period of ten years, at an annual rental during the renewal term of $12,000 (with no provision for any increase during that period), provided "that Tenant shall notify the Landlord in writing by registered or certified mail Six (6) months prior to the last day of the term of this lease that the Tenant desires such renewal." Shortly after the commencement of the term, Vascellaro and Palermo formed a corporation, Foro Romano, Inc. ("Foro"), to which they assigned their lease with JNA.

By 1968 the restaurant operated by Foro had closed. In early 1968, it was advertised for sale, and inquiries came from Cross Bay Chelsea, Inc. ("Chelsea"), a corporation already operating several successful restaurants in New York City. When negotiations began, Chelsea indicated that it would insist on a longer tenancy in JNA’s building than was presently provided for by Foro’s lease (which at that point had not quite six years to run on the original term, plus the possible ten-year renewal). A modification of the lease between Foro and JNA was agreed to by JNA, and on March 16, 1968, JNA and Foro signed a two-page modification agreement extending the renewal period from ten to twenty-four years.9 (That agreement was executed for JNA by Nicholas Arena, who was at that time its Secretary; Arena later became JNA’s President, and appears to have been the JNA principal with whom Foro and Chelsea dealt during this period.) Instead of a flat $12,000 rental for each year of the renewal term, as provided in the original lease, the modification agreement called for periodic increases of $1,000 every five years, increasing the annual rental during the renewal term from $12,000 during the first five years to $16,000 during the last four. The agreement also contained the following short paragraph:

All other provisions of Paragraph #58 in said lease, and all provisions for additional rent contained in said lease shall

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8. Actually, the right was one of "second refusal," because it was subject to a prior similar right of another tenant in the center, a food store.
remain in full force and effect, except as hereinabove modified.\textsuperscript{10} (Paragraph 58 of the original lease, which contained all the provisions relating to the tenant's renewal option, was—like the other substantive provisions described above—contained in the twelve-page "Rider," rather than the two-page printed lease form employed by JNA and Foro.) Foro then contracted to sell its restaurant business and leasehold to Chelsea for a total price of $155,000, $40,000 of which was allocated by the bill of sale to the fixtures and chattels with the remainder attributable to "the value of the leasehold and possession of the restaurant premises." As part of the closing of that transaction, Foro assigned to Chelsea all its rights under the lease with JNA, as modified. After taking possession, Chelsea spent some $15,000 on remodeling the restaurant to its own specifications.

In the summer of 1968 Chelsea opened its new restaurant on the premises, which apparently prospered. Nevertheless, when the date arrived by which notice of renewal was required to be given—June 30, 1973—no such notice was sent. By letter dated November 12, 1973, JNA informed Chelsea that the time for Chelsea to renew its lease had "expired," and asserted that "not having heard from you as prescribed by paragraph \#58 in our lease we must assume that you will vacate the premises" at the end of the original term, January 1, 1974.\textsuperscript{11} The tenant's then attorney immediately sent JNA a letter asserting the tenant's intention to renew, stating that the writer had been "authorized in writing . . . to exercise the option," and declaring that the letter was "in confirmation of several oral conversations had with you and the principals" of Chelsea.\textsuperscript{12} Despite this prompt response, JNA refused to recognize Chelsea's exercise of its option, and commenced an eviction action in the New York City Civil Court; Chelsea counterclaimed for a declaration that its renewal option had been validly exercised, and issue was joined.

At trial in the summer of 1974, witnesses included Arena (then President of JNA), Vascellaro (principal of Foro, the original tenant), Peter and John Morfogen (brothers who were principals of Chelsea) and the attorneys who had represented Foro and Chelsea at the time of the lease modification and the sale of the restaurant business in 1968. (JNA appears not to have been rep-
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represented by counsel in any of these earlier transactions.\(^{13}\) Some of the evidence offered by Chelsea's attorney was excluded apparently on the basis of the parol evidence rule and the rule excluding evidence of settlement negotiations; nevertheless, witnesses were permitted to establish that the tenant claimed never to have seen the lease provision in question.\(^{14}\) There was also evidence that the tenant had made some additional improvements to the premises during the summer of 1973,\(^{15}\) and that the landlord had knowledge of this fact, having visited the premises during that period.\(^{16}\) It was also established that JNA occasionally wrote letters to Chelsea reminding it that payments for taxes or utilities were due; one such letter was written in June 1973, but it contained no mention of the imminence of the date for notice of renewal.\(^{17}\) Near the close of the trial, JNA's attorney sought to establish that Arena had negotiated with another tenant after June 30, 1973, but this evidence was excluded as immaterial.\(^{18}\)

On November 19, 1974, Civil Court Judge Eugene McQuade rendered judgment.\(^{19}\) Conceding that there was "sharp disagreement in the testimony" as to whether Chelsea had ever received a copy of the rider, although a copy of the full lease including the rider was "apparently filed on behalf of the tenant" with the Alcoholic Beverage Commission,\(^{20}\) Judge McQuade held that nevertheless "equitable principles of law" would justify giving the tenant relief in these circumstances.\(^{21}\) Quoting an earlier decision of the New York Court of Appeals\(^{22}\) asserting the existence

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13. Id. at 71, 110, 118.
14. The attorney who represented Chelsea in its purchase claimed never to have seen the full original lease, asserting that he had repeatedly asked for a copy but never received one. Id. at 69-72. There was an indication that the principals of Foro might have given their only copy to an earlier prospective buyer of the restaurant, and never obtained a replacement from Arena. Id. at 103-104. JNA's attorney showed that a full copy of the original lease was in the files of the State Division of Alcoholic Beverage Control, and argued that it must have been included in the papers filed by Chelsea with its application for a liquor license. Id. at 84-85. Chelsea argued that this copy of the lease could have been filed at an earlier time by Foro, when Foro itself was applying for a liquor license. Id. at 160-161.
15. Id. at 135.
16. Id.
17. Id. at 51-53.
18. Id. at 176.
19. The Civil Court opinion is not published, but is reproduced in the Record, supra note 9, at 181-184.
20. Id. at 182.
21. Id. at 183.
of a "rule or practice in equity which relieves against . . . forfeitures of valuable lease terms when default in notice has not prejudiced the landlord, and has resulted from an honest mistake, or similar excusable default." Judge McQuade noted that the record was "barren of any 'prejudice' to the landlord by the tenant's late notice of renewal," and held that the option for a twenty-four year renewal term had been validly exercised. The landlord's petition for eviction was dismissed.

Because the Civil Court is an inferior trial court, appeal from its decision lies first to the Appellate Term of New York's Supreme Court, the trial court of general jurisdiction. JNA promptly perfected its appeal to the Appellate Term, and on July 2, 1975, three Supreme Court Justices unanimously affirmed the judgment of the Civil Court, without opinion. JNA then appealed to the Appellate Division of the Supreme Court, the state's intermediate appellate court. On April 19, 1976, a five-judge panel of that court rendered its decision, reversing the Civil Court by a vote of four to one. In a memorandum opinion, the majority declared that there was "ample evidence in the record to prove that Chelsea had knowledge—or is chargeable with notice—of all the provisions of paragraph 58 of the rider to the lease." Conceding that equity "abhors a forfeiture," and will intervene to prevent one in cases of "accident, ambiguity, fraud, surprise, mistake or some other equitable ground," the Appellate Division held that no such cause had been demonstrated, merely a "negligent" and "inexusable" failure on the tenant's part to make a timely exercise of its option. Declaring that other cases cited for the tenant had all involved "excusable fault," sufficient to invoke a court's "sense of justice and fairness," the majority declared that intervention was not called for in the case of "inexusable failure or omission." To excuse the tenant's default in this case, it concluded, "would render similar provisions meaningless and ineffectual." In his dissent, Justice Charles Margett agreed that case law supported relief only where the failure to give timely notice was due to "an honest mistake or similar excusable default," but argued that the record showed Chelsea's failure to renew was

23. Record, supra note 9, at 183-84.
24. Id. at 184.
26. Id. at 618, 382 N.Y.S.2d at 346-347.
27. Id. at 619, 382 N.Y.S.2d at 347.
indeed an "honest mistake." He went on to point out that "substantial improvements" made by Chelsea would cause it "substantial loss" if forced to vacate, and that Arena had said nothing to the tenant about the need for a notice of renewal, either in the letter reminding Chelsea that tax payments were due or during any of his visits to the premises during the summer of 1973. Asserting that Arena's course of conduct had been "designed to lull Chelsea into the belief that it had obtained a long-term lease in the building," Justice Margett declared that the Civil Court and the Appellate Term had been correct in finding that "the equities are almost completely with Chelsea." Margett did not, however, simply vote to affirm the Civil Court's judgment; he concluded that JNA's appeal should be held in abeyance while the case was remanded for trial on a single issue, relevant to an "equitable determination" of the case: whether JNA had sustained any prejudice by reason of Chelsea's failure to give timely notice of renewal.

The burden of going forward was now on Chelsea, which promptly appealed to New York's highest court, the Court of Appeals. That court rendered its decision on June 16, 1977. In a majority opinion by Judge Sol Wachtler, four members of the court voted to reverse the order of the Appellate Division and to remand for retrial. Three judges dissented, in an opinion written by Chief Judge Charles Breitel. Both opinions were lengthy, and together they throw into sharp relief the remarkably strong tensions created by the facts of this seemingly simple case.

In his opinion for the majority, Judge Wachtler began by reviewing the facts as established in the courts below, and then stated the legal issue succinctly. "It is a settled principle of law," he wrote (citing Williston, Corbin and the Restatement (Second) of

28. Id. at 619-20, 382 N.Y.S.2d at 348.
29. Id. at 620, 382 N.Y.S.2d at 348.
30. Id. at 619-20, 382 N.Y.S.2d at 348.
31. J.N.A. Realty Corp. v. Cross Bay Chelsea, Inc., 42 N.Y.S.2d 392, 366 N.E.2d 1313, 397 N.Y.S.2d 958 (1977). The tenant remained in possession all this time; by order of the Appellate Division, enforcement of its judgment for the landlord was stayed pending appeal to the Court of Appeals, on condition that the tenant continue to pay to the landlord "all sums which would have been payable under the lease." Record, supra note 9, at 200.
32. Whether retrial was to be on all issues, or limited to the issue of prejudice to the landlord (the only issue mentioned by the majority) is not evident from the opinion. The landlord's attorney advised us that in a subsequent order the court clarified this point, calling for a new trial on all issues.
Contracts), "that a notice exercising an option is ineffective if it is not given within the time specified."

At law, of course, time is always of the essence . . . . Thus the tenant had no legal right to exercise the option when it did, but to say that is simply to pose the issue; it does not resolve it. Of course the tenant would not be asking for equitable relief if it could establish its rights at law.33

Because an option does not vest any legal rights in property until exercised, Wachtler continued, default in exercising an option to buy goods or property does not ordinarily result in a forfeiture. Where a lease renewal is concerned, however, the tenant is likely to have made valuable improvements in anticipation of enjoyment of the renewal period; to deny renewal is to visit a substantial loss on the tenant. Although past New York cases had not raised the point squarely, prior decisions from other jurisdictions have held that even "mere forgetfulness" may excuse a failure to renew, where a forfeiture would result.34 Invoking the words of former Chief Judge Cardozo, Judge Wachtler argued that relief should be granted where default in giving notice has resulted from mere "venial inattention" and the resultant hardship to the tenant would be "out of all proportion to the gravity of the fault." Here the tenant had made a considerable investment in improvements on the premises, and also "undoubtedly would lose a considerable amount of its customer good will" if forced to vacate.35 Having said all this, Judge Wachtler's majority-following the lead of dissenting Justice Margett below—nevertheless declined to render final judgment for the tenant. Because the trial court had excluded evidence of JNA's negotiations with other potential tenants, Judge Wachtler concluded, the record failed to show whether JNA would be prejudiced by a grant of relief to Chelsea.

It may be that after the tenant's default the landlord, acting in good faith, made other commitments for the premises. But if JNA did not rely on the letter of the agreement then, it should not be permitted to rely on it now to exact a substantial forfeiture for the tenant's unwitting default. This, however, must be resolved at a new trial.36

Writing for the minority, Chief Judge Breitel took sharp issue

34. Here the court cites Fountain Co. v. Stein, 97 Conn. 619, 118 A. 47 (1922).
35. JNA, 42 N.Y.2d at 399, 366 N.E.2d at 1317, 397 N.Y.S.2d at 962.
36. Id. at 400, 366 N.E.2d at 1318, 397 N.Y.S.2d at 962.
with the majority’s characterization of the tenant’s failure as “mere neglect or forgetfulness,” as opposed to “gross or willful negligence.” Such a distinction, he wrote, is not one which is generally accepted, “and is hardly a pragmatic one to apply in an area where the opportunities for distortion and manipulation are so great. The instability and uncertainty would be dangerous and would allow for ad hoc dispensations in particular cases without reliable rule so essential to commercial enterprise.”

The majority’s decision permits the tenant to speculate at the landlord’s expense, Breitel argued: by delaying its exercise of the renewal option, the tenant can await the action of the market, renewing if the market has moved favorably while being free from obligation if it has not. Conceding that Chelsea could hardly be accused of consciously gambling in this fashion, Breitel nevertheless pressed his argument; the court must be concerned with a rule which will serve for all cases, including those where the tenant’s good faith may be not so clear. Nor was the fact of the tenant’s investment in the leased premises sufficient in Breitel’s eyes to justify the majority’s decision, since virtually every commercial tenant could point to some “threatened investment in the premises,” either a physical improvement or good will. The tenant’s contention that it had not seen the lease provision at issue was brushed aside with the observation that “experienced, sophisticated businessmen and their lawyers” would certainly have “assembled and scrutinized every relevant document” affecting the acquisition of a thirty-year leasehold; assertions to the contrary bordered on the “utterly incredible.” Breitel’s conclusion was sweeping but succinct: “That adherence to well-settled principles . . . works a hardship on some does not, alone, permit a court to depart from sound doctrine and principles.”

Suppose it is 1977, and you are a member of the New York Court of Appeals, considering the disposition of the In re Appeal. Three members of your court, led by its eminent Chief Judge, are resolved to affirm the Appellate Division’s decision for the land-

37. Id. at 406, 366 N.E.2d at 1321, 397 N.Y.S.2d at 966.
39. In response to this argument, Wachtler’s opinion asserts that a tenant guilty only of negligence should not be denied relief merely because some other tenant might be found to have acted in bad faith: “By its nature equitable relief must always depend on the facts of the particular case and not on hypotheticals.” Id. at 400, 366 N.E.2d at 1318, 397 N.Y.S.2d at 963.
40. Id. at 407, 366 N.E.2d at 1322, 397 N.Y.S.2d at 967.
41. Id.
42. Id.
lord; your other three colleagues stand ready to uphold the tenant’s right of renewal unless the landlord should, at retrial, be able to establish some prejudicial change of position (a possibility which you might well assume to be a remote one). Breitel and Wachter have each circulated drafts of their proposed opinions. At this point, the \( J \rightarrow A \) case has been at four levels of your state’s court system, and has been tried or reviewed by a total of sixteen judges, fifteen of whom have divided as evenly as any fifteen judges can: eight on the tenant’s side and seven on the landlord’s. The arguments on either side are persuasive, and legal doctrine appears not to dictate a result. Can legal theory inform your decision?

II
LEGAL REALISM

Professor White has suggested that all practicing lawyers are legal realists by trade.\textsuperscript{44} Judges typically reach the bench by way of the bar, and presumably most of them preserve some of the practitioner’s perspective even after making this transition. At least one prominent judge, Jerome Frank, was well-known as a realist scholar.\textsuperscript{45} So one can surely be a realist in robes. If you were to take that posture as a judge in the \( J \rightarrow A \) case, how might your decision be affected? As a starting point, it may be helpful to recall the attitudes identified by Professor White as particularly likely to be held by a “card-carrying” legal realist: skepticism about the decision-making process; skepticism about the effects of legal rules; and reliance where possible on empiricism as a source of potentially relevant data.\textsuperscript{46}

Some degree of skepticism about the decision-making process probably comes naturally to judges. Insiders in any business may have great respect and even affection for many of their colleagues, but knowledge of what makes the wheels turn is likely to produce a much more realistic, perhaps even cynical view of the business than outsiders may have.\textsuperscript{47} Assuming that you as a judge have this degree of realism about your court and its work, how might that affect your approach to decision-making?

One result of process-skepticism could be an enhanced de-

\textsuperscript{43} Who will himself later become Chief Judge of the Court of Appeals.
\textsuperscript{44} White, supra note 2, at 7-8.
\textsuperscript{45} Id. at 9. See, e.g., J. Frank, Law and the Modern Mind (1930).
\textsuperscript{46} White, supra note 2, at 14-15.
\textsuperscript{47} As a random example, see W. Goldman, Adventures in the Screen Trade: A Personal View of Hollywood and Screenwriting (1983).
gree of self-awareness. Are you yourself a tenant? A landlord? Do you bring either from your private life or from your experience in practice a perspective which is likely to make you empathize with one side rather than the other in landlord-tenant disputes? Chelsea’s tenancy is commercial, rather than residential, so at least the particularly emotional identification often engendered by cases of the latter type may be absent. Nevertheless, if in all candor you would concede yourself to be either a pro-landlord or pro-tenant person, your responsibilities as a judge appear to require you either to justify your bias in some way consistent with your judicial role, or consciously to subordinate it—perhaps by consciously guarding against a tendency to give the benefit of the doubt to the side you instinctively favor. And your judicial responsibilities also permit or even require you to be sensitive to the possibility that your colleagues may have biases of their own which are similarly reflected in their decision-making as well.

Your approach to deciding JNA’s suit against Chelsea could also be affected by the degree to which you adopt the realist stance of skepticism about the effect of legal rules. Professor White has suggested that realism includes awareness of the fact that a rule developed in one case is likely to be often ignored in practice and to have only a modest effect on courts in future cases. Too large a dose of this brand of skepticism might breed sloppiness or indifference in the performance of your judicial duties: Why worry so much about the rules—either the ones which precedent has already created, or the one your decision in this case may be about to create? But a healthy degree of rule-skepticism can be useful to a judge in assessing the relative force of arguments for either side. Legal advocacy often depends on some version of the “floodgate” metaphor—the Slippery Slope, or Pandora’s Box, for example. Such arguments may seem compelling if one assumes that any departure from precedent is indeed likely to be the opening of a floodgate, releasing a tide that

48. You might, for instance, believe that you and your fellow judges were selected in part because of attitudes that you have previously displayed (off the bench or on lower courts) and that therefore you should continue to give rein to those attitudes, rather than subordinating or abandoning them.

49. It might also be noted at this point that the record shows the tenant’s principals to be of Greek extraction; the principals of JNA and Foro bear what appear to be Italian names. Even today, stereotypical attitudes about ethnic groups often tacitly influence our actions, consciously or otherwise; surely a legal realist would be sensitive to this possibility as well.

50. White, supra note 2, at 15.
will sweep future lawyers and judges before it. Rule-skepticism suggests, however, that even the most innovative of decisions is likely in the long run to be more like a stone dropped in a pond, sending out ripples that for a time disturb the surface of what will soon become once more a placid pool.

Having achieved an appropriately skeptical frame of mind, your Honor may be better prepared for decision-making. But a decision still has to be made, and skepticism alone, even if it could be sufficient for other purposes, won’t do the job for a judge. Fortunately, the legal realists have something to offer besides skepticism. They call upon judges to look beyond mere doctrine, to the social policies which the doctrine—perhaps dimly—reflects and seeks to further. So you should think not just about rules, but about the interests those rules may serve, and the social ends which might be achieved by their application. The legal realists also urge lawmakers—judges as well as legislators—to adopt an empirical attitude. What facts can you glean from the record, what facts do you know from experience, what facts can you learn from observation of the world—systematic or otherwise—that could aid you in choosing between Chelsea and JNA?

At this point in your decision-making process, you may be troubled by Chief Judge Breitel’s argument that a decision for Chelsea would “disregard commercial realities” and introduce “dangerous instability” in business transactions.51 As noted above, rule-skepticism may suggest that such arguments should be taken with a grain of salt; this does not mean, however, that they should not be taken seriously. Would a decision for Chelsea really open a “floodgate”—induce the bringing of a large number of similar cases? Would such a decision really open a “Pandora’s Box”—produce surprising bad effects? Would it really start your court down a “slippery slope”—make it virtually impossible for your court in later cases to avoid going farther and farther down the road taken by this decision? In attempting to answer these questions, it may be helpful to distinguish between two factors in the JNA case: the tenant’s reason for failing to give notice; and the effect on the landlord of permitting the tenant to make a late election to renew.

As we have seen, the principals of Chelsea adamantly maintained at trial that they were ignorant of the notice clause. The trial court’s decision suggests that Chelsea may at least have had

51. JNA, 42 N.Y.2d at 400, 406, 366 N.E.2d at 1318, 1321, 397 N.Y.S.2d at 963, 966 (Breitel, C.J., dissenting).
"reason to know" of that provision, because at one time Chelsea's attorney—if not its principals—had a copy of the lease, as evidenced by the liquor license application. However, the trial court's decision can be read as consistent with a finding that at the time when notice was due, the notice provision was not known to the tenant's principals, nor called to their attention by its attorney. The *ratio decidendi* of a decision for Chelsea could thus be limited to cases where the tenant was in fact ignorant of the need for notice at the time it should have been given, although perhaps not without "reason to know" of the notice provision itself. Would this limitation be sufficient to avoid the "slippery slope" problem? It is probably fair to assume that, from your experience in practice, you believe notice clauses like the one in Chelsea's lease to be quite common in connection with options of renewal. Do you have any basis in experience for concluding that commercial tenants commonly forget to give timely notice of renewal? If not, you may conclude that a flood of exactly similar cases is unlikely.

This conclusion would not dispose of the landlord's argument, however. Chief Judge Breitel has argued that a pro-Chelsea decision will encourage tenants in future cases intentionally to delay giving notice of renewal, in order to speculate on the direction which the rental real estate market will take. From your experience, you may well believe that commercial real estate values, although subject perhaps to dramatic shifts (up or down) over the long run, are unlikely to fluctuate dramatically in the short run of a few days or even weeks. Particularly if such is the case, do you believe that significant numbers of commercial tenants will take the risk of such a delay in giving notice of renewal, gambling that

52. Vincent F. Nicolosi, an attorney now in practice in Bayshore, Long Island, was attorney for Chelsea throughout this litigation. He was gracious enough to grant me and my research assistant an interview to discuss the case. When we raised the question of the missing lease rider, Mr. Nicolosi was loath to contradict Chelsea's former attorney, who testified under oath that he had never seen a copy of the rider to the original lease. Mr. Nicolosi did, however, freely concede that whether the attorney simply failed to procure a copy of the lease, or did in fact get one but failed to advise his clients of the need to give timely notice of renewal, the result in either case was sloppy lawyering. As to the sanction for such possible inadequate representation, Mr. Nicolosi noted that the other attorney to his knowledge had not represented Chelsea since the case arose, while Nicolosi himself has done so on several occasions since.

53. The word "known" is used here in the sense in which it is defined in Uniform Commercial Code §1-201(25), referring to "actual knowledge" rather than merely "reason to know." [Citations to the Uniform Commercial Code in this article are to the Official 1987 version, hereafter referred to as "U.C.C."
if they do decide in the end to renew, the court can be fooled into believing that the delay was inadvertent?\textsuperscript{54} If so, you may come in on JNA's side; if not, you may be more inclined to resolve Chelsea's case with an \textit{ad hoc} opinion concerned less with future cases and more with its distinctive facts.

Another factor to be considered, in terms of the possible precedential value of a pro-tenant decision, is its effect on landlords in future cases. Assuming that the precedent created by a decision for Chelsea could be limited so as to apply only to tenants that had been truly ignorant or forgetful of the notice provision, would a decision for Chelsea inevitably lead to greater and greater extensions of time for such tenants? Here again it is necessary to recall the facts in this case: the landlord, JNA, did not call the notice provision to the attention of the tenant, Chelsea, until over four months had passed. Any landlord wishing to avoid a long delay could promptly point out the tenant's failure to give notice. If the tenant truly wanted to renew, it would presumably give notice as soon as the question was raised (as did Chelsea, in fact). Is the landlord then unfairly prejudiced if it is held to an immediately communicated notice of renewal? Only, it would appear, if the landlord's goal at this point is not merely to get a prompt decision from the tenant, but to avoid renewal on the terms stated in the option agreement. And here, at last, we come to the point which may after all be the critical issue in this dispute: Does the notice clause need judicial protection merely because the landlord is entitled to know definitely as of a given date whether it needs to look for a new tenant? Or does the notice clause have another legitimate function, which the court should also protect, of giving a landlord that had earlier agreed to a renewal option a way to evict forgetful tenants—or at least to force them to accept a rent increase beyond anything provided for in the lease?

In approaching that question, you might want to apply the sort of empiricism stressed by Professor White in his discussion of Karl Llewellyn and the Uniform Commercial Code ("U.C.C."). Professor Llewellyn appears to have believed that the law should in commercial cases generally take its cues from the business community, whose practices the law should ordinarily follow unless they fall below some minimum standard of acceptable con-

\textsuperscript{54} Such a delay could be more likely if the tenant were hoping that a particular alternative deal—more attractive than the renewal of its present tenancy would be—might come to fruition in the immediate future.
DUCT THAT THE LAW OUGHT TO ENFORCE.\textsuperscript{55} AS PROFESSOR WHITE HAS POINTED OUT, THIS REALIST VIEW SOMETIMES LED THE DRAFTERS OF THE U.C.C. TO PRESENT RATHER CONCRETE RULES INCORPORATING PARTICULAR CUSTOMS OR PRACTICES.\textsuperscript{56} OFTEN, HOWEVER, IT LED THEM TO IMPOSE A STANDARD OF "COMMERCIAL REASONABLENESS,"\textsuperscript{57} PERHAPS SUPPLEMENTED BY EVIDENCE OF "USAGE OF TRADE."\textsuperscript{58} OFTEN, LEWELLYN MAINTAINED, THERE IS A RULE OUT THERE, IF YOU WILL JUST LOOK FOR IT—"IMMANENT" IN THE COMMERCIAL SETTING, AND CAPABLE OF BEING RETRIEVED AND EMPLOYED BY A COURT WITH SUFFICIENT "SITUATION SENSE" TO DO SO.\textsuperscript{59} DOES THE BUSINESS COMMUNITY—MORE SPECIFICALLY, THE COMMUNITY OF COMMERCIAL LANDLORDS AND COMMERCIAL TENANTS—BELIEVE THAT IN CASES LIKE CHELSEA'S THE LANDLORD HAS ANY OBLIGATION EITHER TO REMIND THE TENANT THAT NOTICE IS DUE, OR TO ALLOW IT TO EXERCISE A SOMewhat LATE NOTICE WHERE LATENESS WAS TRULY THE RESULT OF IGNORANCE OR INATTENTION? OR, IS IT INDEED "COMMERCIAL REASONABLE" TO USE THE NOTICE CLAUSE TO GET RID OF—OR TO FORCE A RENT INCREASE ON—AN IGNORANT OR CARELESS TENANT?

CHALLENGED BY PROFESSOR WARREN'S STINGING INDICTMENT OF VIRTUALLY ALL LEGAL ACADEMICS FOR THEIR UNWILLINGNESS TO DO EMPIRICAL RESEARCH OR TO EXPECT IT FROM OTHERS,\textsuperscript{60} AND INSPIRED BY RICHARD DANZIG'S EXHORTATION THAT EVEN VERY MODEST EMPIRICAL WORK MAY BE BETTER THAN NONE AT ALL,\textsuperscript{61} I DECIDED TO CONDUCT A LITTLE SURVEY OF MY OWN AMONG THE ALUMNI OF THE NEW YORK UNIVERSITY SCHOOL OF LAW. OUR ALUMNI OFFICE WAS KIND ENOUGH TO FURNISH ME WITH A MAILING LIST OF SEVERAL ALUMNI IN NEW YORK (WHERE THE JNA DECISION IS NOW OVER TEN YEARS OLD) AND IN NEW JERSEY (CONTIGUOUS TO NEW YORK BUT NOT RULED BY DECISIONS OF THE NEW YORK COURT OF APPEALS). THE LIST WAS LIMITED TO PERSONS PRACTICING IN THE REAL ESTATE OR LANDLORD-TENANT AREA; OTHERWISE THEY WERE RANDOMLY SELECTED, OF NO PARTICULAR AGE OR TYPE OF FIRM. EACH ATTORNEY WAS SENT A QUESTIONNAIRE ASKING FOR COMMENT ON A HYPOTHETICAL CASE WITH FACTS LIKE THE JNA CASE.\textsuperscript{62} WHILE FEW IN NUMBER,\textsuperscript{63} THE RE-

\textsuperscript{56} White, supra note 2, at 18-21.
\textsuperscript{57} E.g., U.C.C. § 2-311(1).
\textsuperscript{58} E.g., U.C.C. § 2-314.
\textsuperscript{61} See id. at 63.
\textsuperscript{62} Copies of the questionnaire and of all responses received are on file at the office of the Annual Survey of American Law.
sponses were interesting at least on an anecdotal level: Virtually all respondents agreed that as attorney for the landlord they would not advise their client to provide the tenant with any reminder of the need for a notice of renewal, even though letters were sent by the landlord to remind the tenant of other things, and even though the landlord was described in my statement of the hypothetical case as having some reason to believe that the tenant either did not know about or had forgotten the notice provision.\textsuperscript{64} When asked whether this advice would in their opinion be inconsistent with what either their hypothetical landlord client

\textsuperscript{63} Approximately a 10\% return on some 200 questionnaires sent to attorneys in New York and New Jersey (slightly more from New York than from New Jersey). Professor Warren is surely right in asserting that we don’t do empirical work in part because we don’t know how to do it. Next time around I will enlist the help of some knowledgeable colleague, at the Law School or elsewhere.

\textsuperscript{64} Of the eighteen attorneys who responded to my questionnaire, only three indicated they would advise their landlord client to send a reminder to the tenant in advance of the date by which the renewal option must be renewed. The most specific of the three was a Brooklyn practitioner with a very active real estate practice (representing both landlords and tenants) who asserted that he would advise the landlord to give notice by certified mail (return receipt requested) at least six months prior to the expiration date; this action, he stated, would reflect “good business principles” and also would provide proof later if litigation were threatened. (One of those who said he would give notice indicated the advice might be different if the tenant had been a problem tenant, and the landlord just wanted to terminate the relationship.) The other respondents indicated they would “let sleeping dogs lie” by doing nothing to alert the tenant to the need for a renewal notice. Some added that they would advise the landlord not to discuss any renovations that the tenant might be considering, but to have only routine discussions of ordinary matters. If the deadline passed with no notice from the tenant, most indicated they would advise the landlord to wait some period of time before giving notice that the tenant was expected to vacate at the end of the term; the suggested delay ranged from ten days to the expiration of the term. Many indicated they would advise their client to relet the property as soon as possible, so as to establish a change of position which would make relief against the tenant’s delay unlikely. A few made a point of mentioning the need to avoid any particular actions that might lead to a finding of waiver or estoppel, such as the acceptance of rent for a renewal period.

At a fall 1988 meeting of the New York area Contracts teachers, I discussed briefly my interest in the \textit{JNA} case, and invited any of my colleagues who were interested to fill out my lawyers’ questionnaire. Three who were present later accepted that invitation: Joseph Perillo (of Fordham) concurred generally with the no-notice/prompt-reletting position of most of the respondents; Margaret Kniffin (of St. John’s) advocated sending a reminder notice to the tenant, on the grounds of both fairness and waiver-avoidance; and Deborah Post (of Touro) wrote a long and thoughtful letter exploring in depth both the lawyering problem and the general question of deriving norms for legal dispute-resolution from custom and usage.
and its peers or the hypothetical tenant and its peers would regard as "reasonable," "fair," or "honorable" conduct, most answered that it would not.\textsuperscript{65} Among a number of possible problems with this survey, one may be that my questions were addressed to the wrong group—to attorneys, rather than to their clients. Perhaps it is unrealistic to expect practicing attorneys to admit that they would knowingly advise their clients to behave unfairly or dishonorably, even if they thought that would be the case in fact.\textsuperscript{66} In any event, it seems that to the extent one can distinguish between the business community and the legal community, Llewellyn's "immanent" rules for the legal regulation of business activity should probably be sought among the people by whom business is actually conducted, rather than those whose primary task it is to worry about the effect of legal rules on business conduct.

You may at this point share my conclusion that legal realism as conceived by Llewellyn and applied by the Uniform Commercial Code provides a number of helpful insights but no definitive answer to Chelsea's dispute with JNA.\textsuperscript{67} Even assuming that evi-

\textsuperscript{65} Some of the respondents noted that they were assuming "sophisticated business people" on both sides, and that "market forces" would govern behavior here. On the other hand, some indicated that the standard for behavior might vary with the size of the enterprise; failure to give the tenant warning might be more acceptable for a landlord which was a "small guy." One or two suggested that the notion of business honor had little place where commercial real estate interests were concerned, and that the tenant in such a case might consider the landlord's action as "sleazy." One responded with disarming candor:

I do not think any two members of the business community have the exact same standards. Some might feel obligated to remind the tenant, but I feel my own obligation is to my client, not the tenant. I may be a bit prejudiced, as early in my career I represented my parents-in-law, who were landlords in Brooklyn.

\textsuperscript{66} And I don't mean here to imply that any of my respondents did. They may have felt some difficulty in separating the two issues, however, as suggested by the following response:

My answers are all based on the fact that I am an advocate . . . . If I felt I could not take the position I have set forth I should not be representing [the landlord]. Aside from the Code of Ethics requirement that I owe total loyalty to my client's best interest, it is my view that the client has a sound legal basis for so acting and deserves proper legal representation for that view.

\textsuperscript{67} Beyond the obvious fact that Article Two of the U.C.C. does not apply to a landlord-tenant case, there appears to be no provision in the Code which even "by analogy" would resolve this case. A few sections might be noted here: § 2-309(3) calls for "reasonable notification" whenever a contract is to be terminated by one party "except on the happening of an agreed event." Here the termination (even if regarded as termination "by one party") was to be in the event of failure to give timely notice of renewal, which would presumably be
dence of commercial practice would be regarded if available as both admissible and material, it is not available on anything more than a scattershot basis. U.C.C. realism has more in its toolkit than “trade usage” and “commercial reasonableness,” however. Various provisions of the U.C.C. direct the court’s attention to the parties’ dealings with each other, past and present, and to the general obligation of “good faith.” Perhaps the JNA-Chelsea dispute should be viewed not just as one of a potentially large number of similar cases in the commercial community, but with an eye toward its own particular facts, and specifically in light of the relationship between this landlord and this tenant—JNA and Chelsea. Without denigrating the contribution of Llewellyn and his collaborators to the burgeoning attention being given in modern law to the notions of “good faith” and “fair dealing,” it seems appropriate here to move to the possibility that the JNA-Chelsea dispute should be viewed as a “relational” one. To what extent does the history of the relationship between JNA and Chelsea bear on the way their dispute should be decided?

III
GOOD FAITH AND COOPERATION IN A CONTRACTUAL RELATIONSHIP

Suppose that, as Professor Linzer has urged, you approach your judging duties in the JNA-Chelsea dispute not merely with an eye toward the formal expression of the parties’ agreement, as found in the written documents—the original lease (including the rider), the lease extension and the assignment of lease, and perhaps the letters back and forth—but also by taking into account, as best you can, the relationship (both commercial and personal) that appears to have existed among the various parties. The parties’ interaction over time, Linzer argues, may have created legitimate expectations of behavior on either side; your examination of that relationship may also lead you to conclude that one side or

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68. E.g., U.C.C. § 1-205(2), (5), (6).
69. E.g., U.C.C. §§ 1-205(3), (4), 2-208.
70. E.g., U.C.C. §§ 1-203, 2-103(1)(b).
the other has fallen below a standard of reasonable or fair conduct which in the circumstances should have been observed.

As Professor Linzer’s paper demonstrates, one may view relationship and context as a source of law beyond any notion of the parties’ “consent”\(^71\)—except as one finds a species of consent in the general “social contract”\(^72\) we all can be deemed to have entered. Or, as Professor Burton has suggested, one may view it merely as another clue to what the parties to the dispute may in some sense have apparently “agreed to.”\(^73\) For the purpose of deciding the JNA case, that distinction seems less important, since the possible imposition of liability on parties not bound at all by contract ties\(^74\) is not at stake here. This case involves a simple landlord-tenant dispute, a situation in which both “neoclassicists” and “relationalists” alike might well regard the contacts between the parties as having bearing on their respective rights and duties. Preliminarily, it might be noted that despite the tendency of Professor Linzer\(^75\) and others\(^76\) to proclaim the death of the parol evidence rule, that rule did play a part in the litigation of this case, and to some extent prevented the tenant’s attorney from introducing evidence of the way in which the parties dealt with each other.\(^77\) So you as an appellate judge, confined to the record on appeal, may not know everything there is to know about the relationship between JNA and Chelsea over the years.\(^78\)

From what evidence does appear in the record, it seems that the contacts between the principals of JNA and those of Chelsea were for the most part unremarkable. Nothing in the record suggests that Chelsea was a problem tenant for JNA, late in its rental

\(^74\) E.g., Linzer, supra note 71, at 180-89.
\(^75\) Id. at 167-68.
\(^77\) Record, supra note 9, at 67-68.
\(^78\) Both the U.C.C. (§ 2-202(a)) and the Restatement (Second) of Contracts (§§ 202(5) and 212 comment b) seem hospitable to the notion that a written agreement should be interpreted and possibly supplemented by evidence of the parties’ course of performance (of the agreement in question) and course of dealing (performance of prior similar agreements). Of course, the former should be freely provable without regard to the parol evidence rule, as it involves conduct subsequent to the adoption of the writing.
payments or otherwise undesirable as a tenant. On the other hand, it does not appear that contacts between the principals of JNA and Chelsea were particularly friendly; at most, there is some indication that Arena sometimes ate dinner at the restaurant, and that the Morfogens may have occasionally provided him with lobster at bargain prices. Certainly there is nothing to suggest the sort of close personal relationship that might lead a court to find a sort of "quasi-fiduciary" relationship, in which one party could rationally have expected the other to look out for the former's interests at the expense of its own. As JNA's attorney characterized it, they were "business friends." There was apparently no relationship at all between the principals of JNA and Chelsea before the latter entered into its dealings with Foro that culminated in the purchase of Foro's leasehold, and no business relation between them after that time other than landlord and tenant. There are, however, three factors in the situation that might affect your view on the question whether JNA's obligation to Chelsea had effectively been terminated. These are: a general increase in property values in the area; a possibility that the landlord knew (or had reason to know) that Chelsea was ignorant of the need for notice by June 30; and the assertion by Chelsea that Arena, JNA's principal, was aware that Chelsea intended to extend its lease and had already relied on that extension by improving the premises.

The first of these factors, an increase in property values,

79. Were that the case, you might be inclined to feel that JNA was justified in taking advantage of a "technicality" to rid itself of an ongoing problem, particularly in light of the very long renewal term contemplated by the extension agreement. Thus, one of the few respondents to my questionnaire who generally would have advised the landlord to remind the tenant of the notice requirement also indicated that his advice on that point might be different if the landlord merely wished to rid itself of a problem tenant.

80. Record, supra note 9, at 50, 135, 172-173.


82. Samuel Shapiro, an N.Y.U. Law graduate of the class of 1922 practicing law in downtown Manhattan, was the attorney for JNA throughout its litigation with Chelsea. Like his counterpart, Vincent Nicolosi (see note 52, supra), Mr. Shapiro gave generously of his time to discuss the JNA case with me and my research assistant, and his information and point of view were very helpful to me in preparing this discussion of the case. If Messrs. Shapiro and Nicolosi are any indication, a rich source of empirical data is waiting for all of us academics just down the street, in the law offices of our cities and towns.

83. By contrast, it appears that Arena did have other business relationships with Sylvester Vascellaro, one of the principals of Foro. Record, supra note 9, at 93.
seems to call for attention from a law and economics point of view, but it also can be relevant from the relational perspective as well. Long-term contracts which bind the parties to a price level or a price formula that turns out to be surprisingly inadequate or burdensome have often been regarded as good candidates for adjustment in light of the principles of good faith and fair dealing, given the difficulty the parties in such cases face in accurately predicting the future circumstances which might affect price levels of the commodities in which they are dealing. According to JNA’s attorney, it was a substantial increase in property values in the Howard Beach area that motivated JNA to assert that Chelsea had lost its right to renew at the rental rates agreed on earlier. You might as a judge be inclined to give this factor substantial weight in considering whether JNA should have been entitled immediately to declare Chelsea’s lease at an end.

On the other hand, you may also recall that when the lease extension agreement was signed in the spring of 1968, Foro’s lease had been running for four years, since the start of 1964. For its agreement to the extension of Foro’s renewal term from ten years to twenty-four, JNA exacted in return an agreement that the rental for that longer renewal term be increased periodically, from $12,000 to, eventually, $16,000. Granted, this seems a pretty small-potatoes increase for a twenty-four-year leasehold, but it shows that in the interim since 1964 JNA had at least been alerted to the likelihood that its property would increase in value over the next several years. To use Professor Macneil’s term, JNA had at least attempted to “presentiate” with respect to the renewal price term (something it had neglected to do in the original lease). Of course, you may believe that by 1968 JNA should have

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84. See notes 101-23 infra and accompanying text.
86. This is substantiated by the fact that the parties eventually settled their dispute by negotiating a new long-term lease at an increased rental, according to their attorneys. Since there is no indication that Chelsea and JNA had a bad relationship, presumably JNA’s adamant refusal to accept Chelsea’s renewal reflected the fact that the rental originally provided in the extension agreement had come to be a bargain for the tenant. This would also account, at least in part, for Chelsea’s determination to stay; if other comparable premises had been available in the area at lower rentals, Chelsea might not have attempted to exercise its option at all, or might have tried to negotiate a lower rental as the price of its staying on.
87. According to Arena’s testimony at the trial, at the time the original lease was executed, the building was only two years old, having been built by JNA in 1962. Record, supra note 9, at 44.
been able to anticipate that over the next thirty years\textsuperscript{88} there would be either a general increase in property values or specific appreciation in the Howard Beach area well beyond the level of increases provided for in the extension agreement, and for that reason you might be less sympathetic to JNA's claim of hardship.\textsuperscript{89} On the other hand, the parties did also attempt to presentiate their agreement with respect to the timing and notice of renewal (well, at least JNA did). In light of the specificity of those provisions, you might be persuaded that even if an unanticipated increase in property values would not have justified a refusal by JNA to accept a \textit{timely} notice of renewal from Chelsea,\textsuperscript{90} such an increase could nevertheless be sufficient justification—if justification be needed—for JNA's taking advantage of the fact that timely notice of renewal from Chelsea was \textit{not} received.

A second troubling factor in the JNA dispute is the indication that the principals of Chelsea were unaware of the existence or terms of the notice provision in the underlying lease, and that Arena, acting for JNA, may have known this. Here, unfortunately, the facts are equivocal. Chelsea's attorney at the time of the restaurant purchase asserted that he repeatedly asked Arena for a copy of the lease rider, but never got one;\textsuperscript{91} if this is true, then Arena not only knew of Chelsea's lack of knowledge, he was in a real sense responsible for it, a factor which could impel you to excuse the untimeliness of Chelsea's notice of renewal. On the other hand, there was some evidence that at least Chelsea's earlier attorney at one time had a copy of the lease rider, in which case Arena was not the cause of the Morfogens' ignorance (and perhaps they were not even truly ignorant, merely forgetful).\textsuperscript{92} Indeed, Chelsea's attorney in the case appeared in his discussion with us freely to concede that if Chelsea's earlier attorney had re-

\textsuperscript{88} Six years to go on the original lease, plus a 24-year renewal term.

\textsuperscript{89} Chelsea's attorney advised us that any lease drawn today for such commercial property would have elaborate escalation clauses for future rentals, tying increases to some measurement of inflation such as the cost of living index.

\textsuperscript{90} Even though not an \textit{excused} breach, such a refusal could have amounted to an "efficient" breach. See notes 110-12 infra and accompanying text.

\textsuperscript{91} Record, supra note 9, at 69-72.

\textsuperscript{92} Because no one appears to have contended otherwise, I am assuming here and elsewhere that the principals of Chelsea were truthful when they denied having actual present knowledge of the renewal provision at the time notice was due. Even Chief Judge Breitel conceded there was no indication that the Morfogens had been consciously "speculating" at JNA's expense, and such conduct for them would appear to have been foolhardy, given the strong chance that a tardy renewal would be ineffective.
ceived a copy of the lease rider, Chelsea could from that point on be regarded as having constructive notice of all of the rider’s provisions, including the requirement of timely notice of renewal. The trial court’s opinion on this point is, unfortunately, less than clear, but it does seem to accept the landlord’s position that the tenant’s attorney had probably received a copy of the lease, including its rider, at the time Chelsea acquired the restaurant or shortly thereafter.

The third, and perhaps most troubling, of the three factors mentioned above as peculiar to this case is the possibility that at the time when the renewal notice was coming due, the landlord failed to call the notice requirement to the tenant’s attention, even though the landlord knew that the tenant was making valuable improvements in anticipation of a continued tenancy. As a judge, you may question whether it would be appropriate to impose on landlords generally a duty to remind tenants in advance of such notice provisions, absent any statute so providing.93 Certainly the attorneys who responded to my questionnaire were virtually unanimous in asserting that there is not—and should not be—any such duty, even though a landlord might (and in JNA’s case, did) have occasion to remind the tenant of other things that were to the landlord’s advantage, such as the tenant’s obligation to pay taxes or insurance.94 But here it seems important to stress the particular context of this relationship, rather than just the obligations of landlords and tenants in the abstract. There was testimony that the landlord’s president, Arena, was in fact a “frequent” visitor to the restaurant premises during the summer of 1973,95 that he observed the tenants making improvements to the premises,96 and even that he stated to one of the Morfogen

93. I am indebted to Richard R. Kahn, Esq., who replied to my questionnaire with a long and thoughtful letter, for reminding me that in New York a statute does require the landlord to give a reminder notice to the tenant 15-30 days before the expiration of the initial term whenever the lease provides for an automatic renewal. N.Y. Gen. Oblig. L. § 5-905. That sort of lease provision would of course be the equivalent for the tenant of an option not to renew, exercisable by notice; the New York state legislature apparently views an unintended renewal as a greater hardship than an unintended failure to renew. The statute does not by its terms differentiate between commercial and residential tenancies.

94. As one put it: “Avoid the tenant, say nothing, write nothing, do nothing unusual, just shut up and lay low.”

95. Record, supra note 9, at 135.

96. These were never specifically described, unfortunately, but they were apparently the only substantial improvements since the ones made originally, at the time of the restaurant’s opening. Id.
brothers during that time, in discussing the possibility that the property might be sold to another, "You have a thirty-year lease, there is nothing to be concerned about, I'll be your landlord for many years to come." 97 One does not have to be an avant-garde legal theorist to suggest that such conduct could be regarded as giving rise to either a "waiver" of timely notice or an "estoppel" to assert that a lack of timely notice terminates the right to renew, particularly if—but not, I think, only if—the landlord had specific reason to think that the tenant did not know about, or had forgotten, the renewal notice provision. 98

Enough has been said at this point to indicate that relational considerations could well have an influence on your judicial reaction to the JNA-Chelsea dispute. True, their relation as landlord and tenant does not appear to have entailed the kind of long-term cooperative endeavor that requires for its success a myriad of adjustments, more or less freely agreed to in the expectation of further reciprocal adjustments in the future. And neither these parties nor Chelsea's predecessor Foro could have had any specific expectations about the manner in which a renewal option could be exercised, based on a course of dealing or course of performance, because no earlier renewal had occurred. Still, the JNA-Chelsea relationship did at least involve repeated occasions for contact between the parties in which expectations of future behavior, not stemming from their written agreements alone, could have been generated. Professor Robert Summers has observed that "good faith" can perhaps best be characterized as the absence of "bad faith," 99 and Professor Burton has suggested that bad faith may consist of conduct which, even if expressly permitted by the contract at issue, exploits a technicality to recapture for one party an opportunity which it had forgone by entering

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97. Testimony of John Morfogen, Record, supra note 9, at 156. Arena denied the conversation. Id. at 167. However, Arena's testimony on at least one other point (his non-attendance at the closing of the sale of the restaurant from Foro to Chelsea) was contradicted by several other witnesses, and as a result a trier of fact might have been inclined to doubt his credibility. Id. at 48-49, 79, 105-06, 128-29.

98. In all the circumstances—the landlord's knowledge of an apparent intention on the tenant's part to remain and of some additional investment by the tenant in the premises, coupled with a substantial increase in commercial rental values—it could be argued that the tenant's failure to give timely notice of renewal would ipso facto give the landlord reason to believe that the tenant had forgotten or was unaware of the notice provision.

THEORETICAL APPROACHES

into the contract at issue.\textsuperscript{100} If you conclude that JNA's agreement to the lease extension in 1968 effectively precluded it for thirty years from realizing on any post-1968 increase in rental values beyond the levels of increase provided in that agreement, then as a judge you may hold that JNA's failure to make any inquiry as to Chelsea's intention to renew was a bad faith attempt to exploit a technicality.

You may, that is, unless some other perspective on the case pulls you more strongly in the other direction.

IV
ECONOMIC ANALYSIS

In attempting to assess the relation between JNA and Chelsea, in order to determine what effect that might have on your decision in their case, we have necessarily stressed the individual facts of their particular case, rather than just the relation between landlords and tenants in general. If we now shift our perspective to that of economic analysis, we necessarily begin by turning our attention from the specific back to the general. To the extent that commercial landlords and their tenants can be regarded simply as buyers and sellers of a particular commodity—commercial rental space—on a free market,\textsuperscript{101} what might economic analysis tell you as a judge about either what your decision should be, or what the effects of your decision may be?

Justice Pollock, both in his earlier opinions written for the New Jersey Supreme Court\textsuperscript{102} and in the concurring opinion appended to these proceedings,\textsuperscript{103} has attempted to use the tools of

\textsuperscript{100} Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 Harv. L. Rev. 369, 387-92 (1980).

\textsuperscript{101} As a judge in New York State, you would surely be aware that residential leases in New York City have for many years been regulated by a complicated system of rent controls, while commercial leasing is free of any such restrictions (although as of this writing an active campaign is underway to institute at least some limited control over the commercial landlord's presently unlimited power to raise rent levels at the expiration of the lease). Of course, this knowledge could cut either way: you might regard the legislature's failure to enact commercial rent control as indicative of a public policy in favor of as unrestricted a commercial rental market as possible; or, you might feel it not inappropriate to create judicially some minimal restrictions on landlord power in a system which leaves that power largely beyond control.


economic analysis to sharpen his own and his court’s perception of economic factors as they might affect decision-making. He has, however, candidly (and perhaps too modestly) conceded that his own mastery of economic analysis is incomplete, and also (perhaps with less modesty but greater accuracy) suggested that the general level of economic sophistication among the present generation of judges is almost surely less than his own, and probably in fact rather low. Assume for the moment, therefore, that—like me—you have no training in or apparent natural bent toward the methods of economic analysis, but have read and heard enough to have a sense of some of the main themes sounded by the writers of this school. How might you apply them to the JNA-Chelsea dispute?

Without necessarily taking the position that “efficiency” is the only or even a principal goal of legal decision-making, you might start by attempting to assess the degree to which the various possible decisions in the *JNA* case would be “efficient” from an economic point of view. One way in which some writers have approached this question is to consider what legal rules appear to advance the goal of maximizing total social wealth by directing resources at the lowest cost to their most highly-valued uses. Another is to consider what legal rule would in the long run reduce transaction costs for parties in future cases, by creating the “default” rule most likely to be preferred, thus reducing *ex ante* bargaining costs. Or, you might consider what decision would be likely to reduce *ex post* transaction costs for landlords and tenants in similar disputes, either by making post-dispute *ex ante* bargaining unnecessary or undesirable, or by facilitating it in some way. You might even adopt approaches more common to the analysis of tort law, focusing on the question of which party is the better risk-avoider, or loss-absorber. And in making this analysis, you will be relatively indifferent to the idiosyncratic preferences of JNA and Chelsea, if any, and more attuned to those which it can be assumed will motivate rational actors in similar future cases. Nevertheless, it may help at the outset to explore

104. There are obviously at least two; as we shall see, there might be intermediate ones as well.

105. Economic analysts often use the term “post-breach” bargaining, but Chelsea’s failure to give notice is merely a failure of a condition, not in any legal sense a “breach.”

106. Except perhaps as these may indicate the likely prevalence of similar preferences on the part of other tenants.
more fully the economic and other motivations which may have been at work in this dispute.

From the record, it appears that the tenant Chelsea had by 1973 established a profitable restaurant at the Howard Beach location, one which it wished to continue. You may assume that it would at that point have been possible for Chelsea to find comparable space in some other building close enough so that at least some of the "good will" attributable to location would be retained, but that the high costs of moving (including both the costs of physical removal and the loss of profits occasioned by an interruption of business) plus uncertainty about the transferability of its good will made Chelsea strongly prefer to stay at its present location on the JNA premises. This could have been the case even if rental levels in the area had not risen to levels higher than those provided for in its lease-renewal agreement with JNA; since apparently they had, Chelsea's decision to invest resources in an attempt to stay on at its present location is easily seen as the act of one motivated by rational self-interest.107

For its part, the landlord JNA appears to have been motivated entirely by a desire to realize from the property a level of rental income higher than that provided by the lease extension agreement.108 To analyze more completely the economic factors at work, however, it appears relevant to note that landlords in similar cases (i.e., landlords resisting lease renewal) might well be motivated by a variety of concerns, and that these various possibilities should be taken into account in any economic analysis of the case.109 At least three distinguishable cases may be suggested: (1) The landlord may believe that the property could be sold for an advantageous price if it were unencumbered by this tenancy; (2) the landlord may be willing to continue to rent to a tenant of this type, perhaps even on comparable terms, but may wish to get rid of this particular tenant; (3) the landlord may be willing to continue to rent to this tenant, but only at a higher rental (as was apparently true in JNA's case). How might each of

107. This is not to deny the possibility that other factors might have been motivating the Morfogens, merely to assert that it is not necessary to assume any noneconomic factors to explain their conduct.

108. At least, this was apparently the basis on which a settlement of the case was eventually reached.

109. The analysis at this point will continue to assume that the tenant is motivated by the concerns which apparently did motivate Chelsea in fact, although of course a tenant's resistance to relocating might vary in the three cases examined in the text which follows, for economic or other reasons.
these three situations be viewed from an economic analysis point of view?

The first case might involve a potential sale to another landlord who preferred for some reason to start fresh with new tenants (that reason could simply be the rise in rental values to levels above those provided in the existing leases), but the opportunity for an advantageous sale may be particularly likely to arise when the building already on the land is less valuable than a new one which could be built on that land (possibly a larger structure, utilizing adjoining land as well). Such a new building would seem a fortiori to be a more highly-valued use than the one to which the land is presently being put, and a legal rule which facilitates the application of resources to their most highly valued uses is thought by some to be both efficient and desirable. Indeed, these circumstances appear to resemble those which in the eyes of some economic analysts would make even a breach by the landlord a potentially efficient event, assuming complete compensation by the breaching party of all the loss suffered by the other as a result of that breach. Whether or not you would accept the efficient-breach analogy here, it does appear that permitting the landlord to take advantage of the tenant’s fortuitous neglect in failing to give timely notice of renewal would indeed be efficient in the sense that it would facilitate the landlord’s sale of the property and its eventual more profitable utilization.

The above analysis may be incomplete, however, if it rests on an assumption that the landlord would not be able to sell the property if the tenant’s right to renew were to be upheld. As many economists have pointed out, parties free to do so will bargain their way to an economically superior outcome for both no matter what the applicable legal rules provide. If the property in

110. The case suggested in the text at this point raises the interesting question whether the advocates of “efficient breach” would take the position that a landlord in these circumstances should be able to evict (of course with appropriate compensation) a non-defaulting tenant whose term has not yet expired, merely because this would be a pareto-superior move. As we have been reminded by the speakers at this Conference, judges ranging all the way from Richard Posner to Rose Bird have endorsed the principle of efficient breach; one suspects, however, that even those jurists who have swallowed the efficient breach camel would strain at this particular gnat, if only because the tenant’s interest would at this point be protected by a “property” rule rather than a mere “liability” rule. See generally Kronman, Specific Performance, 45 U. Chi. L. Rev. 351 (1978); compare R. Posner, Economic Analysis of Law 106-107 (3d ed. 1986)(efficient breach of contract) with Macneil, Efficient Breach of Contract: Circles in the Sky, 68 Va. L. Rev. 947, 963 (1982)(efficient theft).
question has become more valuable for some other use, then presumably there is a gain to be realized from its sale, all of which will be retained by the landlord if renewal is denied. If the tenant’s right to renew is upheld, however, then—assuming still that each actor is motivated by rational self-interest, and not by irrational or idiosyncratic, noneconomic factors—the landlord and the tenant will strike a deal, in which that gain is divided between them in exchange for the tenant’s surrender of its lease. One drawback of that outcome, however, is that there will be transaction costs involved in making that deal, costs which could be avoided if the landlord has a simple, clear right to declare the tenancy at an end as soon as the renewal date has passed.111 So to the extent that you value efficiency as a goal, you may be inclined to uphold the landlord’s right to terminate in the absence of timely notice of renewal.112

The second example posed above, in which the landlord simply wants to get rid of this particular tenant, seems again to be a relatively strong case for the landlord when viewed from the economic perspective, if efficiency is a goal. Continuing our assumption that both parties are motivated by rational self-interest, why would a landlord have this particular preference? Perhaps this tenant is constantly late with its rental payments; perhaps it is a chronic complainer about things that need repairing or replacing; perhaps it has bad relations with the other tenants; perhaps there is some reason why some other tenant’s occupation of the premises would be more complementary to the range of tenancies in the building (if it is a shopping center, for instance). Some of these reasons might amount to grounds for eviction even of a ten-

111. It might be noted here that the landlord’s ability to make that deal on relatively advantageous terms may be enhanced by its possession of information not shared by the tenant. Presumably existing rules of law would give the tenant a remedy if the landlord should actually lie in the course of such buy out negotiations; assuming that it refrains from active misrepresentation, should the landlord have any obligation to share that information with the tenant? This is another issue which economic analysts have considered. See Kronman, Mistake, Disclosure, Information, and the Law of Contracts, 7 J. Legal Stud. 1 (1978).

112. It should also be noted that the argument for toleration or even encouragement of the “efficient breach,” correctly applied, depends on an assumption that the breaching party can and will fully compensate the non-breaching party for the injury inflicted on the latter by the former’s cessation of performance. In our supposed case, however, the landlord if upheld in its power to terminate is not “in breach” at all, and therefore has no obligation to compensate the tenant for the effects of termination. These could include—and in the actual case, probably would have included—the tenant’s loss of ability to recoup amounts invested in acquiring and renovating the restaurant.
ant whose lease had *not* expired (although convincing a court of this might be costly and time-consuming); denying the tenant's right to renew thus offers the landlord a substantial cost saving in terminating the tenancy, and might even be preferred by the other tenants as well. Professor Richard Epstein has defended the terminable-at-will employment contract on similar efficiency grounds,\(^{113}\) a defense with which Professor Linzer and Justice Pollock have both taken issue.\(^{114}\) One might well agree with them on that score, however, and still be willing to accept the proposition that in this commercial situation, where the parties are likely to be on a more even bargaining plane, the cost-free ending of a problem tenancy is attractive from the efficiency point of view—particularly if it occurs at a point agreed to by the parties in advance as a potential time of termination, rather than at some arbitrarily picked time of the landlord's choice.\(^{115}\)

Both of the above examples are cases which might well arise in the real world; neither of them, however, matches the actual facts of the JNA-Chelsea dispute. So far as one can tell from the record or from discussions with the attorneys involved, JNA had no wish to sell the building or to convert it to another use; nor did it have any particular complaints about Chelsea as a tenant. It merely wanted to receive a higher rental than provided for in the lease extension agreement. This is the third situation imagined above. In this variation of the case, a decision in the landlord's favor serves neither to facilitate some fundamentally different utilization of the property in question nor to save the landlord (and society) the expense of effecting what might well be a deserved termination of the tenancy. Instead, your court's decision will merely affect the distribution of wealth as between the landlord and the tenant: the tenant either will be forced to agree to a rent increase, or it won't. How might you evaluate those alternatives in economic terms?

One tactic frequently raised by economic analysts of contract law is to ask what rule the parties in such a case would themselves


\(^{115}\) This latter point is less pertinent as regards Chelsea, which from the beginning sought to acquire the right to a longer leasehold than Foro's original one (and apparently believed it had done so).
prefer, *ex ante*—before the dispute arises, when they are bargain-
ing out their agreement. On the one hand, they might choose to add a tough "time-is-of-the-essence" clause to the renewal op-
tion, expressing plainly the notion that a forgetful tenant will lose immediately and forever all right to renew if it fails to give a timely notice of renewal; on the other, a "grace period" clause might be selected, expressly permitting the tardy tenant to exer-
cise its power of renewal provided it does so within some short stated period after its receipt of a reminder from the landlord that a timely notice of renewal was not given. Presumably, each party would initially prefer the version favorable to it. How would they bargain this out?

Two different settings of this bargaining process might be supposed. In the first, the law is unclear, and the parties them-
selves cannot know what rule will be employed unless they choose one or the other. In the second, the law is clear one way or the other, and the party wanting a different rule must pay for it in some way. In either case, why would one side or the other be willing to bargain actively for the clause of its choice? After all, on the face of it, the question is merely who has to set up the re-
mind-er system, the "tickler" on a file, plus possibly the cost of a business letter or two. Why should either side consider the shifting of this burden to be worth anything more than a nominal sum?

To the landlord, one cost of the tenant's version is a shorter time period within which to find a new tenant, if renewal is not chosen. But that cost could be eliminated simply by providing a slightly earlier initial "due date" for the tenant's notice of re-
newal—a trade-off to which the tenant might readily agree. A sec-
ond cost to the landlord could be the asserted loss of a firm basis on which to enter into commitments to a new tenant, but this again could be met by a procedure which gives the tenant a short opportunity to respond to a reminder notice. The principal cost

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116. In the first situation, bargaining on this point will not even occur un-
less the parties focus on the fact that the law in its present state gives no sure answer; in the second, one party must be aware that the law presently gives an answer it does not prefer, and care enough to raise the point.

117. It might be noted in passing that this observation, if accurate, means that not much useful information can be gained by our asking which party is the better (more efficient or effective) risk-avoider. Either party could set up a re-
minder system that would probably be effective, and in either case the expense would probably be very small. Even a landlord with a very large number of tenants could computerize a reminder system, just as today it presumably com-
puterizes everything else of this sort.
of the lenient provision, from the landlord's point of view, may simply be that it gives up the chance—probably slim, but perhaps real nevertheless—that a negligent tenant will forget to renew, in a situation where the landlord can then exact a rent increase as the price of extension. 118 This may strike the landlord as a substantive difference, which would indeed be worth paying for; the ability to take a tough stand could serve as a slight hedge against its failure to accurately foresee the state of the rental market at the time of renewal. On the other hand, from the tenant's point of view, the real cost of the landlord's version may seem trivial, even if viewed as including the potential risk of losing an advantageous rental rate through negligence—because a tenant conscious of the latter risk can avoid it merely by setting up a reminder system of its own. 119 Thus in most cases the landlord would probably be willing to pay more for its version than the tenant would for the opposite one, and so a bargain adopting the landlord's clause might be assumed.

Again, however, the analysis seems incomplete. The problem for your court, now that the issue has been raised, is how to evaluate the effects of the various possible decisions—one firmly favoring the landlord, one equally strongly favoring the tenant, or possibly one leaving the law in a somewhat wishy-washy, "it all depends" state. How would the ex ante bargaining of future JNAs and Chelseas be conducted under those three regimes?

Viewed from this perspective, the important question may not be how much either side would be prepared to pay for its own version of the agreement—a question to which in either case the answer might be, "not very much"—but rather, what is the effect of requiring one side or the other to bargain for its own version? Here the difference may be more significant. On the one hand, the tenant would not be inclined to bargain for a reminder notice unless it foresaw the possibility of its own negligence, and its raising of the issue would do no more than signal the possibility that such negligence might occur. Furthermore, the tenant might foresee the possibility of such negligence, and still elect not to raise the point, being satisfied that its own internal procedures could protect against that risk. On the other hand, for the landlord to raise the issue, it would have to foresee the likelihood of

118. Or, in the other two versions of the case assumed above, get rid of the tenant entirely.

119. Of course, a risk-averse tenant might prefer to have the back-up protection of a notice from the landlord, even if it did propose to set up its own internal reminder system.
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wanting to take a tough stand where renewal was concerned: no matter how slight the lateness, or how urgent the tenant's need to renew, the landlord might want the right to stand firm. One of the topics often stressed by economic analysts is the communication of information between the parties and the way in which legal rules discourage or encourage such communication. In our case, forcing the tenant to actively bargain for a lenient clause only communicates the information that it might be a bit careless in the handling of its own affairs: this is hardly a surprising bit of news, even in the world of rational actors. On the other hand, forcing the landlord actively to bargain for a tough clause signals information that otherwise might not be clearly apprehended by the tenant (particularly at the ex ante bargaining stage, when all is more apt to be sweetness and light): your landlord-to-be thinks it important to have the right to be as tough as it chooses, whether that's hard on you or not. 120 This sort of information about a potential landlord may in some circles come as no surprise, but at least in some cases it might serve as a salutary correction of an otherwise dangerously inaccurate perception. 121

Having attempted to envision ex ante bargaining about this issue, you will naturally want to consider the complementary question: What about ex post bargaining? What sorts of transaction costs will each regime engender? Suppose the tenant has indeed failed to give timely notice, but nevertheless asserts a claim to renewal when the landlord raises the point. What sort of bargaining—if any—is likely to ensue?

In a world governed generally by a hard-edged "time-is-of-the-essence" rule, the answer in many cases could be little or none. Unless the tenant can bring itself within some well-established exception to that rule, 122 one fundamental issue—the ten-

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121. A few of the respondents to my questionnaire indicated that they had on occasion bargained on behalf of a tenant for a reminder-notice provision, typically where the tenant was in a strong bargaining position. One amplified his response as follows:

In our form leases representing national chain tenants, we have a provision which imposes on the landlord the obligation of sending to a tenant a notice in the event the tenant has failed to timely exercise the renewal option, thereby affording the tenant additional time to exercise that renewal option. Any time a landlord negotiates too vehemently on that point, I draw my own obvious inferences about the level of fairness and equity that one can expect from this landlord in the future.

122. E.g., pre-JNA case-law excusing lateness occasioned by the post of-
ant's entitlement to a renewal term—will already have been resolved in the landlord's favor. If the landlord simply wants the tenant out in order to sell the property, there will be no further bargaining at all. In the second case assumed above, where the landlord wants to get rid of this tenant, there may also be no ex post bargaining, unless the problems with the present tenant can be removed by bargaining out some additional or refined set of tenant obligations. It is only where the landlord merely wants a rent increase that ex post bargaining seems likely. And here—because the tenant has lost its right to renewal—the landlord can charge whatever the traffic will bear (plus, probably, some additional sum reflecting the tenant's desire to avoid renewal, possibly because of sunk costs of renovation).

Where the legal rule is a clear one of excuse for merely negligent lateness, ex post bargaining may be somewhat more likely (unless the landlord chooses simply to acquiesce in the renewal, which is of course possible). If the landlord's goal is to get rid of the present tenant—either to sell the property or to substitute another tenant—that goal may still be achieved, but only at some substantial cost (both in the costs of bargaining and the price ultimately paid to the tenant for surrender of its lease). If the landlord's goal is merely to raise the rent, however, no bargaining will take place, because this goal will not be realizable.123

Suppose the legal rule is not a hard-edged one either way, but a softer one: "each case will be decided on its own facts," "the court will weigh all equitable factors," "the court in its discretion may...", or the like. How will the ex post bargaining be affected? The uncertainty engendered by such a rule seems to guarantee that some ex post bargaining will take place, no matter what the landlord's reason for seeking to avoid renewal. Obviously this situation resembles the stronger pro-tenant regime in that at least the tenant will not be obviously out in the cold with nothing to bargain about; on the other hand, a tenant operating under this frankly indeterminate rule will also know that if a mutually satisfactory bargain is not struck, it risks a lawsuit which it stands a substantial chance of losing. This situation will require bargaining skill on both sides, and the outcome of that bargaining is perhaps

123. A possible exception could lie in cases where the landlord believed it could establish the sort of "speculating" delay envisioned by Chief Judge Breitel.
more likely to be affected by non-legal factors, such as the relative economic strength of each side, the skill of its bargainers, or the extent to which one side or the other needs a fast resolution of the matter. But that outcome will still be greatly influenced by each side’s perception of how the hypothetical law-suit might probably be decided, the odds of victory or defeat.

The above analyses are surely not exhaustive of the economic arguments which could be made; if you are at all sophisticated in economic analysis, you may have propounded a dozen others of your own. Does economic analysis bring you closer to a decision? For me, perhaps the most salient point to emerge from such considerations is this: The landlord seeking to terminate (or to assert the right to terminate) a tenant’s lease may have various economic goals. Any rule which is not a strong, time-is-of-the-essence type will in most cases require the landlord to engage in further bargaining with the tenant to achieve those goals; in many cases, however, they will still be attainable.

The basic issue thus can be restated. It is not, should the landlord be held to the renewal term of the lease? It is, rather, should the landlord have to buy its way out of that lease? In many of the cases assumed above, a change in circumstances—an increase in general property values in the area, the emergence of an attractive alternate use for the property, etc.—has created an unanticipated surplus. A strong pro-landlord rule leaves that surplus with the landlord; a balanced or strongly pro-tenant rule makes it likely that in some (perhaps many) cases the landlord will be forced to share this windfall with the tenant. Should the landlord in effect be forced to offer the tenant a share of this larger pie, in order to enjoy a slice of its own? For me, economic analysis sharpens perception of this distributional question, but does not answer it. Values other than purely economic ones seem inescapably to demand consideration as well.

V

CRITICAL ANALYSIS

Having persevered thus far, Your Honor may surely be pardoned for feeling slightly impatient. Perhaps conscious of some efficiency constraints of your own—how long can a busy court spend on one simple case?—your impulse might be to skip this last chapter in our series of theoretical explorations, consideration of the critical legal studies ("CLS") perspective, in the belief that it might not be helpful anyway. Professor Spann himself shield away from any attempt at describing a methodology for de-
ciding cases, and Judge Kaye declared her own inability to draw any useful lessons from Gerry's analysis. Even Professor Feinman has conceded that for all its vitality and variety, the CLS movement is less at home with construction than with deconstruction, more enthusiastic about "trashing" than about recycling. Is the very notion of CLS decision-making an oxymoron—a Mission Impossible that we should decide not to accept, so that in another fifteen seconds it can self-deconstruct?

Some in the world of legal education have apparently succumbed to that temptation; I suggest that at this point you resist it. In his addendum to these proceedings, Jay Feinman has given us a glimpse of that rara avis of the legal world, a CLS judge constructing a legal opinion. Taking inspiration from Gerry and Jay's example, perhaps you can come up with your own version of "A Day at the Court-House," turning sense into non-sense in order to create your own sense out of what may have been, after all, non-sense to begin with.

The first step, as Gerry has demonstrated, is to deconstruct existing doctrines and arguments drawn therefrom, in order to

124. I assume that most of its critics would concede that CLS exhibits at least one of those two characteristics, without necessarily agreeing which one.

125. I am surely not the first to observe that if CLS is to be characterized as "Marxist," the reference could as well be to Groucho as to Karl.


128. In expressing antagonism toward "formalism" in its various forms, Professor Spann sounds a note repeated throughout the CLS canon. Spann, supra note 3, at 226; Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976). In light of the dependence of the landlord's case on the letter of the documents (and particularly since the tenant denies even having seen the relevant one), it is tempting to skip the analysis and go right for the jugular here: Obviously a CLS judge will decide for the tenant in three seconds; next case. That temptation should also be resisted, if only for the reason that to a CLS theorist a quick answer can never be the right one—because then we are deprived of the fun of extended analysis. In the world of CLS, as in the world of Grantland Rice, it may not matter very much whether you win or lose, but it sure as hell matters how you play the game.
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demonstrate their essential indeterminacy, their inability to really constrain the decision-maker (at least the self-conscious one). You might assume that this task had been done already in our case; after all, I chose JNA for discussion in large part because existing doctrine appeared not to dictate a decision. But even JNA may have thus far appeared at least to pose a clear choice between two opposing results, each supported by a more or less coherent policy ground. On the one hand, Ladies and Gentlemen, we see the landlord, claiming only his due under the formal documents, disinclined to show mercy where mercy was not bargained for—Ebenezer Expectation himself, beloved of formal classicists and neoclassicists alike. On the other hand we see the tenant brothers, sturdy Reliance and fair-minded Restitution, asking only that the court render unto them what they themselves would have been delighted to render, had the tables been turned. Is that really an accurate—if somewhat caricatured—picture of the choice posed by this case?

Well, maybe yes and maybe no. Gerry and Jay have both agreed that a decision-oriented CLS analysis is likely to begin by describing a favored hierarchy, and then deconstructing it by a process of inversion, demonstrating that the favored goal supposedly served by one outcome and not served by the other is really better served by the latter than by the former.129 Suppose, following Gerry’s and Jay’s examples, that you do a little deconstructing of your own. You might start with the proposition that the hierarchy in question is between protecting the parties’ reasonable expectations and failing to do so; the privileged position is given to the former, for a combination of reasons including facilitating commerce and keeping promises. You might assume that upholding the landlord in its right to terminate should then be the favored outcome, because the landlord expected that the lease would terminate as of the stated date if no notice was given, and indeed none was. To require the landlord to extend the tenant’s term would be to disappoint that expectation.

If you invert (or “flip”) the hierarchy, however, it becomes apparent that to deny the tenant its right of renewal is to disappoint the tenant’s actual expectation of a lengthy renewal term. However, the landlord in all the circumstances (a shift in values in the commercial rental market, the tenant’s successful restaurant, the tenant’s embarking on some improvements) could hardly

129. See Spann, supra note 3, at 231-32; Feinman, supra note 126, at 275-78.
have expected that the tenant would not renew, and therefore cannot really have had an expectation that the lease would terminate. Your goal of protecting the expectation interest can therefore only be truly served by a decision for the tenant, rather than the landlord.

Suppose, however, you start with a different hierarchy. In this version, you want to protect acts of reliance reasonably undertaken on the strength of promises apparently seriously made, for reasons having to do with fairness as well as utility. Failing to protect such reliance is the disfavored member of the hierarchy. You might then assume that in this version the tenant should be given the decision because the tenant has since the outset of its tenancy relied in substantial, costly ways on the continuation of its tenancy. Not to extend that tenancy would be to leave that reliance unprotected. However, the flip side of this one also plays a different tune. On further analysis, you might note that the landlord has since the inception of this relationship looked to the tenant’s notice as its signal of the intent to renew; because no notice was given, the landlord may well have been relying, not necessarily in tangible ways (making a new, inconsistent lease with another tenant) but in intangible, unprovable ways (such as negotiating with several possible tenants, believing that it has ample time to work out those arrangements before this tenant actually moves out). On the other hand, the supposed acts of reliance by the present tenant may appear on closer examination to have been unreasonable, given the tenant’s failure to protect itself, and therefore to be undeserving of protection in this case.

A similar fate awaits the restitution argument. Does denial of a renewal violate the tenant’s restitution interest because if evicted it will have to leave behind valuable improvements? At first blush it might seem so, but maybe not. Maybe those improvements are of dubious value to the next tenant, so that they don’t enrich anyone else—indeed, they may even decrease the rental value of the property. On the other hand, maybe giving this tenant an extended lease at a below-market rental will unjustly enrich the tenant, at the landlord’s expense.

Enough, already. Arguments like these may persuade you that no set of rules, no set of policies and no version of the facts dictates a result in JNA’s dispute with Chelsea—or, at least, that the possible results can all be defended both on doctrinal and on policy grounds, regardless of what doctrine you espouse or what policy goals you wish to advance. At this point any decision may seem almost random, the product of mere chance. Having thus thrown
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your mental dice in the air, we must now see if they will land in some new, helpful pattern.

At this point, you might usefully peruse again Jay Feinman's dissection of the New York Court of Appeals decision of *Graff v. Billet.*\(^{130}\) Some of the things Jay does with that case we have already done with *JNA* in the course of our earlier discussion. We have, for instance, done what we could to glean, from the public record plus discussions with the attorneys, a sense of the factual setting of the case. What we have learned appears to eliminate some of the possibilities that might have affected our view one way or the other. We don't, for instance, apparently have here an abuse of grossly unbalanced economic power by one side to force another side to its knees; nothing suggests that *JNA* was a conglomerate wolf in cheap clothing, or the Morfogen brothers babies in the Howard Beach woods. This restaurant was not the Morfogens' only enterprise, nor was it a long-standing family establishment, so it seems unlikely that they had a lot of idiosyncratic investment which eviction would have liquidated. The parties appear to have dealt at arms'-length, as businesspeople, with only the degree of personal relationship that comes with superficial business acquaintance.\(^{131}\) Another possibility that earlier seemed potentially promising—that Arena himself was to blame for the Morfogens' apparent ignorance of the limitations on their rights—did not pan out on further investigation.

Related to that latter point, however, is one theme which conceivably might pique the interest of a CLS analyst. If anything went wrong in this scenario, it seems to have been the lawyering. If Chelsea's original attorney never received a copy of the lease rider, as he claims, why didn't he? Or, if in fact he did—as appears not unlikely—why didn't he communicate it to them, and make sure that they set up a reminder system to protect their very sizeable investment in the leasehold?\(^{132}\) On the other hand, *JNA* itself—acting through Arena—appears to have been unrepresented by counsel at the crucial stages of these transactions. If the tables had been turned, with *JNA* being counseled and Chelsea not, you


\(^{131}\) Jay's posing of the contrast between a large metropolitan setting and a small town is useful as an analytic device, but in this case the Howard Beach setting seems to sit at the mid-point between those extremes, a somewhat self-contained community on the fringe of the quintessential metropolitan area, neither big-town nor small-town.

\(^{132}\) See note 52 supra.
might as a Crit-oriented analyst have seen in this story some metaphor for the invidious imbalance of power inevitably created by a capitalist economic system and its hired-gun defenders. As it is, the moral of this story appears to be that it is better to have no lawyer at all than to have a careless one—a somewhat perverse moral, the wisdom of which we might debate, but which in any case seems to move you no closer to a decision.

Waist-deep as you are by now in the Big Muddy of indeterminacy, three themes discussed by Professors Spann and Feinman might serve as potential lifelines to higher ground, even if this is terra more incognita than firma. The first is the identification of broad-based community norms which seem implicated in this story. I will suggest two for your consideration. The first is, I think, almost universally accepted in our culture, and is surely well-entrenched in a variety of specific legal rules and more general principles. It is the belief that we should all exercise reasonable care in the conduct of our affairs, recognizing as we should that failure to do so may hurt others as well as ourselves. This precept has two corollaries: One, that if by our negligence we injure others, we may expect to be called to account for that; two, that if by our negligence we injure ourselves, we can expect little sympathy and less compensation for that injury. Although Chelsea's principals and its attorney attempted perhaps persuasively to point to extenuating circumstances, the fact is that most of those who have considered this case have concluded that Chelsea has to be characterized as negligent in failing to give a timely notice of renewal.

A second community norm is perhaps less widely honored, either in the observance or in the breach, but it is arguably a part of the moral outlook of most of us: one does not knowingly profit from the misfortune of others. Perhaps few of us would imitate the legendary Abraham Lincoln, trudging miles across the wilderness to return a customer's overpayment, but probably you and I would both call back the stranger who drops her purse, instead of just picking it up and keeping the contents for ourselves. On the other hand, those who profit from guessing correctly whether the market will go up or down may be profiting from the aggregate of a lot of events, many of which were regarded as extreme misfortune by those who suffered them. On which side of that line would you put JNA? Here, perhaps the communal values of continuity, reciprocity, solidarity and fairness come into play: It may seem easy to take advantage of the misfortune of someone you don't know, haven't met or perhaps even seen; it's harder—or it
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should be— to take a conscious advantage of someone with whom you have, however fleetingly, a personal relationship; it should be even harder to do so when you have it in your power to undo the misfortune and return them to their previous state of affairs.

How can the tension between these norms be resolved in JNA’s case? You might choose to stress the stronger force of the negligence norm: it seems much more universally accepted than the norm counseling forbearance to profit from another’s misfortune (which we might call here the forbearance norm), a principle that some might accept not at all and others only grudgingly or selectively. On the other hand, you might stress the relative culpability involved: the negligence norm has to do only with carelessness, while the forbearance norm involves intentional conduct. Or, you might draw an analogy to tort law, pointing out that the negligence norm is sometimes trumped by contributory negligence doctrine or the “last clear chance” rule, both of which may relieve the negligent actor from liability for the consequences of its negligence when the injured party could reasonably have avoided that result. In this case, that approach might partly counter the landlord’s arguments by stressing JNA’s ability to protect itself from at least some of the consequences of Chelsea’s negligence. No matter how you choose to resolve this tension, these larger themes are inescapably wound into this dispute. Any decision may further one norm at the expense of the other, unless the decision itself is more creative than simply choosing a winner and a loser.

This connects with the second theme sounded by Jay Feinman in his analysis of Graff v. Billet. Our legal system at least in its ideology is heavily invested in the complementary concepts of winning and losing. Although parents ordinarily have the good sense to mediate sibling quarrels so that neither participant comes out a clear “winner” or “loser,” our rule-system and our adjudicative system together seem for the most part hell-bent to force disputes into a pattern of argument in which one side

133. Arguably the former should be just as hard as the latter, but that argument doesn’t have to be accepted to follow the point pursued in the text.
134. The latter point may serve effectively to distinguish the polar case of the one who benefits from misfortune-generated changes in the market.
135. Contract law has a similar principle in the mitigation doctrine, also known as the doctrine of avoidable consequences.
must lose completely if the other is to win anything. If you conclude that both sides in this case in fact failed to live up to some community norm of conduct which they ought to have observed, how can an all-or-nothing decision be appropriate? The result contended for by the landlord depends on a rule of "law" while the tenant is invoking "equity"; perhaps you might adopt the latter approach, but condition the exercise of your court's equitable power upon the tenant's willingness to accept some rent increase as the price of the court's mercy. That amount could either simply be fixed by the court—at some figure higher than that provided in the lease, but less than the general rise in market values—or the court could first give the parties a chance to negotiate a figure themselves, knowing that the court would fix one if they did not. 137

This approach has some obvious virtues, and probably some equally obvious defects. 138 You might prefer a more conventional way of resolving this dispute: decide for the tenant, while stressing the peculiar facts of the case—such as the investment, the reliance, the apparent reason-to-know on the landlord's part. That approach would have the virtue of enabling your court to preach the norms implicated on both sides, while enunciating the reason for allowing one to trump the other in this particular case. Is this preferable? A third approach you might choose is to do what the court actually did in the FNA case—to decide in principle that the tenant could prevail, but remand to see whether the landlord had taken substantial action in reliance on non-renewal. 139 (That actual decision, it should be noted, had—as perhaps the court foresaw that it would—the effect of sending the

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137. For this to work, the court would presumably have to give some idea of the approach it would take in setting the figure in default of agreement.

138. Advocates of economic analysis, for instance, would presumably have questions about the kinds of bargaining incentives presented to future parties by such a decision.

139. Any such reliance would most likely have taken place in the period before the tenant attempted to give its tardy notice, since both attorneys indicated that once the tenant's claim had manifested itself, the landlord would have to have been a fool to enter into a new lease without a saving clause protecting it against the possibility that Chelsea's right to renew would be upheld. A new lease with such an escape clause would probably not have been viewed by the court as the sort of reliability that would trump Chelsea's rights (if any). The landlord's attorney, Mr. Shapiro, indicated that their inability to prove such reliance was a major factor in the landlord's decision to reach a settlement before any retrial of the case. More than one of the respondents to my questionnaire noted that the landlord's entry into a new lease would probably be the action most likely to deter a court from permitting the tenant to make a tardy renewal;
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...parties back to the bargaining table for a settlement that involved some raise in the tenant's rent.)

If you have followed thus far, you may be ready to accept the sermon which seems to me to be not only a fundamental teaching of critical legal analysis, but in some form or other a lesson to be drawn from the other schools of thought we have surveyed as well: The decision-maker in our legal system is not, and never was, just a prize-giver, a sort of Academy of Legal Arts and Sciences with a shelf full of "Oliver" statuettes ready to be awarded to the keenest litigators of the year. Every judge in our system of law is a part of the legal and moral fabric of his or her community, and each decision is a part of the dialogue that we conduct within and among ourselves about the way we survive here in Grovers Corners. The judge is not the audience, merely applauding or booing someone else's performance; the judge is part of the performance, onstage with the rest of us actors. Most of us, in many of the roles we play, can adopt the strategy of deciding by appearing not to decide, hiding our actions behind the mask of inaction. In his or her judicial role, the judge does not have that luxury. Every decision is an act of choice, and every judge a moral actor. To choose wisely is commendable; to choose poorly, at least sometimes, is inevitable. To pretend that you have no choice is the only clearly wrong decision.

VI
CONCLUSION

At this point, any further conclusion may strike the reader as redundant. But the issue from the start has been not, how should the \textit{/Na} case have been decided, but rather: How might the insights offered by legal theory improve a judge's ability to decide that case? Having listened carefully to Professor Warren's injunction that scholars should always be armed with a testable hypohe-

on the other hand some were sensitive to the risk thus created. One phrased it thus:

The obvious pitfall with this advice [act promptly to relet or to sell] and the reason why many of our clients are reluctant to pursue it, is that if our contention is incorrect, our client could not only be stuck with the lease renewal, but more importantly, could be subject to liability to the third party. . . . To the extent that the new lease or the contract of sale for the property contained any "outs" insofar as the old lease renewal option is concerned, such a provision would give the judge an easy way to find that the old tenant's renewal option was, in fact, duly exercised, even though it was late.
sis, I have been engaged all along in trying to test my own hypothesis, which is that legal theory can and should contribute to that process.

I do not mean by this to suggest that the only or even the main reason for engaging in the creation, promulgation and examination of legal theory is that it may help courts and lawyers get the job done. Professor Feinman has correctly objected that a perspective so narrow would mistake the academic's vocation for that of the practitioner. What I do suggest, however, is that to the extent legal theory attempts either to explain why actors in the legal system behave as they do, or to say how they should behave, it seems likely that persons actually engaged in the enterprise of so behaving should find useful information there.

Having assumed that general hypothesis, I have been trying to test one small application of it. This testing was not easy for two reasons, both of which have surely been obvious to the reader. One is that I am not and never have been a judge, and therefore my speculations about what a judge might think or do are just that: speculation. This is a severe handicap, and renders the whole enterprise perhaps unreliable. The other is that I do not count myself among those who have either originated or excelled in propounding any of the theoretical approaches discussed above. This has made the enterprise difficult, but perhaps not inappropriately so: one of the ancillary assumptions here is that a judge attempting to bring these insights to bear is going to have a more superficial and less complete grasp of the theory than the academics actually engaged in creating it.

The results of this inquiry have just been spread before you the reader, so you can evaluate them as well as I. My own hunch is that probably most jurists will regard at least some of the cases before them—critical legal studies to the contrary notwithstanding—as being essentially controlled by rules they are powerless to change (especially if they do not sit on the high court of their jurisdiction), and therefore not calling for the degree of dissection and introspection we have attempted here. For those cases that are not perceived as rule-determined, however, the effect upon the court of having to discuss everything from several different perspectives, and sometimes with a different vocabulary, ap-

140. Feinman, supra note 126.

141. I had originally hoped to circulate this piece in manuscript form for comment to all the speakers at our Conference, a hope that my dilatoriness and the Annual Survey deadlines have made impossible to fulfill. This necessity may be a virtue, however, in light of the point made in the text above.
pears to be potentially an enlightening one. Facts or arguments that seemed to have already been taken into account turn out to have different significance when viewed in a different theoretical framework. And even a simple specimen case can exhibit new qualities when viewed through different lenses, or tweezed at with different instruments.

Having taken an initial cue from Judge Kaye’s own seeming rejection of at least one of the theoretical perspectives under consideration here, it seems only fair to give her the last word. In an article published recently in the Cornell Law Review, Judge Kaye surveys the task of the appellate judge. She closes with a passage in which all of the participants in our Conference, and perhaps you the reader as well, would surely concur. “My concluding thought,” she writes,

is that the danger is not that judges will bring the full measure of their experience, their moral core, their every human capacity to bear in the difficult process of resolving the cases before them. It seems to me that a far greater danger exists if they do not.142
