THE DYNAMICS OF INFORMAL PROCEDURE: THE CASE OF A PUBLIC HOUSING EVICTION BOARD

RICHARD LEMPERT

This paper examines a public housing eviction board and asks how the decision to prosecute cases informally affected both board action and the implications of that action. It argues that board decisions were patterned and that apparently similar procedures produced different outcomes at different points in time. Informality is seen as compatible with rule-oriented decisionmaking and as a factor that affects the ways that rules and outcomes may be changed and manipulated. Informal justice is not defined, but certain features, such as the quality of discourse in a tribunal, are posited as keys to judgments of informality. It is argued that these keys determine whether a tribunal is perceived as formal or informal but that the actual quality of tribunal need not fit this neat dichotomy, for it is a complex function of whether prosecutors, defendants, and judges take informal or legalistic stances toward the procedural and substantive issues that arise in a case.

I. INTRODUCTION

"Informal procedure" sounds like an oxymoron, for procedural rules more than anything else seem to give law its formal qualities, and our image of informal justice is a picture of justice unencumbered by the need to comply with procedural rules such as discovery rules or rules of evidence. Yet the fact that a tribunal is informal and that it fails to follow familiar legal rules of procedure does not mean that it is ruleless. Legal rules may in fact

I have accumulated more than the usual intellectual debts in writing this paper. My work was supported by grant SES-8617981 from the Law and Social Science Program of the National Science Foundation and by the Cook Funds of the University of Michigan Law School. I received valuable comments from Rick Abel, Edward Cooper, Shari Diamond, Robert Ellickson, Bruce Frier, Joel Handler, Shelly Messinger, Jeffrey Paige, Lawrence Rosen, Fred Schauer, Barbara Yngvesson, Mayer Zald, and a person whose name I cannot attach to a helpfully annotated draft that was returned to me. I also benefited from the opportunity to present this paper to groups of scholars at the Boalt Hall, Cardozo, and Columbia law schools and at a Law and Contemporary Problems Symposium at Duke Law School. The cooperation of the Hawaii Housing Authority was essential to this research. I would like to thank the many people associated with the Authority who facilitated my investigation. All findings and opinions expressed in this paper are mine and should not be attributed to the National Science Foundation, the University of Michigan, the Hawaii Housing Authority, or the preceding list of helpful critics.

LAW & SOCIETY REVIEW, Volume 23, Number 3 (1989)

structure much of what goes on in informal tribunals, for they may specify actions that the tribunals must or may not take, and practical experience may give rise to procedural routines that are honored at least as regularly as the procedures specified in those formal rules that in theory order behavior in ordinary courts.

Indeed, like formal procedural rules, informal procedures are typically adopted with specific substantive goals in mind. Thus the small claims court was conceived as a forum in which procedural rules were relaxed so that plain folk such as tradespeople, lodging housekeepers, and wage earners would be allowed to use the machinery of law.[1] This does not mean, however, that the substantive goals of informality will be achieved. The very informality of small claims courts may mean that some individual plaintiffs do not effectively present viable legal cases (O'Barr and Conley, 1985). Indeed, some have argued that informal procedures may generally serve to extend state control over the working class and poor while denying these classes the full benefit of their legal rights.[2]

II. EVICTIONS IN HAWAII

In this article, I shall examine an informal legal tribunal—the Hawaii Housing Authority's (HHA) eviction board[3]—and ask how the decision to process cases informally affected both board action and the implications of that action. I identify forces that shaped the board's informal procedures and point to outcomes that were shaped by them in the sense that different outcomes might have been expected had the eviction cases been heard instead by a formal court. Two basic points that emerge from this investigation are that adjudicative outcomes are patterned and that informal procedures that appear to change little over time may nonetheless produce different outcome patterns at different points in time. This is because outcome patterns reflect the interaction of recurrent facts with substantive norms and will change if either changes over time. Changes in the quality of cases heard or in the norms governing them may themselves be resultant of or facilitated by the use of informal procedures.

My research findings are based on two stays in Hawaii, one for three months in the summer of 1969 and the other for ten weeks during the summer of 1987. During both visits I interviewed every

---

[1] See, e.g., Smith ([1919] 1967); Cayton (1939). For a general discussion of the history and practice of small claims courts, see Yngvesson and Hennessey (1975).

[2] These are themes of a number of the essays in Abel (1982b). See especially Abel (1982a).

[3] The HHA now calls this board its "hearing board," but for much of its existence it was known as the "eviction board," which is the term I shall use. Ironically and perhaps not accidentally, eviction decisions have become far more common since the board was renamed.

sitting eviction board member and all the past eviction board members whom I could identify who were still in the islands. I also interviewed virtually every current and past HHA official with important management responsibility in the housing area since the board's inception, which is to say the HHA's executive directors, assistant executive directors in charge of housing, supervising public housing managers, representatives to the eviction board, project managers, and some of its assistant project managers.[4] These interviews generally lasted between thirty minutes and two hours, with most being between an hour and an hour and a half. The 1987 interviews were taped and transcribed. During both trips I also reviewed the minutes of the HHA's Commission, searching for matters relating to evictions, and I examined a number of the Authority's internal operating memos and other records with the same end in view. In addition, I or a research assistant read the file for virtually every case that had appeared on the eviction board's docket from its inception in December 1957 through December 1985. Information on case characteristics, board actions, and tenant characteristics were coded from these files.[5] In addition, in 1987 I talked with a number of lawyers and paralegals who had represented tenants before the eviction board or in court, with Honolulu-area HUD officials with oversight responsibility over the eviction board, and with people who had played leadership roles in the HHA's tenants' union. These interviews lasted between about ten minutes and an hour and a quarter, depending on the information the interviewee could provide. With the exception of one or two lawyers, these groups did not exist in 1969. Finally, with the aid of research assistants I reviewed mentions of the HHA in Hawaii's two major newspapers for the years of my study, and I reviewed all changes in state and federal public housing legislation relating to rent collection from the start of federally assisted public housing in the late 1930s through 1986.

The one major group that is largely missing from this study is the tenants of the HHA. The time and money that I had available did not allow me to canvass this group, and my organizational interests made it less important for me to do so than had I been attempting a full ethnographic portrayal of the eviction process. I did, however, attempt to get some feel for the tenants' view of the

[4] The spacing of my two stays allowed me to interview virtually everyone who had held these roles between 1957 and 1987. A few people were deceased and a few had left the islands; I did not seek to interview every assistant project manager, and I also neglected several project managers who served briefly in the early 1970s. Some people were interviewed on both my trips to the island, but most were interviewed only once.

[5] The pre-1969 data collected in 1969 were analyzed in 1970 and 1971 (Lempert, 1971), and I have drawn from these analyses here. The analysis of the 1966–85 data collected in 1987 is ongoing. Some data from this phase of the work are reported here, and other data may be found in Lempert and Monsma (in press, 1989a).

process by talking with tenants who had served on the eviction board and with a few former public housing tenants whom I haphazardly encountered. I also asked lawyers who represented tenants about tenants' views of the board. In addition, in both 1969 and 1987 I sat in on every eviction hearing held while I was in the islands and so observed more than thirty tenants caught up in the eviction process.

The eviction board I examine deals with cases that arise on the island of Oahu (which includes the city and county of Honolulu) in the publicly aided housing projects of the HHA. To evict tenants from its projects, the HHA must first secure an eviction order from its eviction board. When an eviction order is sought, the tenant is notified of the hearing date, the reason for the action, and his or her right to be accompanied by legal counsel or some other spokesperson. Once before the board, tenants hear the HHA's case, can question HHA witnesses, tell their own story, present witnesses, make legal arguments, and plead for mercy. The board decides whether an eviction order is justified, and, if so, whether to issue it immediately or to give the tenant a chance to correct the lease violation. About three-quarters of the cases the board hears involve only non-payment of rent,[6] and these are the focus of most of what I have to say in this paper. In these cases the lease violation is clear and under the general principles of Hawaii landlord-tenant law the Authority has a right to an eviction order if the tenant has not cleared the debt by the time of the hearing. However, for almost the entire period under study, the HHA and the board have treated these cases as if there were outstanding issues; namely whether to give the tenant a second chance and, if so, on what conditions.

The rights the HHA accords tenants seem commonplace today, for similar hearing rights are mandated by HUD grievance procedures[7] and in some circumstances by due process.[8] But the

[6] Other causes include a variety of lease violations that I lump together as "trouble cases," and, at one time, exceeding project income limits ("overincome"). Trouble cases involve such matters as fighting with neighbors, opening one's unit to unauthorized guests, parking more than one car or a car that does not run in a housing project lot, and keeping pets. Some of the trouble cases involve a non-payment charge as well. At one time the Authority's projects had rigid income limits, and tenants who did not move within 6 months after being notified they were over income were evicted. The requirement that these tenants be evicted was first relaxed by HUD, when in the early 1970s regulations were passed that allowed overincome families to remain in public housing if they could not find decent, safe, and sanitary housing on the outside, and later were abolished. The proportion of cases commenced by subpoena that involve non-payment is even higher than 75%, since many tenants charged with non-payment either clear their accounts or vacate before a hearing can be held. In the early 1980s non-payment cases were given special priority, and in a number of years the proportion of cases brought for non-payment exceeded 80%.

[7] HUD announced requirements for tenant grievance proceedings in Circulars RHM 7465.8 and RHM 7465.9 (38 FR 15988, 1973) that it distributed in 1971, but the final rules mandating such proceedings and specifying the form

HHA's eviction board existed for more than a decade before federal law guaranteed hearing rights to all tenants in federally aided public housing, and over the years it has remained unique in both its powers and its composition.

The powers of the HHA's eviction board are similar to those of a circuit court. The board has the same authority to administer oaths, compel the attendance of witnesses, subpoena documents, and examine witnesses as a Hawaiian circuit court judge. Moreover, its eviction orders may be executed by the sheriff or by an official appointed by the Authority as if they were the orders of a circuit court.[9] Thus, a tenant evicted by the eviction board will find her belongings physically removed from her apartment if she does not move voluntarily after the hearing or bring a successful appeal.[10]

When the eviction board began hearing cases in 1957, it consisted of three HHA officials: its project engineer, comptroller, and assistant executive director. I call this the internal board. Since that time the board has undergone three major changes in composition. In 1960 the internal board was replaced by a five-member board of citizens, many of whom were otherwise active in efforts to aid the poor. In 1970 two tenants were added, thus increasing the board's size to seven. In 1979 a second seven-member panel was created so that weekly meetings could be held without

---

they had to take were not promulgated until 1975 (24 CFR, Part 866, Aug. 7, 1975). Since 1978 a grievance procedure has been available to HHA's tenants, but they seldom resorted to this procedure when threatened with eviction, and it need not concern us in this paper.

[8] *Thorpe* v. *Housing Authority of the City of Durham*, 336 U.S. 670 (1967).

[9] A tenant may appeal an order of the eviction board to the HHA's Board of Commissioners if new facts or evidence that "could not have been presented and were not available" for presentation to the board become available (Hawaii Revised Statutes § 360–4 as amended in 1980). If the commissioners decline to hear a review because there is no such new evidence or if they review a case and affirm the board's decision, the tenant may then appeal to a circuit court. The judicial review follows the general pattern of judicial review of administrative action. It must be based on the record of the administrative hearing(s), although the court may order the Authority to reopen the case and take further evidence. Review of the board's decision is confined to questions of law and the question of whether the decision below is "clearly erroneous" given the record as a whole. Before 1981 the "new facts or evidence" standard did not apply to commission appeals, and the commissioners often heard appeals *de novo*. From 1981 until early 1984 the commission would hold hearings to determine whether the requisite new facts existed. In 1984 the power to make this determination was delegated to the executive director. This gave the management staff effective control over the conditions under which defendants are allowed to appeal, and the staff exercises this power so that appeals ordinarily are heard only where the staff is willing to allow the tenant to remain in housing.

[10] A HUD grievance panel, by contrast, is essentially an arbitration panel that cannot terminate any tenant right. While a local housing authority is bound by any adverse determination of a grievance panel, the tenant retains all prior rights, including the right not to be evicted without appropriate legal action, which in the case of the HHA means a hearing before the eviction board.

unduly burdening the volunteer members. The panels seldom get together and never meet jointly to hear cases, so over the past decade the HHA has had, in effect, two eviction boards. During most of the years under study the board's composition changed only gradually, as new members replaced people who moved, resigned or retired. Until recently there was no effort to hold board members to fixed terms, and while some members quit after a year or less, most served several years, and some served for ten years or longer. When the second eviction board was added in 1979, the old panel was split, and four new members were added to one group and three to the other. The infusion of new members may have been as important a change in the board's composition as the creation of the second panel.

The HHA's management of the eviction process has also changed over time. Until 1979 the person in charge of presenting the Authority's case to the board was an HHA official, usually the supervising public housing manager, who in addition to overseeing evictions had many other duties, most of which were seen by him and others as more central to his role. In 1979 the Authority created a new staff position that had the general responsibility of overseeing the eviction process, including approving managerial requests for eviction, prosecuting cases before the eviction board, and handling appeals to the HHA's commission. The first person to fill this position was not a lawyer, but the two people who succeeded him have been.[11] At the same time this position was created, a full-time secretary/administrative assistant was assigned to this area. The woman who has handled this position from its inception ensures that cases forwarded by the project managers are promptly processed, checks to be sure that subpoenas are served in a timely fashion, and speeds the paperwork necessary to evict if an eviction decision has been reached by the board. In addition she serves as the eviction board's secretary and is the only member of the Authority present during their deliberations. She also processes appeals after board decisions and is an informal advisor to numerous tenants who call her, sometimes in a state of panic, after receiving an eviction hearing notice or being officially informed that they have been evicted. Her efficient performance is as important to the efficacy of the HHA's eviction process as any other single factor.

Associated with these changes have been changes in case outcomes. Put simply, for most of its existence the independent board was far less likely to evict than the board that had been composed of Authority officials. Recently, however, the independent board has been more prone to evict than at any time in its history, to the

[11] I shall treat the situation as it existed in the summer of 1987 as if it were the present situation. There have been some dramatic changes in the Authority since then; one of the less dramatic was a change in the Authority's representative to the eviction board.

point where it votes to evict a greater proportion of tenants owing rent than did the internal board. One task of this paper is to suggest that the informality of eviction hearings may have contributed to such radical changes in outcome. But this is getting ahead of the story I wish to tell. First, more basic matters deserve attention.

III. INFORMAL JUSTICE

As Abel (1982b: 2) notes, institutions of informal justice are nonetheless legal institutions—bodies that "declare, modify, and apply norms in the process of controlling conduct and handling conflict." What makes legal institutions informal is, to paraphrase Abel (ibid.), that they have at least some of the following characteristics: a non-bureaucratic structure, relatively little differentiation from the larger society, minimal use of professionals, and a tendency to eschew official law in favor of substantive and procedural norms that are vague, unwritten, commonsensical, flexible, ad hoc, and particularistic. These characteristics combine to give such institutions a naturalistic rather than a legalistic tone. Parties before them feel less removed from the world of ordinary discourse than they do in more formal or legalistic tribunals. They speak on their own rather than through professional intermediaries; they address their judges as people and are directly addressed by them; the expected mode of conversation is ordinary English or folk variants; if specialized legal language is used, its meaning is explained; and charges and excuses are advanced and discussed in a commonsense way. A tribunal, however, need not have all these characteristics to be informal, and a tribunal might have many of them and still appear formal, for Abel's list does not constitute the defining conditions of informality but rather a set of parameters that need not move together.[12] Thus a tribunal may make minimal use of professionals but explicitly rely on official law. It may employ commonsense procedural norms, but they may be applied routinely rather than in an ad hoc fashion, or the tribunal may be relatively differentiated from the larger society but use procedures that are familiar to litigants and easy to understand.

Yet we, and here I mean not just social scientists but also litigants, tend to categorize tribunals as either formal or informal rather than thinking of them as distributed along a continuum. In a world of variation, how is such categorization so easily accomplished? The answer, I think, lies in Goffman's (1974) concept of "keying."[13] Certain features of a situation, or keys,[14] can trans-

[12] Abel noted this in a letter commenting on an earlier version of this manuscript dated April 27, 1988.

[13] I am indebted to Shelly Messinger for calling my attention to the implications of Goffman's *Frame Analysis* (1974) for my work and noting that informal justice is a transformation of a transformation. Goffman argues that keying transforms a naturalistic experience—a strip of activity—into some-

form the proceedings for both participants and audience by altering the frame in which the activity is perceived. Thus what is in fact a trial with legally binding and consequential results can be transformed in the eyes of both participants and observers into an informal hearing or even "informal justice."

I hypothesize—but with my data cannot prove—that there are several keys to informal justice. One is a procedure in which the participants are allowed to and tend to follow the rules of ordinary conversation and storytelling, or what Goffman (ibid., ch. 13, pp. 496–559) calls "informal talk." A second is that one or more persons who lack legal training are obviously in charge. A third is the tribunal's own characterization of itself as an informal forum or as an official court of law. In addition there are a set of factors that are such powerful cues to the likely existence of these keys as to serve as keys themselves, including the location of the tribunal (e.g., in a courthouse or a storefront), the place of the hearing (e.g., in an ornate courtroom or in a plain meeting room), and the dress of the participants. Ordinarily, those features that are key to the perception of an informal tribunal vary together, but they need not do so. Where they do not—and to the degree they do not—participants are, I expect, confused about whether they are before an informal tribunal or an ordinary court. The confusion may be resolved by contrasting the characteristics of the tribunal in question with the experience or image of recognized courts. Thus one litigant may respond to a tribunal that presents mixed keys by drawing on experience to say "this is just like a court," while another, contrasting the tribunal with a different experience or with an unexperienced image of high legalism, may feel that his case is being handled informally.

I do not claim that my list of those keys that trigger an informal frame is exhaustive, and I may have missed a key as important as those I mention. However, my exclusion of several factors on Abel's list is intentional, for I do not think that they serve as important keys to how we frame our perceptions of a tribunal. Among those factors intentionally excluded are the bureaucratiza-

---

thing else. The institution of a court is one product of such keying, for we recognize that argument in court is not ordinary argument but is instead a stylized or ceremonial argument that has its own special set of rules and consequences. Particular cues, like the presence of judges and lawyers, allow us to recognize that we are in court. To perceive an informal tribunal is to recognize first that we are confronting a court and then, by reference to certain keys, to realize that it is not precisely a court (in the usual sense of the word) but an informal tribunal. In this sense, identifying an informal tribunal involves a transformation of a transformation.

[14] Goffman would use the term "cue" where I use the word "key." A "key" for Goffman is a key in the sense of a musical key, which specifies the mode or form a particular strip of activity is perceived (or heard, in music) to be in. I am using "key" in the sense of "key features," like key signatures, which lead us to perceive the key—in Goffman's sense—of a strip of activity. I believe this usage extends but is consistent with Goffman's analysis.

tion of the court structure (apart from the hearing itself), the differentiation of the tribunal from the larger society, and a tendency to eschew official law. Thus I predict that even if a tribunal were at the formal (or legalistic) end of each of these dimensions, participants (as well as most social science observers) would regard it as informal if it were at the informal end of the dimensions that are the hypothesized keys to the informal frame. Conversely, a tribunal that employed professional lawyer-judges, strictly followed rules of evidence, and announced at the start that it was a court of law would be regarded as a formal court no matter what its status on the excluded dimensions. If this perspective is correct, when the listed keys to a tribunal's formality are mixed, participants will characterize a tribunal not by reference to the tribunal's position on omitted dimensions but by looking to the exact mix of key characteristics,[15] and the contrast between the tribunal's positions along these dimensions and images of formal and informal courts.

Both judgments of informality and the keys to framing a tribunal as informal are likely to be culture specific, which means that judgments may vary within a multicultural society. The researcher's perspective (including mine here) is most commonly shaped by the comparison with the image of the formal Western court. This biases judgments about the character of particular alternative tribunals in the direction of informality.[16] Culture specificity also means that we probably err when we classify certain tribunals in less developed societies as informal. What are keys for us may not be for those who live in the societies we observe. Thus the Kpelle (Gibbs, 1963) may have regarded their moots as formal proceedings, and the Lozi of Zambia almost certainly regarded their kutas in this way (Gluckman, 1955).

The phenomena of keying does not mean, however, that Abel is wrong when he lists variables that do not key perceptions of informality as constituents of ideal-typical informal justice. Social

---

[15] It may be that the keys are lexically ordered. A tribunal's self-characterization might be more important in determining whether it is regarded as informal than whether evidence is presented conversationally, and this in turn might be more important than whether the presiding judge is a layperson or professional. Whether the keys are lexically ordered and, if so, what that order is are questions that I cannot answer based on the research reported here or on what I know of the literature.

[16] One contribution of a number of the authors in Abel's (1982b) *Politics of Informal Justice* is to remind us that for many purposes the appropriate comparison is with officially formal courts as they in fact behave. One reason why institutions of informal justice may paradoxically extend state control is because they are in fact more formal in their treatments of cases than the procedures that the formal legal system would otherwise employ. Contrast, for example, the lecture that a police officer might give a youth who persisted in playing loud music at 1:00 A.M. with the hearing that might occur if the case were diverted from a formal court (which would never in fact have time to concern itself with such a trivial offense) to an informal tribunal, (see, e.g., Felstiner and Williams, 1978).

scientists may define types to serve their purposes. Not only is there reason to suppose that measures of the informality of tribunals on Abel's excluded dimensions will be correlated across tribunals with measures of informality on the key variables, but the image of what informal justice is about and conclusions regarding its faults and virtues often assume the states on these dimensions that Abel posits as characteristics of informality. It is important to remember, however, that if the key variables determine perceptions of informality, assumptions about the situation of "labeled informal" tribunals on the excluded dimensions are weak ones. Even if there is an empirical correlation, this correlation, unlike that between key variables, does not play a part in the labeling decision. There may in fact be no correlation, but the tribunal will still be considered informal.

We shall see in this paper that throughout its history the HHA's eviction board has been characterized by features that key the definition "informal." Yet while the keys have endured with only small changes over time, the pattern of board decisions has changed dramatically. Once the board treated the legal norms that define the Authority's right to evict as largely irrelevant to its task, but eventually it changed its conception of its task and came to regard the Authority's legal basis for demanding eviction as ordinarily controlling. This left tenants thinking that the informal conversations that they had with board members affected the disposition of their cases, when in fact their legal situations determined the outcome. As I argue in the conclusion, this is a situation of "hidden legalism," which is made possible by the fact that a tribunal's procedures but not ordinarily its stance toward official law key perceptions of informality. I shall also argue that features that may be chosen for the perceptions that they key—such as the conversational modes of case presentation we commonly associate with informal justice—may themselves be consequential. They may create systems that foster certain styles of exercising discretion, that lead to rules that would be different under different procedures, that shape judgments of the quality of the judicial action, and that condition the vulnerability of systems to change and affect the ways that change attempts are managed.

IV. THE OPPOSITE OF FORMAL

Thus far I have contrasted informal justice and informal tribunals with formal justice and formal tribunals. Yet "formal" is not the best term with which to describe the contrast. By itself the word has little meaning, for it applies to organizations, ceremonies, abstract models, and other non-legal phenomena. Therefore, the formal-informal contrast has no meaning apart from a concrete context. While one might give the term "formal" meaning as a modifier of "tribunal" or "justice" (indeed we know what a formal

tribunal is and can contrast it with an informal one), "formal" already has a well-known meaning within the Weberian tradition of the sociology of law (see, for example, Weber, 1968; Trubek, 1972; Kronman, 1983) and a well-known opposite, which is not "informal" but "substantive." For this reason I propose that when we wish to draw contrasts with informal tribunals, we speak not of "formal" tribunals but of ones that are "legalistic" in the sense of being infused with legality. Thus the opposite poles of the keys to informality I have mentioned are ways of proceeding that hew to specific legal rules, legalistic modes of conversation, persons in charge with specialized legal training, self-characterization as a court of law, and the physical structures, dress, and the like that we associate with the "majesty of the law."

V. THE EVICTION BOARD'S CHARACTERISTICS

The eviction board I studied would be characterized by most observers and, I believe, by most participants as informal rather than legalistic. Indeed, in an eviction process that is bureaucratically organized from the time a project manager first learns by computer printout that a tenant did not pay her rent until the sheriff escorts, forcefully if necessary, the tenant out of her apartment, the eviction hearing is an oasis of informality. The room in which the hearing is held has none of the dignity of a courtroom. It is a long, narrow room, perhaps thirty feet by fifteen feet, dominated by a long, narrow table. It is well lit, but its walls are bare. There is nothing particularly cheerful or gloomy about it. At one end—the end farthest from the door through which the parties enter—the board chair sits with the members of the board arrayed along both sides.[17] At the other end, the tenant and the tenant's representative, if any, sit. Near them on the side of the table to their left will be the manager who has instituted the eviction action and is ordinarily the Authority's principal witness, while along the side of the table to their right sits the board secretary, who tapes the hearing in case a transcript is necessary, and the Authority's hearing officer, who presents the HHA's case. Witnesses, in the occasional case in which they are present, may sit along the side of the table, sometimes displacing the Authority's representatives in the direction of the board members, or more commonly back from the table in chairs along the walls. The room and seating arrangements looked the same in 1987 as they did in 1969. I did not see them in 1957 or 1960, but I expect they were the same then as well.

The board members may appear casually dressed,[18] and the tenants almost certainly will; T-shirts are not uncommon. Ordina-

[17] Currently the chair of one panel prefers to sit closer to the tenant, along the same side of the table as the project manager.

[18] This does not have the same significance in Hawaii as it might on the

rily overt legalism creeps into the procedure only briefly at the outset—when witnesses are sworn, the tenant is alerted to her right to counsel and asked to waive it, and the Authority's hearing officer (prosecutor) asks the tenant to verify her signature on the lease and reads the part of the lease that has been allegedly violated—and at the conclusion, when the legal implications of the board's decision are explained to the tenant, and the tenant is told of any appeal or other rights she might have.[19] Also at the outset the tenant is told that the people who will decide her fate are citizen volunteers—including two tenants—and that proceedings before the board are informal with no rules of evidence. At the conclusion of the case the tenant may be casually asked if she has any questions, and the implications of the decision for the actions she may or must take will be explained in simple terms.

The case discussion itself is almost always orderly and follows lay rather than legalistic modes of presentation.[20] This, ironically, is mandated by formal law. When the Authority in accordance with the Hawaii Administrative Procedure Act adopted rules regulating the eviction process, one of the rules it adopted was: "Hearings shall be conducted in an informal manner unless otherwise required by law."[21]

After the chair has introduced the board members and made a brief introductory statement, the proceedings are turned over to the hearing officer. He begins by noting that although the hearing is informal, there is an obligation to tell the truth, and he asks that all witnesses be sworn. Then he asks the tenant or tenants, if both husband and wife are present, to verify their signatures on the lease, and he reviews the charges with them. The tenants ordinarily admit and attempt to explain the violation. If the tenants admit the violation and do not spontaneously try to excuse it, the hearing officer usually invites an explanation, and the board members ordinarily inquire further into the causes of the offense and may explore what can be done to correct it. Regardless of whether the tenants question the rule they have allegedly violated, the

---

mainland, for even high-level bureaucrats, like the head of the HHA, often wear short-sleeved shirts without jackets or ties.

[19] On rare occasions the board chair may make a "legal" ruling during a trial, as when a tenant, remembering some television show, objects to an item of evidence or requests a postponement because the tenant suddenly realizes that it would be helpful if a certain witness were present.

Most reports of informal hearings do not focus on the legalistic aspects, but very often they are an essential part of the proceeding because they help establish or protect the jurisdiction to proceed informally. Thus before proceeding to small claims mediation, parties may be alerted to their right to a judicial hearing and pressed to waive it, or, as in the eviction board, parties may be alerted to their right to counsel and asked to waive it.

[20] Often even the presence of a lawyer does not lead to heightened legalism, and board members report feelings of both impatience and annoyance when it occurs.

[21] Hawaii Administrative Rules § 17.501.2(c) (effective January 1, 1981).

board chair is likely to justify it, and some board members are prone to give paternalistic lectures on the virtues of conforming to the Authority's rules or on the tenants' moral failure in not doing so. Individual conversations—almost as if no one else were present—can occur between a tenant and a board member or a tenant and the manager; on rare occasions the latter have involved screaming accusations by the tenant. Usually the manager will have a chance to talk directly to the board, since the prosecutor may seek the manager's recommended disposition before resting the Authority's case and will ask the manager in the course of the hearing about the tenants' general behavior, even if the action only involves non-payment. By contrast with the two- to five-minute hearings reported for some housing courts (Lazerson, 1982), small claims courts (Conley and O'Barr, forthcoming), traffic courts (Netherton, 1956–57), and even misdemeanor courts (Mileski, 1971), the most routine eviction cases are seldom disposed of in less than twenty minutes, and hearings of half an hour or longer are not uncommon. An observer gets no feeling of assembly-line justice, and the tenant accounts for a good portion of the conversation. In these respects the eviction proceedings in 1958, 1969, and 1987 were generally similar.[22]

Few legal rules are cited when the parties leave the room and the board discusses the case.[23] The board decisionmaking follows upon conversation, not all of which is directed at issues in the case. For example, I witnessed a case in which the tenant's fecundity was discussed. More legally relevant conversation might include a discussion of the tenant's truthfulness, speculation about whether there is a grudge between the tenant and manager or whether the manager did everything possible to help the tenant, or a dispute about what decisionmaking options are available. Occasionally a dispute over decisionmaking options will be about the law, as when the board members argue over whether they have the legal authority to impose a particularly creative solution.[24] Here the

[22] I observed hearings in 1969 and 1987. I also looked at transcripts from the early years of the board.

[23] Until 1969 the Authority's representative to the board remained in the room with the board members while they deliberated. This practice was discontinued in response to comments I made when I was invited by the HHA to report on my research and critique its eviction process. In 1987 only the eviction board secretary, who will typically have been silent throughout the hearing, remains in the room during the board's deliberations. If my observations were not contaminated by my presence (and discussion with board members suggests they were not), she does not take part in the deliberations but may answer questions if asked or, on rare occasions, volunteer information when the discussion indicates that the members are confused about some factual or legal issue.

[24] For example, in one case I observed the Authority sought to evict an elderly woman who on 3 occasions had forgotten she was cooking down beans on the stove and had left her unit, leaving the pot to boil dry and the beans to burn. The Authority was worried that she posed a fire hazard to her elderly neighbors. During their deliberations the board members wondered whether

board's secretary might be asked for an opinion. When precedent is cited, it is not ordinarily done to make a point of law but rather to argue for an exercise of discretion, as when a board member supports a suggested disposition by pointing out that two months ago a factually similar case was treated in the proposed way.

Sometimes even the ultimate decision seems haphazard. For example, a debate about the proper outcome might be decided after it is suggested that since one member had won the last such debate, she should lose this one, or the board may accept one characterization of how a case should be disposed with so little concern that one suspects that another characterization would have been adopted had it been advanced. Informality is further evidenced in conversation that does not relate to the case. Some cases are easily disposed of, but the board senses that it would appear unseemly to reach an instant decision. Thus after the decision has been reached, conversation may continue for another five minutes as the board discusses a member's travels or, as in several meetings I attended, plans for a party.

Thus both the presentation of the cases and the decisionmaking process proceed with little attention to the constraints that officially rule an ordinary court of law. People talk to each other and consider cases in plain English. While there are references to rules the tenant has allegedly violated, the scope of discussion extends far beyond the issue of whether a rule has been violated. (Indeed, in non-payment cases, which make up the bulk of the caseload, the fact of a rule violation is almost never in dispute.) Non-legal perspectives on misfortune and responsibility enter into the discussion at both the case presentation and decision stages. Those with no business before the tribunal almost never observe the process, and those who do have business there are usually only the parties. Except for the HHA project manager, witnesses are seldom called by either side, and most tenants appear without legal or lay counsel, although several Legal Aid lawyers and paralegals have handled more than one case before the board with one appearing so often as to qualify as a "repeat player." What follows from this? What patterns of behavior can informal procedures allow or facilitate?

VI. DISENCHANTMENT AND CIRCUMVENTION

To the extent that they invite non-legalistic decisions, informal procedures are likely to be unattractive to parties who have the law on their side and the resources to prove this in formal legal action. This was essentially the situation of project managers seeking to evict tenants for non-payment of rent. At the same time an informal tribunal may be easier to avoid than a formal

they had the power to order that the stove be removed from the woman's apartment and a microwave installed.

court that is known to present a legal barrier to arbitrary action. Thus informal tribunals can both motivate and facilitate their own circumvention.[25]

In the late 1960s a number of project managers who came to view the board's leniency as intolerable developed "bluff systems" to get tenants to leave without a hearing.[26] The key to every bluff system was that eviction actions are needed only when tenants do not vacate voluntarily. Thus some tenants, when told they had to vacate for a lease violation, left without taking advantage of the hearing that very likely would have given them a chance to correct the violation and remain in housing. To encourage more tenants to do this, several project managers drafted legalistic-sounding lease termination notices designed to get tenants to think that they had no choice but to move. Figure 1 shows the standard notification that was used at one project, and Figure 2 is an example of a specific communication sent when a tenant questioned his status.

If the forms did not induce tenants to leave, other tactics, which involved giving misleading information, were used. Tenants might, for example, be told that they would be evicted immediately if they were brought before the board but that they could have four to six weeks to find new housing if they signed a vacate notice and agreed to move voluntarily. One project manager bragged to me that by using this and other tactics, he had "evicted" seventeen tenants in a row without bringing one before the board. When one tenant he was trying to evict asked him if the HHA had an eviction board, he replied, "It does; you're looking at him." An-

[25] Formal tribunals can do the same, but ordinarily the circumvention must be cooperative, as in plea bargaining or the choice of an ADR (Alternative Dispute Resolution) forum.

[26] At this time the Authority grouped its projects on Oahu into 5 major management areas. Each area, which might consist of a number of projects typically totaling between about 800 and 1,200 units, was the responsibility of a single housing manager. The managers had great discretion in how they ran their project and collected rents, extending even to the choice of collection agencies to pursue tenants who had left housing with outstanding rent debts. This basic management structure remains intact today, except a sixth area to handle rent supplement families has been created and certain projects are not in any area but under private management contracts. The fifth area is also the responsibility of a private management company, but for our purposes it may be treated like the others. Virtually all cases the board hears come from the five major areas.

If the Authority's area structure has changed little over the years, its rent collection procedures, particularly in the amount of discretion delegated to project managers, have been substantially altered. Because a computer printout lists each tenant's rental status and because for more than a decade tenants have paid their rent at banks rather than at the project offices, the supervising public housing manager, the central office staff member who is the direct supervisor of the project managers and the direct subordinate of the head of housing, knows which tenants have not paid their rent as soon as the project manager. When tenants miss payments, follow-up procedures, including the notices sent, are now largely standardized. Where project managers were once allowed and perhaps encouraged to "work with" tenants who were behind in their rent, managers today must justify decisions not to start eviction proceedings against tenants who are 6 weeks or more behind in their rent.

Figure 1. Letter Sent to Tenant

Notice of Termination of Dwelling Lease

This is to notify you that Dwelling Lease No. _____, dated the _____ day of _____, between the Hawaii Housing Authority, as Lessor, and _____, as Lessee, for Unit No. _____, has been terminated on _____, for failure to renew your Lease according to the Lease provision.

This means that you have waived your right to live in the apartment on _____, and we are entitled to take possession of the apartment on _____.

Therefore, demand is being made upon your family to move out of the apartment peaceably not later than _____. If you fail to move out, the management will take such steps to regain possession of the apartment as it deems necessary and appropriate.

This action is in accordance with the provision of the Lease which you signed with us.

HAWAII HOUSING AUTHORITY

By _____

Dated at Honolulu, Hawaii,
this _____ day of _____.
Received by: _____
Served by: _____
Date served: _____

other manager carried things further. Occasionally he would call a friend (also a project manager), give the tenant the telephone, and tell the tenant that he was talking to the chair of the eviction board.

These tactics took advantage of the fact that tenants were ignorant of their rights and of the legal hurdles the Authority had to clear when it sought to evict. While ignorance about such important matters may seem surprising, people in fact are often unaware of their legal rights in dealing with acknowledged authorities. This has been found to be true not only of welfare recipients (*Duke Law Journal*, 1969) but also of people whom one might expect to be more legally sophisticated, such as landlords confronting housing inspectors (Ross and Thomas, 1981) and industrial managers dealing with pollution control officials (Hawkins, 1984). While the informality of the board's procedures had no direct effect on tenant ignorance or the manager's ability to circumvent the board, I think it had important indirect effects.

Although I cannot test the hypothesis, I think that in the late 1960s and early 1970s, when the bluff systems flourished, the informality of the board's procedures contributed to the apparent low visibility of both the right to a hearing and the favorable outcomes

Figure 2. Response to a Tenant

April 30, 1969

Dear _____

This is to acknowledge your undated letter received on April 28, 1969.

Your monthly rent payments were delinquent for the past six months. During these months, we forwarded your rent reminders and also made home visits, but no improvement was made to pay your rent on the due date.

On April 22, 1969, we found your son, _____, sleeping in the vacant unit next to your unit, _____. He claimed that he did not have the house key to _____, yet your ex-daughter-in-law set up quarters in your unit, without authorization. This is in direct violation to covenant "G" of your Dwelling Lease.

In the past you have violated several covenants, rules, and regulations of the Authority such as: delinquent rental payments, unauthorized persons, nuisances, dogs in your unit, inoperative vehicles, etc. This shows that you are no longer interested in living in the project with your flagrant violations.

Therefore, due to the severity of this case, we are allowing you until Tuesday, May 20, 1969, to surrender your unit. If any violation happens from this date to May 20, 1969, we will evict you and your family from the premises.

If you have any question regarding the foregoing, please notify the undersigned immediately.

Very truly yours,
Public Housing Manager

that tenants could expect.[27] Since the hearings seldom involved lawyers, there were no professionals to question what was occurring or to spread information to a client population. Because the board did not seem like a court, tenants who told their neighbors about their experience before the board may not have conveyed the impression that in appearing before the board they were exercising a legal right. Indeed, the experience of tenants who received deferred eviction orders and in this sense won their cases was designed to convey the sense that withholding eviction was an act of grace.[28] Moreover, the opinions of informal tribunals are

[27] Some managers complained that the board's leniency was well known in the projects and made it more difficult for them to collect the rent. The rent payment evidence that I gathered did not support this thesis as a general matter, and widespread knowledge of board leniency is inconsistent with the working of the bluff systems. I did not interview tenants in 1969, but in 1987 I talked to several, including some who were in housing in 1969. These conversations suggest that tenants had a rather low level of awareness of eviction board activity, at least until recently.

[28] Which it was in the sense that an eviction could have been legally ordered whenever a tenant was behind in rent. But in fact withholding evictions in such cases was the usual disposition, and while tenants had no legal right to this outcome, they did have a legal right to a hearing in which second chances were the norm. The informal procedures lent themselves to emphasizing the

not recorded, nor are records of their dispositions ordinarily compiled. Thus even tenants who had heard through the grapevine that the board had behaved leniently in certain cases could not be sure that leniency characterized most decisions. Finally, certain bluff tactics might have been less likely had the system been more formal. For example, I asked the manager who had pretended he was the board chair to aid a fellow manager in bluffing nettlesome tenants if he would have cooperated with his friend had the request been to imitate a judge. He responded immediately, "No! No!" When I asked him why, he said, "We do respect the judicial system and we don't imitate a judge or police officer. The eviction board is less prestigious." As Nonet (1969) documented two decades ago in his study of the California Industrial Accident Commission, a desire for prestige is one factor that motivates adjudicators in informal tribunals to seek greater formality.

Even more importantly, the board's procedures helped create the conditions that led the managers to attempt to avoid hearings not just because they resulted in lenient outcomes but also and in large measure because of the kinds of conversations they allowed. In ordinary court, the managers would simply have presented evidence of the lease violation. Evidence of how the managers worked or did not work with tenants would probably have been declared irrelevant, and even if a court was willing to hear such evidence, it would have been elicited by the opposing party's lawyer in an acknowledged adversarial confrontation. Since courts are not designed for conversation the manager would not have been expected to respond to most of the tenant's complaints, and the judge, except in his rulings, would indicate neither agreement nor disagreement with them.

In the eviction hearings of the late 1960s, evidence of the managers' efforts was often central. On a few occasions tenants actually interrupted the manager's testimony to dispute what he was saying. More often they would blame the manager or staff for some failure, real or imagined. When tenants did blame the managers, their accusations were not filtered by an attorney seeking to present a case effectively but were stated in their own words and directed to the person sitting next to them. Even more hurtful from the managers' perspective was the fact that the board members took such complaints seriously and asked the managers to comment on them. Indeed, when a tenant did not complain, some board members took it upon themselves to ask the manager what

"by grace" nature of this outcome, while disguising the fact that it was a usual result. Thus before telling a tenant that she was to be given a chance to clear her rent debt, the board might lecture the tenant on her moral responsibility to "keep current" and emphasize how lucky the tenant was that the board in this instance would act leniently. Interestingly, similar practices apparently characterized another informal tribunal, the pre-*Gault* juvenile court (see, e.g., Wheeler *et al.*, 1968), and Shari Diamond tells me that she observed similar behavior by lay magistrates in England.

he had done to help the tenant, a kind of judicial intervention that would be less likely the more legalistic the proceedings. The result, according to several managers, was that they felt that they rather than the tenants were on trial when they took a case to the board. Thus the informality of the eviction process allowed the proceedings to develop in ways that created substantial stress in most managers and this was a major impetus toward the development of ways to "evict" tenants without bringing them before the board.[29]

When I returned to Hawaii in 1987, the situation was entirely different. The bluff systems had disappeared,[30] and the managers spoke highly of the eviction board. Several factors may have contributed to the disappearance of bluffing, and some might have been sufficient by themselves. First, but least likely, the formation of a tenants' union in 1970, the appointment of two tenants to the eviction board in the same year, and the increased availability of legal aid at about the same time might have increased the tenants'

---

[29] The one manager (of 5) who was active in 1969 who did not attempt to bluff tenants and seemed least bothered by the board's actions was the one who most saw the board's role—if not its procedures—as legitimate because of its legal position. He believed that it had its job to do and that he had his, and if the board decided to give a tenant a second chance, the decision was not his responsibility and did not reflect any failure on his part. It may also have been the case that this manager's work with tenants was ordinarily so considerate and careful that the adequacy of his performance in this respect was seldom called into question by the eviction board.

Several former managers who had moved up the hierarchy into supervisory positions on the HHA's central office staff seemed from their reports closer to this manager than to the others in their view of the board while they were project managers. Perhaps their perspective on the board reflects one of the qualities that led to their promotion, or it may be that from the vantage point of the central office staff they misremembered their earlier attitudes. The managers' negative reactions to the board were also considerably exacerbated after the appointment of a liberal minister, who saw himself as an advocate for the poor. This minister, several managers told me, assumed that the responsibility for the tenants' failings lay with the system—which is to say the manager—and would ask questions accordingly. With one possible exception, the managers who had been promoted to central office positions had not had to bring cases to a board that included this man. Indeed, in 1969 many of the managers spoke rather fondly of the board as it had existed in 1964, when the pattern of evictions was essentially the same as it was in 1969 but the quality of the discourse apparently differed, thus confirming the hypothesis that the type of conversations that informality allowed played a big part in the managers' reactions to the board and in their motivation to circumvent it. Similarly, in evaluating individual board members, the managers referred not to their decisions but to the style of their conversation with tenants. "Tough" was the recurring word of praise.

[30] One way of encouraging tenants to leave without a hearing was acknowledged, but it involved telling the truth rather than bluffing. In 1985 the Authority amended its regulations so as to bar anyone who was evicted from public housing from ever again being rehoused in an Authority project. Project managers alerted tenants to this rule, and some tenants moved "voluntarily" to avoid its force. Since the probability of eviction in 1987 was much higher than it had been in 1969, these tenants, unless they could have paid their rent debts, were unlikely to have forfeited a valuable right.

awareness of their rights.[31] Second, there was substantial turnover in the managers. The two of those most prone to bluff and most extreme in their willingness to create false impressions left their positions in the 1970s. Also, in the 1970s and 1980s a number of male managers were replaced by women, several of whom had social work backgrounds. Even the women who had been managers longest reported never having attempted to bluff tenants.[32] Third, the administration of rent collections and evictions became more bureaucratically formal. The notices to be sent tenants were standardized, and in conformity with HUD regulations notice of a right to a hearing was included when the Authority threatened to terminate a lease. Also, rent payments came to be made at banks rather than project offices, thus eliminating a chance for tenant-manager interaction and an opportunity for bluffing. Finally, the impetus to bluff disappeared. Not only did the pattern of board decisions change so that evictions in non-payment of rent cases became the norm rather than the exception, but the quality of the conversations that occurred at the hearings changed as well. These changes may themselves reflect implications of informal procedures, a possibility I examine below. One point is clear: Hearing procedures that had changed little in appearance between 1969 and 1987 in fact yielded very different outcomes. For a long time both the project managers and the Honolulu-area HUD office thought that such a change could be realized only by abolishing the eviction board,[33] but the potential for dramatic change in board decision-making had been present all along.

[31] It appears that this was not very important because the rate of subpoenaed tenants who vacated without a hearing did not diminish until about 1978, which was after the period of greatest vitality of the tenants' union and the most aggressive involvement of Legal Aid in the eviction process. The bluff systems were designed to—and apparently often did—get tenants to move without any legal process. However, tenant responses to being subpoenaed might reflect a manager's past or continued efforts to bluff them; that is, they may have been convinced that legal process meant the jig was really up. Treating the proportion of tenants who vacated after being subpoenaed but before their hearing as a proxy for the relative amount of pre-subpoena bluffing, we find that the proportion of subpoenaed tenants vacating without a hearing is 10.8% in the period 1966–74 (years when some managers admitted bluffing) and about 5.3% from April 1982 through 1985 (years when bluff systems had allegedly disappeared). The comparable percentages of cases in which the hearing was called off by the Authority after a subpoena was issued because the problem was settled were 7.7% in 1966–74 and 1.8% in the April 1982–85 period. The latter figure in part reflects a then-recent policy of holding hearings in non-payment cases even when the rent was paid before the hearing.

[32] Bivariate analyses controlling for time period indicates no consistent difference in final outcomes associated with the manager's gender, nor is there a consistent gender-related difference in the size of the debts that accrue before non-payment actions are commenced. However, bluffing may still be gender related, even if other aspects of processing evictions are not. The two managers who in the late 1960s and early 1970s resorted most often to bluffing were the two who seemed to value toughness most highly, an attitude that may be gender related. (One of these managers was a former prison guard).

[33] The managers felt this way when I interviewed them in 1969. From

VII. RULES FROM INFORMAL PROCEDURES

One aspect of Abel's (1982b: 2) perspective on institutions of informal justice is his observation that they tend to eschew official law in favor of substantive and procedural norms that are "imprecise, unwritten, democratic, flexible, ad hoc and particularistic." To the casual or infrequent observer, including tenant defendants, these features may seem to characterize board procedures, but over time an observer sees procedural and substantive norms that are not vague, that in the context of a given case are no more flexible than formal law, and that are seldom ad hoc or particularistic. I doubt whether the eviction board differs from most other informal tribunals in these respects.[34] Indeed, even legal negotiations, a further step in the direction of informality, tend to become rule bound, and particularism is commonly submerged in stereotypes (Maynard, 1984; Ross, 1970; Sudnow, 1965). The contrary picture of flexibility and particularism that some associate with informal justice may simply represent an observer artifact. Either not enough similar cases are observed to spot regularities, or the observer focuses on or reports differences, thus hiding norm-bound regularities from the reader's eye.[35]

What distinguishes the hearings of ordinary courts from those of informal tribunals is not the presence or absence of rules but rather the source of rules, the publicity given to them, and the expectations about whether they will be followed. The rules that courts officially apply are prescribed by law; they are ascertainable by reference to generally available sources, and they are expected to be followed so that the flexible interpretations that occur all the time may nevertheless be occasionally held by a higher body to be legal error. Informal rules, on the other hand, arise out of practice; parties learn of them by proceeding before the tribunal, and deviations from them are seldom grounds for reversal by some higher tribunal, often because there is no appellate review or, when there is, because the rules could legally have been otherwise. The rules officially applied in courts are, in sum, legal in origin; they are captured in some official pronouncement. Informal rules

---

1975 until 1982 HUD, in letters I found in the Authority's files, pressed the Authority to toughen its eviction policy and as a first step urged the abolition of the eviction board.

[34] This claim does not apply to tribunals in which judges turn over almost as rapidly as cases.

[35] Abel, as I have pointed out, does not list these characteristics as *requisites* of informal justice but rather as among the features a subset of which will characterize any institution of informal justice. As I suggested in my discussion of keying, I believe that certain of these characteristics, such as flexibility and particularism, are not used to differentiate formal courts from institutions of informal justice. Indeed, I would argue, with considerable realist and critical legal studies support, that official courts are more flexible in adapting to the particularities (including technically irrelevant features) of individual cases than they appear. I would also argue that informal institutions are less particularistic than they appear.

are generated by the tribunal and can be changed by it.[36] They are often no vaguer than official rules, but because they are not reduced to writing, they may appear vague to inexperienced litigants. They reflect regular responses to the procedural and substantive issues that the tribunal confronts on a recurring basis. One might say that "familiarity breeds precedent."[37]

Many factors influence the quality of the various rules that informal tribunals develop. One that is often ignored is official law. Since many informal tribunals, like the HHA's eviction board, occupy a niche which official law provides, they must often accommodate themselves to certain legal requisites as they proceed informally. Consider, for example, the introductions to two eviction hearings I witnessed in the summer of 1987. They reflect the different styles of the chairs of the board's two seven-member panels.

Panel 1

Chair: O.K. In conforming with Section 360 of the Hawaii Revised Statutes this hearing relating to docket number 87-90_____ [tenant] is hereby called into session. For the record my name is _____; I will be the chairperson today of this _____ [Panel 1]. I, as well as the other members of this _____ [panel], donate our time as a community project. We work for free, if you will. I would like to introduce the people to you, beginning with the lady to my left . . . . The purpose of this _____ [panel] and one of the reasons we are here today is to hear cases such as your case, and in your particular case the Authority is charging you with non-payment of rent and chronic delinquency. We ask that you allow the Authority to overview the statement in front of you, the statement of charges, and we ask that you respond to these charges. Should you have rental receipts with you, or should you have witnesses, you may bring those into evidence to support your position. Do you have any rental, have you made any payments at all, do you have any rental receipts with you?

Tenant: No, I don't.

Chair: Well, then, that is no problem, O.K. Have you understood everything and heard everything that I have said so far?

Tenant: Yes.

---

[36] The common law is also generated and changeable by courts, but the courts that do the law making are ordinarily appellate courts rather than trial courts.

[37] See, for example, the discussion of "shallow case logics" in Lempert and Sanders (1986: 75–78).

Chair: Do you feel that you can continue with the hearing without the benefit of counsel?
Tenant: Yes.
Chair: Let the record so indicate, and without further ado I will turn this hearing over to the hearing officer for the Authority.

Panel 2

Chair: According to Section 360-3 of the Hawaii Revised Statutes this hearing relating to the case of _____, docket number 87-80, is called to order. For the record my name is _____, and I will be the presiding officer before _____ [Panel 2]. The other members of the board are _____. We are here to receive testimony and evidence to determine if your rental agreement should be terminated with cause and that you should be required to vacate your unit. Yourselves and the Authority are party to this hearing. You will have the right to present evidence and call witnesses to support your position, you have the right to cross-examine witnesses or repudiate evidence that the Authority may present. You have the right to be represented by an attorney, or someone else to speak for you, or you may speak for yourself.
Tenant: Yea.
Chair: The rules of evidence at this hearing are relaxed, and as the presiding officer I will make all final rulings of law. If there are no motions, _____ [hearing officer] please proceed.

First, consider the introduction to the Panel 1 hearing. While this introduction may appear informal to the tenant or reader, after one has heard essentially the same introduction ten times, one is aware that the specific details reflect procedural norms that have been institutionalized at least within this panel. Indeed, in this instance it is a norm reduced to writing, for the chair is following a "script" provided by the Authority. However, the script itself simply replicates a mode of commencing proceedings that was in large measure standard and unwritten twenty years before. Some elements, such as the introduction of board members and the statement that they are volunteers, simply grew out of a natural practice. Others, such as the explicit notice of a right to counsel, reflect an understanding of what due process requires in this setting; an understanding, incidentally, that was not reflected in the standard introduction of twenty years ago. Still other elements, such as the discussion of rental receipts, are not part of the script but reflect longtime habits of the chair that are now a regular part of Panel 1's procedures.

Contrast this with the introduction used by the chair of Panel 2. It is based on the same script used in Panel 1, and many of the elements are the same. The case is announced by docket number, and the applicable law is cited. The tenant is told of the charge and of her rights to present witnesses and to have counsel. However, the chair did not note that the board members were volunteers, which is part of the script, yet mentioned that he would make rulings on matters of law, which is not. Nevertheless, each introduction is governed by similar rules.

Although there is a very different flavor to the introductions, it is probably a mistake to attribute this to the fact that the eviction panels are informal tribunals, for one can find similar differences in the way judges in ordinary courts address juries or the parties before them. Indeed, it may be wrong to think that tenants hearing the second introduction would anticipate a more legalistic procedure than those hearing the first. While in Panel 1 the chair engages the tenant while advising her of her legal rights, in Panel 2 the chair delivers his introduction in a rapid monotone that suggests that "all this legalism doesn't matter, so let's get on with it." This difference, like the difference in how the two chairs embellish the central script, probably reflects their personalities and their attitudes. It is not surprising that chair 2 takes a more legalistic attitude toward substantive decisions, while chair 1 believes more strongly in arranging accommodative outcomes.

Procedurally the remainder of the proceedings are just as norm bound as the introductions. The prosecutor must introduce the rental agreement and get the tenant to acknowledge that she has read it,[38] and he must summarize the details of the lease violation. The tenant and the manager are each assured of a turn to speak. In trouble cases the manager is ordinarily a crucial witness and in non-payment cases she is regularly asked whether, apart from not paying the rent, the tenant family has caused any other difficulties. There is also a sense that the tenant ought to have a say. If, for example, a non-payment tenant does not speak up without prodding, she is asked why she has been having payment problems. Questions from the board members also seem to be obligatory. In several sessions I observed there seemed to be no need for inquiry, but the board chair took it upon himself to ensure that the tenant was asked some questions. The procedures were essentially the same twenty years ago, although the substance of the discussion differed somewhat, since at that time the board was applying substantive rules that differed from what they are today.

Substantive rules may also be generated by informal tribunals, for a body that hears case after case develops its own principles for

[38] The rule appears to be more procedural than substantive. In one case I observed the tenant said she had not read the lease because she did not read English, but after a bit of hemming and hawing the case proceeded anyway.

imposing order. For example, early in its existence the independent board developed a rule that tenants who owed rent and showed up for their hearing would, unless they lacked all ability or intention to pay their debt, be given a second chance to remain in public housing. This was accomplished by ordering eviction but deferring the execution of the order on the condition that the tenant make payments toward her accrued debt and pay her future rental obligations on time. A tenant who did not pay on schedule was subject to the immediate execution of the outstanding eviction order.

This procedure and mode of decision are nowhere sanctioned by law. Indeed, were the board an ordinary court, in every such case the law would have required a decision for the landlord/authority. However, the independent board did not invent this procedure. It had been used by the internal board of Authority officials when they thought it appropriate. This remedy was an unexceptional one for them since their chair, the HHA's assistant executive director, ordinarily exercised supervisory responsibility over the managers. What the independent board did was to transform a procedure, which granted occasional reprieves on the basis of close case-by-case examinations of tenant situations, into a rule of precedent, which applied to all non-payment tenants and for all practical purposes was a rule of substantive law. Thus in 1969 I sat in on board decisionmaking sessions in which some board members predicted that the tenant would never pay her debts but nevertheless voted to defer eviction because that was the way these cases were handled.

The establishment of a precedent means that cases do not have to be probed as deeply as they must when a decisionmaker confronts them as unique problems with potentially unique solutions (Lempert and Sanders, 1986). Transcripts available for the first two years of independent board hearings support this view of the development of precedent. When cases are arrayed in the temporal order in which they were heard, the correlation between transcript length and temporal order for fifty-six non-payment cases is $-.538$.[39] I believe this pattern exists because the board initially treated each non-payment case on its merits and decided on what seemed to be an appropriate resolution. But as time passed and a rule of law developed, the board's verdict was no longer problematic, and only a few questions were needed to determine into which precedential category a case fit. Since most tenants

[39] Transcripts were available only for these years. After that the Authority continued to record hearings but ceased to transcribe them routinely. The transcripts analyzed ran from case 22 to case 122. Some cases did not involve non-payment, and others were closed without a hearing. The first 20 cases are not included in the analysis because, as will become clear, the independent board did not become fully independent until the Authority's assistant executive director, the chair of the internal board, ceased to represent the Authority before it.

could make colorable promises to repay their rent debts and could give some indication of how this might be done, the conditional deferral was the routine outcome, accounting for about 95 percent of the board's non-payment dispositions between mid 1960 and mid 1969.[40] Indeed, the precedent was so strong that the board evicted at the initial hearing in only two of eighty-six cases of non-payment heard between 1966 and 1974.

VIII. JUDICIAL VALUES

It is no secret that judges follow not only the election returns but also values to which they personally hew. But judges are also constrained by their understanding of the law and their conceptions of the judicial role. One might expect the decisions of an informal adjudicatory tribunal to be even more reflective of the judges' values than the decisions of an ordinary court, since the openness of the procedures allows an appeal to a range of values that could not be addressed in legalistic proceedings and since the constraints of both written law and the possibility of an appeal are either non-existent or small. The expectation that personal values will have a greater effect on decisions when procedures are informal than when they are legalistic may be justified, but the Hawaiian data suggest that the relationship between values and decisions is no simple one. It too is mediated by the judge's perception of what law and role entail, and the influence of personal values on decisions is considerably softened when the decision is entrusted to a diverse panel rather than to one individual.

From 1960 to 1969 virtually every vote of the eviction board was unanimous, but the unanimity did not reflect a basic value consensus among the members, apart from their conception of what their role and the law entailed. For example, eight of the independent board members who served in the 1960s agreed with the statement that "most non-payment tenants will improve their rent payment habits if given another chance by the board," three disagreed, and one was undecided. The numbers are the same but the direction of agreement is reversed when the statement is "troublesome tenants never change." Yet when board members with such different views sat together, they voted the same on almost every case.

---

[40] The negative correlation between transcript length and case order cannot be explained by an increase over time in board efficiency, familiarity with the hearing procedures, or caseload pressure. For 15 overincome violations in the same period, the correlation between transcript length and case order is an insignificant .031, which is significantly different from the negative correlation in non-payment cases at the .05 level. This is to be expected, for each overincome case was unique on its facts, and the depth of the required exploration depended on the facts of the case rather than on the easy fitting of facts to categories for disposition. Of course, had the board faced as many overincome cases as it did non-payment cases, it might have spotted commonalities and developed precedents in this area as well.

The unanimous votes reflected the existence of a strong precedent in non-payment cases, a shared understanding of what the law required in overincome cases, and a tendency to strive for consensus or at least the appearance of consensus that is common in small decisionmaking groups. These features are ordinarily sufficient to override decision propensities based on personal values. We can better appreciate this because the board members' value preferences surfaced in a situation in which norms were absent. In each case, after some discussion the board chair would either summarize what had been said and invite a motion to defer or evict or some member would attempt to capture the consensus by making such a motion.[41] When the seventeen independent board members who served during the 1960s were classified by their latent roles,[42] those with latent roles that suggested a special concern for the poor made 69 percent of the motions to defer but only 42 percent of the motions to evict, while those with latent roles that did not suggest such a concern made only 31 percent of all motions to defer but 58 percent of all motions to evict ($X^2=9.05$; $p<.01$).[43] Thus the board members' behavior in making motions was related to attitudes associated with their general positions in life. Yet these attitudes had no apparent effect on the members' voting behavior because virtually all votes were unanimous. There was, as we shall see shortly, some effect of members' attitudes on board decisions, but the effect was slight because these decisions were constrained by a shared normative sense of appropriate dispositions.[44]

[41] In only a handful of cases was acquittal a real possibility, for except in certain trouble cases, the tenant did not dispute the existence of a lease violation.

[42] By latent roles I mean the occupational or voluntary association roles that ordinarily occupied the board members' working lives. Ten members who were either ministers, social workers, or people involved in extensive volunteer social services with the poor were, before voting and attitudinal data were examined, predicted to be lenient. Seven board members who fell into none of these categories were predicted to be strict.

[43] In a more stringent test I looked at individual board members and compared the actual number of their motions to evict and defer with the number of motions that one might expect given the outcomes in the cases they sat on and the number of members hearing each case. Looking at all members, the Chi-Square for the difference between expected and observed motions to defer aggregated by latent roles is .693, which does not reach an accepted level of statistical significance. The Chi-Square for motions to evict is 4.261, which is significant beyond .025 with the direction predicted. When 4 board members (all predicted as lenient) who played a passive role and seldom made motions of any sort are excluded, the Chi-Square for the difference between observed and expected motions to defer is 3.875, which is significant beyond .025 with direction predicted, while the Chi-Square for motions to evict falls to 1.207, which is only significant at the .15 level with direction predicted. Note, however, that these statistics are not assessing the probability of sampling error. Since we are dealing with the population of cases, the reported association between latent role and motions made precisely characterizes that population.

[44] This is confirmed by the pattern of decisions in overincome cases in which formal law rather than board precedent imposed a bias toward strictness in that the board members were told that federal regulations gave them

This is not to say that personal values were unimportant to the pattern of decisions that the Authority developed or that the effects of these values were not enhanced by the board's informal procedures. Had the independent board not initially consisted of a majority of people with special sympathies to the poor and had its original chair not been a leader in this respect, a different decision-making pattern might have developed at the outset. Moreover, the fact that a panel was deciding cases was important, because the panel provided a forum in which the prevailing norms, particularly the norms of leniency in non-payment cases, could be restated and enforced. A single judge free of recorded precedent might well have changed the pattern of decisions in non-payment cases dramatically if she thought that non-payment tenants seldom improved their payment habits when given another chance.

Indeed, if we look at all cases rather than just non-payment cases, there is evidence that the dominance of a particular value position on the board had some small effect on the outcomes reached. If we consider only those board members who were active in trying to crystallize the board's position,[45] we find that those predicted as lenient by their latent roles constitute 59 percent of the members sitting in deferred cases but only 47 percent of the members sitting in cases in which evictions were ordered. This suggests that in some cases verdicts would have been different had the values of the board members hearing the case been different. Despite the emphasis on norms in the analysis thus far, this result is not unexpected, since the bulk of evictions in the 1960s were in cases involving trouble behavior or income violations, such as fraudulent concealment. These causes of action were

---

no choice but to evict families who had gone over the income limits and had not moved within 6-months. Counting as evictions those cases in which the board deferred for only a limited period (usually a month) to give a tenant family an opportunity to find a home, there is no significant difference between the pattern of decisions by the internal and independent boards, with the latter evicting about 9 out of 10 families at the initial hearing. Families escape eviction for overincome when they can show that their income has diminished to the point where it no longer exceeds the income limit. The one case in which the board came closest to nullifying the law was an overincome case in which a family with 8 children had used up their 6-month grace period while a house was being built. The day before the family was to move, the house burned to the ground. The Authority brought the family to the board, claiming that the law allowed them no choice but to evict them. The board refused to evict, deferring a decision on several occasions, and the board chair personally tried to find a house for the family. Ultimately the problem was resolved when the Authority moved the family to a 3-bedroom unit on a project without income limits that it administered for the Navy. Because of their lack of a naval connection and their family size, the family did not qualify for this unit, but strings were pulled to resolve the first problem, and the second was simply ignored.

[45] Four board members, all predicted as lenient, made motions of any sort less than half as often as would be expected given the number of cases they sat on and the hypothesis that board members did not differ in their propensity to make motions. These are considered inactive members.

too infrequent and too diverse to foster precedent,[46] and thus are good candidates for the influence of value preferences. Presumably some of the people evicted for these reasons would have been allowed to stay had the panel that heard their cases been more dominated by members predisposed to sympathy.

IX. CHANGING NORMS

To judge by the Hawaiian experience, informal procedures allow not only the establishment of norms that control decisions, but also marked changes in these norms. Indeed, while I cannot prove it from a case study, informality appears to make a tribunal especially vulnerable to pronounced change, particularly if key personnel are replaced with some frequency.

Several aspects of informality contribute to this situation. The first is that rules are unwritten. This deprives an informal tribunal of any anchor other than past experience from which to argue that a proposed departure from a rule is unwarranted. In part because the board's precedent for deferring non-payment tenants had not been written into law, when the Authority made cracking down on non-payment tenants a priority in the 1980s, it was easy for its hearing officers to point to the Authority's rules and its lease and to claim that, given a lease violation, routine leniency was an improper disposition. Those who would defend the prior practice could point to no equally concrete embodiment of a counter principle.[47]

---

[46] The trouble behavior category, for example, includes only 38 cases and involves such diverse causes as prostitution in a project unit, fighting, failing to control one's children, parking 2 cars, parking a car that does not run, and keeping pets. In 16 of these cases, the board voted to evict. The board, in contrast, voted to evict in only 8 of the 160 pure non-payment cases it heard from mid 1960 to mid 1969.

[47] I am not asserting that unwritten rules are always weak and specially vulnerable to change. They might be as strong or even stronger than written law in cultures in which law is not usually written and in tribunals in which the judges and, if it matters, the audience, are socialized to accept the validity of the unwritten rules. The eviction board, however, existed in a culture in which binding legal rules are expected to be written and in which there is no cultural reinforcement of board norms apart from the board setting. Without written law to consult, new members were in the position of a jury that must be instructed in the law. The instruction could come from either the hearing officer or old members. Given membership turnover, the general sympathies of most new appointees, and the hearing officer's claim to legal expertise, it is not surprising that the board members tended to be guided by the hearing officer's views.

I am also not asserting that written law is always insulated from dramatic change. On the contrary, a written norm may be reversed with the stroke of a pen. But the process to bring about such legal change is different from what it is when the norm is institutionalized in a tribunal as unwritten and understood. I have no doubt that if the Authority had had a written norm mandating deferrals in the typical non-payment case, it would have changed it before 1987 to make eviction the usual outcome. But had there been a written norm that was not changed, I do not think the Authority's hearing officer would have been able to reverse the board's prior pattern of decisions by insisting that in the typical non-payment case the proper verdict was eviction. Just as

A second reason why informality is conducive to abrupt change is that the subject matter open for consideration, what Sanders and I (1986: 200) call the "*res gestae*" of the case, is wide. Thus new considerations that may pressure the tribunal to adopt different norms may be introduced at any time. Almost any argument is in order.

Finally, the judges in informal tribunals are generally lay persons. Often such tribunals are authorized by some more formal authority, and they may, as the eviction board does, occupy a decisionmaking niche bounded closely by law. In these circumstances lay judges may be unsure of their proper sphere of discretion and thus turn to those with apparent authority or greater legal knowledge for guidance. This makes a tribunal vulnerable to rule changes suggested by an external authority even when the suggestions have no binding legal force. Its vulnerability is enhanced if the authority appoints the members of the tribunal, provides support personnel, or dispenses its funds.

We can see these influences at work in the way in which the pattern of eviction board decisions changed at two points in time. In each case a change in the identity and behavior of the Authority's representative to the board contributed to a substantial change in the way the board decided cases.

The first change occurred at the independent board's inception. During its first six months the HHA's assistant executive director (AED), who had chaired the internal board, presented the Authority's case. Then he was promoted to executive director and replaced as the "prosecutor" by one of the Authority's project managers. Table 1 shows how the relative participation of the board members and of the parties before it changed with the composition of the board and with the identity of the Authority's representative. The data are based on transcripts from the first two years of the independent board's existence.[48]

---

tenant-oriented board members of the 1960s reluctantly evicted overincome families because federal law provided that they could not stay, so I think the Authority-oriented board members of the 1980s would have deferred evictions if they could have been shown by reference to some authoritative source that in certain kinds of cases deferral was a firm norm. Indeed, lay judges might defer more to written norms than legally trained individuals, for the latter are trained to realize the non-bindingness of precedent and the openness of texts to creative interpretation.

[48] The transcripts cover 133 cases in which hearings were held, 39 before the internal board and 94 before the independent board. The total transcript lines accounted for by board members, by the HHA's spokesperson and by the tenant or tenants were counted for each case and then converted to a percentage expressing the fractional participation of each party in the hearing. Lines of less than half the average line length in the transcript were not counted, except that the contribution of an individual accounted for at least one line, even if only one word was said. The participation of witnesses was counted with the participation of the party introducing them. A check on whether the tenant category accounted for more participation when both husband and wife were present than it did when only one spouse appeared revealed no strong relationship.

Table 1. Mean Percentage Participation in Eviction Hearings by Actor and Board Type (1957–69)

Board	Board Members[a]	Authority and Authority Witnesses[a]	Tenants and Tenant Witnesses	Total
HHA board ($N = 39$) (December 1957–June 1959)	46	34	21	101[b]
Independent board: AED "prosecutes" ($N = 17$) (July 1959–December 1959)	18	61	21	100
Independent board: Other prosecutors ($N = 77$) (January 1960–June 1969)	33	45	23	101[b]

[a] Pairwise t-tests of the differences in mean participation by the board and by the Authority $< .001$ for all possible pairwise combinations of boards.

[b] Does not add up to 100 because of rounding error.

The dominance of the AED in both the internal and independent boards is clear. When he was chairing the internal board, the mean percentage participation of board members was 46 percent while it was only 33 percent when the independent board heard cases presented by the project manager, and the participation of the Authority's prosecutor and witnesses goes from 34 percent with the HHA board to 61 percent when the AED participated as a prosecutor, and then drops back to 45 percent when the AED's participation counts neither for the board nor the Authority. The proportional participation of the tenants and their witnesses is virtually the same throughout.

The AED was, in short, the dominant personality so long as he participated in the hearing process. When he was on the board, he took over questioning that would normally have been part of the prosecution's presentation of the case. When he was the prosecutor, he posed the kinds of questions that the board would normally have asked, and if the tenant offered excuses, he participated along with the board members and the tenant in discussing her problems.[49] Neither form of dominance was surprising. The informality and newness of the process meant that participant roles

[49] Comparing 3 cases in which the AED was the prosecutor with 3 cases handled by his successor, we find that the AED accounted for 42% of the conversation as measured by transcript lines and that his successor accounted for 21%. Moreover, on the average the AED accounted for 3.9 lines whenever he spoke, while other participants averaged 1.9 lines. The AED's successor in the cases studied accounted for an average of 2.4 transcript lines whenever he spoke compared to an average of 2.3 lines for other participants. The cases analyzed were selected to minimize the time spread so that differences in participation could not be attributed to long-term trends within the board. The first

were not clearly defined. Because the AED supervised those who brought cases to the board he chaired, the members were used to looking to him for guidance. It is also not surprising that the first members of the independent board did the same thing. They received no significant training, did not know their precise role or the rules they were to apply, and had no written rules to guide them. Not only was the AED experienced as a board chair, but he represented the Authority whose rules they were enforcing.

When the AED left, his replacement found himself in a different situation, for now the board was experienced but the prosecutor was not. Not only did the members not have to look to the Authority's representative for guidance, but the prior pattern of deference to the Authority's representative was disrupted, and the board chair could exert his leadership.[50] As one board member said, recalling this period of transition:

> The board unbended a bit. It seemed to take a more sympathetic viewpoint as time went along. In the beginning the Authority said this was an action for eviction and we should do it. The relationship changed as time went along. The Authority became less formal. [Did the board become more independent?] Yes.

Not surprisingly the pattern of the board decisions changed. Table 2 presents the results at the initial hearing for cases involving either non-payment of rent or non-desirable behavior.

Despite the small number of cases during the six months the AED served as prosecutor, it appears that the pattern of decisions in that period was different from what it was before or after, and slightly more similar to the pattern of decisions by the HHA board than to that of the later independent board. It is unlikely that in an ordinary court hearing relatively simple cases the prosecutor's identity would have such an effect on patterns of judicial participation or on the decisions reached.[51]

This becomes even clearer when we look at more recent history. In the 1980s the board's eviction rate in non-payment cases increased dramatically. According to board member and housing staff informants, by 1987 the board ordered eviction without conditions in virtually every case in which the tenant had rent outstand-

---

of the AED's cases that was analyzed was heard on December 16, 1959, while the last of his successor's cases that was analyzed was heard on March 3, 1960.

[50] In the first 17 transcripts available for cases after the AED left, the Authority representative and the Authority's witnesses account for 48% of all participation and the board members for 30%. The overall figures for the post-AED period are 45% and 33%, respectively, which suggests that the transformation from the pattern of board passivity that existed when the AED was present was an abrupt one. The original board chair was a competent, high-status individual, which may have facilitated the board's greater assertiveness.

[51] It might affect decisions if the discretion to prosecute were exercised differently by different prosecutors or if one prosecutor prepared cases better than another. But in the eviction situation, it was the managers who decided to bring cases and were responsible for gathering the evidence.

Table 2. Outcome of Initial Hearings by Board and Cause of Action, 1957–69

Board	Non-Payment Only		Non-Desirability (Alone or with Non-Payment)	
	Defer	Evict	Defer, Clear or Transfer	Evict[a]
HHA board (December 1957–June 1959)	53%(9)[b]	47%(8)	23%(3)	77%(10)
Independent board: AED "prosecutes" (July 1959–December 1959)	71%(5)	29%(2)	38%(3)	63%(5)
Independent board: Other prosecutors (January 1960–June 1969)	95%(152)	5%(8)	58%(22)	42%(16)

[a] Five independent board cases in which deferral was for a limited period to give the tenant a chance to find a home are included with the evicts.

[b] Number in parentheses is the total number of cases in the category.

ing.[52] The news of this verdict was, however, softened by telling the tenant that if her entire rent debt was paid before the time for filing an appeal to the HHA's commission had lapsed, she could appeal and expect to be reprieved.

As Table 3 suggests, this transformation of the board's decisionmaking is the culmination of a process that began in the mid 1970s. The periods were chosen for substantive reasons (described below) before the data were examined.[53] The first period for which I was able to collect data in 1987, was 1966–74. These years are treated together because the qualitative information I gathered indicated no reasons why board decisionmaking for these years should differ from the pattern that the independent board had established earlier, and indeed there is no substantial difference (cf. Lempert and Ikeda, 1970). The second period, 1975–77, was one of great substantive upheaval at the Authority. The eviction process was under attack in a class action brought by Legal Aid,[54] and at

[52] Tenants who have cleared their rent debt before the hearing are also technically evicted but have their eviction orders deferred on the condition that they pay their rent on time for the following 6 months. Until about 1980, these cases almost never reached the board, because when a tenant cleared her rent debt before a scheduled hearing, the hearing was ordinarily cancelled.

[53] A case is classified by the date of its first hearing if one was held, or by the date of the subpoena, if the case was closed without a hearing. I collected no data for 1960–66 on my 1987 trip. I did, however, analyze data from 1960 to 1964 more than 20 years ago, and the pattern of outcomes was very much like what it was in 1966–74 (Lempert and Ikeda, 1970).

[54] Legal Aid correctly claimed that the Authority in its use of the evic-

Table 3. Outcome of Initial Eviction Hearings for Non-Payment Cases by Period, 1966–85

Outcome	January 1966–December 1974	January 1975–December 1977	January 1978–October 1979	A: October 1979–January 1982	B: January 1982–February 1984	C: March 1984–December 1985	Overall
Conditions or continuance	96.6%(84)[a]	62.1%(18)	78.1%(50)	56.0%(108)	66.5%(165)	58.2%(64)	66.9%(489)
Problem cleared or settled	1.1%(1)	—	—	4.7%(9)	6.5%(16)	.9%(1)	3.7%(27)
Evicted at hearing	2.3%(2)	34.5%(10)	20.3%(13)	32.6%(63)	19.4%(48)	34.5%(38)	23.8%(174)
Default eviction (tenant does not appear)	—	3.4%(1)	1.6%(1)	6.7%(13)	7.7%(19)	6.4%(7)	5.6%(41)
Total cases (*N*)	87	29	64	193	248	110	731

[a] Number in parentheses is the total number of cases in the category.

one point all eviction actions were put on hold. Indeed, of 120 subpoenas issued during this period, only 24 percent resulted in hearings. The proportion of subpoenas resulting in hearings never falls below 78 percent in the other periods and is above 90 percent in the last two. In addition, the management of the Authority was changing dramatically at this time[55] and HUD supervision was intensifying as general authority to oversee the HHA was transferred from HUD's regional office in San Francisco to the Honolulu-area office. A particular concern of the local office was the Authority's rent collection arrearages, and the leniency of the eviction board was seen as the prime source of the problem. Indeed, as late as September 1982 the Honolulu HUD office was pressuring the Authority to abolish the eviction board or otherwise make a drastic transformation,[56] and as recently as 1986 HUD officials

---

tion board did not comply with HUD-mandated grievance procedures. For a while it appeared as if the eviction board might be replaced by a grievance arbitration panel, but eventually it was perceived that the two were compatible. So few eviction actions give rise to adjudicated grievances that this procedural innovation need not concern us here.

[55] When I first studied the HHA in 1969, its entire business was building and managing public housing projects. By the 1970s it had been given major responsibility to build and sell housing for middle income families. These responsibilities, coupled with its responsibilities to manage and help finance a program whereby homeowners could convert leased lands to fee simples, transformed the HHA from an organization that was seldom in the news to a highly visible political body and also directed much of the agency's attention away from public housing. One result was a major reorganization of the Authority following a series of newspaper articles about its failures as a development agency. This led to a change in the law that removed the executive directorship of the HHA from the civil service rolls and made it a gubernatorial-appointed position. This was soon followed by the resignation of the long-time executive director, who had come up through project management ranks, and his replacement by a person with no public housing experience who saw his task in part as bringing a more business-like attitude and organization to the Authority.

Shortly after my 1987 field work was completed, the HHA was divided into two agencies, one with land finance and development responsibilities and the other, like the HHA I observed in 1969, charged with managing public housing and other housing support programs for people of low income.

[56] It appears that in doing this HUD had not independently analyzed the situation but was instead echoing the diagnoses and solutions for the Authority's rent collection difficulties that the project managers had fed HUD auditors in their project-level investigations.

The December 1978 response of the HHA's acting executive director to a HUD suggestion that the board be abolished reveals a sophisticated perspective on the virtues of instruments of informal justice as means of official control:

> The Eviction Board (now designated as Oahu Hearing Board) is the only procedure by which evictions can be processed in a timely fashion. A single Hearing or Review Officer on management staff would be constantly challenged by the grievance procedure and appeals to the HHA Commission. Although these are still options to the tenants, even with the Hearing Board, the sense of fair play representation and judicial action seems to minimize grievance and appeals. Recourse directly to the courts would not only result in a loss of control, but require lengthy delays in scheduling appearances. The inconsistencies that would be experienced under a number of different judges

were complaining about the board's propensity to put non-payment tenants on conditions.[57]

The period 1978–79 runs from the beginning of 1978 until mid October 1979. It marks the end of litigation about the viability of the eviction board and the first point at which the Authority's new, more business-like management could begin to place its stamp on the eviction process. The Authority's longtime representative to the board, who did not believe that it was his responsibility to give the board direction, was replaced during this period. At the start of this period there was a backlog of evictions resulting from the delays attendant to the litigation of the prior period. The period ends with the Authority determined to take steps to speed up the pace of evictions.

The last three columns of Table 3 mark the period of two eviction panels. It begins in October 1979 with the division of the existing board into two panels, and the appointment of four new members to one panel and three to the other. In addition, a day-long training session was held for board members in which the Authority's rent collection problems and the importance of the board in rent collection were stressed. These columns are labeled with letters because the periods they mark are defined by the Authority's representative to the board. *A* was the Authority's first full-time eviction specialist. He was not a lawyer, but enjoyed acting like one and negotiating with lawyers. Period A runs from the end of October 1979 until mid January 1982.[58] Period B runs from January 18, 1982 until February 28, 1984. *B* was the first lawyer to hold the position of hearing officer and was officially attached to the state attorney general's office as a deputy attorney general rather than to the Authority. But she, like her successor, was in effect a full-time Authority employee and reported to the Authority's director of housing management. *C* was a deputy attorney general who became the hearing officer in 1984 and occupied this

might well encourage rather than deter delinquency among the tenants. The time factor alone would increase delinquency before eviction is effectuated.

[57] The officials did not realize that by 1986 almost all tenants placed on conditions had paid their rent debt by the time of the hearing and that the conditions constituted a threat to evict them immediately should they fall behind on their rent within the next 6 months.

[58] *A* actually came to the Authority earlier in 1979 and handled cases before October of that year. I begin period A when I do because this marks the start of the 2-panel system that, even more than the appointment of *A*, is a major break with the past. Moreover, the training session (which *A* ran) and new board memberships that accompanied the start of the second panel provided conditions that were conducive to *A*'s attempts to exert influence. *A* left the Authority before the end of 1981, but cases that arose after his departure but before a permanent replacement was in office are included in Period A. A parallel decision was made with respect to the transition between *B* and *C*. These decisions reflect the expectation that the influence of one hearing officer was likely to linger until there was another person in a position to give the board's panels consistently different messages week after week.

position until shortly after my field work concluded in the summer of 1987.

Table 3 seems to show a major break in the board's routine disposition in non-payment cases in 1975–77, for there are five times the number of eviction decisions (including defaults, which are evictions that are voted when the tenant does not appear) during this period as in the preceding eight years.[59] However, as Table 4 reveals, the break is not as significant as it appears.

The only difference between the 1975–77 eviction board and the earlier board was that the later board would evict when a substantial number of months' rent was due while the earlier board would give a tenant another chance to clear the debt. Indeed, Table 4 does not quite reveal the strength of the rent debt factor, for in ten of the eleven cases in which the 1975–77 board evicted, the tenant's rent debt was six months or more. Moreover, as we have noted there is a substantial selection problem in 1975–77, because so few subpoenaed cases resulted in hearings that those that did may have involved tenants who had both exceptional debts and exceptionally bad rent payment histories or exceptionally poor prospects for paying what they owed. This is evident from the fact that during this period 71.4 percent of the cases heard involved more than six months' rent, while no more than 27 percent of the cases in any other period fall into this category. Thus in 1975–77 the board appears to have been evicting only when its members were absolutely convinced that the tenant would not pay the back rent, something it had done occasionally throughout. The 1978–79 period also does not suggest a marked change in prior practice. In only one of eighteen cases with a rent debt of three months or less did the board evict. The board, however, was willing to evict when the amount owed was between three and six months' rent and did so in nine of twenty-seven cases. Indeed, those who owed more than six months' rent fared better than those who owed between three and six months' rent, for only four of nineteen such tenants were evicted at the initial hearing.

The pattern of board decisions changed dramatically only after *A* was handling cases and the second panel was in place. Then the probability of evictions rose dramatically regardless of amount owed. The substitution of *B* for *A* suggests that the identity of the hearing officer does matter, for except when more than three months' rent was owed, the board was less likely to vote eviction when *B* handled cases than when *A* did.[60] Yet another change oc-

[59] Note that the figures refer to decisions reached at the *initial* hearings in non-payment cases. In some instances tenants were given a rehearing or, especially in later periods, were allowed to stay after appealing to the HHA's board of commissioners. In other instances tenants put on conditions were again brought before the board after failing to meet those conditions, and either the conditions were changed or extended or the tenants were evicted.

[60] The figures for zero-balance cases (those with no rent owed) may be contaminated by selection bias, for when a tenant paid her rent in full before

Table 4. Proportion of Eviction and Default Evictions at Initial Hearings by Period and Number of Months' Rent Owed at Hearing

Number of Months' Rent Owed	January 1966–December 1974	January 1975–December 1977	January 1978–October 1979	A: October 1979–January 1982	B: January 1982–February 1984	C: March 1984–December 1985	Overall
None	0%(4)[a]	—	0%(4)	22.6%(31)	6.8%(59)	15.9%(44)	12.7%(142)
3 months or less	0%(24)	0%(4)	7.1%(14)	37.5%(88)	18.4%(114)	38.9%(36)	24.6%(280)
More than 3 months	3.7%(54)	45.8%(24)	28.3%(46)	52.9%(68)	56.8%(74)	80%(30)	56.8%(296)

[a] Number in parentheses is the total number of cases in the category.

curs when *C* takes over and the probability of evictions rises substantially at all levels of debt. Table 4 in fact tells only part of the story, for the data extend only through 1985, when *C* was still trying—by his own admission—to impose his views on the board.[61] By the summer of 1987, according to both my observations and statements of informants, an eviction order was the almost certain result when tenants appeared at a hearing with rent owed. But even without this information, Table 4 suggests the vulnerability of informal tribunals—at least when staffed by laypeople—to direction from authoritative repeat players.

There is one other change that is reflected in Table 4. At one point cases were ordinarily canceled if subpoenaed tenants paid their debt before the hearing date. As Table 4 shows, *A* started bringing some of these cases to a hearing.[62] Often these involved tenants who had a history of chronic delinquency, either repeatedly falling a month or two behind on the rent and then clearing the debt before a subpoena could issue or continually being about a month behind on the rent. When these cases were brought up, the board sometimes simply acquitted because there was no outstanding debt, but more often (most likely when there was history of chronic delinquency) voted an eviction order but deferred its execution on the condition the tenant keep her rent current for the next six months. During *C*'s tenure the board's attitude in these cases was transformed so that chronic delinquency did not matter; the mere fact that there had been a rent debt was sufficient to trigger an eviction order deferred on conditions. We see this first in the proportion of zero-balance cases in which the board acquitted outright, which went from 17.25 percent (28.6% if continuances[63] without an eviction order are included) under *A* to 22 percent under *B* to 2.3 percent under *C*. Moreover, selection effects mean that *C*'s board was probably hearing less serious cases with respect to chronic delinquency than *A*'s or *B*'s, for *C* unlike his predecessors virtually never withdrew a case after a subpoena had

---

the hearing, the hearing officer could dismiss the case. *B* brought relatively more (24% versus 18%) zero-balance cases to the board than *A* did, and it may be that the cases *A* brought to the board were better candidates for eviction on characteristics, like rent payment history, that the data do not measure. However, the magnitude of possible bias is unlikely to be large enough to explain the differences in the proportion of zero-balance cases evicted.

[61] *C* may not have come to his position with these views. According to one well-placed informant, the director of housing management made a considerable effort to impress upon *C* the need for board strictness in non-payment cases. However, regardless of *C*'s original views, by the summer of 1987 he strongly believed that the board should always vote to evict when rent was owed at the hearing; he felt that he had worked hard to make eviction the automatic outcome under such circumstances.

[62] The small number of zero-balance cases before Period A may be cases in which the tenant paid off the rent debt so soon before the hearing that the board did not know that the case was cleared until the tenant appeared.

[63] These might be ordered to see if the tenant would pay the rent on time for the next few months.

issued.[64] Thus zero-balance cases constitute 18 percent of the nonpayment cases that *A* prosecuted; 24 percent of the cases that *B* prosecuted; and 40 percent of the cases that *C* brought to the board.

The changes that transformed the eviction board in the 1980s resulted from the Authority's decision in the late 1970s to speed up and tighten its eviction process, first by devoting two staff positions, *A* and a full-time secretary, to evictions, and then by dividing the board into two panels so that a panel of citizen-volunteers could meet weekly. At the same time a concerted effort was made to secure a board that would take a tougher, more legalistic approach to the eviction decision. The board training session mentioned above was part of this effort as was, somewhat later, the Authority's decision to send the chairs of its two panels to the Judicial College in Reno, Nevada.[65] In addition, reappointment decisions took account of the board members' attitudes, and new appointments were made with an eye to the members' likely positions. (In the summer of 1987 three of the five non-tenant members on one panel worked for property management firms.)[66]

These actions and others created fertile soil for changes in how the board decided cases. What was crucial, as we have noted in discussing Table 4, was the position that the Authority's representative took in the hearings. *A* and *B* often urged eviction but acknowledged the board's authority to defer evictions on the con-

---

[64] This was probably the result of policy set by the director of housing management.

[65] The 2 chairs told me their behavior as chairs had not changed as a result of this experience. One enjoyed it, and the other regarded it as a joke. Subsequent chairs were not sent to judges' school, although the HHA's executive director pointed to this move as one of the most important steps he had taken to toughen the board.

[66] In addition, effective January 1, 1981, the legislature changed the law authorizing the HHA to evict tenants in accordance with an HHA-produced draft. The most important changes made it easier to subpoena tenants and rationalized the process of appeals. Neither these changes nor the promulgation of administrative rules about the same time seem to have had any direct effect on the board's decisionmaking. As *B* outlined the board's responsibilities in a memorandum to the acting supervising public housing manager in 1982, they were legally what they had always been:

> The Hawaii Housing Authority's hearing boards perform three basic functions: determining whether tenants violated provisions of the rental agreement with the Authority; determining whether the rental agreement should be terminated as a result of the violation; and determining whether tenants should be evicted for the aforementioned violations.

The change in the appeal provision, which limited appeals to the Authority's commission to cases in which there were "new facts and evidence," came to have a substantial indirect effect during *C*'s tenure. As we shall see, he persuaded the board to abdicate some of its discretionary authority to the commissioners. The Authority would not have found this workable had the availability of appeal not been limited in this way and had the commissioners not delegated the task of determining whether new facts and evidence existed to the executive director.

dition that debts be paid in full (although in 1980 a rule was adopted placing a six-month limit on the length of such deferrals). However, *C*, the attorney who next occupied this position, was determined that the outcome be eviction in all non-zero-balance cases. He developed a standard speech in which he argued that if the tenant was actively in lease violation (that is, owed money), it was the board's obligation to evict. To soften the argument he pointed out that the board's decision was not final because the tenant had a right to appeal. This, he pointed out, was the proper locus for merciful discretion.[67] The board's responsibility, he emphasized, was to decide whether there was a legal violation. At times *C* embellished his standard argument by emphasizing that an evicted tenant would be replaced by an equally needy but more responsible tenant from the Authority's waiting list. *C*'s ability as a repeat player to emphasize these themes again and again, the fact that he was clearly speaking on behalf of the Authority, and the fact that the eviction board had come to be dominated by people not bothered by strict decisions[68] meant that in cases in which tenants had not already cleared their debt, the board's norm of decision was transformed from one of deferrals on the condition that the debt be repaid according to some schedule to one of immediate eviction subject to the possibility of a reprieve if, after the board voted eviction, the rent debt was paid in full.[69] This attorney's in-

---

[67] But the commissioner's decision, as the board knows, is conditioned on the tenant's paying the entire rent debt before the time for appeal has lapsed. In some cases *C*, who after having presented cases to the board then processed the eviction orders, would delay the paperwork needed to commence the appeal period in order to give a tenant more time to pay her back rent. He was a former legal services attorney and saw himself as personally sympathetic to the situation of low-income tenants, and in internal HHA discussions *C* took policy positions that were more pro-tenant than those of a number of other Authority officials. At one point *C* complained to me that the Authority's increased efficiency in processing cases after the board's decision was limiting his discretion to allow tenants whom he thought might be good candidates for reform sufficient time to generate the new evidence (full payment in the case of tenants who owed rent at the hearing and a period of full, on-time payment in the case of tenants evicted for chronic delinquency) required for an appeal.

[68] Not only are there a number of property managers on each board, but the tenants on the board are generally quite strict with their fellow tenants. This is not because they have been selected by the Authority for their strictness, for usually they have been selected from a short list furnished by the HHA's tenants' union. Rather it is because the kinds of people who become active in the union are good project citizens who for the most part comply with project rules despite their own financial and other difficulties and feel little sympathy for those who do not.

[69] The demand for lump-sum repayment was less onerous than it would have been earlier, because the Authority's policy of initiating eviction actions before large debts had accumulated coupled with its increased efficiency in scheduling hearings meant that tenants were commonly brought before the board with arrearages of between 1 and 2 months. Often, by borrowing from relatives or other support groups, tenants could clear such debts. During the 1960s and 1970s debts of 3 or 4 months and more were common, because cases were not processed as rapidly. Tenants this far in debt had little hope of clearing their accounts unless they were given time to pay.

fluence is reminiscent of that of the AED some twenty-five years before, except the AED did not try to impose a rule of decision on the board but instead attempted to impose his view about how each particular case was to be decided.[70]

I hypothesize that the success of this effort to impose an automatic eviction rule is, like the earlier domination by the AED, attributable at least in part to the fact that the board follows informal procedures. Had a right to deferral been enacted into law or been the pronouncement of some higher court, the Authority's representative would not have made the case he did. Even without a prior writing, if tenants before the board were routinely rather than rarely represented by lawyers,[71] these lawyers might with some authority have reminded the board of its power to be lenient and argued that the board had a responsibility to decide in accordance with past decisions. But an informal tribunal, even one that in practice follows precedent, is not legally or necessarily bound by it and can change its precedent when an authoritative source continually champions a new rule that most of the board members find congenial.[72] Finally, if professional judges sat on the bench, they would be cognizant and jealous of their power. Thus if there was a precedent justifying conditional deferrals in nonpayment cases, they would be unlikely to change their practices simply because a prosecutor insisted that another rule was proper. Of course, professional judges are likely to see themselves as bound

---

[70] Complementing *C*'s efforts were several informal meetings that the director of housing management held with the board members to discuss the Authority's concerns about its rental delinquencies and the rent collection pressures it faced from HUD. The board members interviewed in 1987 had only sketchy recall of these meetings and did not attribute to them any great effect. However, similar meetings with board members on the islands other than Oahu that were held after the conclusion of my field work were, according to one informant, followed by stricter decisionmaking in non-payment cases, although not as strict as the pattern one finds on Oahu.

[71] Over the entire history of the board fewer than 1 in 20 non-payment tenants had a lawyer at the hearing, and by Period C the rate of representation at the hearing was down to about 1%.

[72] The chair of one of the panels, who had served for about 10 years on the board, will contest the hearing officer's assertions if he goes too far and says in a particular case that, because there is an outstanding rent debt, the board has no choice but to evict. He will also point to the board's power to defer cases during its deliberations. However, with the exception of one case I observed, his protestations go for naught, and I have heard other members say in deliberations that the new rule was that they had to evict. Perhaps because of the mixture of old and new members with different ideas of what the norms require, board members who served in the 1980s, unlike those who served in the 1960s, did not report that virtually all their decisions were unanimous. In this respect it is important to note that the change in unanimity does not reflect a greater mix of attitudes toward tenants in the 1980s. In the 1960s there were members, whose attitudes might be characterized as pro-Authority, who regularly voted for deferrals, and in the 1980s there were board members, who showed great sympathy for tenants, who regularly voted for eviction. What has changed is the balance of attitudes on the board and the sense of which dispositions are normative.

by the law, which in this instance gives the Authority the legal right to evict tenants who are a month or more behind in their rent. This is all the Authority's latest prosecutor was asking for.

We have seen some of the data that traces the transformation that occurred under *C*, but in 1985, which is the last year for which data are available, this transformation was not complete. By the summer of 1987, when I conducted my second wave of interviews and observations of board hearings, the rule that made eviction the standard outcome when rent was unpaid had been institutionalized, and the comments of the Authority's representative were not so much a justification for the rule as a reminder that there was a new standard. For example, in one hearing the Authority's attorney addressed the tenant—and obliquely the board—as follows:

> O.K. Well, given your balance here and what you are saying you are going to do, normally when somebody comes before the board and they do have a balance, what we recommend is that the board order an eviction, but if you do what you say you are going to do and you take care of it by the seventeenth, you do that then we recommend that you file an appeal showing that it is all taken care of. If you do what you are saying that you are going to do, more than likely you can stay. But you have to do that. If you don't there is nothing that we can do to help you out.

However, I did witness one hearing in which a deferral was granted. The case involved a family that in the month before the hearing had paid $750 to cover two months' rent and at the time of the hearing, on July 28, owed only July's rent. The family had gotten into financial trouble due to medical expenses incurred when a son's finger was almost severed. Their problems were compounded, if the husband can be believed, when the money from a recently cashed paycheck was stolen. The deferral was to allow the family to spread the repayment of the July rent over two months. It was done because the date on which the husband received his paycheck was such that even if he applied his next two paychecks to the July and August rent, he might not have a zero balance in time for his appeal, since the second paycheck would not arrive until after the August rent was due. The board was also influenced by the fact that if the husband's next two paychecks were used for the July and August rent, the family would have almost no money for food or other necessities.

The fact that deferring eviction in a non-zero-balance case had come to be perceived as unusual was obvious in the discussion of this case and the remarks made afterward. As the board waited for the tenant to be brought back to hear its verdict, one member remarked, "It must be Professor Lempert's influence; this is the first time we have done a conditional like this in over a year." Another member said, "HHA will have a hemorrhage." A third chimed in, "*C* is going to croak."

The member was right about *C*. He was terribly distraught.

During the next case, involving another non-payment tenant with an outstanding debt, *C* did not make his usual pitch for an eviction but muttered that given the way the board had decided the previous case, he was not sure what to ask for on this one. Later he complained to a fellow employee, who sympathized by saying that the board would not recognize the facts. He also complained to me. He felt that it was unfair that the board was not consistent, and he was worried both that the board might be establishing a new precedent (after he had worked so hard to get them to develop a precedent of evicting) and that the project manager in this case would tell other managers about the outcome, with the result that the managers generally would be reluctant to bring eviction actions. As I predicted at the time, these fears have not been realized.

The most recent changes in the pattern of eviction decisions are interesting not only for what they tell us about how the decisionmaking of informal tribunals may be transformed and how informal procedures can contribute to certain transformations, but also because these changes remind us that informal procedures do not necessarily yield results that *seem* inattentive to law. Under the general Hawaiian landlord-tenant law, when a tenant is brought before a court owing rent that he cannot then repay, the landlord has a right to evict him. This is what the eviction board is now doing in almost every case. Yet the experience of tenants before the board and the procedural freedom they enjoy are, apart from outcomes, much like what they were thirty, twenty, or ten years ago.

X. DIMENSIONS OF INFORMALITY

Figure 3 calls attention to the fact that tribunals of informal justice are informal along two dimensions that need not be associated. One concerns the quality of party participation: whether the parties hew to legal rules of proceeding like rules of evidence and develop their cases by reference to legal rules and arguments. The second takes the parties' style of presenting evidence as a given and concerns the judge's stance toward a case: whether the judge seeks to decide cases in accordance with official legal principles or tries to do what is right by reference to common sense and widely shared norms of popular morality.[73] Only when both the judicial

[73] Ordinarily the first judicial stance is associated with judicial passivity, while the second brings to mind the image of the judge who actively participates in the litigation process, but these associations are not necessary. In continental legal systems or in settlement conferences in this country, legalistic judges are commonly activists, and a substantively oriented judge may simply let the parties tell their stories. The empirical association is (in this country) expected to exist because, on the one hand, official law constrains judges to passivity and a legalistic judge is expected to be oriented to this body of law as well as to procedural rules and the law governing the case. On the other hand, the judge who takes an informal stance will often find that she will have to

Figure 3. Dimensions of Informality

Party Participation	Judicial Stance: Legalistic	Judicial Stance: Informal
Legalistic	1. Legal adjudication	2. Court-induced settlement
Informal	3. Hidden legalism	4. Commonsense resolution

stance and the party's mode of participation are informal, do we have an institution of informal justice. When both are legalistic we have the model of ordinary legal adjudication.

As with all fourfold tables, real world phenomena never fit neatly into the social scientist's conceptual boxes. Cells 2 and 3 of Figure 3 illustrate this, for the processes given as examples are not pure cases. Court-induced settlements that combine party legalism with an informal judicial stance emphasize the procedural aspects of the stance. The judge comes down off the bench, so to speak, and seeks to persuade the parties that a certain outcome is both fair and desirable. This, however, is often done with reference to official law, and judges will sometimes make or threaten legal rulings to induce settlement. Along the other dimension, the parties may act less legalistically once it becomes clear that they have established the legal parameters within which a settlement will occur.

Hidden legalism emphasizes judges' attention to official law, but when the parties' participation is informal, the judge may also enter the discussion in an informal way rather than remain a passive evaluator. Moreover, if the parties realize that the judge, despite the style of her participation, is attending to official law, they will, while proceeding in an apparently informal manner, be sure that necessary legal ground is covered and that appropriate legal arguments are made. If only one party realizes that an informal judicial style does not mean that the substantive law has been relaxed, that party will be at a substantial advantage. This differential understanding of what the tribunal is about is more likely when one party is a repeat player and the other is a one-time participant. Small claims courts often fit into this cell.[74]

intervene to be sure the parties reveal everything that she regards as relevant to her decision, particularly if, as will often be the case, the parties are proceeding informally and, in the absence of clear rules, are uncertain about what the tribunal regards as important.

[74] See, e.g., Yngvesson and Hennessey (1975) and O'Barr and Conley (1985). The O'Barr and Conley article is particularly instructive, for they re-

The older practice of giving non-payment tenants a second chance was a commonsense resolution that had hardened into precedent. But there was still room for considerable common sense in the way the precedent was effected, for the tribunal had to determine from the facts of each case what the terms of the second chance would be. The parties knew what the adjudication was about and proceeded accordingly.

Today, board hearings embody hidden legalism. From a purely procedural standpoint, they look essentially as they always have. Participation on both sides is informal. Tenants seldom have lawyers, and the Authority's representative, although an attorney, ordinarily does not act much like a lawyer. There are no rules of evidence, and the board members ask questions, express sympathy, and occasionally give tenants a piece of their mind as they have always done. Yet the decision is almost always fully determined by legal criteria. The tribunal applies the official legal rule that if there is rent money due, the landlord has the right to an eviction. The tenant's story is probed, but regardless of what the tenant says, the decision is almost always determined by one basic fact: Is there a rent debt outstanding? If the tenant realizes this at all, it is only after some discussion, when the Authority's representative tells her that the tribunal's usual rule is to evict whenever there is an outstanding rent debt and explains that if the debt can be paid after the hearing, a reprieve is likely on appeal.[75] This transformation from commonsense resolutions to hidden legalism was facilitated by the informality that characterized the commonsense regime.

Before we leave Figure 3, note the simplifications that it incorporates for expository purposes. It assumes that the party takes the same stance toward both rules of proceeding and the substan-

---

port that, as compared with litigants in ordinary courts, small claims litigants are often satisfied with their experience, because they feel that they have had an opportunity to tell their story in their own words to a person in authority. Yet some of these litigants lose what could have been winning cases because, with limited knowledge of the law and without the constraints of legal form, they fail to include in their stories all the legal elements necessary to a valid claim or defense.

[75] If the tenant has sought advice from Legal Aid before the hearing, the tenant may realize the legalistic nature of the hearing at the outset, for the Legal Aid staff tells tenants that unless they pay their rent, they will be evicted. The Legal Aid staff came quickly to recognize the Authority's new policies and the fact that the board was implementing them. Perhaps because they occasionally tried to negotiate cases with the Authority's representative, they were explicitly informed of the change in the Authority's position and the board's behavior. Legal Aid's reaction to the new legalism was to discontinue almost entirely the representation it had occasionally provided non-payment tenants at eviction hearings. Its lawyers and paralegals recognized and accepted the validity of the legal rule the board was applying and were unwilling to expend their limited resources on cases they were sure to lose. Occasionally they will still step in to aid a tenant with an appeal, but in doing so their first concern, as one paralegal told me, is to help the tenant find some "sugar daddy" who can give her money to clear her debt.

tive law (legalistic or informal) and that in this respect the two parties do not differ. It further assumes that the only judicial stance that is relevant is that which the judge takes toward the substantive law. These assumptions saved us from having to consider the possible intersections of three actors (judge, prosecutor and defendant) whose positions might vary in two ways along two dimensions and the unwieldy multi-cell table to which these possibilities give rise. By way of illustration, however, it is instructive to consider certain configurations at this level of detail.

Recall that the degree to which participants in a tribunal are constrained by legal rules and the degree to which a tribunal's decisions are oriented to official law are two of the dimensions that were defining variables of Abel's (1982b) ideal-typical informal justice. I argued at the outset of this paper, however, that while both variables might well be aspects of ideal-typical informal justice, only the character of participation (whether it follows legal rules of proceeding) and not the degree to which judges or participants were oriented to official law was a *key* to defining a tribunal as an institution of informal justice. Thus parties may characterize a tribunal as an institution of informal justice when it differs from the ideal in more fundamental ways than those that always characterize attempts to link ideal conceptual types to real world exemplars. This opens various possibilities of perception, confusion, and misperception. For example, we can state more precisely why the label for cell 3 of Figure 3 did not quite fit. Whenever a party's participation is procedurally and substantively informal[76] and the court's stance is procedurally informal and substantively legalistic, the party will believe her case is being heard in an informal tribunal, but we will in fact have a situation of hidden legalism. On the other hand, if the party's participation is procedurally informal but substantively legalistic and the court's is the same, we will have an informal legal forum—as in certain settlement conferences—in which informality provides an efficient way of testing who has the better legal case.

If one party and the judge are procedurally informal and substantively legalistic while the other party proceeds informally in both respects, the latter is seriously disadvantaged, for only her opponent is addressing the normative issues that concern the court. This is essentially the situation of non-payment tenants before the eviction board today. They may respond expansively when the board asks them why they could not pay their rent, but they soon learn their responses do not matter. Earlier in the board's history the situation was different, with the managers stubbornly holding

[76] Note that informality with respect to the substantive law is Weber's (1968) substantive rationality. Parties with an informal substantive orientation orient themselves to norms, but they are not legal ones. This can cause further confusion as the non-legal norms the two parties invoke need not be the same nor need they be the same as the norms the judge thinks relevant.

out for what they saw as the legally mandated outcome, and the tenant and board responding to similar, unofficial norms. As repeat players, the managers of course recognized the situation, and they responded by withdrawing legitimacy from the board: It had weak judges and was a phony court.[77]

One could explore other combinations of party and court stances and party perceptions. Some may have characterized the eviction board in certain cases (for example, when Legal Aid represents a tenant) but not others, and some no doubt characterize other tribunals. However, I think I have said enough to make my point: there is variance worth exploring here. I leave the examination of other configurations and their perceptual and behavioral implications to those seeking to make sense of other forums.

XI. CONCLUSION

I have suggested in this paper that Western observers and participants characterize tribunals as either formal or informal based on certain keys, such as the quality of the conversation the tribunal allows. These keys allow tribunals to be quite rule bound—both procedurally and substantively—yet still characterized as informal. I believe the Hawaii Housing Authority's eviction board is such a tribunal. If I am correct, throughout its history this board has had rules of proceeding that were every bit as regular and often almost as inviolate as the codified rules that officially govern ordinary courts.[78] This has been true with respect to both the procedures the eviction board followed and the substantive norms that it applied.

Anthropologists have long documented procedural and substantive regularities in tribunals that to Western eyes (although perhaps not to native ones) appear informal. Fallers (1969), for example, tells us that trial transcripts of cases arising among the Basoga in Uganda read (to the Western observer) like a series of non sequiturs that are sometimes interlarded with apparent contradictions. Natives, however, perceive legal principles that fill in the gaps and resolve the contradictions. Sociologists also have documented the fact that rules arise in informal interaction. This is so even when, as was in some respects true of the eviction board, the rules are institutionalized largely within the confines of the interaction setting itself rather than, as is true of most of the tribu-

[77] When the board was composed of Authority officials, the managers (and perhaps the tenants) assumed that the board, despite its legal status and adjudicative function, would respond to the managers' substantive concerns. Indeed, several managers described the board to me as a "kangaroo court." This label is further testimony to the power of keying (here the composition of the board is a key), for the board did not routinely ratify managerial discretion but reversed the managers in about a third of its cases.

[78] That rules change does not mean they are not binding as they exist at a given point.

nals studied by anthropologists, in a larger society (cf. Bohannan, 1965). Thus Ross (1970) reports liability and damage rules peculiar to plaintiff-insurance adjuster negotiations; Nonet (1969) describes the emergence in industrial accident tribunals of procedural and substantive rules that transformed the quality of hearings and prefigured legal change; and Emerson (1983) shows that rules can emerge even within a single court session and that decisions are made with this possibility in mind.

The image that one sometimes encounters of informal tribunals as institutions that are unbound by rules of procedure and free to do substantive justice in the manner of Weber's (1968: 976-78) khadi is highly suspect. One may always search for and should expect to find rule-like regularities in the workings of informal tribunals, although the regularities may be quite different from those of ordinary courts. So long as such regularities are not an ordinary court's regularities, they need not threaten perceptions of informality, for they will not key the concept "court of law."

I have also tried to show, using the eviction board as an example, that the kinds of proceedings that we associate with informal tribunals not only affect outcomes in particular cases and behavior beyond outcomes but also lead to substantive rules of precedent and have implications for how that precedent can change. In this connection I have argued that a major difference between legalistic and informal procedure lies in the ways that procedural and substantive norms are shaped and vulnerable to change. Indeed, the substantive norms that informal procedures shape can change even though a tribunal's way of proceeding remains in most obvious respects the same. Because informal procedure is a key to framing our conception of a tribunal, the casual observer or occasional participant may misread the character of a tribunal and overlook or misread fundamental transformations in the nature of what is going on. In particular, a party may not realize that a tribunal is highly legalistic in its orientation to substantive norms until it is too late to save his case.

The causal relationship between formal rules of procedure and substantive outcomes is a staple of law school civil procedure courses and social science investigation, but the substantive outcomes of concern are ordinarily case outcomes rather than the generation of rules. It is clear from this work that legalistic procedures can affect outcomes, but the relationship is not always a simple or expected one. Stapleton and Teitlebaum (1972), for example, found that the usefulness of defense counsel in juvenile court varied with the characteristics of the court that a youth confronted. The relationship between informal procedure and substantive outcomes has received less attention, although some recent work has begun to focus on this. In particular, Comaroff and Roberts's (1981) fine book about the cultural logic of disputes among the Tswana, inhabitants of Botswana, calls our attention

not only to the implications of process for substantive rules and outcomes but also to the ways in which the concepts of process and rules can dissolve into each other. Miller's (forthcoming) reconstruction of Icelandic disputes from the Saga literature carries similar messages, although the dispute processes he examines are to only a small extent institutionalized in tribunals.

In making my arguments, I have drawn on the thirty-year history of the Hawaiian Housing Authority's eviction board for inspiration and examples. Although the board is a specialized agency, I believe that much of what I have found is true of other informal tribunals, especially those that are closely linked to institutions of the regular legal system. (I am thinking here of such forums as small claims courts, court-mandated mediation, court-annexed or contractually mandated arbitration, old-style juvenile courts, and, in some countries, popular tribunals.) Whether I am right in these expectations—whether I have been writing about the "dynamics of informal justice" or just about "the case of a public housing eviction board"—is an empirical question. We need more studies that pay attention to the dynamics, in two senses, of the procedures we find in informal tribunals. First, we need studies that look at informality as the resultant of social forces and seek to understand informal procedures as products of the situation of the tribunals in which they are embedded. Second, we need studies that look at informality as a moving force and ask how it affects the behavior and outcomes in tribunals and whether it has larger social implications. My treatment of the HHA's eviction board is intended as an effort in these directions.

REFERENCES

ABEL, Richard (1982a) "The Contradictions of Informal Justice," in R. Abel (ed.), *The Politics of Informal Justice*, Vol. 1. New York: Academic Press.

——— (ed.) (1982b) *The Politics of Informal Justice*, Vols. 1 and 2. New York: Academic Press.

BOHANNAN, Paul (1965) "The Differing Realms of the Law," 67 *American Anthropologist* 33.

CAYTON, Nathan (1939) "Small Claims and Conciliation Courts," 205 *Annals of the American Academy of Political and Social Sciences* 57.

COMAROFF, John L., and Simon ROBERTS (1981) *Rules and Processes: The Cultural Logic of Dispute in an African Context*. Chicago: The University of Chicago Press.

CONLEY, John M., and William O'BARR (forthcoming). *Rules and Relationships: The Discourses of Law*. Chicago: The University of Chicago Press.

DUKE LAW JOURNAL (1969) "Project: The Legal Problems of the Rural Poor," 1969 *Duke Law Journal* 495.

EMERSON, Robert (1983) "Holistic Effects in Social Control Decision Making," 17 *Law & Society Review* 425.

FALLERS, Lloyd (1969) *Law Without Precedent: Legal Ideas in Action in the Courts of Colonial Bugosa*. Chicago: University of Chicago Press.

FELSTINER, William L. F., and Lynne A. WILLIAMS (1978) "Mediation as an Alternative to Criminal Prosecution," 2 *Law and Human Behavior* 223.

GIBBS, James L., Jr. (1963) "The Kpelle Moot," 33 *Africa* 1.
GLUCKMAN, Max (1955) *The Judicial Process Among the Barotse of Northern Rhodesia*. Manchester: Manchester University Press.
GOFFMAN, Erving (1974) *Frame Analysis*. Cambridge, MA: Harvard University Press.
HAWKINS, Keith (1984) *Environment and Enforcement: Regulation and the Social Definition of Pollution*. Oxford: Clarendon Press.
KRONMAN, Anthony T. (1983) *Max Weber*. Stanford: Stanford University Press.
LAZERSON, Mark H. (1982) "In the Halls of Justice, the Only Justice Is in the Halls," in R. Abel (ed.), *The Politics of Informal Justice*, Vol. 1. New York: Academic Press.
LEMPERT, Richard (1971) "Evictions from Public Housing: A Sociological Inquiry." Ph.D. Dissertation, Department of Sociology, University of Michigan.
LEMPERT, Richard, and Kiyoshi IKEDA (1970) "Evictions from Public Housing: Effects of Independent Review," 35 *American Sociological Review* 852.
LEMPERT, Richard, and Karl MONSMA (in press) "Lawyers and Informal Justice: The Case of a Public Housing Eviction Board," *Law & Contemporary Problems*.
——— (1989) "The Value of Counsel: The Case of a Public Housing Eviction Board." Presented at the annual meeting of the Law and Society Association, Madison, Wisconsin (June).
LEMPERT, Richard, and Joseph SANDERS (1986) *An Invitation to Law and Social Science*. Philadelphia: Univeristy of Pennsylvania Press.
MAYNARD, Douglas (1984) "The Structure of Discourse in Misdemeanor Plea Bargaining," 18 *Law & Society Review* 75.
MILESKI, Maureen (1971) "Courtroom Encounters: An Observation Study of a Lower Criminal Court," 5 *Law & Society Review* 473.
MILLER, William (forthcoming) *Bloodtaking and Peacemaking: Feud, Law and Society in Saga Iceland*. Chicago: University of Chicago Press.
NETHERTON, Ross D. (1957) "Fair Trial in Traffic Court," 41 *Minnesota Law Review* 577.
NONET, Philippe (1969) *Administrative Justice: Advocacy and Change in a Government Agency*. New York: Russell Sage.
O'BARR, William M., and John M. CONLEY (1985) "Litigant Satisfaction Versus Legal Adequacy in Small Claims Court Narratives," 19 *Law & Society Review* 661.
ROSS, H. Lawrence (1970) *Settled Out of Court: The Social Process of Insurance Claims Adjustment*. Chicago: Aldine.
ROSS, H. Lawrence, and John M. THOMAS (1981) "Blue-Collar Bureaucrats and the Housing Code Regulation in Three Cities." Presented at the annual meeting of the Association for Public Policy Analysis and Management, Washington, D.C. (October 23).
SMITH, Reginald H. ([1919] 1967). *Justice and the Poor*. Chicago: National Legal Aid and Defenders Association.
STAPLETON, W. Vaughan, and Lee E. TEITELBAUM (1972) *In Defense of Youth*. New York: Russell Sage Foundation.
SUDNOW, David (1965) "Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office," 12 *Social Problems* 255.
TRUBEK, David (1972) "Max Weber on Law and the Rise of Capitalism," 1972 *Wisconsin Law Review* 720.
WEBER, Max (1968) *Economy and Society*, eds. G. Roth and C. Wittich, New York: Bedminster Press. Vols. 1 and 2.
WHEELER, Stanton, Edna BONACICH, M. Richard CRAMER, and Irving K. ZOLA (1968) "Agents of Delinquency Control: A Comparative Analysis," in S. Wheeler (ed.), *Controlling Delinquents*. New York: John Wiley and Sons.
YNGVESSON, Barbara, and Patricia HENNESSEY (1975) "Small Claims, Complex Disputes: A Review of the Small Claims Literature," 9 *Law & Society Review* 219.

CASES CITED

Thorpe v. *Housing Authority of the City of Durham*, 336 U.S. 670 (1967).

REGULATIONS CITED

17 Hawaii Administrative Rules § 17.501.2(c) (effective January 1, 1981).
Hawaii Revised Statutes § 360–4 as amended in 1980.