

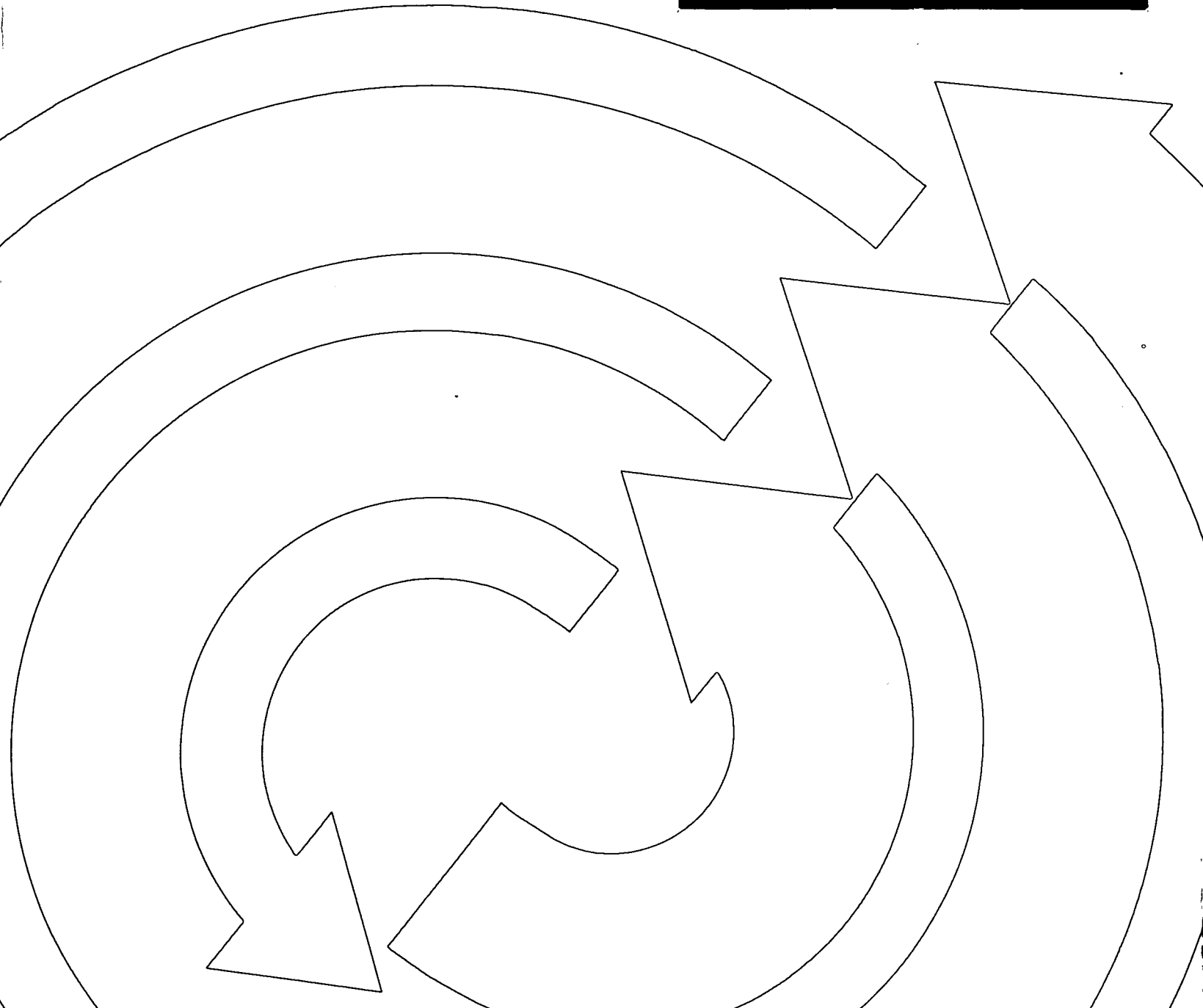
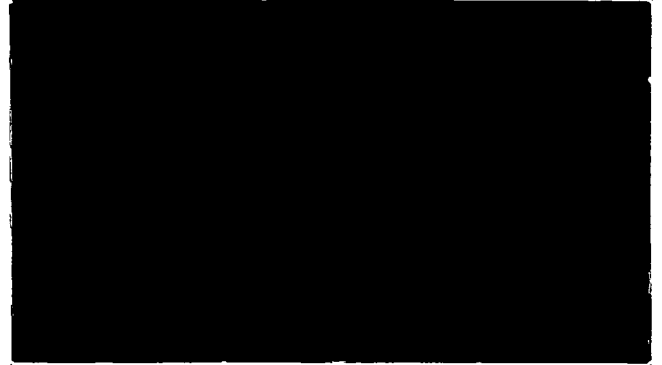


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PERSPECTIVE: THE CASE OF A
PUBLIC HOUSING EVICTION BOARD

by Richard Lempert

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**DISCRETION IN A BEHAVIORAL PERSPECTIVE:
THE CASE OF A PUBLIC HOUSING EVICTION BOARD***

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Introduction

The discretion that law grants may be examined as a quality of rules, as a quality of behavior or as a sense that people have of their freedom to act.¹ Thus legal rules give discretion, people exercise discretion and individuals contemplating or reflecting on action may feel as if their actions are or were discretionary. Discretion as a quality of rules is a topic much mooted by legal philosophers and lawyers writing from an analytic perspective (Barak, 1989; Dworkin, 1978; Fletcher, 1984; Greenawalt, 1975; Hart and Sachs, 1958; Post, 1984; Rosenberg, 1970-71). Discretion in its other two senses is more appropriately studied by social scientists. While the phenomenology of legal discretion has received little empirical attention, discretionary behavior has been the focus of considerable research by social scientists and empirically oriented lawyers studying the legal system. (See e.g. Alschuler, 1975, 1976; Davis, 1969; Emerson, 1983; Goldstein, 1960; Hawkins, 1984; Heumann, 1977; Kagan, 1978; Pepinsky, 1984; Schubert, 1963; Skolnick, 1966, 1967; Sudnow, 1965.)

Most philosophers who write on legal discretion are thinking primarily of judicial discretion and in particular of law-making discretion or discretion to determine the legal implications of an act. From the philosophical discussion two principles emerge. The first is the idea that legal discretion is authorized choice. Thus Hart and Sachs (1958) write, discretion is "the power to choose between two or more courses of action each of which is thought of as permissible." Dworkin (1978) says that a judge has discretion if "he simply is not bound by the authority in question." And for Greenawalt (1975), who has written one of the clearest and most helpful articles on the topic, "discretion exists if there is more than one decision that will be considered proper by those to whom the decision maker is responsible, and whatever external standards may

¹ I am indebted to Robert Post for clearly stating this point in a letter commenting on an earlier version of this manuscript.

be applicable either cannot be discovered by the decision maker or do not yield clear answers to the questions that must be decided."

The second principle is that adjudicative discretion is more than simply the matter of being unbound by authority and in this sense free to choose from among a number of alternatives: it involves choosing within a context set by law. Law, in other words, both constrains as well as frees. It frees the adjudicator because it provides no uniquely correct decision in the circumstances, but it constrains the adjudicator because not every possible decision is permissible (Barak, 1989; 19). Without a freedom and constraint that are both rooted in law, there is no adjudicative discretion. Dworkin offers a nice image. "Discretion," he says, "like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction" (1978; 31). When the discretion is adjudicative that doughnut is law (cf. Post, 1984). If the legal system does not allow the judge to choose, the judge is not exercising discretion but is instead flouting the law, and his decision might properly be reversed. Conversely, if the law places no constraints on the judge's choices, the judge is not exercising a legal discretion at all, but is acting within a realm where law does not apply. Thus, a judge may choose to wear blue pants or green pants or even no pants under his robe; but we would not call his decision an exercise of adjudicative (or legal) discretion.

In discussing discretion, philosophers often point -- either hypothetically or actually -- to the exercise of discretion, but their concern is typically with the nature of rules and the ways in which or the degree to which rules authorize discretionary behavior, not with the behavior that occurs. One result is that when one thinks of judicial discretion one thinks of unpatterned judicial behavior. If a range of actions is permissible, there is no a priori reason to expect that one action within that range will be preferred to another. However, discretion is not only a property of legal rules; it is also a property of behavior. As a property of rules discretion need not shape behavior, for rules are not inexorably influential. Judges and others may choose to act where they have no rule-given discretion, and conversely, if they have discretion, they may not fully consider the range of choices discretion allows. Thus, as a property of behavior, discretion need not reflect the

leeway that discretion-conferring rules allow. If law is no guide, other social forces may be, and they may give rise to patterns of behavior that look, and in a sociological sense are, more rule-bound than behavior that is in theory rigorously structured by law. Indeed, discretion may invite social influences as a vacuum invites its own destruction. When law only loosely regulates decisions, other forces may arise that tighten that regulation.

For behaviorally oriented social scientists, judicial discretion has not been the central or even the most important locus of discretion in the legal system. While there are empirical studies of judicial law making (Casper, 1976; Danelski, 1966; Schubert, 1963) and judicial sentencing (e.g. Cook, 1973; Hagan et al., 1983; Partridge and Eldridge, 1974; Uhlman and Walker, 1980), these tend to focus more on the correlates and predictors of discretionary decision making than on the manner in which discretion is exercised or the forces that channel discretion. Those interested in the latter issue and the way they culminate in "discretionary justice" tend to focus on social control agents that are closer than the courts to those who are subjects of legal control. Predominant among these are: the police (e.g. Black, 1980; Davis 1969; Goldstein, 1960; Reiss, 1971; Skolnick, 1967), lawyers (e.g. Alschuler, 1975; Heumann, 1977; Sudnow, 1965; Skolnick, 1966) and regulatory inspectors of various sorts (Bardach and Kagan, 1982; Hawkins, 1984; Ross and Thomas, 1981).

Those who study how officials exercise discretion often do not focus on legal rules, for discretion is seen as the result of social situations that both shape the exercise of discretion and make its exercise inevitable. Discretion exists not only where an agent is given authority to choose by statute or regulation, but it also exists where that authority is expressly denied. Skolnick's cops, for example, are exercising discretion when they guarantee a burglar lenient treatment if he will improve their clearance rate by confessing to numbers of crimes for which he has not been arrested (1966; 176-79) and Ross and Thomas's housing inspectors are exercising discretion when they pretend to authority they do not have (1981). The behaviorists, in other words, understand that legal actors always have discretion to ignore rules that deny them discretion. Whether this discretion is exercised depends both on the actor's role conception and on

the degree to which the actors conduct is visible and vulnerable to sanctions or reversal. The situation of judges on these dimensions is in most respects less conducive to ignoring clear legal commands than the situations of the other major actors in the law's social control hierarchy.

Both philosophers and social scientists give the impression that where discretion exists behavior is not controlled by rules. For the philosophers this is an analytic truth since if a rule did constrain behavior there would be no discretion. Social science studies give this impression not only because they focus on situational pressures that shape behavior, but also because the rules they most predominantly discuss are frequently legal rules from which behavior deviates. However, as some (e.g. Sudnow, 1965; Ross, 1970) have recognized, one way in which actors can manage discretion is by establishing rules that as a behavioral matter take away much of the discretion that law or situation has allowed.

The Empirical Study

This paper is about the adjudicative discretion which Hawaiian state law gives a public housing eviction board. It is concerned not only with discretion as a quality of behavior but also with the sense that adjudicators have of their discretion. The two are related, for an adjudicator's sense of discretion can shape the way discretion is exercised. Not only are adjudicators likely to respect the law where it appears to limit their discretion, but despite legal discretion adjudicators may establish norms that lead them to feel that they have no discretion in particular cases. In this paper I shall look at a variety of ways in which the eviction board I observed has exercised discretion, and I shall try to identify forces that shaped the board's discretion in particular cases and changed the pattern of discretionary decisions over time.

The eviction board I studied hears the cases of almost all tenants whom the Hawaiian Housing Authority (HHA) seeks to evict from its public housing projects on the island of Oahu.²

² Occasionally, when a quorum of the board cannot be mustered, the HHA will appoint a hearing officer to try cases. Also some tenants when threatened with eviction leave before the board can hear their cases.

The board was authorized by state law in 1949 and established in 1957. However, I shall focus on the board as it existed from 1960 on, which is when a board composed of three authority officials was replaced by one composed of five citizen volunteers.

My investigation into the HHA's eviction board occurred in two stages. The first stage which involved three months of field research during the summer of 1969 examined the eviction board from its inception until that point in time.³ The second stage which involved field work during the summer of 1987 examined the eviction board from 1966 until that point. During both stages I received the full cooperation of the HHA. I was able to interview the great majority of those people, except for tenants, who have been involved in the Authority's eviction process from 1960 on. These interviews included eviction board members, Authority officials, including those responsible for prosecuting the Authority's cases before the board, project managers, and private and legal aid attorneys who have defended tenants before the board. I sat in on more than thirty eviction hearings, all those held during the two summers of my fieldwork. I read the full transcripts of more than 100 additional hearings, most involving cases from the early 1960s. I perused Authority records for any official documents or other materials relating to evictions. I collected and coded information from the records of more than 1400 eviction actions. And I read all the Federal and state statutes and regulations relating to the eviction process that I could identify.

I found that during the 18 years between my two visits, some aspects of the eviction process had remained the same, but others had changed -- sometimes dramatically. The board's status, jurisdiction, and powers were officially the same. At both points in time the board was composed of citizen volunteers who were paid only a nominal sum (\$10 a member a meeting in 1987) for their services. Although the board members were appointed by the Authority, they were independent of it. The board's chair was a board member, and neither the board nor its chair had to answer to the Authority for its decisions. The Authority was required to bring before the board any tenant it sought to evict, and the tenant had a right to a "full and fair hearing"

³ Field work in Hawaii is a tough assignment, but someone has to do it.

which included the rights to know in advance why the Authority sought to evict, to present witnesses or documentary evidence, to cross-examine opposing witnesses and to be represented by counsel.⁴ At both points in time the board had the power to acquit tenants, in which case they had to be allowed to remain; to evict tenants, in which case the Authority was granted a writ of possession without further litigation; or to conditionally evict tenants, in which case an eviction order would issue but its execution would be held in abeyance and eventually cancelled so long as the tenant complied with the conditions specified.⁵

The types of cases the board heard and its procedures for hearing these cases also looked much the same in 1969 and 1987. In both years and every year in between actions brought for non-payment of rent dominated the docket, as non-payment was during this span the sole charge in about three-quarters of the cases, and was charged together with some other offense in an additional five percent of the actions. Other cases the boards heard involved what I call "trouble behavior." This includes such things as income falsification,⁶ fighting, parking more than one car or a car that doesn't run, keeping pets, and allowing unauthorized guests to occupy units.

Hearings were held around the same long table in the same conference room in 1969 and 1987, and in many ways they looked similar. Lawyers were seldom present, rules of evidence were relaxed; conversation was informal; tenants who did not spontaneously excuse themselves would be invited to tell their stories, and board members would not only question tenants but

⁴ In the early 1960s the Hawaii Housing Authority was apparently unique among American public housing authorities in the degree to which it extended these due process protections to tenants it sought to evict. In the 1970s federal rules extended in somewhat different form similar protections to tenants in all federally aided projects across the United States.

⁵ These orders, called "conditional deferrals" or simply "conditions," were most common in cases brought for non-payment of rent, and the usual condition was that the tenant pay back the rent owing by a certain date and pay all rent when due for a certain period of time. A 1980 amendment to the statute establishing the eviction board could be read as removing the board's discretionary authority to issue conditional eviction orders where the HHA had proved a lease violation, but a 1982 statement by the lawyer who then handled the Authority's eviction cases did not interpret the law that way nor, in a training session held that year, was the board told that this was what it meant.

⁶ At both points in time the rent in most of the HHA's projects was set at a percentage of a family's annual income and there were income limits on eligibility for placement in the projects. In 1969 but not in 1987 there were also income limits on continued occupancy.

might advise them on how to deal with their problem or lecture them on their moral deficiencies. The hearings ordinarily lasted as long as the parties had something to say, which was most often in the twenty to thirty minute range, but was not infrequently somewhat longer, and cases lasting an hour or more occurred.⁷ Decisions were reached by the board in a brief discussion following the close of the case and the tenant and manager were immediately informed about what the board had decided.

In other respects, however, there were marked differences in the situations I observed in 1969 and 1987. Many of these were not observable from the hearing but rather concerned the Authority's project management and its officials' views of the appropriate scope of board discretion. In 1969 considerable discretion was granted project managers with respect to rent collection on the projects. Managers were free to "work with" tenants in financial difficulty, and it was largely up to the manager to decide if and when to bring a tenant before the eviction board. Thus when non-payment tenants were brought up for eviction, they commonly had three, four, or more months' rent owing. In 1987, thanks to computers, the central management staff knew as soon as the project managers which tenants were behind on their rent, and project managers had to justify decisions not to seek eviction when tenants were more than six weeks in arrears. Thus many non-payment tenants who faced the board in 1987 owed two months' rent or less, and a number of them owed nothing because they had cleared their debts after being subpoenaed.⁸ In 1969 the latter group would have had their cases cancelled.

⁷ The longer cases are ordinarily trouble behavior cases in which the Authority presents a number of witnesses and in which tenants are disproportionately likely to be represented by attorneys (Lempert and Monsma, in press). The twenty to thirty minute hearings common in open and shut non-payment cases may seem short but are in fact longer than the typical hearing in at least some housing (Lazerson, 1982), small claims (Conley and O'Barr, in press), and misdemeanor courts (Mileski, 1971).

⁸ Cases were also more rapidly processed in 1987 because two full time staff positions -- a secretary and a lawyer -- were devoted to the management of the eviction process. In 1969 the eviction process was managed by the Supervising Public Housing Manager (SPHM) and a secretary, each of whom had numerous other responsibilities that they regarded as more central to their roles.

In 1969 the Authority's central office officials, including its Supervising Public Housing Manager (SPHM), who was in charge of presenting cases to the eviction board, saw the board's independence as a virtue,⁹ did not question the board's discretion to withhold eviction despite finding a lease violation, and regarded the conditional deferral as an appropriate decision when tenants owed rent.¹⁰

In 1987, by contrast, top Authority officials regarded the board as an awkwardly independent cog in the Authority's efforts to maintain peaceful, smooth running projects. While the board's power to conditionally defer was recognized, its discretion to do so was not respected and during the preceding seven years steps had been taken to minimize the occasions on which such discretion would be exercised. In 1979 a training session had been held for the board at which the Authority's rent collection needs were emphasized. In 1982 the board chairs had been sent to "judge's school" in Reno, Nevada in the hope of promoting more legalistic decision making and another training session was held. Also beginning about 1980 fixed terms were established for board members and several were not reappointed because they were regarded as too pro-tenant, while new appointments were made with an eye to whether they would appreciate the Authority's point of view.¹¹

Some changes between 1969 and 1987 were visible just from observing hearings. The most obvious was that the board in 1987 consisted of fourteen members rather than five. In 1970 two tenants were added to the eviction board to create a seven-member panel and in October 1979 a second seven-member panel was created, with its own chair, so that eviction actions could be

⁹ The law establishing the eviction board allowed the Authority to staff it with Authority officials, and it was so staffed before 1960. The Authority's central office official decided to reconstitute it as an independent body staffed by community volunteers because, I was told, they did not want a "kangaroo court."

¹⁰ Project managers did not share these views. Four of the five managers felt strongly that if they could prove a lease violation, they had the right to an eviction regardless of the credibility of a tenant's promise to reform.

¹¹ In 1987 more board members worked in real estate property management than in any other occupation. In 1969 a majority of board members either had a social work background or did extensive volunteer work for the poor.

heard every week rather than every other week, thus allowing the Authority to process cases more rapidly for eviction. As the panels never got together except for one or two parties a year, the situation was one of two seven-member eviction boards rather than one fourteen-member board.¹² Another difference was that the Authority's cases were presented by an attorney, whom I shall call the DAG,¹³ rather than by the SPHM. However, in many respects, the attorney proceeded at the hearing in much the same manner as the SPHM had in 1969. Both acted informally. They avoided legal jargon except at the outset when the cause of action was explained, and they conversed with the tenant to make sure that her story came out. The SPHM, however, tended to leave the presentation of the Authority's case to the project manager while the DAG presented the details of the manager's report himself and relied on the project manager for confirmation and further information.

A slighter difference between the hearings of 1969 and 1987 which an observer might have noticed, was that the board members in 1987 seemed less sympathetic to the tenants than they had in 1969. In 1987 the board members were less prone to delve into ways that the tenant might solve her problems and almost never questioned the adequacy of the project manager's efforts to "work with" the tenant.

Finally, the possibility of an appeal to the Authority's Board of Commissioners was often mentioned during the 1987 hearings -- both before and after the board's decision was rendered -- but was seldom if ever mentioned in 1969. During his case presentation or summation the DAG emphasized the possibility of an appeal to remind the board members that even if they voted to

¹² I shall refer to each panel as the "eviction board." In the data I collected panel identity is not significantly related to case outcome.

¹³ DAG stands for Deputy Attorney General. The Authority's prosecutor from 1982 on was a Deputy Attorney General assigned by the Hawaii State Attorney General's Office to the HHA. Although the DAG remained technically a member of the Attorney General's Office and not of the HHA, for all practical purposes the DAG was an employee, reported in 1987 to the SPHM and through her to the Director of Housing Management (DHM). The Authority had in 1979 appointed a full time eviction specialist to prosecute cases and handle the other legal and quasi-legal work necessary to a smooth running eviction process. The first such specialist was an Authority employee who was not a lawyer. His two successors were DAGs. As far as I can determine the presence of a full time eviction specialist was an important influence on the eviction process, but the fact that the specialist was a lawyer was not (Lempert, in press).

evict, the tenant would not necessarily be forced to leave.¹⁴ After the decision, the appeal was discussed to make it clear to the tenant what she would have to do to remain in housing. In 1969 such explanations were seldom necessary, for tenants were almost always allowed to stay.

From the Authority's point of view the stress placed on the appeal process was made possible by a 1980 amendment to the Act establishing the eviction board which provided that appeals had to be based on "new facts or evidence pertinent to the case which could not have been presented and were not available for presentation" to the eviction board.¹⁵ Before the law was amended the Commissioners had to hear appeals *de novo*, and any system that encouraged appeals would have been untenable. Indeed the burden of deciding whether an appeal presented new facts and evidence was eventually deemed excessive, and in 1984 this responsibility was delegated to the HHA's Executive Director. The result was that after 1984 appeals almost never reached the Commissioners unless it was a foregone conclusion that they would be allowed. Indeed, the Commissioners typically did not hear appeals but instead ratified "stipulated agreements" negotiated between the housing staff and the tenant which noted as a new fact that the tenant had fully corrected the problem giving rise to the board's eviction order (usually by paying an outstanding rent debt) and stipulating that in exchange for the withholding of the eviction order the tenant agreed to comply fully with all lease provisions for a period of one year and to waive all rights to a hearing should any lease provision be violated within that time.

The changes that occurred between 1969 and 1987 did not, of course, occur at the same time. Yet for purposes of investigating changes in the board's exercise of discretion, there are two watersheds. The first is in 1975. Nineteen-seventy-five marks a dramatic change in the leadership of the Authority as well as the commencement of a law suit that at one time appeared

¹⁴ The attorney was also fond of reminding the board that evicting an apparently needy family would free an apartment for a family that would follow project rules and was presumptively just as needy.

¹⁵ Chapter 360 section 3 Hawaii Revised Statutes as amended May, 1980. The usual "new fact or evidence" that tenants alleged on appeal was that since the hearing they had repaid all the rent that was owing. The 1980 Amendments made some other changes in the law establishing the eviction board, but these need not concern us.

to threaten the existence of the eviction board.¹⁶ Before 1975 cases were handled as they had been in 1969 or, for that matter, in 1961, and the outcomes were the same. The second watershed occurs in 1979. This is when a secretary was assigned full time to handle the paperwork of evictions, and a full time specialist was hired to process and prosecute eviction cases. It also marks the appointment of the second eviction panel which was formed by dividing the old panel in two and adding three new appointees to one group and four to another. After the appointment of the second panel, the eviction process comes to look much like it looked when I observed it in 1987. The period between 1974 and 1979 is not so much a period of gradual change as it was a period of upheaval and uncertainty (Lempert, in press; Lempert and Monsma, in press). Hence we shall not focus on these years when we discuss the transformation of discretion.

With this information as background, we are now ready to examine the discretion the board exercised. First, I shall discuss several varieties of discretion that are illustrated by board decision making. Then we shall see that discretion may not only be influenced by external forces, but may be systematically transformed.

Varieties of Discretion

The Case of the House That Burned

In the 1960s, before the income limits for continued occupancy in federally-aided low income housing had been abolished, a family with eight children, let us call them the Teofilos,¹⁷

¹⁶ The specific changes need not concern us here, for their relevant consequences have been described. They involved the conversion of the HHA Executive Directorship from a Civil Service to a gubernatorial appointed position and the retirement of the long time head of HHA -- who had come up through the housing management ranks -- and his replacement by a more business oriented head who had no prior housing experience. These changes in turn reflect vast new responsibilities -- including the task of building and selling middle income housing -- that had been given to the HHA in the 1980s and a local scandal that developed over the way these responsibilities were handled.

The case that almost scuttled the eviction board also has little to do with this article. It is entitled Tileia v. Chang and is described in Lempert and Monsma (1989).

exceeded the income limits and contracted to build a home. The day before the Teofilos were supposed to move and after the grace period which federal law gave them to find a home had expired, their new house burned to the ground. The Authority was not anxious to press the case for eviction, but felt that federal law required that action. The eviction board refused to issue the order. On several occasions it remanded the case to see if anything could be worked out and to give the Teofilos more time to find a home. One member who was involved in real estate went so far as to search for housing for the family on his own time. The board knew what the law required, but its members wished to avoid the force of the law. Indeed, in discussing what to do with the Teofilos one member said he would not evict no matter what the law required. Eventually the case was resolved when the Authority transferred the family to no-income-limit housing it operated for the Navy. Doing this breached both policy and regulations, for the family had no Navy connection and was too large for the unit available, but the Authority apparently felt that it was less important to conform to these rules than to federal housing regulations.

The board was able to exercise discretion effectively in this case because its actions were not reviewable. The board was given no legal authority to do anything other than evict, but it could effectively refuse to evict because the law establishing it did not provide an avenue by which the Authority could appeal to a higher tribunal, and it did not allow the Authority to secure a writ of possession except by prevailing before its eviction board. The board was well aware of its power and that but for it the family would have been without decent shelter.

What is most striking about this case is that it is apparently unique. While I could not look at every case the board heard over 30 years, my perusal of several years of case transcripts did not turn up any other case in which the board knowingly did something it was not empowered by law to do. Furthermore, I did not see such a case during the two summers I sat in on board hearings, nor did I hear of such a case in my interviews with Authority officials, board members or project managers. The latter's silence is quite telling, for they freely complained about board decisions that in their view exceeded the board's proper authority.

¹⁷ All names used in this article have been changed.

The board's more usual attitude in over-income cases is expressed by the chair's statement to a couple with seven children, one of whom was a mute. This family had been unable to find a house because the private rental market provided little housing for moderate-income families with more than a few children:

I regret very much to inform you of the decision we came to arbitrarily; it's one that we have no other recourse [sic] on account of the qualifications of the law governing a case such as yours. We have to order eviction because there is no way we can do otherwise.

The difference in the attitude expressed here and the attitude expressed in the case I first described cannot be explained by board composition since many of the same people sat on both cases. It is explained, I believe, by the extraordinary nature of the tragedy that befell the first family. Almost all over income cases the board heard involved families who had been successful by middle class standards and who could not find suitable housing because of the tight nature of the housing market that confronted large families. The first case involved a family that had solved the housing problem in the then most culturally approved fashion -- buying a home -- only to have their house unexpectedly taken from them.

It appears from both the philosophical and sociological literature that discretion in the sense of unreviewability is relatively common since it is easy to provide examples of adjudicators who have discretion to make decisions that are unreviewable and continually use that discretion (see, e.g. Rosenberg 1970-71). Consideration of the Hawaiian data suggests that there is a further important distinction to be made. Typically, when an adjudicator like a multi-judge court has unreviewable discretion, it also has discretion in the rule-oriented sense that the authority to exercise judgment is entrusted to it; that is it is authorized to choose from a wide range of outcomes, any one of which is permissible. Indeed, a major reason for making an exercise of discretion unreviewable is that it is unlikely that a reviewing agency will be able to exercise better judgment. The eviction board's members did not have discretion in this sense. The law did not allow them to exercise judgment about whether families that were over the income limits should

be evicted once the statutory grace period had expired. They were mandated to evict in these circumstances. Their only discretion was whether to comply with their mandate. This discretion was effectively allotted them only because the Authority could not appeal from their decision.

It is a mistake to think that the law authorizes this type of discretionary decision making.¹⁸ Rather the law establishes structural or legal conditions¹⁹ which ensure that a particular adjudicator's decisions will be complied with while not providing a way to effectively remedy errors through appeal. Such conditions give decision makers the power to force actions that do not comport with legal norms although as a matter of law they lack the authority.

What the law can do for judges, other structural features do for other decision makers. Thus the cop on the beat who has stopped two youths in "the wrong neighborhood" may arrest the one who "gives him lip" and let the one who is respectful off (Black, 1971; Werthman and Piliavin, 1967). The cop can do this not because the law provides that disrespect or being in the wrong neighborhood are crimes, but because the officer's power vis-a-vis youths is such that they must comply with his decisions, and the officer's "credibility advantage" coupled with the low visibility of the encounter means that if he later concocts an account of the encounter legally sufficient to justify arrest, he rather than the youth will be believed. The eviction board that spared the Teofilos was much like the cop except that its flouting of the law was more visible. However the Authority shared the board's sense that the Teofilos had done nothing that was unreasonable, and it was pressing for eviction only because it could be held accountable if it did not enforce federal income limits. Had the Authority been unsympathetic to the Teofilos, it might have found a way to impel the board to conform to the law.

¹⁸ The jury is perhaps the best example of a legal decision maker that gains considerable discretionary power from the fact that its decisions are not reviewable. This power is not accorded the jury by law but is rather a matter of the jury's structural position. See *Bushell's Case*, 124 Eng. Rep. 1006 (1670) and *Sparf and Hanson v. United States*, 156 U.S. 51 (1895).

¹⁹ An example of a structural condition is the fact that in the United States there is no higher court than the Supreme Court and hence no appeal, except through a cumbersome amendment process, from its constitutional decisions. An example of a legal condition is a restriction on interlocutory appeal which allows a trial court to harm a party through a mistaken ruling in a way that a higher court cannot, even by reversing the decision below, fully undo.

Discretion in the sense of unreviewability is common at the street or factory level (Lipsky, 1980; Bardach and Kagan, 1982), and it might seem that it is common among adjudicators also. Looking at court decisions from the outside, there appear to be many situations in which adjudicators are able to enforce their will only because their decisions are unreviewable. But consider the matter from the adjudicator's point of view. The members of the eviction board in the Case of the House that Burned could and, in effect, did say, "The law required me to evict, but I exercised my discretion," meaning discretion in the sense of the power of unreviewability. Usually, however, it will appear to the adjudicator whose decision sticks because of unreviewability that his discretionary action (which just happens to be unreviewable) is in accord with a legal mandate to exercise judgment and is not an exercise of lawless power. The Teofilo case may be unique in my data because adjudicative discretion that exists only because unreviewability confers a power is, at least phenomenologically, rare.²⁰

The Case of the Beans that Burned

This case involved a Korean woman, whom I will call Mrs. Park, who lived in one of the Authority's high rise buildings for the elderly. On three separate occasions over two years, while boiling down beans with ginseng for an ethnic dish she enjoyed, Mrs. Park had forgotten she had beans cooking and left the apartment. On each occasion the beans boiled dry and then burned, sending smoke into the halls. After the third such incident the project manager sought to evict Mrs. Park because he thought that she was likely to forget again and that an overheated pot or burning beans might in some way spark a fire. He cited the woman for violating lease covenants relating to (a) not damaging the dwelling unit or causing insurance premiums to increase, (b) keeping the unit in a safe and sanitary condition, (c) using facilities only in a reasonable manner,

²⁰ Some project managers, on the other hand, knowingly denied tenants their right to an eviction hearing by bluffing them out (Lempert, 1989). They knew their actions, which involved misleading notices and, on occasion, blatant lies, were unauthorized denials of rights given tenants by Authority policy. They saw bluffing as a way of recapturing from the board a discretion -- to decide when tenants could not be "saved" -- that was rightfully theirs. The bluff system began in the mid-1960s and endured for about a decade.

and (d) conducting oneself so as not to disturb the neighbors' peaceful enjoyment of their accommodations and maintaining the housing project in a decent, safe, and sanitary condition.

When I discussed this case with the Authority's prosecutor the day it was to be heard, we both expected Mrs. Park to be growing feeble minded as well as old and increasingly incapable of living alone. At the hearing, however, a different picture emerged. Mrs. Park came to the hearing with a lawyer, a minister who translated for her since she did not speak English, a Korean speaking neighbor, and a petition signed by many of the building's tenants saying that they wanted her to remain and would look after her. She looked as if she were about 70 and quite capable of looking after herself. The evidence at the hearing was that she was well-regarded by the neighbors and was an active volunteer in her church, who was there almost every day and could greet each of the 500 or so church members by name. While the project manager made a convincing case that the building was constructed so that a fire would be especially dangerous, Mrs. Park's advocates showed that, with the exception of one occasion when the hot pot was apparently dropped, scorching part of a rug, no damage had been done by the several incidents. Except for these incidents, the project manager agreed, Mrs. Park was a good tenant and a pleasant person. The Korean-speaking neighbor who lived across the hall was a friend who said that she would look in on Mrs. Park daily and boil beans for her once a month, the schedule Mrs. Park had followed.

Perhaps the key to the hearing was that the Authority's prosecutor did not think that Mrs. Park should be evicted, nor did he think that the board would be willing to evict her. Thus he shaped the discussion so that it focused on steps that could be taken to ensure that Mrs. Park would not pose a fire hazard if she stayed. Mrs. Park's lawyer had the same agenda, hence the offer by the neighbor to look in on her. There was also some discussion about whether Mrs. Park would be willing to give up her stove and cook with a microwave instead.

The prosecutor had perhaps misjudged the board. At the start of its deliberations one member, a real estate manager who had just joined the board, moved to evict. Eventually the motion was defeated, and a conditional eviction -- a form of probation -- was voted. The conditions

were that the Authority remove Mrs. Park's stove within a week, that Mrs. Park secure a microwave to replace it, and that there be no further incidents for three years. It is impossible to say whether this decision, as opposed to an outright eviction, would have been reached had the prosecutor not obviously favored a compromise of this sort. The member who moved for eviction was intelligent and articulate and he might have persuaded a majority of the board to go along with him had the Authority's representative been pressing for the same action.

The board in this example is exercising three kinds of discretion. First the board has discretion to determine whether there is a lease violation. The determination is discretionary in the sense that the judgment is entrusted to the board and the board must pick out those facts that bear on its decision making task (Barak, 1989:13). If burning beans does not violate any of the cited lease provisions, not only will the woman avoid eviction, but she may go on burning beans to her heart's content. The second, which is dependent on finding a lease violation, involves deciding whether to allow Mrs. Park to remain in housing despite the lease violation.²¹

The third locus for discretion, which is dependent on both finding a lease violation and determining that alternatives to eviction should be explored, is in deciding the conditions under which the woman will be allowed to remain. This discretion too is not clearly confided by the statute authorizing the eviction board, but is firmly rooted in the board's "common law" and would be regarded by both the board members and the Authority as a necessary concomitant of the board's power to withhold eviction when the Authority has presented a legally sufficient case.

²¹ From the face of the statute, particularly after it was amended in 1980, it is not clear that the board is authorized to exercise such discretion but the board's statute has always been interpreted by it and the Authority to confide such discretion in it.

The existence of this discretion was acknowledged in a 1982 memorandum describing the powers of the eviction board that the Deputy Attorney General who ran the Authority's eviction process wrote to the acting SPHM:

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.

According to a "script" in the Authority's files, a similar description of the board's powers, with explicit mention of the power to set conditions, was given to the board members at a training session held for them in 1982.

The existence of analytically distinct forms of discretion does not, however, mean that all forms will be equally salient to those involved in the decision making process. Ordinarily only two discretionary decisions are salient, but they are not the same for tenants and project managers on the one hand and the board members on the other.²² For the parties, the first two types of discretion -- determining whether there is a legal cause for eviction and if so whether eviction should follow -- are lumped together and important while the third is distinct and subsidiary. Thus both the tenant and the projects managers are interested in whether the tenant will be evicted immediately or allowed to stay. It does not matter whether the tenant is allowed to stay because no lease violation has been found or whether despite a lease violation the tenant is not expelled. When the tenant avoids immediate eviction, the tenant regards the decision as a victory, and the manager regards it as a loss regardless of the conditions that are set and the implications that these conditions have for the tenant's prospects of avoiding eviction in the long run. The tenant's attitude is like that of the criminals described in a number of plea bargaining studies who focus on the sentence which might be received and are relatively indifferent to whether the sentence is a result of charge or sentence bargaining, even though the charge pleaded to will become a matter of record that may have substantial future implications.

From the board's standpoint it is the first type of discretion on the one hand and the second and third types on the other which are distinct. The board must decide whether there has been a lease violation and, if so, how to dispose of the case. The former determination seldom poses any difficulties. But in dealing with the latter issues, the decisions on whether to allow the tenant to stay and on the conditions to be imposed if the tenant does stay are typically inseparable. Assuming a lease violation has been proven, the more likely it is that the tenant can cure that violation and not violate again, the more likely it is that the tenant will be given another

²² All these stages appear salient to the DAG, at least in some cases. He recognizes that he must show a lease violation, and while he argued in 1987 that it was inappropriate for the board to refuse evictions when it found that a tenant had not fully met her rent payment obligations, he never argued that it was beyond the board's power to do so. Thus he was aware of the board's discretion to refuse eviction notwithstanding a lease violation and if so, he recognized, as in Mrs. Park's case, that the conditions set by the board were important.

chance conditional on the cure and subsequent good behavior. Conversely, even a sympathetic tenant may face eviction if it appears unlikely that future violations can be prevented. Thus, had there been no way to meet the Authority's concerns regarding the fire hazard Mrs. Park posed, she would not have been allowed to stay. Indeed, at one point it appeared that the board's decision might become unraveled because it was unclear that federal regulations allowed the removal or disconnection of a tenant's stove even when all parties desired it.²³ Similarly the board has evicted families for damages caused by their children when it appeared that the families, despite their best efforts, could not control what their children would do.

From an analytic perspective the board's discretion to determine the conditions under which Mrs. Park could stay seems stronger, in the sense of being less law bound, than its discretion to determine whether she should be allowed to stay subject to conditions (cf. Dworkin, 1978). The law provided no guidance to the board members as they creatively sought to determine arrangements that would prevent Mrs. Park from posing a fire hazard, but in deciding whether Mrs. Park should be allowed to stay despite her actions the board was constrained by its need to respect the goals of the lease clauses Mrs. Park was shown to have violated.

This analytic distinction, however, makes no sense from a behavioral perspective. The two determinations cannot be separated, for it is the board's creativity in establishing conditions that determines whether it can allow a tenant to stay while still respecting the goals of the lease provisions that it is called on to enforce. Discretion is often intertwined in this way, and efforts to limit or extend discretion of one analytically distinct sort may affect how discretion of another analytically distinct sort is exercised. Thus Heumann and Loftin found that the Michigan legislature's effort to prevent judges from sentencing gun carrying criminals to less than two years in prison affected the changing discretion of prosecutors and the discretion that judge had to accept or reject plea bargains (Loftin et al., 1983). It is for similar reasons that Abel (1982) and others

²³ I was told in a letter by one board member that several months after the case I observed, Mrs. Park again let her beans burn, was brought before the board, and was this time evicted. The incident may have happened because the stove had not been removed or disconnected, or because Mrs. Park had impermissibly reconnected her stove, or because Mrs. Park found a way to burn her beans in a microwave. My correspondent did not tell me.

argue that the institution of informal justice may extend state control. When police or prosecutors have the discretion to refer disputes to institutions of informal justice, they may pursue matters that they would have discretionarily dropped had pursuing the matter necessarily placed it in formal court. Those who focus on the discretion that inheres in rules may miss important ways that discretion constrains and frees choices if they don't consider individual rules as parts of applied rule systems.

The board's other discretionary decision, the decision about whether there has been a lease violation in the first instance, is, of the decisions entrusted to the board, the one most closely confined by law. In reaching this decision, the board members are to examine the facts and determine whether they make out a lease violation. From a legal-analytic perspective this narrow task may nonetheless involve substantial judgmental discretion, since the factual determination may be quite difficult, and lease provisions may require interpretation.

From a behavioral standpoint, however, the situation is different. The fact of the lease violation in Mrs. Park's case appeared so unproblematic that the board in its discussion did not even address the issue. Rather the members turned immediately to the question of whether there were any conditions under which the woman could be allowed to remain without posing a threat to her neighbors. In the eviction setting this is almost always the case. Lease violations are ordinarily clear,²⁴ and the board has no discretion, except in the sense that, as in the Teofilo case, they may ignore the law, to find otherwise. Thus, what is conceptually a major locus for the exercise of board discretion is behaviorally almost never the occasion for discretionary decision making. The question whether there has been a lease violation seldom merits discussion.

The case of Mrs. Park reveals one other way in which the board's discretion is affected and, in effect, limited. In this case, the DAG, despite the manager's position to the contrary, did not seek eviction. Rather he participated with the board members and Mrs. Park's lawyer in a

²⁴ The one rare exception is in the occasional case involving troublesome behavior where different witnesses may present different stories about an event (e.g. who started a fight) or the Authority may have difficulty in finding credible witnesses to testify to the defendant tenant's misdeeds.

discussion of arrangements that would remove the threat of a fire yet still allow Mrs. Park to cook her beans, and he concluded the Authority's case by stating:

If the board feels that there has been sufficient corrective actions ... then I would see no problem with some kind of conditional deferment that there be no further forgetfulness of boiling beans down or whatever. Some type of condition; that is what I would recommend. Let her stay on probation.

This prosecutorial concession further limited the board's discretion. While the board might have decided to let Mrs. Park stay even if the prosecutor had sought her eviction, when the prosecutor is willing to accept a conditional deferment, the board as a behavioral matter is unlikely to offer less. The point applies generally. In an adversary system whatever the discretion of the decision maker, a party is unlikely to do worse than the opposing party requests.²⁵ Thus, the board did not seriously consider the motion of one member to evict Mrs. Park. Had the prosecutor's concession not been made, the motion certainly would have divided the board and might well have carried.

The Cases of the Tenants Who Owed Rent -- Part I²⁶

Mrs. A, a woman of about 35, owes \$300.00, or a little more than two months back rent. She appears before the eviction board with three children, all under six years of age, in tow. After the board chair introduces himself and the board members, Mrs. A is told the cause of action and

²⁵ There are exceptions such as juries that give a plaintiff greater damages than his lawyer sought or a judge who imposes a stiffer sentence than a prosecutor requested. However, these exceptions are empirically rare occurrences. The plea bargaining system, for example, could not work if judges insisted on more severe sentences than those agreed to by prosecutors, and rejections of civil settlements are almost unheard of even in class actions where judges have a special obligation to consider the interests of the plaintiff class as a whole.

²⁶ The prior cases are based on actual transcripts of cases I observed. The cases under this head are composites and so are described in the present tense as they might appear to an observer attending the hearing. No one case exactly fits the descriptions which follow, but these cases are as typical as any I might offer of the kinds of cases involving non-payment of rent that the eviction board hears. The quotations I use are not composites, they are taken from transcripts, although some extraneous material has been eliminated and portions have been rendered more grammatical than in their spoken form.

asked whether she is willing to proceed without counsel (which she agrees to do). She and the project manager, who will report on her payment history, are placed under oath.

The Authority's prosecutor, in this case the SPHM, lets the project manager present the details of the Authority's case. He reports that Mrs. A has often been late with her rent and that about three months before the hearing she stopped paying entirely. Three notices to speak with him were ignored, and he didn't find her home on two occasions when he went to her house. Two weeks before the hearing, shortly after she was subpoenaed to appear, Mrs. A came to the project office and paid \$120.00, but \$300.00 on a monthly rent of \$140.00 is still outstanding.

At this point Mrs. A is asked if she wishes to make a statement. She explains that she got behind in her rent when she fell on some stairs and injured her back. To get treatment she had to spend her rent money on doctors' bills. She also says that she lost time from her work in a candy factory, and that she had to spend the first paycheck that she received when she got back on food. The manager interrupts to say that two years before when Mrs. A fell behind on her rent she also said that she injured her back, and he reminds the board that during the period when Mrs. A was supposedly home from work with her back injury, he went to her unit twice to talk to her but she wasn't in. The board doesn't know whether to believe Mrs. A's story or not.

The board chair then takes control of the discussion. He asks Mrs. A where Mr. A is. She explains that she was divorced more than two years ago. He then asks whether Mr. A pays child support. She replies that he left the island after the divorce and that she cannot locate him. At this point the chair asks her whether she wants to stay in public housing. Mrs. A replies that she does because she doesn't know where else she and her children can live. Another member asks whether she has considered welfare. She replies that she gets food stamps, but that with her job her income is above the AFDC (Aid to Families with Dependent Children) cut off. The chair asks her whether, if she is allowed to stay in housing, she could manage to pay her current rent as it accrued and pay an extra \$50.00 a month on her debt. She replies that she could. The chair then reminds her that next to food for her children, rent must be her highest priority. Mrs. A nods her agreement. She is then excused, and the board retires to deliberate.

After a quick and almost perfunctory deliberation, spiced only by some discussion of whether Mrs. A really did injure her back, the board returns, and the chair tells Mrs. A that they have voted to evict her (Mrs. A looks crestfallen) but that they have deferred the execution of the order and that Mrs. A can stay in housing if she keeps her rent current and pays an extra \$50.00 a month until her back charges are paid off. (Mrs. A looks relieved and happy.) The chair further explains that should she not stick to this payment schedule, the manager will report back to the board and they will order her evicted immediately without another chance to be heard. He concludes by wishing her good luck, and she thanks the board members for giving her a second chance. The manager looks disgruntled but unsurprised as he leaves.

The next day the project manager complains to another manager that although he could not prove it, he thinks that Mrs. A was vacationing on another island with a male friend during the two weeks she claimed to be away from work with her injury. At least this is what a neighbor told him she was doing on one of the occasions when he called on Mrs. A and found that she wasn't home. He didn't mention this to the board, he tells his friend, because his evidence was only hearsay and he didn't think the board would buy it. His fellow manager sympathizes and they both agree that cases like Mrs. A's cost the Authority oodles of money.²⁷

Mrs. B's case was exactly like Mrs. A's case except that she went to the project office and paid the \$300.00 she owed five days before the hearing. The case was cancelled. If Mrs. B. fell behind on her rent sometime during the next six months, she would again be summoned to appear before the board and she, no doubt, would be allowed to pay off her rent debt over time. If Mrs. A should miss a rent payment or an installment payment during the next six months, she would, if the manager brought the default to the board's attention, find that the board voted to execute the deferred order, and she would be evicted.

²⁷ My research reveals that the managers are wrong if by this they mean that the Authority's losses when conditionally deferred tenants fall deeper in debt exceed its gains when such tenants pay off all or part of what they owe (Lempert, 1972). The Authority reached conclusions similar to mine when, in 1979, it examined the effect of eviction board deferrals on subsequent rent collections. I cannot, however, say whether the managers are wrong if they mean to make the general deterrence argument that knowledge of board leniency means that some tenants who would otherwise pay their rent on time do not do so.

The board is clearly not exercising discretion in the case of Mrs. B, for it did not hear her case. However, as we shall see when we look at the case of Mrs. Y in the next section, the Authority need not have cancelled Mrs. B's hearing. There is an important point here which, perhaps because it is so obvious, is often missed in studies of adjudicative discretion. This is that the discretion of an adjudicator is typically constrained by the discretion exercised by others, which in turn shapes the observer's perceptions of how discretion is exercised.

Mrs. B's case is extreme. Because the Authority chose to drop the case once the lease violation was cured, the board had no occasion to decide whether a cured lease violation might merit a probationary sentence or some other sanction. Other instances are less extreme in that the adjudicator reaches a decision, but possible decisions are foreclosed by the discretionary determinations of others. Thus, when the project manager did not mention the information he received from Mrs. A's neighbor, the board could not base a decision on this information even, if they would have believed the hearsay and been prepared to evict for such irresponsible behavior.²⁸ More generally, as I have already pointed out, it is usually the case that in an adversary system the adjudicator is constrained to be no more severe on a party than the party's opponent demands.

Mrs. A's case, unlike Mrs. B's, appears to involve discretion of a far ranging sort. Mrs. A violated her lease agreement and could legally have been evicted for that violation. The law, however, does not demand this result but leaves it to the board's discretion. Moreover, nothing about the law suggests that if Mrs. A is to be allowed to stay it should be on the condition that she repay her rent at the rate of \$50.00 per month. Yet despite this rule-granted discretion, if we look at the way the board actually makes decisions, we find that the board does not see itself as having much choice.

²⁸ In one case a woman told the board that she had taken several months' rent money (which I expect was from welfare) and gone to the outer islands on vacation. She said that she had been too poor ever to leave Oahu; that she was happy that she had chosen to spend her rent money in this way, and that she was prepared to live with the consequences. The board evicted her, but the members who had voted to evict remembered the woman with fondness. They admired both her integrity in admitting what she had done and the spirit which led her to want to see something more of the world.

Indeed, the decision to allow Mrs. A to stay on the condition that she repay her rent hardly involved a choice at all, for at the time of Mrs. A's case (which is based on observations I made in 1969) the board virtually never evicted a tenant who owed rent and claimed to be able to clear that debt. Instead eviction was voted but, as with Mrs. A, the execution of the order was stayed on the condition that the tenant keep current and pay off the accrued debt. By 1969 this practice had been routine for nearly a decade.

During the period when this practice of always deferring was being established, which is to say at the outset of the independent board's existence, the board may well have regarded each case as an occasion for the exercise of discretion in that it may seriously have considered the facts of each non-payment case and may have decided each action without feeling that its decision was preordained. Yet the decisions were invariably the same: the tenant was put on conditions and allowed, at least for the moment, to stay. But any sense of discretion receded over time as precedent developed, so that an immediate eviction in circumstances like Mrs. A's was almost unthinkable. I found evidence for the development of precedent in the transcripts that were available for 56 non-payment cases heard during the board's first two years of existence. The correlation between case order and transcript length as measured in lines is $-.538$, meaning that the more non-payment cases the board had heard, the less time, on the average, it took to dispose of new ones. Such a negative correlation is to be expected if what were once discretionary decisions, which required an in depth investigation of circumstance, became routine, meaning that there was less to talk about.²⁹

Students of discretion often argue that officials with discretion, particularly low level decision makers like police, prosecutors, and trial judges, generally seek to maximize their

²⁹ The negative correlation does not appear to be due to a generalized experiential effect. For fifteen income violation cases that the board heard over the same time period, the correlation between transcript length and case order is an insignificant $.031$ which differs from the similar correlation for non-payment cases at the $.05$ level. Income violation cases often involved disputed allegations about whether tenants had properly reported their entire family earnings and, if not, whether they had innocently misunderstood their responsibility. Of course, had the board confronted as many income violations as it did non-payment cases, the board might have developed discretion-limiting precedent in such cases as well.

discretion. The argument may be correct but only in one sense of the word discretion; that is, the "authority" or "finality" sense (Dworkin, 1978). This we have seen may involve "legal" or authorized discretionary, but it may also be a situational discretion, such as that enjoyed by the cop on the beat, to ignore the law. Observing the eviction board suggests that the opposite phenomenon also occurs. Where a decision making body has legal discretion, it may act to minimize its discretion, that is, to limit the discretion that it must and, eventually, can exercise.³⁰ Familiarity, as Joe Sanders and I argue elsewhere, breeds precedent (Lempert and Sanders, 1986; cf. Schauer, 1987), and a precedent for interpreting facts may be every bit as powerful as precedential pronouncements of law.³¹ Thus, there were cases I observed in which board members were suspicious of a tenant's story or felt that the tenant's prospects of repaying her rent debt were poor, yet nonetheless voted to defer eviction because that was the way non-payment cases were handled. Assuming the situation of the HHA's eviction board is not unique, we may expect to find that decision makers with discretion routinely act so as to limit their discretion as a behavioral matter. Those that do not, such as the United States Supreme Court or the eviction board when it is considering a family accused of fighting, do not hear large numbers of factually similar cases.³² I shall expand on these points later.

In non-payment cases the eviction board exercises greater discretion in deciding the conditions under which a deferment should be given then in deciding whether to give a deferment. This is not surprising since cases differ substantially in the size of accrued debts, the reasons for

³⁰ Individual decision makers, no doubt, do the same, but the mechanism involves not the establishment of protocols or routines such that alternatives to the routine precedential disposition are not consciously considered (Emerson, 1984).

³¹ Ultimately a precedent for interpreting facts is hard to distinguish from a rule of law, or the factual interpretation matter because it entails specific invariant legal consequences.

³² What is factually similar depends, of course, on how closely one looks at different cases (Lempert and Sanders, 1986). The Supreme Court chooses to look quite closely at those cases it accords full hearings. Where it examines such large numbers of cases that it cannot look closely at them, as at the certiorari stage, rules of thumb develop which systematically and predictably cut down on the scope of exercised discretion even though the Court has the authority to hear what cases it will. The primary rules seem to be a strong presumption against granting certiorari unless one of a small number of conditions are met (Tanenhaus et al., 1963).

them, and the ability of tenants to repay what they owe over time. Indeed, in the 1960s much of the hearing time was devoted to determining the resources available to the tenant and the conditions under which the tenant's accrued rent debts could be paid. Again, however, the image of an adjudicator exercising authorized discretion by using its judgment to reach a wise decision is misleading. What we have instead is what might be called "cooperative discretion." Although Mrs. A as a legal matter had no say over the conditions that were set for her continued occupancy, as a practical matter she considerably influenced the board's decision because the board realized that there was no point in setting conditions that Mrs. A could not meet. Thus the board negotiated with her over the terms to be set, and used its discretion to confirm the results of the negotiation.

This is a phenomenon rarely noticed by students of discretion, but one which is not unusual. People with discretionary authority can be expected to negotiate with and be influenced by those over whom they are supposed to exercise discretion. Moreover, the eviction board example suggests that this does not just occur in situations such as the typical plea bargain where the object of discretion has something to offer the adjudicator, like a speedier disposition of the case. Rather it depends on the goals the decision maker seeks to achieve. Since the eviction board that heard Mrs. A's case wanted it to end with Mrs. A remaining in housing and the Authority made whole, they wanted a solution which she thought would make this feasible. Regulatory officials, like water pollution inspectors, for example, engage in similar negotiations with those who are subject to their discretion (Hawkins, 1984), and some students of regulation have argued that such negotiations are not only common (Winter, 1985) but desirable (Scholz, 1984).

The Cases of the Tenants Who Owed Rent -- Part II

Mrs. X's case is like that of Mrs. A. She is charged with the same offense, she owes the same amount of money, and she offers the same reasons for falling behind on her rent. She fell down the stairs, hurt her back, had medical bills, and lost time from work. However, at her hearing the Authority's prosecutor is not the SPHM, but a lawyer who devotes almost all his time

to the eviction process, and this lawyer, not the board chair, dominates the proceedings. Mrs. X's story does differ from Mrs. A's in a few particulars. The \$120.00 paid before the hearing was paid not at the project office but at a bank, and Mrs. X has a bank receipt which she brings to the hearing. No board member asks about Mr. X, for they presume there is no Mr. X, nor is Mrs. X asked whether she can manage time payments. Both the prosecutor and the board question her. She is asked about whether she receives aid from welfare and about whether she has any sources from which she can borrow money to pay off the debt. She tells about her food stamps and says that maybe she can get some money from her mother but that her mother isn't too well off either.

After Mrs. X has told her story and answered some questions, the prosecutor summarizes the situation:

O.K. let me explain. What happens here is usually everybody is treated pretty much the same before the board. Usually when somebody comes in here and they owe rent, we ask for an eviction from the board, and if you can get the money together and take care of everything then you can file an appeal. If by the time you put in the appeal you have everything paid off -- zero balance -- nothing owed -- then usually the Commission that runs the housing authority will look at that and in general they will let you stay. So if you can borrow, like you said you could from your mother, and pay off the debt, it usually works out.³³

"Rosemary," the prosecutor then says, turning to the project manager, "Do you have any other recommendations than that?"

"No," says the manager, "eviction without conditions. I talked to her several times and told her that her best chance would be to get a zero balance by the time she came here. She had some time to get the money together but except for that \$120.00 there has been no payment, so eviction without conditions is what I'm asking for."

³³ This question and those that followed are taken from hearings that I observed and tape recorded. Some grammatical corrections have been made and all names have been changed.

The prosecutor then asks the board whether they have any questions. One member asks Mrs. X whether the candy factory where she works has a credit union she might borrow from, and she answers that she already owes them \$800.00. Another member lectures her for not going to the manager when she hurt herself and explaining her problem.

The board then retires to deliberate. The discussion is even quicker and more perfunctory than in the case of Mrs. A. Indeed, the members soon turn to small talk about their private activities because they do not want to give Mrs. X the impression that they have not genuinely considered her case. After about eight minutes, they send for the parties.

The chair explains to Mrs. X that because of her rent debt the board has voted to evict her. The chair adds, however, that it will take several weeks to get the eviction papers in order, and that if during that period she can come up with the money to pay everything she owes, she will have the "new facts and evidence" needed to appeal to the HHA's Board of Commissioners. In these circumstances, he says, the Commissioners are "more than likely" to allow you to stay. If she has any questions about how to appeal, she is told to bring the eviction papers to the project manager along with a bank receipt showing that she has paid off her debt, and the manager will tell her what needs to be done.

Mrs. Y's case is like Mrs. X's except that she, like Mrs. B, cleared her debt five days before the hearing. However, unlike Mrs. B, Mrs. Y's hearing is not cancelled.

Mrs. Y's case takes less time than Mrs. X's. After the "due process" preliminaries, the prosecutor checks with the project manager to make sure the entire rent debt has been paid and that the Mrs. Y currently enjoys a zero balance. He briefly ascertains the cause of her rental delinquency and her intention to keep up with her rent in the future. As if to justify bringing Mrs. Y before the board, he adds, "Well, you can't be delinquent because the federal government is really down on us to make sure that we make everybody pay on time. It isn't just the state, it is the federal government too." He then asks the project manager whether the tenant is otherwise a good tenant and when she says that there have been no other problems, he recommends that the family be allowed to stay but put on six months' probation through a conditional deferment. The

manager expresses her agreement with this disposition, and the prosecutor invites the board to ask questions. They briefly go over the reasons for Mrs. Y's delinquency and then retire to deliberate. When they return the board chair says:

Mrs. Y, the board has decided on an eviction, but with conditions. In other words, an eviction order is deserved but it is held back, not given to you, but you have to comply with a couple of conditions. One is that beginning this month, you pay the rent on time, within the first seven days of each month, and you verify the payment with the receipt, go to the office, within the very next day, 24 hours.³⁴ Do both of these for six months and then the eviction order is dissolved and everything is O.K.. Do you understand?

The prosecutor reiterates the conditions. He emphasizes that not only must Mrs. Y pay her rent on time, but she must bring her payment receipt from the bank to the project office the day after she pays (the "verification" requirement). The case concludes with a pleasant interchange between the prosecutor and tenant:

Mrs. Y: Thank you very much.

Pros.: Good luck.

Mrs. Y: Have a good day.

The cases of A and B differ from those of X and Y in one important particular. The first two cases were heard in 1969 while the latter arose in 1987. In the case of Mrs. B, the board had no discretion, for her case was never brought to the board. In the cases of A, Y, and X, however, the board had essentially the same authority to choose among various outcomes. The board that heard Mrs. A's case could have evicted her and relegated her to a right to appeal. The board that heard Mrs. X's case could have allowed her to stay on the condition that she pay off her rental debt in \$50.00 monthly installments. And in the case of Mrs. Y, the board might have decided

³⁴ The official reason for this is so the manager will learn whether the rent has been paid without waiting for the computer printout that reports rental payments five days after the due date. Thus if the rent is not paid when due, eviction proceedings can start immediately. It also is an inconvenience that penalizes the tenant for her delinquency and may be a reminder to the tenant that she must pay her rent on time.

that there was no cause for an eviction order since no money was owing at the time of the hearing.

While the decisions in the cases of X and Y were quite different from the decision in the case of A, the board in these cases was not exercising greater discretion. Indeed, the board's decision making was so perfunctory that the prosecutor of Mrs. X and Mrs. Y could tell them during the hearing what the outcome was going to be, just as the prosecutor of Mrs. A could have done had he so chosen.³⁵ Thus the cases of X and Y provide further evidence of self-limiting discretion. The board, which had the legal authority to choose among a wide variety of outcomes, acted as if it had virtually no discretion in the cases that it most commonly faced.

But, as I shall discuss in more detail later, the choice of how to be bound is itself a discretionary act. We see this when we compare the cases of A and X. In 1969 the board, whatever its opinion of Mrs. A, felt that it had no "discretion" to evict her. In 1987, on facts identical in all important respects, the board felt that it had no choice but to evict.

Philosophers, we saw at the outset of this paper, commonly define discretion in terms of legal authority or, to be more precise, in terms of freedom from the constraints that legal authority imposes. Discretion involves an authorized freedom of choice. From a behavioral perspective this conception translates not into freedom to decide as one will, but into the freedom to be influenced by factors other than the law. The example of the eviction board suggests that such non-legal influences may be strong enough and pervasive enough that a pattern of legally discretionary decisions may be as predictable and as rigidly tied to a few key facts as the decision patterns generated by adjudicators consciously applying specific and detailed legal commands. Indeed, a body with discretion may not only act as if its hands are tied, but it may come to believe that this is the case.

³⁵ In the period between 1960 and 1969 only about 5% of non-payment cases resulted in immediate eviction. In 1987 I saw one of perhaps twelve tenants who came before the board owing money put on conditions. Both the prosecutor and board members told me that this was the first time in about a year that any non-payment tenant owing money had been put on conditions.

The Strength of Law

These observations lead to two final questions that should be addressed in an effort to understand discretion from a behavioral perspective. The first is when is a legal mandate strong enough to foreclose adjudicative choice? The second is how do extra-legal factors come to constrain the decisions of the adjudicators vested with legal discretion? The questions are obviously related, for the influence of the law will vary inversely with the influence of extralegal factors, and vice versa. For this reason a law that will strongly influence the decisions of some legal actors may have little or no influence on the behavior of other such actors. Thus the prohibition against illegal searches and seizures in the United States Constitution may lead most judges to discard certain types of evidence although it might not prevent most police officers from acquiring it.

The case study of the eviction board does not provide great insights into the question of what makes a law influential, and I doubt if what it does tell us adds much to existing learning. First, the mandate and clarity of the law as understood by the decision maker seem important. Before 1980, the statute establishing the eviction board did not require the board to evict simply because it found a violation, and the board developed a pattern of not evicting. One of several amendments passed in 1980 could arguably have been interpreted as mandating eviction whenever a lease violation was found, but it does not clearly require this and the Authority has not so interpreted it. Indeed, in training sessions both before and after the passage of the 1980 amendments board members were told that their discretion extended to withholding eviction even if they found lease violations, and for five years after the passage of the amendments the board sometimes did this.

The board has, however, almost always complied where a legal mandate appeared clear. Thus, The Case of the House that Burned was a unique act of rebellion against the law. In other cases the board has regretfully evicted tenants who were over the income ceiling, citing federal law that required such tenants to move within six months of the over income determination. In similar fashion the board beginning in the mid-1970s limited the period over which tenants were

allowed to repay their rent to six months because they were told that that was the limit which federal law provided for the repayment of back charges. Tenants who had no prospects of repaying their rent debts in six months were evicted.³⁶

A related factor which affects the binding power of law on an adjudicator is his role conception. An attitude toward the binding nature of statutory language and precedent is usually an important aspect of judicial role conception. The eviction board members are somewhat similar to a jury in the way they define their role. The members feel that they are to exercise common sense judgment but that in doing so they are bound by the law. Thus if board members believe a particular action is legally required, they comply. It follows that one way to affect the board's exercise of discretion is to convince them that certain actions are or are not legally permissible.

A major difference between the board and a jury is that board members serve sufficiently lengthy terms that some come to feel that they are experts on what the law requires. For example, in one case I observed in 1987 the prosecutor erred slightly in making his customary speech. Rather than telling the tenant that the board's usual procedure in cases like hers was to evict, he suggested that the law gave the board no choice but to evict. The board chair, who had served for about a decade, interrupted the prosecutor to emphasize that the board had discretion to refuse eviction regardless of its usual practice. In a later case this chair's panel granted a tenant a conditional deferment despite an outstanding rent debt, the first time in almost a year that they had been lenient in this fashion. One member commented jokingly that it must have been my influence. He may have been right. In questioning board members about their usual practice and changes in it over time, I reminded them of their discretion to defer evictions despite rent that was outstanding and of the fact that they once exercised it.

The board is like a jury, however, in that the salience of other values affects the law's actual binding authority. The Case of the House that Burned illustrates this. The Teofilos'

³⁶ It is not clear that the law was correctly interpreted for the board since the provision in question specifically addressed the time that a tenant whose rent had been inappropriately set would have to repay the difference between the proper rent and the rent actually paid rather than the time a tenant would have to repay a debt accumulated by defaulting on the proper rent.

situation induced so much sympathy and respect that the board refused to evict despite their understanding that this was what the law required. I observed a similar conflict in 1987, except that strongly held sentiments clashed not with the demands of external law but with the requirements of the board's by then well-established precedent. The case in which this occurred was a non-payment action involving a divorced woman, let us call her Mrs. Sua, with ten children. Mrs. Sua had not cleared her debt by the time of the hearing but said that she expected to soon receive a special welfare grant to pay it. In 1967 or 1977 the board would have deferred eviction on the condition that the debt be paid by a certain date; in 1987 the board regularly evicted on such facts, relegating the tenant to her right to appeal. In Mrs. Sua's case the board did neither. Rather it continued the case for two weeks to allow the woman to secure her grant without the stress of an outstanding eviction order and the need to proceed through an appeal that would have made her vulnerable to an eviction without a hearing for the slightest defalcation over the ensuing twelve months. In the DAG's judgment the woman's large family was the factor that led to this special treatment. Judges are supposed to be better able than lay decision makers to ignore personal values when these clash with legal interpretations. Perhaps they are, but judges too balance the importance of the values affected by their decisions with their understanding of what law or consistent practice requires.

Canalized Discretion

Since the law as understood by the eviction board members gave the board considerable leeway in deciding how to dispose of cases, our investigation can address the second question, which asks what shapes the exercise of authorized or rule-given discretion. One important factor is that when a decision maker is repeatedly confronted with cases of a particular type there is a tendency toward what Prof. Sanders and I call "shallow" decision making (Lempert and Sanders, 1986). That is, there is a tendency to eschew a deep probing of circumstances and to rely instead

on a few key facts that can be used to fit cases to stereotypes.³⁷ There are no doubt many reasons for this, including psychological mechanisms³⁸ and the efficiency that routine processing allows. This tendency is complemented by a common element of judicial role conceptions, the sense that, regardless of the range of outcomes that discretion allows, cases that are similar in relevant particulars should be decided in the same way. Thus we can expect adjudicators to see cases as similar on the basis of a few particulars and to dispose of cases that are seen as similar in a similar fashion.

As a consequence adjudicators who have discretion to decide a series of similar cases will generate a pattern of decisions which is sufficiently regular to call into question the actuality of their discretion.³⁹ Indeed, it may be, as was apparently the case with the eviction board, that adjudicators with broad discretion to decide will feel in most cases that their decisions are tightly constrained despite their knowledge of the leeway law gives them. Thus to understand how extralegal factors come to constrain the decisions of those vested with discretion, we must explore those conditions that lead an adjudicator to feel that cases of a certain type should systematically be decided in one way or another.

In the case of the eviction board, the predominant factor leading to the early precedent of never ordering an immediate eviction may have been the values that the original board members brought to their work. The original five-person board included a social worker and a minister among its members and was dominated by a chair who did considerable volunteer work on behalf

³⁷ The tendency applies to judges in general, but is not confined to them. Other examples include insurance adjusters (Ross, 1970), public defenders (Sudnow, 1965), private defense counsel (Skolnick, 1967), and prosecutors (Maynard, 1984).

³⁸ See the discussion of the "representativeness heuristic" in Nisbett and Ross (1980, pp. 24-28; cf. Fromm, 1965).

³⁹ This is not to call into question the existence of rule-granted discretion, nor is it necessarily to call into question the phenomenological reality of discretion. Rather it is to suggest that for practical purposes the adjudicator appears to be acting without discretion, and one who did not know the rule but only observed behavior might reasonably think that the law did not authorize discretion and that the adjudicator in acting had no sense of exercising any. In fact, I believe that adjudicators who act in the way described in the text often will have the sense that they lack discretion, but a sense of being without discretion is not entailed by behaviorally regular decision making.

of the poor. Moreover, in establishing the independent board, the Authority conveyed the impression that special sensitivity to the interests of the poor was appropriate. The choice of members reflected the notion that the impoverished tenants were a constituency with interests that deserved representation.

In addition, the Authority's original prosecutor was untroubled by leniency in cases where it appeared that tenants would be able to repay their rent. The members' natural sympathies coupled with their difficulty in deciding which of the tenants who promised to pay back their rent could be believed fostered the development of a precedent that allowed all tenants who said they would pay back their rent a second chance.⁴⁰

Other factors also contributed to this outcome. One was probably the desire of board members to avoid the responsibility for evicting tenants with innocent young children, even when the parents' failure to pay rent was blameworthy. The strategy of deferring eviction placed the responsibility back on the tenant. For tenants had their eviction deferred only if they promised to repay their rent. If they then failed, they were not only shirking their responsibility, but were also breaking their word, and the subsequent eviction could easily be seen as their own doing rather than as the result of the board members' refusal to accept the sympathy-inducing story they were likely to have heard at the initial hearing. Moreover, the board members would not have to confront the tenant again, but would take the Authority's word that conditions were not being met and would vote to execute the deferred order.⁴¹

The forces that establish a precedent are not necessarily those that keep it in motion.⁴²
Members, like a retired project manager, who joined the board with neither an inclination to

⁴⁰ Where the wisdom of a discretionary decision will be validated by another's (or even an object's) hard to predict future behavior, discretion is likely to be abdicated in favor of rules of thumb or, as is the case with many college admissions officers and parole boards, in favor of mathematical formulae. I am indebted to my colleague Carl Schneider to calling my attention to the general importance of "subject unpredictability" in his comments on an earlier version of this paper.

⁴¹ This changed in 1975 with an informal ruling by the Attorney General's Office that deferred tenants who did not meet their rent payment conditions were entitled to a hearing before the eviction order could be executed.

sympathize with financially troubled tenants nor an optimistic view of their prospects for repaying their debts nonetheless respected board precedent and voted to defer eviction despite their doubts. Other factors also served to keep the precedent alive. One was the appointment of a "bleeding heart" (the managers' term) board chair in the mid 1960s who served for 16 years. As chair he dominated the discussion. Moreover as the years passed and new board members were appointed, this chair's experience gave him a special claim to expertise about how different types of cases should be decided.

Another factor that may have helped maintain the pattern of lenient decision making is the feedback that the board members received during the 1960s and much of the 1970s. When the board gave tenants a second chance they were often warmly thanked by the tenants. Managers did not thank the board in the cases in which the board evicted, and they usually hid the depth of their displeasure when the board failed to evict. The board members also learned about what happened after they deferred eviction since they voted to cancel eviction orders when debts were cleared or voted to evict or set new conditions if tenants failed to live up to the conditions of their initial deferral. More often than not, tenants cleared their debts, and even those that didn't often repaid a portion of their debt before again falling behind. Thus the board members felt that when they were lenient they were usually right.⁴³

Finally, the attitude of the Authority officials who prosecuted cases was important, for these were the officials who regularly met with the board and presented the Authority's positions. The prosecutors during the 1960s and early 1970s not only respected the board's authority but were also relatively passive in presenting the Authority's case. While in some cases involving

⁴² Joe Sanders made this observation in a conversation many years ago. I have often been indebted to him for it. One reason for this, as my colleague Fred Schauer (1987) notes, is that the values of precedent are logically distinct from the values of a precedent.

⁴³ The board members were correct if the criterion is the Authority's net rent collection experience in cases where the board deferred eviction. Even allowing for tenants who did not meet the board's conditions and fell deeper in debt before they were evicted, the Authority's losses were less in cases where the board set conditions than they would have been had the board evicted immediately (to cut the possibility of further loss) in each instance. I discovered this in examining data from the 1960s, and an internal Authority memorandum tells the same story based on data from the mid to late 1970s.

behavioral violations, like fighting or harboring unauthorized guests, the SPHM or other prosecutor might press hard for eviction, in non-payment cases they conveyed the impression that it was for the board to decide what was to become of the tenant. Indeed, this was the attitude that the Authority's central office staff conveyed to the project managers when the managers tried to get their superiors to press the board to evict more often. The staff's attitude was that the board was given the power to decide cases as it saw fit, and that the board's pattern of leniency was tolerable. One reason for this attitude was that the Authority's prosecutors during the 1960s, at first the HHA's Assistant Executive Director and later in most cases the SPHM, devoted relatively little of their attention to evictions. Handling evictions was one duty among many, and given the nature of these officials' other responsibilities, their role in managing evictions could not have seemed particularly consequential.

The transformation of this "second chance" pattern to a pattern of always evicting is interesting because the transformation required a 180-degree change in precedent. The attempt to turn the board around began in 1979, and it took about seven years before the transformation was complete. It was spurred by the Authority's serious financial troubles,⁴⁴ by a sense that the Authority was losing a substantial amount of money in unpaid rent⁴⁵ and by the feeling, confirmed by HUD auditors, that the Authority's lenient eviction system was largely responsible

⁴⁴ At one point the Authority was labeled by the United States Department of Housing and Urban Development (HUD) a "Financially Troubled Housing Authority." HUD provided operating subsidies to the HHA and the HHA had to subject itself to HUD audits and comply with certain HUD policies in return.

⁴⁵ It was, however, always recognized that this was not the primary source of the Authority's financial troubles. Rather these troubles were due to the HHA's failure to establish adequate reserves for maintenance and renovation and a federal subsidy which, because of the formula that had been used to calculate it, was inadequate. HUD audits confirmed this diagnosis of the source of the Authority's financial troubles even while suggesting that there was a great need to tighten the rent collection process.

for this.⁴⁶ It also reflected a different, less welfare-oriented attitude at the highest levels of the HHA toward the task of housing poor tenants.

In 1979 the HHA, in part responding to pressure from HUD and in part as a result of its own increasingly businesslike (as opposed to welfare) orientation, decided to get its "eviction house" in order. There were two basic elements to its strategy. One was to rationalize the eviction process and make it more efficient. The second was to transform the board so that it was more appreciative of the Authority's concerns and stricter in dealing with non-payment tenants.⁴⁷

The effort to rationalize the eviction process began in 1979 with the appointment of an administrator whose primary responsibility was to handle eviction actions and the appointment of a secretary to devote full time to paperwork of the eviction process. Prior to these appointments responsibility for evictions both at the secretarial and administrative levels were part time duties of staff members who had other tasks that both they and the Authority deemed more important.

⁴⁶ It appears that the HUD judgment did not reflect their auditor's independent judgment of the situation, but instead reflected the field staff's acceptance of the managers' explanation for their rent collection problems. The managers, at least in 1969, believed that board leniency cost the Authority substantial amounts of money, and they shared horror stories about tenants who failed to meet board conditions and eventually left or were evicted owing three or four times what they had owed at the initial hearing. As mentioned in Note 41 above, both my research and an Authority investigation reveal that the managers' views about the costs of board leniency were wrong. Although there were horror stories, the incremental losses in such cases were more than offset by cases in which rent debts were eventually paid in full or where partial repayment occurred before further default, so that the tenant when evicted owed less than at the initial hearing.

The managers also told a general deterrence story, arguing that knowledge of board leniency was common and that this prospect encouraged tenants to fall behind on their rent in the first instance. Eventually, I hope to analyze some data that may bear on this, but for the moment all I can say is that although the argument sounds plausible, based on what I know of the eviction process and the few tenants I talked with, I would be surprised if it were true. An argument not made by the managers may, however, hold: namely, had the board been very strict and had this strictness been publicized at the project level, rent collection patterns that were not altered by unpublicized board lenience might have been improved. Some data I saw are consistent with this hypothesis. In 1986 and 1987 the proportion of tenants behind on their rent is strikingly low at one project. Two of the tenant members of the eviction board reside at this project. They told me that one or the other goes to every tenant's union meeting and reminds tenants that if they don't pay their rent they will be "kicked out."

⁴⁷ The reforms were motivated entirely by a concern with nonpayment cases. By 1979 there were no income limits on the federally-aided projects, and the board was always more willing to evict in behavior cases than in nonpayment cases, so no great problems were seen in this area. After the reforms, non-payment cases were given a special priority, so the proportion of cases brought for non-payment was somewhat higher in the 1980s than it had been in earlier decades.

One of the first tasks of the new administrator was to study the eviction process in order to respond to HUD's position, which was that the Authority should abolish its eviction board and use the ordinary judicial process when it wished to force tenants out. The administrator found, as I had found a decade before, that the eviction board seemed to save the Authority money by securing time payments from the majority of those tenants whom the managers (and a court) would have immediately evicted. Thus the decision was made to retain the eviction board but to increase the efficiency of the eviction process. The major changes are mentioned earlier in this paper where I note the differences between the eviction process I studied in 1969 and that which I observed in 1987. I will recapitulate briefly.

First the then existing board was split into two seven-member groups which allowed weekly eviction hearings. Second, the HHA drafted and the Hawaiian legislature passed amendments to the Act establishing the eviction board that removed a requirement for in-person service of process in eviction cases and that limited appeals to the HHA's Commission to cases which alleged that relevant "new facts and evidence" had become available only following the board hearing. Later the Commission delegated the task of determining whether such new facts existed to the Authority's executive director, who in turn delegated it to the Director of Housing Management (DHM), and it was the DHM's policy never to find new facts and evidence in non-payment cases when rent was outstanding. Third, the HHA reformed its system for recording rent payments and computerized the process of sending delinquency letters to tenants. Coupled with this was close supervision by the SPHM of project delinquencies and instructions to the managers to process tenants more quickly for eviction. Before 1980 by the time the board heard their cases, tenants were often three months or more behind on their rent. By the mid 1980s, it was not uncommon to have a tenant up for eviction six weeks after the initial default.

While the Authority was revamping its administrative structure in these ways, it was also seeking to develop an eviction board that would view cases from the new, stricter perspective it had come to prefer. One step in this direction was to fill the new slots that became available when the board was split in two with people, like private real estate managers, likely to be sympathetic

to the Authority's point of view. Also, board members were given terms, and a few members who were thought to be unduly sympathetic to tenants were not reappointed. The long-time board chair was among the first to go.

A second step the Authority took was to be more specific in its expectations about how the board should behave. A training session was held for all board members at the time the second panel was established, and another one was held several years later. The board members were told of the seriousness of the rental delinquency problem which the Authority faced, and their task was defined in neutral, judicial terms rather than from the welfare-oriented perspective of how best to help tenants. Later the chairs of the board's two panels were sent at the Authority's expense to "judge's school" in Reno, Nevada, to further encourage them in a legalistic approach.

Complementing these formal actions were attempts at informal influence. The Authority's Executive Director and his assistant occasionally attended board parties⁴⁸ or otherwise chatted informally with board members. On these occasions they discussed the Authority's rent delinquency problems and their expectations about how the board should act, and they complimented board members for acting in accord with their expectations.

Even after these steps had been taken, however, the Authority was not insisting on immediate evictions in all cases in which tenants owed money. Rather board members were given discretion to allow tenants up to six months of time payments to clear accumulated debts. However, the changes in board composition and in the rigor of prosecution had its effect. The board evicted many people outright including some who owed no rent when they appeared before the board, but had histories of chronic delinquency.⁴⁹

⁴⁸ Board members are paid a largely symbolic ten dollars per meeting attended. Rather than collect the money themselves, they pool it and twice a year hold parties.

⁴⁹ Between October 1979 and December 1985, 12.7% of those owing nothing at the time they appeared before the board were evicted as were 24.6% of those owing one to three months' rent and 56.8% of those owing more than three months' rent. Some of those evicted were allowed to stay by the HHA's Commissioners on appeal. The figures on board evictions suggest that the board may have been exercising genuine discretion in this period. Unfortunately, I was not in Hawaii then. My interviews suggest that board members who served at this time had more of a sense that they had real choices to make than did the board members serving in 1987. Clearly

In about 1985, perhaps coincident with the replacement of the Authority's eviction specialist with another attorney, the Authority further toughened its policies. With the concurrence of the Executive Director, the DHM decided that the Authority should seek the immediate eviction of all tenants owing rent at the time of the hearing and should place all tenants who cleared their rent debts between the time they received the subpoena and the hearing on probation for six months.⁵⁰

The Authority's Executive Director and its Director of Housing Management may have communicated these new expectations to board members, but it was largely left to the HHA's eviction specialist, whom I will call Q, to cement a new precedent. Q may have been particularly amenable to this since he did not have experience under the former system, and the new system had its own way of allowing tenants to avoid eviction:⁵¹ namely, by paying, after the hearing but before the time for appeal had lapsed, all the rent that was due.⁵² Moreover, since the time for appeal did not start to run until the tenant was officially notified of the board's decision, Q, who handled part of the paper work of notification, had some leeway to delay giving notice where he thought a tenant could secure money if given extra time.⁵³

the rent owing influenced these choices and it may be that a tenant's rent payment history, whether good or bad, did as well. Other factors are harder to identify.

⁵⁰ If such tenants did not attend the hearing or had records of chronic delinquency, they might be evicted.

⁵¹ Q began practice as a legal aid attorney and exercises sympathy for the plight of poor people.

⁵² Paying the debt in a lump sum became more feasible as the Authority's eviction process grew more efficient since tenants often found themselves before the board with less than two months' rent owing. At an earlier time when eviction actions were not so speedily commenced many tenants who could have managed time payments to clear rent debts of three months and more would have found it difficult or impossible to come up with a lump sum to repay their debt. Of course, there are still tenants who cannot pay off everything they owe before their time for appeal has lapsed who could have paid their rent debt on an installment plan.

⁵³ By 1987, however, Q claimed the process was so efficient and the backlog of cases so small that much of the leeway he once enjoyed was gone. Q was also continually pressed to speed up his end of the process. The DHM took what he called a "business-like attitude," which some might see as a hard line toward non-payment tenants. For example, in 1985 the DHM was apparently instrumental in getting the Authority to adopt a rule that if a tenant was evicted for non-payment of rent she would never again be admitted to an HHA project. Unless this rule has a general deterrent effect, it can only cost the Authority money, for evicted tenants seldom repay what they

Q recalls the process of persuading the board to change its decision making standards as a lengthy and difficult one. It took about a year of continually pressing the board to decide cases as he wanted -- which is to say to always evict when rent was owing -- and to persuade them that this was the right thing to do. Q's strategy was to persuade the board to take a legalistic approach and to convince the board members that their vote to evict immediately did not make them responsible for a tenant's eviction. Q recalls:

My argument was that the board had to make findings of fact and if the findings of fact were that the person was delinquent then they had to -- they could give some kind of conditional deferment -- however that was more the prerogative of the Commission than of the board members. Once they saw that these tenants were not going to get evicted for sure just because they said, "Well you're behind and we order an eviction". . . the board felt more comfortable in saying, "O.K. we will send it on up to the Commission" I remember going in there and standing up and addressing the board with what their functions were ... [T]he selling point was that this board wasn't going to be responsible for the people getting thrown out on the street, that there was still a safety net [Once they saw this] that was probably the major reason for the change.

In addition, Q tried to justify stringency by noting that the welfare of all tenants depended on the rents collected and by pointing out that evicted tenants were replaced by equally needy and presumptively more responsible tenants from the Authority's waiting list. Themes like this along with the "safety net" and "legal duty" points recurred in Q's presentations to the board for as long as he held his office.⁵⁴

In making his arguments and persuading the board to exercise its discretion to change the way in which it routinely decided cases, Q benefitted from more than the logical force of what he

owe unless they seek readmission to an HHA project and are told -- as they once were told -- that they are ineligible until their old debts are cleared.

⁵⁴ Q left for another position in September 1987, shortly after I completed my second stint of field work.

said. First, on each of the boards' panels several members, as I have pointed out, had been chosen because there were likely to be sympathetic to the Authority's position.⁵⁵ In part for this reason the board had since 1980 moved a substantial distance in the direction C wanted them to go.⁵⁶ Second, C was a lawyer officially attached to the Hawaii Attorney General's Office and not the Housing Authority. Thus he spoke not fully as a partisan and with considerable legitimate authority. Third, he was a repeat player before the board. Every week he addressed the board, and he could stress his themes without counter-argument. Tenants usually appeared before the board only once, and defense counsel, including legal aid paralegals, were seldom present in non-payment case hearings. Thus there was no adversary knowledgeable enough to question C's characterization of the board's duties or of the tenant's situation, and no one, other than the more experienced board members, to point to the board's historic ability to set conditions. Few tenants even knew enough to plead that while they could make time payments, they were unable to pay off their debt in one lump sum. Instead, the natural reaction of tenants was to emphasize their ability to pay, in the belief that if they could convince the board they could clear their rent debt, they would stave off eviction. Thus, "Most people," according to C "would tell the board straight out that they are going to get the money together and would pay it." For C such promises made it easier to secure outright evictions, for if such tenants did as they promised, they would be allowed to stay by the Commission. Thus the tenants' promises to pay distanced the board from responsibility for the consequences of its eviction decisions.

In sum, what we see behind the transformation I have discussed is an adjudicative body responding to various pressures to change the way in which it exercised the discretion the law accorded it. Behaviorally and phenomenologically, however, the new standard the board developed was no more discretionary than the one that existed in 1969. Whereas tenants at one time had to

⁵⁵ Two members of each panel were tenants who were chosen in consultation with the HHA's island-wide tenant association. For reasons that need not be explored here, tenant board members were usually disposed to deal severely with tenants brought before them.

⁵⁶ The other major factor was that C's two immediate predecessors had pushed the board for a much harder line toward non-payment tenants, although they had not suggested that the board always evict those behind in their rent.

be given a chance to repay their debts over time even if they were poor risks, by 1987 tenants had to be evicted if they owed money, even if they were unlikely to meet a lump sum demand but were a good bet to clear their debt on an installment plan. In 1969 members who predicted tenants would never pay nevertheless voted to defer their eviction. In 1987, members whose sympathies were aroused by tenants voted to evict them.⁵⁷ The board, in short, possessed throughout the period legal discretion to change its standards and it did so, but it never developed a standard that allowed much room for the play of discretion.

I expect that the discretion of trial judges and other "first instance" adjudicators is often of this sort.⁵⁸ Its operational locus is not where we usually imagine it -- in deciding particular cases; rather it is in deciding on a rule to apply in categorizing cases and in deciding how categories of cases should be treated (cf. Tweedie, 1989). In so doing, trial judges who have discretion to evaluate facts and reach wise judgments, may often be exercising a discretion more akin to that of appellate judges. They are, as a matter of practice rather than pronouncement, making law for the range of cases that come before them, and they are then acting as if they are without discretion; that is as if they are bound by the law they have made. To understand adjudicative discretion one must understand the rules that judges make for themselves. To appreciate how discretion is, as a behavioral matter, constrained, one must understand the forces that lead judges to make particular rules. These forces may not be the same for all courts, and this study of the HHA's eviction board may provide no more than a few general clues. However, any court is likely to exist in a context of forces which systematically constrain its so-called discretionary decisions in a particular direction.

⁵⁷ I witnessed several occasions on which one member, who had just voted to evict a tenant, spoke privately to her after she had been informed of the board's decision about ways she might acquire money to pay her debt. He even directed some tenants who were not Catholics to his Catholic church for help.

⁵⁸ The discretion of law-making appellate courts obviously includes the discretion to change received standards and create precedent that is presumptively binding even on itself.

Conclusion

I said at the outset of this paper that discretion can be a property of rules, a property of behavior or a sense that people have of their freedom to act. Legal philosophers tell us that when rules authorize discretion it means that decision makers are free to choose from a range of legally permissible options. Yet if we look at how adjudicative discretion is actually exercised -- that is at the pattern of decisions generated -- little advantage may be taken of this supposed freedom. Although the law leaves open a range of decisions, adjudicators may adopt routine ways of disposing of cases that admit of only a few outcomes within that range. Moreover, this is not merely a matter of the mechanics of what routines can generate, for routine ways of disposing of cases are easily transformed into subjectively binding precedent. Thus a decision maker with legally authorized discretion may lose the awareness of discretion and come to feel that in a particular situation a particular decision is required.

Thus where rules accord a range of discretion to a decision maker, the decision maker may be both less and more bound than he appears. The decision maker is less bound because there is always discretion to ignore the limitations of the discretion given. Whether this occurs will depend both on the decision maker's conception of his role and on the kinds of incentives that shape decisions to comply with any rule. Thus the police officer who is bound by law to ticket a speeding motorist may, if no one is watching, pocket a twenty dollar bill and let the motorist go. The decision maker with discretion may be more bound than he appears because he may actually feel that this is the case. Thus a police officer authorized by law to stop any motorist going faster than 65 miles per hour may never stop any motorist travelling less than 70 miles per hour, and he may come to feel that he has no authority to do so, perhaps believing that motorists are entitled to a range of grace or that radar guns have a five mile per hour margin of error. His beliefs, however, may have been shaped by motorists who responded with particular hostility when they were stopped for barely exceeding the speed limits, by courts that chose to believe

motorists speed estimates in close-to-the-limit cases, or by fellow officers who mocked him for "chicken-shit" arrests.

What the law gives in discretion -- that is the authorization to reach one of a number of possible decisions and the awareness of this freedom -- social forces may take away. This is not surprising, for what legal discretion necessarily accords is the freedom to be influenced by factors other than the law. When the law leaves open a range of choices, unless the choice is made randomly, it must be influenced by something other than and in addition to the law. Thus the exercise of discretion is not only influenced by the social and psychological circumstances in which a decision maker finds himself, but the existence of discretion invites others to try to influence its exercise. Moreover, the very act of choosing in one case affects the choice made in the next, and the experience of making a number of similar choices often leave a decision maker feeling that no choice exists at all.

This sense of constraint is not necessarily a bad thing, for the consistent exercise of discretion is ordinarily something to be aimed at. Problems arise, however, because the tendency to use shallow case logics in repetitive decision making make it likely that not all the factors that might shape the wise case- by-case exercise of discretion are considered. Thus the 1987 eviction board in routinely evicting non-payment tenants who owed rent ignored the reasons why the family was in debt, the family's need for public housing and the likelihood that a family that could not make a lump sum payment was nevertheless a good prospect to repay its rent debt over time. The 1969 board behaved similarly. In regularly giving second chances, it ignored the Authority's valid interest in immediately evicting tenants who, with no prospects of meeting the terms of a conditional deferment, could only increase their debt. At both points in time it might be said that the board abused its discretion by not using it, for the reason the legislature granted the board discretion was, at least arguably, so that it could consider each case on its peculiar facts and reach an appropriate decision. Had the legislature wanted non-payment tenants behind on their rent to be always evicted or always give a second chance, it could have written this standard into law.⁵⁹

Behavioral regularities do not, of course, necessarily reflect the subjective mental processes that underlie them. It is conceivable that actors conscious of their own discretion and scrupulously attending to the variety of factors they are authorized to consider might nonetheless generate a pattern of decisions that an observer could easily categorize knowing only a few particulars. In the case of the eviction board, however, phenotypes do not obscure genotypes. Board deliberations indicate that board members feel bound by the same factors that one with access only to decisions would identify as crucial. Yet, there are one or two cases (e.g. the case of Mrs. Sua) that do not fit the mold. These exceptions suggest that board members retain some sense of having discretion, but that it takes a truly striking situation to awaken this sense. Moreover, even exceptional decisions are constrained by the usual way of dealing with cases "of this type," with type being defined not by the family's extraordinary situation, but by the factor or factors that are ordinarily sufficient to determine outcomes. Thus the "breaks" that the 1987 board gave a few tenants in circumstances that made an extraordinary case for leniency would have been regarded as particularly hard-hearted and narrow by the board that sat in 1969.

I expect the same is true of other decision makers with discretion. When decisions can be consistently predicted by a case feature or two that stands out, it is likely that the decision maker like the observer senses that little is left to discretion.⁶⁰ In these circumstances it takes extraordinary circumstances to awaken in the decision maker a sense that a range of choices is open to him, and even then the range is unlikely to be coextensive with the decision maker's legal authority but is instead likely to be constrained by the decision maker's sense of what is usually allowed.⁶¹

⁵⁹ It is conceivable although I do not think it is the case here, that a legislature that wanted always to give tenants a second chance nevertheless wanted that chance to appear to be a fortuitous act of grace rather than a legal entitlement.

⁶⁰ By contrast, the ability to predict decisions on the basis of decision maker characteristics like those one finds in some studies of judicial behavior (Goldman, 1975; Ulmer, 1973) is likely to tell us little about the decision maker's sense of acting with discretion.

⁶¹ This may reflect a psychological phenomenon called "anchoring and adjustment." This phenomenon suggests that when a right answer is suggested but is known to be wrong, final decisions are distorted in the direction of the answer originally suggested. See e.g. Tversky, A. and D. Kahneman, 1974.

These conclusions are based on a study of one institution, a public housing eviction board. Thus they must be regarded as hypothesis to be tested rather than as a priori predictions confirmed by investigation. Nevertheless, I believe that the eviction board does not differ greatly from many other decision makers in the way it exercises the discretion that law accords it, and I have cited studies of other decision makers that support this claim. Notably absent from these citations have been studies of the law-making activities of appellate courts,⁶² the discretionary decisions that have received the most attention from philosophers and legal scholars. This is not an accident. Although a number of my conclusions may apply to discretionary law-making at the appellate level, there are two important reasons to expect that not all my conclusions will hold. First, the ability of most higher courts to control their dockets⁶³ means that such courts are less likely than lower courts to be confronted with the steady stream of similar cases that is conducive to shallow case logics and a retreat from discretion.⁶⁴ Second, the law-making discretion that is accorded appellate courts contemplates that they will establish rules that are not only binding on others but will also bind their own future behavior except in exceptional circumstances. Thus the substitution of rules for discretion, which can betray the authority given by law in the cases of trial courts, hearing boards and street level bureaucrats, may embody that authority in the case of

⁶² I have cited some research on appellate courts to support other points and I have suggested that an appellate court's exercise of discretion to hear cases, conforms to what one would expect based on principles derived from this study of the eviction board.

⁶³ The dockets of appellate courts are also shaped and limited by sociological factors such as the costs of appeals.

⁶⁴ Where there are streams of cases that can be easily seen to be of the same type, one should expect to see appellate court decision making that resembles the decision making of the eviction board. Thus intermediate appellate courts seem to deal with the stream of criminal appeals they confront by broad rules of thumb (Davis, 1989), and I would argue that the recent decisions of the United States Supreme Court on the administration of the death penalty has, as a result of the many such cases they confront, resulted in decisions that try to deny the relevance of distinctive facts and in this sense constitute a retreat from discretion. See, e.g., Lockhart v. McCree 476 U.S. 162 (1986) [holding that even if data show that death qualified juries are more conviction prone than juries that are not death qualified, a defendant has no cause of action] and McCleskey v. Kemp 481 U.S. 279 (1987) [holding that even if data show that death sentences in the aggregate appear to turn in part on racial considerations, an individual defendant has no cause of action]. Recently a Committee of the Judicial Conference of the United States, appointed by Chief Justice Rhenquist, has recommended that the number of appeals allowed defendants sentenced to death be drastically limited, thus removing occasions on which courts could exercise discretion.

appellate courts, particularly "highest" ones. One reason why legal philosophers have focused as much as they do on discretion as a quality of rules may be that for the courts that most attract their attention -- supreme courts -- there is less of a disjunction between discretion as a quality of rules and discretion as a quality of behavior than there is when legal discretion is exercised at other levels of the system. I hope, however, to have shown in this paper that if we are to understand discretion in all its aspects, we must not only look at the stars -- we must cast our eyes down as well.

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