Redistribution, Recognition, and Good China:

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INTRODUCTION

Joan Sunderland was a resident of the Bronx and an active member of the New York Citywide Coordinating Committee of Welfare Groups.¹ In October 1967, after participating in campaigns for clothing and furniture by the local and national movements for welfare rights, Sunderland and a public-interest attorney named Stephen Nagler initiated an administrative “fair hearing” against the New York City Department of Social Services. The proceeding concerned a range of goods Mrs. Sunderland had requested.² Mrs. Sunderland’s


¹ “Joan Sunderland” was not this woman’s real name. I have changed all of the names of the people whose fair hearing records I used. For this woman’s role in the New York City welfare rights movement, see Citywide Elections, TELL IT LIKE IT IS [hereinafter TLI], Jan. 15, 1968, at 1; New Executive Board Officers, TLI, Mar. 15, 1968, at 2; Easter Clothing for Our Kids!, TLI, Mar. 29, 1968, at 1.


³ I refer to the appellants as “Mrs.” if this title was used to refer to them in the documents. For many of the women affiliated with the welfare rights cause, it was as important to be known as a

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caseworker believed she did not need some of the items she listed, such as new dishes and drinking glasses to use at meals. At the very end of the hearing, the hearing judge, or referee, elicited Sunderland's perspective on her need for dishes:

THE REFEREE: One final question. Is there anything further, and I am talking to you [Sunderland] now as a gentleman to a lady, that you wish to add to the record, any statement you wish to make?

MR. NAGLER: I have—

MRS. [SUNDERLAND]: Yes . . . Yes, because I feel that something that is given to me when I got married, I don’t feel I should use it to serve my six year old, my two year old children with. These are dishes that a friend of my mother gave me when I got married. I don’t think that this lady that spent her money would think for me to serve my kids on these dishes. Demitasse cups and saucers.

THE REFEREE: You are referring to the dinner set which Miss Sorensen has referred to, is that it?

MRS. [SUNDERLAND]: Yes.

MR. NAGLER: Do you use it for any purpose at all?

MRS. [SUNDERLAND]: Sure. When the Mother’s Club [i.e., the welfare rights group] comes—

THE REFEREE: It is a decorative set more or less and when you have company?

MRS. [SUNDERLAND]: Yes.

MR. NAGLER: [And in regard to the] Glasses that she refused to give you.

MRS. [SUNDERLAND]: There the same thing. They are goblets and wine glasses. My mother was in the house when she said that I should use them. My mother gave me those things and I wouldn’t dare give a two year old—she wouldn’t. No one in this room would.

Joan Sunderland was one of thousands of low-income women who appealed the legal decisions of local welfare departments in the 1960s and early 1970s. Her hearing added force to the citywide and nationwide movement for welfare rights, a movement that included the twenty to thirty thousand formal members of the National Welfare Rights Organization (NWRO) and thousands more who were inspired to participate in demonstrations and hearings without respectful married woman, and to be referred to by one's last name, as it was for many of the women who led the feminist "second wave" to be known as "Ms."

4. Transcript of Fair Hearing 80 (Oct. 24, 1967), case of Joan Sunderland, 49/1. All welfare documents, transcripts, memoranda, letters, and other case-related materials, unless otherwise noted, are from New York City and state proceedings; archived in the Scholarship, Education and Defense Fund for Racial Equality, Wisconsin Historical Society; and either on file with the author or in the author's personal notes.

5. Id. at 80-82.
ever officially joining the organization. Although the backgrounds of these activists were diverse, the overwhelming majority of them were African-American or Puerto Rican women, or, in the Southwest, women of Mexican descent. These women's fair hearings were part of an explicit campaign of "legal civil disobedience" by the movement's strategists. Although leaders of the civil rights movement in the South fought Jim Crow by clogging the prisons and courts with demonstrators who proved their willingness to defy laws they considered unjust, leaders of the welfare rights movement believed that they could change the power dynamics between their members and their perceived antagonists in welfare offices by clogging administrative law dockets and trial rooms with demands for fair hearings.

Scholars of poverty law, administrative law, and the movement for welfare rights have recognized the significance of the fair hearings for public assistance recipients that were authorized by the Social Security Act of 1935. In American constitutional history, fair hearings are recognized as the impetus for the 1970 Supreme Court case *Goldberg v. Kelly* which consolidated twenty legal appeals of decisions made by the New York City welfare department. However, scholars have not studied welfare fair hearings from the period before *Goldberg* (such as the hearing of Joan Sunderland) in any depth. As a result, they have missed part of the history of administrative justice, welfare rights, and low-income women's engagement with federal, state, and municipal welfare policy after World War II.

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7. On October 20, 1967, the National Welfare Rights Organization announced a "new weapon" in the battle against poverty. The cover of the organization's newspaper featured a drawing of an old-fashioned bomb with a long fuse, marked "Fair Hearings." See id. at 65.


The opinion by Justice Brennan in *Goldberg v. Kelly* came as close as any statement by a Supreme Court majority in modern times to suggesting that poverty in the midst of affluent America might be unconstitutional. More narrowly, the decision held that clients of public assistance whose welfare was to be terminated had a right, under the Due Process Clause of the Fourteenth Amendment, to trial-like administrative appeals ("fair hearings") before they lost their aid.\(^{11}\) The *Goldberg* majority struck down a New York State regulation that had provided for written appeals of the decisions of the welfare department before a client lost her benefits, but not for the kind of in-person, trial-like appeal that Joan Sunderland enjoyed. "The opportunity to be heard," Justice Brennan wrote in finding the New York State provision unconstitutional, "must be tailored to the capacities and circumstances of those who are to be heard."\(^{12}\) Brennan's opinion is known for having transformed U.S. law by dramatically broadening access to the procedures of administrative justice, such as fair hearings. Justice Brennan also offered a new rationale for expanding access to administrative law when he cited legal theorist Charles Reich's idea of "the new property."\(^{13}\) Reich argued that the modern state created objects of value, including social welfare benefits, and that the holders of such state-made goods developed something akin to a property interest in their continued availability.

The campaign of "legal civil disobedience" in which Joan Sunderland participated helped create the *Goldberg* decision both directly and indirectly. The large number of fair hearings that occurred under the auspices of the welfare rights movement provided attorneys who were interested in bringing questions about welfare and due process before the appellate courts, with a wide pool of potential plaintiffs. Moreover, the fair hearing campaign, which caught the attention of government officials and of the media, raised the visibility of these administrative procedures, thereby generating momentum behind the litigation; agitation by the welfare rights movement within administrative court rooms and outside them helps explain why the Supreme Court agreed to hear the case and why the Court approached it with as much seriousness as it did. More indirectly, Joan Sunderland and other appellants helped create the expansive and generous aspects of the majority decision in *Goldberg* by sharing details of their experiences on welfare in their fair hearings. As law professor Martha Davis has noted, the papers lawyers drafted in the litigation that ultimately became *Goldberg v. Kelly* were extraordinarily long and detailed. When the case went to the Supreme Court, lawyers attached an appendix to the main brief detailing the circumstances of all twenty

\(^{11}\) U.S. CONST. amend: XIV § 1; *Goldberg*, 397 U.S. at 261.

\(^{12}\) 397 U.S. at 268.

\(^{13}\) Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (cited in *Goldberg*, 397 U.S. at 263 n.8).
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appellants, all of whose appeals began with administrative fair hearings.\textsuperscript{14} These details were the sine qua non of the case, which may have persuaded the justices that high constitutional principles were at stake in what Brennan (following a lower court judge) termed the "brutal need" of poor people for continued access to welfare.\textsuperscript{15}

As much as it sparked the expansive aspects of the \textit{Goldberg} decision, the "legal civil disobedience" of the welfare rights movement also presaged the limitations of that decision. The \textit{Goldberg} decision was truly remarkable relative to what had come before. But it did not accomplish everything that welfare recipients, or the attorneys allied with them, wanted it to. If these activists had won their battle for welfare rights, then the Supreme Court would not only have guaranteed hearings prior to the termination of welfare benefits; the Court would have guaranteed all poor people in the United States incomes above the poverty line whether or not they met the formal criteria for public assistance. In the years leading up to \textit{Goldberg}, individual welfare recipients experienced a mix of remarkable gains and limitations in their fair hearings that was much like the mix that ultimately appeared in the opinion. In the hearings, low-income women who proved that local officials had violated their own regulations gained a great deal in material terms. Virtually all of the women who brought hearings gained in non-material terms, too, especially in their ability to critique the welfare system in public. But some women did not access material gains through the hearings, and others were treated rudely or dismissively. And even the greatest victories in fair hearings did not keep the appellants' families out of poverty, ensure that women would be treated with respect in their neighborhood welfare offices, or assure that legislators facing anti-welfare political majorities would not cut their grants across the board.\textsuperscript{16}

\section*{I. Fair Hearings and Poverty Law Scholarship: The Need for New Categories}

Much as the history of fair hearings makes \textit{Goldberg v. Kelly} appear in shades of gray, the history detailed in this Article adds elements of gray to

\textsuperscript{14} Davis, supra note 8, at 89 (describing the original complaint drafted by lawyers from the advocacy organization Mobilization for Youth), 91-92 (discussing the affidavit by attorney Edward Sparer emphasizing the hardships suffered by individual clients), 103 ("To drive home the point [about the plight of individual poor people] the Center lawyers outlined the stories of each of the plaintiffs in an appendix to the brief [to the Supreme Court].")

\textsuperscript{15} Goldberg v. Kelly, 397 U.S. 254, 261 (1970) ("By hypothesis, a welfare recipient is destitute, without funds or assets ... Suffice it to say that to cut off a welfare recipient in the face of ... "brutal need" without a prior hearing of some sort is unconstitutional, unless overwhelming considerations justify it.") (quoting Kelly v. Wyman, 294 F. Supp. 893, 899, 900 (S.D.N.Y. 1967)). On the source of this phrase, see Davis, supra note 8, at 98.

\textsuperscript{16} Many states, including New York, did cut welfare grants across the board in the early 1970s—after the fair hearing campaign of the welfare rights organizations and after \textit{Goldberg v. Kelly}. Kornbluh, supra note 6, at 161-82.
categories that the scholarship on poverty law has drawn in black and white. First of all, the records of these hearings are evidence of a historic moment in which people with low incomes eagerly used legal institutions and worked fairly amicably with attorneys. There are few signs in these records of the cynicism toward law or lawyers that Austin Sarat found in his study of the ideology of the “welfare poor.” At the same time, however, Joan Sunderland and the other appellants do not appear to have blithely trusted “the first man who puts on a wig,” in E.P. Thompson’s inimitable phrase. These poor people had good reasons to believe that they would gain as a result of their willingness to work with lawyers and file for fair hearings, and, in fact, the overwhelming majority appear to have made significant gains when they sought fair hearings—whether these gains were material or non-material. The history of these hearings also speaks to the critique of administrative “discretion” forwarded by Joel Handler and the critique of “bureaucratization” in welfare departments that has been detailed by William Simon. Since the mid-to-late 1960s, Handler has analyzed the challenge of “controlling official behavior in welfare administration.” He recognized early that case workers had the power to impose conditions of behavior or speech on people who came to them for aid, and that moralism or racial bias could make them especially controlling toward unmarried mothers, African Americans, or Latins. William Simon, on the other hand, has suggested that efforts to control administrative excesses in the public welfare system have created a Kafka-esque regime of bureaucratic indifference to clients’ needs. In Simon’s view, while the welfare system of the 1950s and 1960s may never have approached the ideal, efforts to limit administrative discretion and protect clients’ rights only produced rigid bureaucratization that has served poor people at least as weakly as the older

17. Austin Sarat, The Law is All Over: Power, Resistance, and the Legal Consciousness of the Welfare Poor, 2 YALE J.L. & HUMAN. 343 (1990). The attitude of welfare rights activists changed over time with regard to law and lawyers. By the early 1970s, as fair hearings became more routinized, the appellate courts became less responsive to the claims of poor people, and government officials generally began to express more hostility toward public assistance recipients and the idea of welfare rights, activists were far more cynical than they had been in the mid-1960s. I take this less as evidence of the true “legal consciousness of the welfare poor” than as a reflection of a profound change in historical circumstances and in the degree to which law was available as a resource for social movement organizing. See KORNBLUH, supra note 6, at 172-77.


20. Handler, Controlling Official Behavior, supra note 19, at 158. Even in this early, pre-Goldberg v. Kelly article, Handler expressed remarkably prescient concerns about the degree to which “judicializing welfare administration,” by expanding the accessibility to fair hearings, would help poor families get what they needed.
system ever did. In its place he has proposed a "legality of relative informalities, a decentralized enforcement structure, and a corps of enforcers with some of the attributes of skill, education, and status associated with professionalism."21

From the perspectives of welfare recipients, as recorded in their hearings, "discretion" and "bureaucratization" were both promising and both fraught with potential dangers. Women who relied on public assistance complained when it seemed that caseworkers were using their discretionary power to intrude upon the women's privacy or when it seemed that the caseworkers were treating them unfairly. Given the opportunity, these women would surely have tempered such exercises of discretion with some of the rights-based and rule-bound structures that, according to Simon, came to dominate welfare administration in the 1970s. At the same time, however, welfare recipients benefited from the fact that the government left discretionary power in the hands of caseworkers, who were permitted to issue financial supplements if they believed that the families on their caseloads needed extra goods.22 Although some appellants pointedly demanded that the welfare department leave them alone, others complained passionately that their caseworkers did not spend enough time talking to them or assessing their needs.23

Within the scholarship on poverty law, the records of women's fair hearings from the 1960s most closely resemble the hearing on which Lucie White reflected in her article, Subordination, Rhetorical Survival Skills, and

22. In fact, strategic engagement with caseworkers who had the power to issue "special" welfare grants, or to bring clients up to what the New York City welfare department termed "minimum standards" of material well-being, was essential to welfare rights organizing. Mass campaigns to gain "minimum standards" or additional items of "special need" publicized the movement and helped it attract new members. Since they were disruptive and confrontational, and cost municipalities millions of dollars, these campaigns also helped the movement gain bargaining power vis-à-vis city and state governments. Davis, supra note 8, at 46; Kornbluh, supra note 6, at 42-48; Piven & Cloward, supra note 8, at 296-302.
23. For clients who wanted caseworkers to be more involved in their lives, or to spend more time evaluating their needs, see Transcript of Fair Hearing 15-16, 42-44, 69 (Jan. 16, 1968), case of Jean Younger, 49/35; Memorandum from E. Dahlgren, Senior Caseworker, et. al to Mrs. Mae Feinstein, Administrator (Nov. 10, 1967), case of Jean Younger, 49/35; Transcript of Fair Hearing 25-27, 39-40 (Oct. 23, 1967), case of Martha Dickerson, 48/157; and Letter from Toni Stret, Brooklyn, N.Y., to Mayor [John] Lindsay, [N.Y.C. Welfare] Comm'r Mitchell] Ginsbergs [sic] and [N.Y. State Welfare] Comm'r J[oseph]. Louchermin [sic] (Aug. 28, 1967), case of Toni Stret, 47/118. For those who resisted what they considered interference by caseworkers in their lives—including what they viewed as intrusions on their sexual privacy—see [Ann Freeman], Statement in Preparation for Fair Hearing (Nov. 2, 1967), case of Ann Freeman, 49/14; "Form for Welfare Telephone Calls" (May 25, 1967), case of Louise Miller, 48/73; and Transcript of Fair Hearing at 70-71 (Mar. 30, 1967), case of Jill Jackson, 48/22. In addition to the way these cases complicate scholars' treatments of "discretion" and "bureaucracy," they also complicate our understanding of what Nancy Fraser has termed "the politics of need interpretation." The cases support Fraser's argument that interpreting the needs of clients is a political act, and that the value of such interpretative acts for those who rely on the welfare state for their sustenance varies according to context (and, I would add, historical moment and the strength or weakness of related social movements). Nancy Fraser, Talking About Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies, 99 ETHICS 291 (1989); Nancy Fraser, Women, Welfare and the Politics of Need Interpretation, 2 HYMATIA 103 (1987).
Sunday Shoes.\textsuperscript{24} White chronicled the fair hearing experience of a woman welfare recipient, Mrs. G., who refused to present herself as miserable or abject. Rather than asking simply for shoes for her family, and showing the middle-class professionals in the hearing room her worn-out footwear, Mrs. G. claimed that she and her children had everyday shoes and needed only "Sunday shoes" for special occasions. The case of Mrs. G. has obvious resonances with that of Joan Sunderland; Sunderland may have had a motivation similar to Mrs. G's in insisting that she needed help to buy dishes and glasses only because her other set was too good to eat or drink from every day. However, the hearing of Mrs. G. occurred during the 1980s, long after the high point of the movement for welfare rights and \textit{Goldberg v. Kelly}. The words and actions of Mrs. G. may, as White argues, have revealed her subordinate place within both the welfare system and her community. But what Sunderland and her movement colleagues said in their fair hearings in the 1960s was part of an explicit campaign of social and political change—one that enjoyed astounding successes and was eventually defeated by political forces that were far more powerful than it was.

Neither the contrast between resistance and compliance, nor that between discretion and bureaucracy, fully captures what appears to have been at stake for low-income women who entered the legal arena in the 1960s. Instead of using either of these frameworks, I propose to take the records of fair hearings in the 1960s as evidence of the perspectives on justice of hundreds of low-income women. These perspectives matter because they were the animating substance of the movement for welfare rights. They also paved the road for the majority decision in \textit{Goldberg}, which, despite its limitations, is still the most generous and potentially radical statement about social justice and the Constitution that the Supreme Court has issued in modern times.\textsuperscript{25}

To describe the perspectives of women who sought fair hearings, I borrow from political theorist Nancy Fraser ideas about "redistribution justice" and "recognition justice." Fraser has written that "virtually every struggle against injustice, when properly understood, implies demands for both redistribution and...
and recognition." The movement for welfare rights was one such struggle. Public assistance clients who brought fair hearings during the heyday of the welfare rights movement sought both redistribution and recognition; their claims for one were often inseparable from their claims for the other. In Joan Sunderland’s fair hearing, for example, she sought redistribution in the form of specific household goods, but she also sought recognition from the hearing referee (who spoke to her “as a lady”) and welfare department employees as the kind of person who deserved decent goods and who knew something about raising children. “I wouldn’t dare give a two year old [demitasse cups to drink from]—she [Sunderland’s case worker] wouldn’t. No one in this room would,” she said, declaring her standards as a mother and her equality with the middle-class women who worked for the welfare department.

In what follows, I begin by describing the women to whose fair hearing records I have had access, and the general reasons why they sought hearings. I then use transcripts of women’s hearings to explore in greater depth their rationales for seeking legal help with their problems. I emphasize the ways in which these rationales reveal the salience of redistribution and recognition for women appellants, particularly for low-income women of color who were raising families in the midst of the consumer society after World War II. Third, I discuss the degree to which fair hearings delivered the justice of recognition and redistribution. I find that women appellants received considerable material aid (i.e., redistribution) and gained significant opportunities for the public speech and respectful treatment that signaled recognition. However, regulations and the decisions of individual hearing referees limited their experiences of both kinds of justice.

II. WHO BROUGHT FAIR HEARINGS AND HOW?

The records of Joan Sunderland’s confrontation with the New York City welfare department were preserved in the archives of the activist attorney Carl Rachlin. Rachlin was the legal director of the Congress of Racial Equality (CORE) and its affiliated Scholarship, Education and Defense Fund for Racial Equality (SEDFRE). The national offices of both CORE and SEDFRE were in New York City; Rachlin drew clients from both the city and nearby Westchester County. Beginning in 1967, he served as general counsel of

28. New York State did not retain transcripts of the fair hearings it convened. However, I discovered this set of transcripts in the papers of attorney Carl Rachlin, which were available at the Wisconsin Historical Society as part of the manuscript collection of the civil rights group Congress Of Racial Equality and its legal arm, the Scholarship, Education and Defense Fund for Racial Equality (SEDFRE) (on file with the author).
National Welfare Rights Organization (NWRO), the national umbrella organization for local welfare rights groups throughout the United States. Rachlin and his staff—most particularly Stephen Nagler, who represented a majority of the clients at their hearings—represented at least 365 clients at fair hearings between 1966 and 1968.

Attorneys, social workers, and administrative law judges (or, as they were called in this context, hearing referees) were all parties to these proceedings. Their motives and understandings undoubtedly shaped the outcomes of welfare fair hearings in the 1960s. As I have written elsewhere, free and low-cost legal assistance was a vitally important resource for the welfare rights movement. The support of sympathetic social workers, some of whom were themselves in the midst of organizing public-sector trade unions, was also critically important. However, the perspectives of attorneys or social workers who helped bring fair hearings, or who helped build the movement for welfare rights, lie outside the scope of this paper. Nor do I explore the motives of those social workers or attorneys who represented the New York City and Westchester County welfare departments in fair hearings.

The case files of Carl Rachlin and Stephen Nagler testify to the variety of people who sought fair hearings in New York City and Westchester County in the middle and late 1960s. Although a sizable majority of the appellants were recipients of the federal public assistance program Aid to Families with Dependent Children, Rachlin and Nagler represented people who were receiving all of the categorical programs authorized by the Social Security Act. Their caseload included married homeowners, older white ethnic women living in public housing, unemployed or under-employed Vietnam veterans, Puerto Rican families that had recently migrated to the U.S. mainland, and African-American and white women raising children with limited help from male companions. Several of these people found SEDFRE with the help of the Mount Vernon Community Action Program in Westchester County, which sponsored a welfare rights group among its other activities. Others reached Rachlin through Open City, a fair housing initiative sponsored by CORE, or

29. Nagler ultimately left SEDFRE to head the New Jersey chapter of the ACLU. On his departure, see Memorandum from Carl Rachlin, Legal Director, to the SEDFRE Board of Directors, 30/2 (Jan. 15, 1969).

30. Fair hearing case files appear alphabetically, by name of appellant, in Boxes 47, 48, and 49 of the SEDFRE papers. Correspondence, memoranda, and notes from telephone calls about additional cases appear throughout Rachlin's papers in the SEDFRE collection.

31. See KORNBLUH, supra note 6, at 26-27, 68, 80-85.


33. Some background facts on clients were integral to their status as public assistance recipients and appeared in the fair hearing records—as, for example, the veteran status of an unemployed adult receiving benefits through the Veterans' Assistance Center, a special welfare office in New York City for returning Vietnam veterans. However, much of the relevant information, such as clients' geographic places of origin, the amounts of time they lived in New York State, or their racial or ethnic backgrounds, only rarely appeared in the records.
through neighborhood chapters of CORE. Others had the help of welfare rights organizations that pre-dated NWRO, such as the New York Citywide Coordinating Committee of Welfare Groups or the welfare rights project of the Brooklyn-based Christians and Jews United for Social Action. Social workers based in private agencies such as the YMCA, Jewish Board of Guardians, and assorted New York City settlement houses also referred clients to Rachlin and SEDFRE, as did a small number of welfare case workers (who appear to have feared reprisals from their superiors for doing so).

Joan Sunderland and other women welfare recipients required ingenuity to locate attorneys who were willing to represent them free of charge. However, in the New York City area in the middle 1960s through the early 1970s, their options were far more robust than they had been at the beginning of the 1960s, or than they would become by the middle 1970s. In addition to Rachlin and Nagler at SEDFRE, New Yorkers who were interested in appealing welfare department decisions could turn to the Legal Aid Society or the Legal Unit of Mobilization for Youth, the multi-issue service and activist organization on the Lower East Side of Manhattan. Legal advocacy was also available through the Law Students Civil Rights Research Council. A limited number of welfare recipients might find representation at the Center on Social Welfare Policy and Law, the federally funded legal services back-up center that brought some fair hearing cases in service of its appellate litigation strategy on welfare rights. Others might receive help from the ACLU or its New York City chapter, or the NAACP Legal Defense and Educational Fund (through its Ford Foundation-funded project, the National Organization for the Rights of the Indigent), although attorneys on the staffs of these groups preferred test cases and high-court litigation to representing individual clients in fair hearings. Sunderland and other low-income women could also seek legal help from the local offices of the federal Legal Services Program. However, the program was not operational in New York City until 1968. A limited number of women could


36. A list of major providers of legal assistance for poor people in New York City appeared in the preparatory materials for a meeting on forming a poor people's bar association, which was organized by Gabe Kaimowitz of the Center on Social Welfare Policy and Law. Carl Rachlin chaired an early meeting of the proposed group and served on its first Temporary Executive Committee. See Letter from Gabe Kaimowitz, Center of Social Welfare Policy and Law, to Carl Rachlin (Apr. 16, 1968); Letter from Gabe
gain legal assistance from attorneys employed by private firms who were willing to work pro bono. Finally, activist welfare rights organizations trained members to conduct their own appeals, or to represent other welfare recipients who had grievances they wanted to pursue in fair hearings.\textsuperscript{37}

III. WHY WOMEN BROUGHT FAIR HEARINGS

The people who sought Carl Rachlin’s and Stephen Nagler’s help with their fair hearings were interested in both the justice of redistribution and that of recognition. They requested hearings because their caseworkers or others in the welfare bureaucracy had cut them off from assistance, or because welfare department personnel had reduced their grants. Their basic, obviously redistributive, claim was that their grants should be reinstated or restored to previous levels. Like Joan Sunderland, however, many of the women who brought fair hearings did so because they had requested budget increases to cover what they saw as ongoing needs (e.g., for a certain number of hours of baby-sitting, or extra-large clothes for a child who was overweight or growing extra-fast) and welfare personnel had refused to make the adjustments.\textsuperscript{38} These

\textsuperscript{37} The activist lawyers working with the Citywide Coordinating Committee of Welfare Groups on its 1967 minimum standards/fair hearings campaign, which generated many of the appeals in the SEDFRE caseload, estimated that ninety percent of the clients who actually brought their cases to hearings had either attorneys or lay advocates to represent them. See David Gilman & Ezra Birmbaum, National Welfare Rights Organization, New York City Minimum Standards—Fair Hearing Campaigns—June to December 1967, (Jan. 1968) (2101/Basic Needs Campaign) (National Welfare Rights Organization papers, Moorland-Spingarn Research Center, Howard University, and on file with author) [hereinafter NWRO]. On non-professional advocates (such as law students) representing clients, see Transcript of Fair Hearing (Dec. 21, 1967), case of Doris Brown, 47/41 (represented by Richard Greenberg).

\textsuperscript{38} See e.g., N.A., Fair Hearing Record, State of New York Department of Social Services, In the Matter of the Appeal of Alicia Timms (Oct. 31, 1967), case of Alicia Timms, 48/159 (babysitting); Letter from Carmen Thompson, Mt. Vernon, NY, to Stephen Nagler (Jan. 4, 1968); Letter from Carmen Thompson to Stephen Nagler (undated), case of Carmen Thompson, 47/101 (babysitting); Transcript of Fair Hearing 2 (Mar. 26, 1968) and George K. Wyman, Comm'r, State of N.Y. Dep’t of Soc. Servs.,
women entered the world of administrative law looking for more than cash; their testimony indicates a desire to make welfare department employees listen to them and respect their families’ needs. Similarly, Rachlin and Nagler represented welfare recipients who pursued fair hearings because they wanted to move into new apartments and welfare department employees either did not authorize the moves or delayed approval for so long that they lost out to other renters. While women certainly wanted help from the welfare department to improve their material conditions, they also sought recognition as women deserving of decent accommodations and important enough to earn rapid responses from a bureaucracy that supposedly had been created to serve them.

As in the case of Joan Sunderland, many of the women Rachlin and Nagler represented were welfare rights activists whose fair hearings were part of an explicit social movement strategy. These women typically filed for hearings because they had asked welfare departments to distribute cash or goods that were not explicitly covered by their regular public assistance grants. Caseworkers could give welfare families funds for virtually any household goods or clothing if they believed that these were part of the “minimum standards” that underlay normal American family life and that the families truly needed them. By demanding that welfare departments fulfill their “minimum standards,” or, as organizers called them, “basic needs,” welfare rights

“Decision After Fair Hearing, In the Matter of the Appeal of TONI STRET’ (undated), case of Toni Stret, 47/118 (babysitting and “outsise” clothing); Frances Garnet, List of Needs (n.d.) & Robert Keyes, Supervisor of Referees, State Dep’t of Soc. Servs., “Fair Hearing Follow-up for Frances Garnet” 5 (Mar. 14, 1968), case of Frances Garnet, 47/21 (babysitting); Transcript of Fair Hearing 32-33, 38 (Jan. 16, 1968), case of Jean Younger, 49/35 (“outsise” clothing); Transcript of Fair Hearing 11, 26, 32-33, 57-58 (Sept. 18, 1967), case of Christina Mann, 48/142 (outgrowing clothes and clothes wearing out); Letter from Marian Wilson, Mt. Vernon, N.Y., to Carl Rachlin (June 12, 1967), case of Marian Wilson, 47/92 (outgrowing clothes).

39. In New York City, welfare personnel determined that an “adequate basic supply” of clothing that would bring an adult woman “up to standard” included one hat, two cotton dresses, one “dressy dress,” three pairs of panties, one girdle, and two pairs of stockings. Internal welfare department documents specified appropriate unit prices for each of the items, for both regular and large sizes, and also specified “minimum standards” in furniture and household equipment. Beyond these specified standards, welfare department employees insisted on their discretionary power to distribute funds for other items when caseworkers and their supervisors found good reason to do so. For further explanation of use of the standards, see Memorandum, N.Y.C. Dep’t of Welfare, “Subject: Determining Need for Household Furniture, Furnishings, Supplies and Equipment, To: Administrative Group, Case Unit, Home Economist [PROCEDURE NO. 66031 Classification 9, Replaces: P 62-57]” (Oct. 24, 1966), 2101/Basic Needs Campaign, NWRO; Social Service Employees Union, “Tables of Minimum Standards from Information Found in the Handbook for Case Units in Public Assistance,” n.d., 2010/ SSEU-NY, NWRO; MORRIS, supra note 36, at 69. For a defense by the welfare department of maintaining the discretion to issue extra grants for these goods, see Transcript of Fair Hearing 53-54 (Mar. 28, 1968), case of Linda Winterson, 47/60; N.Y. City Dep’t of Welfare, “Determining Need For Household Furniture, Furnishings, Supplies and Equipment.”

40. For the language of “basic needs” and chronicles of “basic needs” campaigns by welfare rights groups, see N.A., June 30th Nationwide Welfare Demonstrations Roundup, NOW! NAT. WELFARE LEADERS NEWSLETTER, July 3-10, 1967, at 2; George Wiley, Executive Director, NWRO, Letter to Welfare Rights Leaders and Organizers, NOW!, May 2, 1967, at 2; Untitled Article, NOW!, Aug. 7, 1967, at 9 (“The basic needs campaign in Cleveland has succeeded in getting the Welfare Department to
activists gained millions of dollars for themselves and other poor people. By submitting hundreds of requests for these “standards” at once and following up the requests with demands for fair hearings, they generated havoc in welfare offices and city government. Appellants who were also activists appealed denials of their requests for “basic needs” as part of a larger effort to change the balance of power between the welfare rights movement and government officials. Fair hearings certainly promised them redistribution in the form of particular household goods or extra cash. At the same time, the joint demands of women welfare clients for minimum standards and fair hearings promoted recognition: this activist legal campaign made the welfare rights movement an inescapable part of the political landscape in New York and nationally.41

The language women used in seeking hearings and in the give-and-take during their hearings indicates the degree to which their claims for redistribution and recognition were joined to one another. In explaining why they had sought fair hearings, the appellants often pointed to particular words welfare department personnel used, words that indicated a lack of respect for their clients. For example, in a letter to Carl Rachlin in which she described her reasons for seeking a hearing, AFDC recipient Denise Hamill described her efforts to obtain more goods from the welfare department. Hamill, a mother of three from Mount Vernon, New York, also suggested that her caseworker failed to recognize her as a person and a family head with genuine needs. She recalled having made “minimum standards” requests for “an iron, sheets, dishes, pots and pans, two chairs and a dresser.” However, when she discussed the items with her caseworker, she was told that she “could wait for these things.”42

Disabled recipient Maria Gutierrez wrote a letter to New York State Welfare Commissioner Joseph Louchheim in which she pointed to a similar mix of material and non-material reasons for requesting a hearing:

I am requesting a Fair Hearing because I am a disabled woman, unable to do any work and have been receiving Welfare for more than 4 years. For some unknown reason I did not receive a check for January 16, 1968. When I tried to find out why I didn’t receive it, I learned that my investigator had closed my case. . . . [H]e came to see me and ordered me to come see him at his office on January 29, 1968. I went there and after a long wait [he] came down to tell me that he was going to reopen my case. On February 5th, I had to call [my caseworker] again and explain to him that the grocery store that was feeding me on credit told tell workers to meet all basic needs requests for beds, mattresses—blankets, tables and chairs, stoves, refrigerators and washing machines.”), reprinted in KORNBLUH, supra note 6, at 65.
41. See KORNBLUH, supra note 6, at 83-86.
42. Letter from Denise Hamill to Carl Rachlin (Apr. 26, 1967), case of Denise Hamill, 47/149. On Hamill’s family and receipt of public assistance, see id.
me that they could not continue and that I didn’t have any food to eat. His answer to me was ‘to take it easy.’ Jean Younger, a member of Brooklyn CORE and mother of a large family, focused on the language of her caseworker, Mr. Shapiro, who, came out to visit me, and he [only] stay five minutes. I was chasing him all over the house trying to explain what I needs. Things like bedding, I was trying to show him. He said to me, ‘One thing at a time.’ So I was trying to show him the kids’ beds. We didn’t have linen on it... and the blanket I was trying to show him and all this. So he said, ‘One thing at a time.’

Younger appears to have requested a fair hearing because she wanted the “redistribution justice” that would come with receiving a new bed and decent linens. She also appears to have sought public recognition of her needs, and a public condemnation of her caseworker’s treatment of her.

IV. CONSUMER CITIZENSHIP AND WELFARE JUSTICE

The public assistance clients who asked Rachlin and Nagler to represent them often complained about the way that they were treated as consumers by welfare department personnel. They sought redistribution justice in the form of goods or cash that would allow them to participate in the private consumer market. At the same time, these women wanted their caseworkers to see that they deserved decent goods and to listen when they said their grants were too low to cover their families’ needs. For low-income mothers in postwar America, especially those who were African-American or Puerto Rican, redistribution may in itself have signaled recognition. The ubiquitous consumerism of the period after World War II made high levels of purchasing a sign of inclusion in U.S. culture—and navigating the consumer marketplace was paradigmatically women’s work. To be unable to shop, unable to make one’s own choices in the market, or simply to lack goods that were considered basic necessities, was to lack a critical dimension of social personhood or citizenship in postwar America.

43. Letter from Maria Gutierrez to Joseph Louchheim, Comm'r N.Y. State Dep't of Soc. Welfare (Feb. 8, 1968), case of Maria Gutierrez, 47/122. Officials of the welfare department argued that Gutierrez’s case was closed because they had been unable to contact her. Letter from Claudia Lang, Senior Welfare Representative, Family Servs., N.Y. State Dep’t of Soc. Welfare, to Mrs. Maria Gutierrez (Mar. 19, 1968), id.

44. See Transcript of Fair Hearing 8 (Jan. 16, 1968), case of Jean Younger, 49/35.

45. Id.


47. I discuss welfare rights and citizenship, including consumer citizenship, in Felicia Kornbluh, The Goals of the National Welfare Rights Movement: Why We Need Them Thirty Years Later, 24
Yale Journal of Law and Feminism

Rachlin’s and Nagler’s clients used their fair hearings to compel social workers and welfare department administrators to listen as they narrated their day-to-day experiences of attempting to provide decent food, clothing, and shelter for their families. For example, Ilene Money, a mother of eight from Brooklyn, focused on her search for housing. When she found something she liked, she reported, she tried to enlist welfare department personnel in moving her and her children, paying their security deposit, and moving their welfare case to the new neighborhood. However, Money testified, street-level bureaucrats with conflicting agendas dragged their heels on giving her a final answer about whether her proposed living space was acceptable.48 The space she wanted was ultimately taken by another renter. “When I met Mr. Badger [the welfare department’s housing expert],” she recalled, “I said to him, I said, ‘Why you make so much scenery about the place? You know I need it.’ His expression to me is as though the place was too good for me to have. And I explained that to him, it was really a one-family house.”49

Several appellants sought redistribution and recognition in their hearings by recounting their battles with welfare officials about purchasing children’s clothes. Christina Mann and Mary Sellors both insisted that case workers and the home economists on welfare department staffs underestimated the costs of clothing their children—and suggested that the professionals should both give them more money and acknowledge their mistakes. Mann seemed practically to jump out of her seat when the referee hearing her case provided her an opportunity to speak on this point:

REFEREE: Mrs. [Mann], will you tell us where it is or how it is that you claim that you are not getting what you are entitled to from the agency with reference to your recurring grant?

... MRS. [MANN]: For $30 I can take care of [one of my daughters]? A son that is as big as this man (indicating) and I got three more little


Redistribution, Recognition, and Good China

Girls behind him. Do you think I can do it on $30 [the clothing portion of the regular welfare grant]?\textsuperscript{50}

Sellors likewise expressed her sense that there was a disjuncture between the estimates welfare department employees made of clothing costs and what she actually needed to spend:

REFEREE: Had you ever bought any clothing for the children or yourself from the [regular] budget [as opposed to special clothing grants]?

MRS. [SELLORS]: Oh, yes, I buys clothing from the budget like underwear and pants. If I don't, the children would have nothing to wear because [a] $4 [budget] could not get Thomas a pants, and $4 would not get Vernise a dress[,] or $2.\textsuperscript{51}

Ann Freeman argued during her fair hearing that welfare department personnel misjudged how long children's clothes would last. She suggested that a mother knew best how much wear and tear a child inflicted on her or his clothes:

Q [Stephen Nagler, attorney for appellant]: What happened to the money which you received for Kevin for a shirt, pants, shoes, and socks?

A [appellant Freeman]: This I bought him, right.

Q: In what condition are they now?

A: They are not in good condition. He wore them through the summer.

Q: How come?

A: Because he's been wearing them continuously over and over and washing them and wearing them.

Q: What was he doing during the summer?

A: Playing a lot.

Q: Playing a lot?

A: Yes, and wearing the same things, you know. What they give you—I mean, the few things that they give you you have to be changing continuously, and you are washing and changing. For the little bit they give you to spend, it doesn't hold up.\textsuperscript{52}

If Freeman's only goal had been to persuade welfare officials to give her more money—that is, if she had been interested only in the justice of redistribution—then she might have constructed her argument differently than she did. She could have argued that Kevin's clothes wore out in the course of some exceptional circumstance, that he was unusually hard on clothes, or that he grew remarkably fast for a boy of his age. However, Freeman suggested that

\textsuperscript{50} Transcript of Fair Hearing 11 (Sept. 18, 1967), case of Christina Mann, 48/142.
\textsuperscript{51} Transcript of Fair Hearing 55-56 (Sept. 25, 1967), case of Mary Sellors, 48/154.
\textsuperscript{52} Transcript of Fair Hearing 15-16 (Nov. 2, 1967), case of Ann Freeman, 49/14.
her son was perfectly normal and that welfare department standards and budgets themselves were off-base. This was a more risky strategy in terms of winning her case, but one that suggested a bid for recognition justice, public acknowledgement of her expertise as a mother and a citizen of affluent America.

V. HOW FAIR THE HEARING?

Ann Freeman, Christina Mann, Joan Sunderland, and other low-income women brought their aspirations for justice to the administrative courtroom. The fair hearings in which they participated fulfilled some, but not all, of their hopes. Most of Rachlin's and Nagler's clients received significant amounts of material aid—and the enhanced social standing that came with their increased ability to participate in the consumer marketplace—prior to their hearings and in negotiations that occurred off the record during hearings. The women who did not settle with the welfare department before or during their hearings received relatively little in material terms. However, many of the appellants who did not receive much in the way of "redistribution justice" from their welfare appeals may have received a measure of "recognition justice": Joan Sunderland and hundreds of others voiced their complaints in public, talked back to their caseworkers, demonstrated their thoughtfulness, and served as experts on the subject of living on a welfare budget. Although not formal proceedings in civil courts, the fair hearings possessed the trappings of formality that dignified clients' participation. The participants interacted with great politeness, treated the testimony of each witness as of similar weight, and recorded the whole for posterity with a verbatim transcript. On the whole, the women who brought fair hearings as a direct or indirect result of welfare rights agitation in the 1960s gained access to the justice of redistribution and of recognition even when they participated in the sometimes arid procedures of administrative justice.

During the heyday of the welfare rights movement, fair hearings offered most appellants real gains. At the same time, however, welfare department officials successfully defined many significant issues as outside the purview of fair hearings, and thus limited appellants' access to both redistribution and recognition. The issues defined to be beyond the scope of normal fair hearing adjudication included the conduct of social workers toward their clients (consigned to internal welfare department disciplinary procedures), the role of the welfare department in relations between parents and children, or husbands.

53. For further discussion, see KORNBLUH, supra note 6, at 39-62, 114-36.
and wives, among their clients (assigned to the family courts), and the adequacy of welfare grant levels for families that had no other sources of income. At the urging of bureaucrats and attorneys on the staffs of local welfare departments, fair hearing referees ruled out of order the most basic questions these hearings raised as to whether welfare grants should be raised across the board so that recipients could have adequate incomes. Moreover, in their efforts to expedite the proceedings, hearing examiners silenced clients who were on the verge of describing their needs.\textsuperscript{55} In such cases, low-income women may have benefited materially, but they did not gain much in the way of recognition justice.

VI. BARGAINING IN THE SHADOW OF THE HEARING: REDISTRIBUTION

The most salient fact about fair hearings is that they produced significant material gains for the preponderance of New York welfare clients who brought them in the middle to late 1960s. David Gilman and Ezra Birnbaum, professionals who helped coordinate a massive fair hearing campaign by the New York Citywide Coordinating Committee of Welfare Groups, estimated that “several million dollars were ‘recovered’ by clients” within the first four months of the campaign.\textsuperscript{56} Gilman and Birnbaum noted that most of the people who brought appeals received what they wanted prior to their hearings, as a result of individual negotiations with welfare department personnel. Moreover,

[\textit{o}f the 10\% who did show for their hearing, at least half received a settlement on their hearing date that covered substantially all the requests made. Of the half that did not receive a settlement for monies to cover all of the requests and needs of the family, they did receive at least a partial grant.\textsuperscript{57}]

The records of women’s fair hearings bear out these overall estimates and reveal how the negotiations among appellants, attorneys, and the welfare department worked in practice. Most of the Rachlin’s and Nagler’s clients received material benefits simply as a result of filing requests for hearings. Rather than proceeding with vast numbers of hearings, the New York City and Westchester County welfare departments attempted to save money, staff time, and negative publicity by offering many of the things the clients said they needed. Generally this desire was submerged, but, on occasion, the relationship between welfare department generosity and the desire to avoid hearings became evident. In one case, for example, appellant Martha Dickerson filed for a fair

\textsuperscript{55} See Transcript of Fair Hearing 18-19 (Nov. 2, 1967), case of Ann Freeman, 49/14; Transcript of Fair Hearing 50-52 (July 31, 1967), case of Gertrude Small, 47/100.

\textsuperscript{56} Gilman & Birnbaum, \textit{supra} note 37.

\textsuperscript{57} \textit{Id.}
hearing and then received a visit, a promise of aid, and a suggestion that she might want to stay home from her hearing:

Q [Murray Gingold, Esq., Attorney for the New York City Department of Social Services]: You said you made a formal request to the Department for clothing?

A [appellant Dickerson]: I wrote a letter.

Q: What did you request in that letter?

A: I requested clothing for my children, my husband and myself.

Q: Did you get any answer to that letter?

A: I got no answer.

Q: Was there any refusal on the part of the Department to grant you those—

A: Well, I called the Department several times and I couldn’t get in touch with Mr. Dranoff [my caseworker]... So I think after Mr. Dranoff was informed that I was coming down here, he came to see me and he told me that the check would be coming along, that I could come down here if I didn’t—I could come here or I couldn’t. 58

Her promise to bring a fair hearing appears to have brought about a dramatic change in Dickerson’s treatment by her local welfare office. Although at the time of her hearing she still had not received a check for the items she requested, Dickerson had gained the attention of bureaucrats who had not previously answered her letter and a case worker who had lacked the time to see her.

The desire on the part of welfare departments to avoid fair hearings often made them willing to negotiate indirectly with clients, offering as many bundles of special grants or budget adjustments as necessary to preclude hearings. For example, Denise Hamill, whose case worker had said that she “could wait” on various requests, engaged in this kind of legally inflected negotiation. Carl Rachlin sent a letter on Hamill’s behalf to New York State officials requesting a fair hearing. Two-and-one-half weeks later, the Mount Vernon office of the Westchester Department of Public Welfare issued “special needs” grants to the Hamill family totaling $165.10. By the end of the following month, Hamill had received another special grant and was continuing to demand a fair hearing for living room chairs and spreads for her children’s bunk beds. 59 Miriam Mitchell, a caretaker for her severely disabled brother

59. Letter from Carl Rachlin to Hon. Max Waldgeir, Director, Area 5, of N.Y. State Dep’t of Soc. Welfare (May 10, 1967); Notice of Special Grant from M. Dorin, Case Worker, County of Westchester Department of Public Welfare (May 29, 1967); Letter from George Elcaness, Senior Welfare Rep., Family Servs., and Max Waldgeir, Director Area 5, N.Y. State Dept of Soc. Welfare to Carl Rachlin
Timothy, likewise continued to request a hearing until the welfare department met nearly all of her demands. When she first contacted Rachlin about a possible fair hearing, Timothy Mitchell was on the verge of being cut from the Aid to the Disabled rolls. By the end of a protracted correspondence in which Mitchell and Rachlin insisted on the hearing, the New York City Department of Social Services had raised Timothy Mitchell’s grant, increased both the number of hours and the rate of pay it would reimburse for his home health attendant, and disbursed hundreds of dollars for items that promised to make him more comfortable and to make it easier for his sister to care for him. The first two responses the Mitchells received from the welfare department, concerning a grant increase and a special needs grant, were both dated May 27, 1968, the date of their scheduled fair hearing.\footnote{60}

In addition, women who were not fully satisfied prior to their hearings often received what they wanted through negotiations during the hearings. Jean Younger (the CORE member who had complained about having to chase her caseworker around the house so that he would listen to her) and attorney Stephen Nagler negotiated at what would otherwise have been Younger’s second fair hearing and succeeded in reaching an amicable settlement. The referee, Robert K. Story, Esq., began the hearing by asking Nagler if there was “anything that [he] could do to abridge these numerous issues” that Younger had raised. The hearing then recessed. When it resumed, Story reported that the welfare department had agreed to give Younger a grant for graduation clothing for her daughter and to re-evaluate her and her children’s needs for clothing.\footnote{61}

Similarly, the second fair hearing of Ann Freeman, the mother who upbraided the welfare department for failing to understand how quickly her son’s clothes wore out, was an opportunity for in-person negotiations among the appellant, her attorney (Nagler), and welfare department representatives. After a break, Nagler reported on the record:

> A lengthy discussion was had off the record with regard to Mrs. Freeman’s clothing needs and the needs of her son, Kevin. Certain agreements were reached with regard to those needs and consideration of the list of items presented previously by Mrs. Freeman. . . . Mrs.

\footnote{60. Letter from [Miss] Miriam Mitchell to N.Y. State Dept. of Soc. Welfare (June 27, 1967), case of Denise Hamill, 47/149.

61. Transcript of Fair Hearing 10 (Jan. 16, 1968), case of Jean Younger, 49/35.}
Freeman states she is satisfied, conditioned upon the receipt of those grants.62

Women who did not gain relief prior to, or during, their hearings waited to see the results of the consideration of their cases by the New York State Commissioner of Social Welfare. They were less likely to make gains at this stage than at either of the prior stages. The political forces that encouraged local welfare departments in New York City or Westchester County to accede to their clients' demands clearly were not as powerful for the state-level administrators of public assistance programs. Moreover, by the time state officials were able to evaluate the records of the hearings and make their determinations, the hearings had already occurred; there was no way that distributing a few more dollars or goods could prevent the occurrence of a potentially expensive or embarrassing proceeding. Even so, some clients did win reversals of local welfare department determinations.

The opinions of George Wyman or Joseph Louchheim, the two commissioners of welfare who served during the period covered by these hearings, and who had final say over them, may have had a weight that informal haggling with case workers and attorneys prior to or at the beginning of fair hearings did not. Small redistributive gains may have loomed large in clients' understandings of the degree to which their hearings delivered justice. The decision of Commissioner Wyman may have figured in this way for Elspeth Smith, a public aid recipient from Westchester. Smith's fair hearing had centered on whether she was "entitled" to the number of dressers that the welfare department handbook indicated was standard for families of her size. She insisted that she was, while representatives of the welfare department insisted that the power to judge her needs lay in the hands of their casework staff. Although he spoke in terms of need rather than entitlement, Wyman indicated that he sided with Smith:

The agency is directed to cause an investigation to be made and in the event it is determined that a wardrobe and chest of drawers is required, to issue a special grant to provide appellant with a chest of drawers and/or a wardrobe essential to meet her need in accordance with . . .

the Regulations of the State Department of Social Welfare and to report to the Area Office of the Department.63

63. George K. Wyman, Comm'r, N.Y. Dep't of Soc. Welfare, Decision After Hearing (May 3, 1967), In the Matter of the Appeal of Elspeth Smith, 47/143. SEDFRE client Mary Stevenson saw a less equivocal, but still small, victory in her New York State fair hearing decision. Her rent and utilities payments were "on restriction," that is, paid by two-party checks or directly to her creditors rather than included in her regular cash welfare grant. New York State found that her local welfare department "did not offer any evidence to explain the reason for such restriction of appellant's grant," and directed the agency to pay Stevenson in cash. See [Comm'r], N.Y. Dep't of Soc. Servs., Decision After Fair Hearing (May 1, 1969), In the Matter of the Appeal of Mary Stevenson, 47/58.
This was admittedly a small victory. Wyman did not even issue an order, but only a directive that Westchester officials "cause an investigation to be made" and report on it to state welfare bureaucrats. However, Wyman indicated that he expected the Westchester casework staff, on re-examination, to discover a "need" for more furniture on the part of Elspeth Smith and her family.

VII. ACHIEVING RECOGNITION JUSTICE?

In addition to the material gains they made before, during, and after their fair hearings, women who appealed the decisions of case workers and other welfare department employees made gains in “recognition justice” that are more difficult to assess. The hearings were not perfect vehicles for the justice claims of low-income women, but they provided opportunities to speak, to be heard, and to be seen. One component of recognition for these women was the opportunity they gained in their hearings to talk back to their case workers with little immediate fear of reprisal. Women welfare recipients used their fair hearings as opportunities to complain about official behavior and to confront their caseworkers. They pursued confrontations and spoke impolitely, even though these would appear to have been strategically unwise things for clients to do if they wanted to maximize their financial gains from the hearings. However, such confrontations were consistent with a social movement strategy that emphasized making the hearings as long and complex as possible, so that they would impose the greatest overall burden on the welfare system—and they were consistent with clients’ bids for recognition justice. Appellant Gertrude Small, for example, appeared to have sought the justice of recognition even if it came at the cost of redistribution when she interrogated a casework supervisor.

64. I am aware that welfare clients were not completely free from vulnerability to retaliation, especially in the long run and in the period after the brief heyday of welfare rights activity. See White, supra note 24, at 33-37; Ed Sparer, Fundamental Human Rights; Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement, 36 STAN. L. REV. 509, 562-63 (1984).

65. Some scholars have used anthropologist James Scott’s language of “resistance” and “infrapolitics” to describe the responses of people who have little power to those who hold power over them. Scott’s theories have considerable application to the general situation of poor people and welfare recipients in U.S. history. I find especially useful his emphasis on “dignity,” which is similar in its treatment of the non-material dimensions of power to what I have been calling “recognition justice.” “While the confrontation may originate in the exploitation of an onerous tenancy [or some other material relationship], the discourse is one of dignity and reputation.” JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 7 (1990). See also JAMES C. SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE (1985). However, what transpired during fair hearings at the height of the welfare rights movement was less an instance of what Scott terms “fugitive political conduct” than a “rare moment[ ] of political electricity when . . . the hidden transcript is spoken directly and publicly.” SCOTT, WEAPONS OF THE WEAK, supra at xii, xiii. For historians’ uses of Scott’s concept of resistance, see LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON, 1880–1960 (1988); ROBIN D.G. KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS (1994).
she believed had wronged her. At three points in her hearing, Small told the same story of approaching a casework supervisor with requests for "minimum standards" and being told that she would have to submit to a home visit before receiving anything she requested. The third time Small told the story she was the most emphatic:

MRS. [SMALL]: She say, 'Well, we don't issue this on minimum standard until someone visit you into the home.' I said, 'Well, this should be a need. If there wasn't a need, I wouldn't ask for anything. Otherwise I don't want this. I don't want to be on welfare, but I have no other choice."

Small then turned to the supervisor, said: "Can I ask you a question?" and tried to pin her down about her statements in the welfare office. Appellant Toni Stret spoke directly to the administrative law judge in her hearing:

THE REFEREE: Do you want to say something, Mrs. Stret?

MRS. [STRET]: Yes. They have used excuses, just excuses, and we have not received anything that we need, and until this hearing is complete—do I understand that you are going to adjourn this hearing; am I right?

THE REFEREE: That's right.

MRS. [STRET]: For how long? These kids here, they need shoes... The child has one dress that is too small for her, and I have been waiting since October for winter clothes. Now, how much longer can I wait? This has been going on one year.

Joan Sunderland was the most confrontational client in Carl Rachlin's and Stephen Nagler's caseload. In addition to the moment quoted at the beginning of this article, when Sunderland insisted on her need for glasses so that she would not ruin her "demitasse cups and saucers," she interrupted testimony repeatedly during her fair hearing. On one occasion, she attempted to deflate her case worker's claim of generosity toward her:

THE REFEREE [Robert K. Story, Esq.]: Will you please... enumerate for me the items which were not covered by that special grant?

MISS [Marjorie] SORENSON [Case Worker]: Yes, I will. One couch cover, linoleum, one single bed, pillows, bedspreads. Pardon me, there were bedspreads given and requested.

MRS. [SUNDERLAND]: Not for my bed.

When Sunderland's case worker discussed her evaluation of Sunderland's request for dishes, she again interrupted:

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66. Transcript of Fair Hearing 71 (July 31, 1967), case of Gertrude Small, 47/100.
67. Id. at 71-72.
68. Transcript of Fair Hearing 8 (Mar. 26, 1968), case of Toni Stret, 47/118.
THE REFEREE: Is it true she did not get those dishes?
MISS [SORENSON]: Yes, she has a full service for eight which she terms good china and doesn’t think should be used in every day use.
MRS. SUNDERLAND: I sure do not with my children.  

Finally, Mrs. Sunderland interjected when the hearing referee grilled her about the need she expressed for a telephone:

THE REFEREE: Do you live in a project?
MRS. [SUNDERLAND]: Yes.
THE REFEREE: Are there public telephones?
MRS. [SUNDERLAND]: No.
THE REFEREE: Nowhere?
MRS. [SUNDERLAND]: No, we are a low income project. Not a middle income project.

Speaking as the resident of a “low income project,” Sunderland implied that the referee and the other middle-class people in the room did not know anything about being poor. Sunderland and her family did not gain materially as a result of her fair hearing. However, she appears persistently to have sought the recognition justice—acknowledgement of her family’s needs and of their special circumstances—that the hearing and other forms of welfare rights activism had promised her.

VIII. LIMITS TO REDISTRIBUTION AND RECOGNITION INJUSTICE

Much as there were limits to the Supreme Court decision in Goldberg v. Kelly, so were there limits to the justice women welfare recipients experienced when they participated in fair hearings. Generally speaking, Toni Stret, Ann Freeman, Joan Sunderland, and the other women who asked Carl Rachlin and Stephen Nagler to represent them gained redistributive goods and recognition of their personhood when they appealed welfare department decisions. However, although the overwhelming majority of appellants gained materially and collectively raised the profile of the welfare rights movement, a small number did not reap any direct gains in terms of consumer goods or increased cash grants. In addition, a portion of the group that worked with Rachlin and Nagler experienced a kind of recognition injustice: They were treated

70. Id. at 49.
71. Id. at 37.
72. Decision, State of N.Y. Dep’t of Soc. Servs. (Oct. 24, 1937), id. (“After careful consideration, it is determined that the appellant failed to substantiate her need for additional items of household furnishings and a telephone in accordance with [the regulations] .... It is further determined that all clothing needs of the appellant which were made known to the agency prior to the hearing have been met through the issuance of or authorization of special grants. DECISION: The actions of the agency about which the appellant complained, were proper and are hereby affirmed.”).
dismissively, and even exposed to public rebuke, by their caseworkers or the administrative law judges who heard their cases. As a result of regulations and determinations by individual hearing examiners, some of the issues women and their attorneys were eager to raise, including the fundamental issue of the adequacy of welfare grants for poor families, were ruled out of order. These rulings narrowed the degree to which fair hearings could fulfill the ultimate claims for redistributive justice that low-income African-American, Puerto Rican, and white women brought to them. They set the stage for the limited interpretation the appellate courts ultimately offered of the amount of redistribution or recognition the Constitution required state and local governments to grant their poor constituents.

For all of the material gains that most women achieved in their fair hearings in the 1960s, they also suffered costs of participation. These women, whose lives were already made chaotic by young children, low incomes, and welfare department practices, invested their scarce time and energy in filing for, preparing for, and presenting themselves at fair hearings. For a mother who relied on public assistance, participating in a fair hearing required getting time off from work, if she had paid work, and finding a babysitter; buying, borrowing, or at least pressing appropriate clothes; and laying hands on enough cash for carfare and lunch. The hearing might last much longer than planned. It might be stupefyingly dull. It would almost certainly involve public discussion of—and various normative suggestions about—the woman’s honesty, sexual practices, parenting skills, housekeeping abilities, and effectiveness as a money manager. The hearing might afford her opportunities to speak, and to gain recognition of her unique perspective on the problems of poverty in the United States, but there was a chance that it would also marginalize her. The gains in “recognition justice” that came with being able to narrate one’s life story in a dignified public setting dissolve if no one is listening.

Some of the same women who successfully pursued redistribution and recognition justice through their fair hearings also discovered the limits that local hearing referees and state administrators placed upon the hearings. Ann Freeman, for example, who spent time in her hearing explaining why she thought the estimates of children’s clothing needs by the welfare department were inaccurate and who was the beneficiary of an off-the-record negotiation between her attorney and representatives of the welfare department, also discovered the limits of the fair hearing as an instrument of recognition justice. In her hearing, referee Joseph N. Fristachi, Esq., micro-managed all of the

73. See generally Transcripts of Fair Hearings, Boxes 47-49.
74. See e.g., Transcript of Fair Hearing at 26-33, 62-65 (Mar. 30, 1967), case of Jill Jackson, 48/22 (discussion of Jackson’s supposed inability to handle money between Carl Rachlin and an attorney for the welfare department, which devolved into a discussion of the professional standards of law versus those of social work while Mrs. Jackson remained silent). See also id. at 81 (“Jackson: LET me explain something to you. This is getting on my nerves.”).
testimony, presumably in order to expedite the proceeding. As a result, the transcript of her hearing includes few of Freeman's own words. When she attempted to speak, she did not get far before the referee silenced her:

Q [Nagler]: ... Did you write the letter [requesting certain basic needs, which the Department of Social Services discovered in the case record]?

A [Freeman]: Yes.

... Q: Why did you write the letter?

A: Because I was in need of—

THE REFEREE: Immaterial. It speaks for itself. There is no question that the Agency received it. Now, I think you ought to ask her whether she got any of these items.\(^75\)

In addition to the opportunities she gained to confront the bureaucrats who had power over her family's finances, Joan Sunderland also received unwanted negative attention when she brought a fair hearing. She endured a discussion of her housekeeping practices that was more than a figurative airing of her dirty laundry in public:

MR. NAGLER: As to the towels... [h]ow many towels were in this clothes container?

MISS SORENSON [case worker]: I don't know. I did not count them.

MR. NAGLER: Why didn't you count them?

MISS SORENSON: Well, I suppose partly because of the odor as much as anything.

... MRS. CARLIN [attorney for the New York City Department of Social Services]: She did not itemize them because they smelled.\(^76\)

Despite the material gains many women made when they filed for fair hearings, there were limits to the amount of redistribution that these proceedings produced. The hearings were ostensibly convened to ensure that localities followed state law; although authorized by federal statute, they were convened and ultimately adjudicated by the state agency that administered the public assistance programs in New York. In theory, hearing referees could have entertained broad questions about the quality of the welfare programs in New York City or Westchester County, by way of evaluating whether the programs were in compliance with state and federal law, and whether welfare grants were high enough to keep people out of poverty. Instead, the hearings took up the narrower question of whether employees of Westchester County or New York City followed their own regulations in computing clients' budgets and distributing grants. Hearing referees would not even allow discussion of the adequacy of welfare grants during the proceedings. This was frustrating for

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Rachlin and Nagler, and other public-interest lawyers who were eager to include as much information as possible in the records of these hearings. They were looking forward to appeals in the federal courts that could challenge welfare department practices under state statutes and, ultimately, the federal Social Security Act and various provisions of the federal Constitution.\(^7\)

The constraints administrative law judges placed on the discussions in fair hearings were most evident in the transcript of Christina Mann’s hearing. Mann and Nagler, her attorney, tried to spark a more expansive discussion about the quality of the welfare system, which hearing referee Victor Zuckerman rebuffed. At first, it appeared that Zuckerman was merely delaying discussion of the general adequacy of welfare payments. Cutting into a discussion between Zuckerman and New York City officials on whether Mann’s welfare grants matched New York City’s regulations for families of her size, Nagler offered a wider view:

\[
\text{NAGLER: May I suggest you incorporate that information... under the Social Services Law of the State of New York which specifies that the welfare recipient shall receive a standard of minimal health and decency.}
\]

\[
\text{THE REFEREE: Right now I am concerned with the City standards. Whether or not they are correct or adequate is something we will determine. Let us see whether or not it adds up.}^{78}
\]

When Nagler tried to press the point, Zuckerman decisively turned him away, asserting that the city was adhering to its own regulations and that little else mattered. “I will not,” he declared, “permit any facts on the adequacy or inadequacy of these standards at this hearing.”\(^79\)

Finally, fair hearings often produced less justice than women hoped they would because hearings were not well-equipped to address many issues important to women appellants. When a welfare recipient brought concerns to her hearing that the judge and her attorney did not understand or see as in any way related to the mandate of the hearing, then she suffered a kind of recognition injustice. Linda Winterson, for example, expressed a range of desires and interests that motivated her to seek a welfare appeal. But the issue Winterson raised most persistently during her three fair hearings was the disappearance of her sixteen-year-old son, whom she believed was abetted in his efforts to leave home by Winterson’s case workers. At least once in each of her hearings, Winterson asked for information about her son’s whereabouts and tried to enlist officials in her efforts to bring him home. In her first hearing, Winterson spoke when she believed adjournment was imminent to say that she

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\(^{78}\) Transcript of Fair Hearing 13-14 (Sept. 18, 1967), case of Christina Mann, 48/142.

\(^{79}\) \textit{Id.} at 17.
wanted "to know where my child is." Hearing referee Frederick Goldfeder told her that, in his view, such an investigation was "a police matter." In the transcript of her second hearing, Winterson appeared merely as "A VOICE" reminding the caseworkers and attorneys in the room: "My child is still out of my home." In her third hearing, she was emphatic:

MRS. [WINTERSON]: Can I ask one question?

THE REFEREE: Yes—what is that?

MRS. [WINTERSON]: At the time my child was taken away [the caseworker] Miss Harmon told me he don't have to stay in my home, and he doesn't [?]

THE REFEREE: Mrs. Winterson, that is not a matter for this hearing. I have no control over anything like that. Is there anything further?

For all of the effort Mrs. Winterson devoted to participating in three separate appeals, scheduled over a period of two months, the hearings never reached the issue of her son’s whereabouts or his future. Neither welfare department staff, nor hearing referees, nor her attorney attempted to answer her persistent concern about her son.

CONCLUSION

Participating in a fair hearing was in many ways a formidable business. It cost low-income women time and effort, and exposed them to potential embarrassment and hostility. Studying the exchanges that occurred during fair hearings, and their outcomes, helps in understanding women’s willingness to participate in them. Although fair hearings exposed welfare recipients to unwelcome scrutiny and to public discussion of their home lives, they also created space in which the recipients could speak publicly about the routine lapses of compassion and civility that they saw within public aid agencies. Clients who daily experienced rudeness, obfuscation, and unexplained delay from welfare officials, reached for fair hearings as they became increasingly available in the 1960s because they provided at least the promise of a check against welfare department behavior. In a universe of poverty, racism, gender discrimination, and status discrimination against welfare recipients—as well as unresponsive attitudes on the part of those whose job it was to personalize social compassion for the poor—the fair hearing could be an attractive option. If hearings did not always make much space for clients’ narration of their

80. Transcript of Fair Hearing 41 (Mar. 28, 1968), case of Linda Winterson, 47/60. For background on Winterson’s relationship with her son, see Letter from Frederick Means, son of Linda Winterson, to N.Y. State Welfare Dep’t (Jan. 7, 1968) ("She have been running back and forth to the Welfare Center since August trying to get her case fair.").
81. Id. at 98.
82. Id. at 51-52.
perspectives and their needs, they generally did make some such space. If hearings were not always characterized by respect for clients as citizens and as human beings, they at least assumed respectful forms (e.g., the consistent use of courtesy titles) toward people who only rarely received even so much from agents of the city or state governments.

There was much to recommend the use of fair hearings by low-income women welfare clients in the 1960s. Merely applying for a fair hearing usually helped them get much of what they wanted in terms of higher budgets or special grants for furniture or clothing. These applications often spurred welfare department employees to act upon long-standing client requests. In other cases, they encouraged departments to act quickly upon recent, welfare-rights-movement-inspired demands for “minimum standards.” The hope that they could persuade people to adjourn their fair hearing requests made many local bureaucracies generous far beyond their clients’ past experiences or expectations. Welfare recipients, who lacked many other resources, saw the virtues that at least temporarily characterized fair hearings and pursued the justice of redistribution and of recognition through the instrument of administrative law.

To be sure, welfare clients did not get everything they needed or desired from their engagement with the fair hearing process. They did not, and probably could not, address all of their complaints against their case workers, or respond to all the slights they perceived at the hands of welfare departments. More significantly, while they achieved redistribution in the form of discrete material benefits, they were not able to challenge welfare grant levels themselves. As would later be true of the Goldberg v. Kelly litigation, women welfare recipients in the 1960s raised serious substantive issues in the context of hearings they were granted under the constitutional guarantee of due process. But in the end, fair hearing referees, much like the justices of the Supreme Court in Goldberg, largely sustained the distinction between substantive and procedural due process, or, in the terms I have borrowed from Nancy Fraser, limited the amount of redistribution justice welfare clients could achieve through these means. This was not the fault of administrative fair hearings as a tool of social movement organizing, or of substantive due process as a vehicle for economic redistribution. Rather, it was a consequence of the political defeat of the cause of welfare rights, as both a grassroots movement for social change and a movement in the courts for constitutional change.