

POST TRAUMA: CAMBODIAN REFUGEES
AND SOCIAL SECURITY'S DISABILITY FRAUD INVESTIGATIONS

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Since 2003, the Oakland unit of Social Security's Cooperative Disability Investigations ("CDI") program has targeted certain Cambodian refugee applicants with Post-Traumatic Stress Disorder and Depression for fraud investigations. The practices of Social Security's anti-fraud program in Oakland reveal disturbing disadvantages to Cambodian refugee applicants in particular, including institutional prejudices in Social Security's rules and CDI agents' gross insensitivity to claimants' impairments and cultural realities. This Note examines these disadvantages under the legal norms of national origin discrimination, disability discrimination, and due process, and concludes with a policy proposal on how Social Security might better protect claimants' rights and interests while ensuring the integrity of its anti-fraud efforts.

Introduction

At seventeen, S.A. witnessed her brother's execution at the hands of Khmer Rouge soldiers, as they bound his hands and threw him off a cliff. After escaping Cambodia and four years in a Thai refugee camp, she came to the United States on an asylum visa in the 1980s, but her troubled emotional state prevented her from learning English or gaining any employment. S.A. began seeing a therapist for her depression and recurring nightmares of her brother's death. Her therapist diagnosed S.A. with severe Post-Traumatic Stress Disorder (PTSD), and she applied for disability benefits. Cooperative Disability Investigations (CDI), an investigative unit under the Social Security Administration, pulled D.T.'s claim for investigation. CDI had previously flagged S.A.'s therapist as a fraud risk for her repeated PTSD diagnoses. Although S.A.'s examining doctors never diagnosed malingering, and although CDI investigators never alleged any fraud, the analyst rejected S.A.'s credibility and denied her claim. Three years and two appeals later, an administrative law judge reversed the analyst's decision, rejected the investigators' report, and awarded B.R. disability benefits.¹

¹ S.A. ALJ Decision (on file with Homeless Action Center). See note 32 *infra*.

S.A.'s story is far from unique. Since 2003, the CDI unit for Oakland, CA, has investigated at least twenty-nine Cambodian disability benefits applicants, all refugees at one point treated by S.A.'s therapist.² In at least twenty-four of these cases, no examining doctors had diagnosed malingering; rather, the therapist's name had triggered the investigation. These investigations led to a rejection at the initial application stage, though they rarely accused the applicant of fraud were often dismissed years later at the appeal stage. The pattern of these investigations reveal broad, institutional flaws in Social Security's programs and policies, which severely prejudice the claims of these refugee applicants and other vulnerable classes.

This Note explores and evaluates these flaws through a case study of thirteen Cambodian refugee applicants investigated by the Oakland CDI unit. Part I provides an introduction to Social Security disability benefits and the Cooperative Disability Investigations program, and briefly develops these thirteen applicants' cases. Part II examines the disadvantages to traumatized Cambodian refugee applicants created by the CDI program, while Parts III, IV, and V evaluate these disadvantages under three different legal theories, respectively: national origin discrimination, disability discrimination, and due process. I conclude with suggested changes to the CDI program that would mitigate these disadvantages while respecting CDI's mission.

I. Background

Before turning to these Cambodian refugee applicants' stories, it is important to understand the context within which we find them. The following Part expounds briefly upon the mechanics of Social Security and the cultural forces surrounding Cambodian refugees, welfare fraud, and the Cooperative Disability Investigations anti-fraud program.

² Lonny Shavelson, "Cambodian Refugees and the Social Security Administration," *BBC's The World* (aired Nov. 28, 2006), available at <http://www.photowords.com/radio/Cambodian.htm>.

A. Cambodian Refugees in America

The Cambodian refugee community suffers from extremely high rates of Post-Traumatic Stress Disorder (PTSD) and Major Depression due to traumatic experiences during the Khmer Rouge genocide. From 1975 to 1979, the Khmer Rouge massacred as many as two million Cambodians out of a population of seven million.³ One million more died in the preceding and following civil wars.⁴ Many refugees to the United States arrived only after years in crowded Thai camps with substandard, dangerous living conditions.⁵ In a National Institute of Mental Health (NIMH) study of a Cambodian refugee community in California, 99% reported having experienced near-death due to starvation, 96% reported forced labor, 90% reported having a family member or friend who had been murdered, and 54% reported experiencing torture.⁶ The NIMH study reported 62% suffered from PTSD, and 51% suffered from Major Depression.⁷ (The rates of these disorders among the general American population are 3% and 10%, respectively.⁸) The subjects reported severe symptoms of these disorders as many as two

³ Grant Marshall, M.D., et al, *Mental Health of Cambodian Refugees 2 Decades After Resettlement in the United States*, 294 J. AM. MED'L ASS'N 571, 572 (2005).

⁴ *Id.*

⁵ James Boehnlein, M.D., M.Sc., & J. David Kinzie, M.D., *Psychiatric Treatment of Southeast Asian Refugees*, NAT'L CTR. FOR PTSD CLIN'L Q., Vol. 6, No. 1 (1996), available at <http://www.ncptsd.org/publications/cq/v6/n1/boehnlei.html>.

⁶ Marshall, *supra* note 3 at 575.

⁷ *Id.* Other studies record different, but still quite high prevalence rates for PTSD and Major Depression. See Richard Mollica & Laura McDonald, "Old Stereotypes, New Realities: Refugees and Mental Health," *United Nations Chronicle*, Vol. 39, No. 2 (2002) (37% and 68%, respectively); William H. Sack, M.D., et al, "The Khmer Adolescent Project: Epidemiological Findings in Two generations of Cambodian Refugees," 182 J. Nervous and Mental Disease 387, 390-91 (1996) (finding rates of 40% PTSD and 32% Major Depression in adolescents, 58% and 23% in mothers, and 33% and 14% in fathers).

⁸ Mollica, *supra* note 7.

decades after resettlement in the United States.⁹ A majority of Cambodian refugee subjects could not speak English even after twenty years in the United States; 69% lived below the federal poverty line, and 72% were currently receiving some form of government assistance.¹⁰

In the late 1990s, a series of high profile busts of fraud rings run by and for Cambodian refugees helped foment the growing push for welfare restrictions for immigrants. These rings typically involved a corrupt Southeast Asian translator or social worker who, for a sizeable kickback, coached refugees in faking disabilities, invented traumatic histories, and succeeded in obtaining disability benefits for them, at an overall cost of millions to the government.¹¹ Several newspapers reported these busts in sensational, strongly anti-immigrant and anti-welfare language (one headline ran: “America’s Most Wanted Welfare Plan: Immigrants Walk Off the Boat and onto [the] Disability Rolls”).¹² These reports of abuse by immigrants, as well as the substantial numbers of immigrants receiving government assistance, provided impetus for Congressional legislation restricting immigrant access to government assistance.¹³

⁹ Marshall, *supra* note 3 at 578; Sack, *supra* note 5 at 392.

¹⁰ Marshall, *supra* note 3 at 575.

¹¹ See, e.g., Putsata Reang, “Cracking the Case of Welfare Fraud,” 6/1/98 Seattle Times A1; Leslie Brown, “State Employee Arrested in Fraud, Bribery Scheme,” 4/13/95 Morning News Trib. (Tacoma Wash) B1.

¹² Jim Haner & John B. O’Donnell, 1/24/95 Balt. Sun 1A; see also Michelle Malkin, “DSHS Doesn’t Seem to Mind Welfare Fraud by Immigrants,” 10/6/98 Seattle Times B4; Elaine Porterfield, “Man Who Taught Refugees How to Bilk Government Convicted of Mail Fraud,” 6/6/98 Morning New Trib. (Tacoma Wash) B4; Editorial, “Millions Defrauded From SSI,” 9/6/95 Harrisburg (PA) Patriot & Evening News A6.

¹³ See Lanelle Polen, *Salvaging a Safety Net: Modifying the Bar to Supplemental Security Income for Legal Aliens*, 76 WASH. UNIV. L.Q. 1455, 1463-66 (1998); Bill Ong Hing, *Don’t Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARVARD C.R.-C.L. L. REV. 159, 168 (1998).

B. Cooperative Disability Investigations

The Cooperative Disability Investigations (CDI) units are a project of SSA's Office of the Inspector General (OIG), designed to combat fraudulent awards under Social Security's means-tested disability benefits program, Supplemental Security Income (SSI). From 1998 on, reports from the General Accounting Office (GAO) starkly criticized the SSI program's vulnerability to fraud, particularly its vulnerability to fraudulent "middlemen," such as translators, who could exploit SSA's lack of bilingual staff.¹⁴ The pressure from these reports prompted OIG to create the CDI units, which coordinate the efforts of CDI special agents, SSA and state Disability Determination Services staff, and law enforcement agencies to gather evidence in suspicious cases.¹⁵ CDI teams do not typically develop evidence for the criminal prosecution of fraud; rather, OIG insists that their primary mission is to gather evidence so that the DDS analyst may make an accurate disability determination in suspicious cases.¹⁶ CDI agents investigate individual disability claimants and middlemen (such as translators, doctors, lawyers, or claimant representatives) suspected of fraud. These agents may gather information typically unavailable to DDS analysts, through hidden surveillance of claimants and

¹⁴ See Office of the Inspector General, Social Security Administration, *Eye on OIG*, October 2005, available at <http://www.ssa.gov/oig/communications/eyeonoig/eyeoig10052005.htm> (hereinafter "*Eye on OIG*").

¹⁵ *Id.*

¹⁶ General Accounting Office, *Supplemental Security Income: Additional Actions Needed to Reduce Program Vulnerability to Fraud and Abuse*, Report to the Honorable Henry A. Waxman, GAO/HEHS-99-151, 11 (Sept. 1999), available at <http://www.gao.gov/cgi-bin/getrpt?GAO/HEHS-99-151> (hereinafter "GAO Report to Rep. Waxman"); Office of the Inspector General, Social Security Administration, *Semiannual Report to Congress: The Realities We Face: Continuity Amid Change*, 22 (April 1, 2004–Sept. 30, 2004), available at <http://www.ssa.gov/oig/ADOBEPDF/sar042004102004.pdf> (hereinafter "OIG Semiannual Report, Fall 2004")

unannounced, often deceptive interviews with the claimants and their neighbors.¹⁷ Currently, there are nineteen CDI units in seventeen states.¹⁸

CDI units have had an enormous impact on the SSI program, though the nature of this impact is questionable. From July 1999 to July 2005, CDI Reports of Investigation (“ROIs”) have been used to support over 8,000 denials, which has saved the federal government about \$492 million.¹⁹ However, an OIG audit revealed that, of 907 ROI-supported denials, administrative law judges (ALJs) reversed 526, or 58%.²⁰ While most ALJs found the evidence in the ROIs helpful, and although OIG concluded that clerical errors regarding the ROIs may have contributed to the reversal rate, the audit observed that ALJs will disregard evidence in the ROIs they regard as hearsay, and that some ALJs had requested CDI units to back up their statements better, limit their ROIs strictly to factual observations, and provide proper context for their statements.²¹ One may plausibly conclude, then, that a substantial number of ALJ reversals resulted not simply from clerical errors, but actual disagreements with the conduct and conclusions of the CDI investigations.

¹⁷ National Association of Disability Examiners, *Position Paper: Expansion of the Cooperative Disability Investigations Units* (July 1, 2004), available at http://www.nade.org/CDI_Position_Paper_July_2004.doc (hereinafter “NADE Letter”).

¹⁸ *Eye on OIG*, *supra* note 14. There are two CDI units in California, one in Oakland and the other in Los Angeles. *Id.*

¹⁹ Office of the Inspector General, Social Security Administration, *Office of Hearings and Appeals Reversal of Disability Denial Decisions Involving Investigative Information from Cooperative Disability Investigations Units Audit Report*, Audit Report A-07-05-15091, 2 (Jan. 2006) (hereinafter “OIG Audit Report”).

²⁰ *Id.* at 3.

²¹ *Id.*

C. The Disability Determination Process

The Supplemental Security Income (SSI) program provides financial assistance to persons with a severe, medically determinable, mental or physical disability, below a certain resource limit.²² An applicant submits an initial SSI application to a local Social Security office, which, after various preliminary screenings, forwards the application to a state-operated Disability Determination Services (DDS).²³ The DDS analysts decide the initial application based on medical evidence it solicits from the claimant's medical providers, as well as the claimant's work history and other lay evidence, such as daily functioning reports filled out by the claimant and/or her family.²⁴ If the analyst finds insufficient medical evidence in the file to decide the claim, he will order a Consultative Examination, in which an independent doctor examines the claimant at the state's cost.²⁵ At this point, the analyst may refer the claim to a local CDI unit, or the CDI unit may pull the case for investigation itself. The analyst weighs the evidence and decides whether the claimant has a disability under the federal Social Security Act, the numerous federal regulations promulgated by the Social Security Commissioner, and the Program Operations Manual System (POMS), a set of agency guidelines for analysts.²⁶

If the analyst rejects an initial application, the claimant has the option to request a de novo reconsideration of her claim by a different DDS analyst.²⁷ If the second analyst similarly rejects the claim, the claimant may request an administrative hearing before a local

²² Title XVI of the Social Security Act, 42 U.S.C. §§ 1382, 1382c(a)(3)(B).

²³ HARVEY L. MCCORMICK, SOCIAL SECURITY CLAIMS AND PROCEDURES, §§ 1:2, 1:8 (5th ed. 1998); SOCIAL SECURITY ADVISORY BOARD, DISABILITY DECISION MAKING: DATA AND MATERIALS, 101 (Jan. 2001) (hereinafter "DISABILITY DECISION MAKING").

²⁴ MCCORMICK, *supra* note 23 at § 1:8; DISABILITY DECISION MAKING, *supra* note 23 at 101.

²⁵ McCormick, *supra* note 23 at § 8:94.

²⁶ The POMS do not have the force of law, nor do they bind SSA, but they are "persuasive authority." *See, e.g. Stroup v. Barnart*, 327 F.3d 1258 (11th Cir. 2003); *Knott v. Barnhart*, 269 F. Supp. 2d 1228 (E.D. Cal. 2003).

²⁷ MCCORMICK, *supra* note 23 at § 1:8.

administrative law judge (ALJ). The next appellate levels are a system-wide Appeals Council, and then federal district court.²⁸ While DDS analysts rarely or never meet the claimant, the ALJ hearing is face-to-face, non-adversarial, and provides for limited, quasi-judicial procedures.²⁹

D. Case Studies

The current Note explores the CDI program's interaction with Cambodian refugees with PTSD and Depression through thirteen case studies in the Oakland/Berkeley area in Northern California. During Summer 2006, I worked at the Homeless Action Center (HAC), a non-profit organization providing legal representation to SSI claimants with mental disabilities. Since 2003, HAC has represented thirteen of at least twenty-nine Cambodian refugees who had applied for SSI and been targeted for investigation because of their association with a CDI-flagged medical provider. In all twenty-nine cases, CDI investigations resulted in an initial denial. ALJs have reversed at least sixteen such denials.³⁰ While thirteen case studies cannot speak for the entire CDI program,³¹ these investigations reveal several institutional disadvantages for traumatized Cambodian refugees, and suggest larger problems with the CDI program.

Each CDI investigation follows a particular cycle: the state DDS analyst refers a suspicious claim to the Oakland CDI unit; the unit decides to investigate the claim, conducts

²⁸ *Id.*; Disability Decision Making, *supra* note 23 at 102-103. These appellate levels are open only to claimants, never to SSA seeking to reverse claimant-favorable decisions.

²⁹ General Accounting Office, *SSA Disability Redesign: More Testing Needed to Assess Feasibility of New Claim Manager Position*, Report to the Chairman, Subcommittee on Social Security, GAO/HEHS-96-170, 11-12 (Sept. 27, 1996), available at <http://www.gao.gov/cgi-bin/getrpt?HEHS-96-170>; DISABILITY DECISION MAKING, *supra* note 23 at 102-03.

³⁰ Eight of the thirteen claimants represented by HAC, and eight of sixteen represented by other non-profit claimant representatives, have successfully appealed initial denials or terminations.

³¹ Due to SSI applications' confidentiality, I study only the thirteen applicants represented by HAC during my internship. Since HAC does not select its clients according to any qualities of their cases, but only according to its attorneys' caseloads, one may safely assert that the thirteen cases are sufficiently representative of the twenty-nine refugee CDI-investigated applicants.

whatever investigation it deems appropriate, and files a Report of Investigation (ROI) with the analyst; the analyst weighs the ROI against the other evidence in the file, and, in each of the twenty-nine Cambodian refugee cases, denies the claim.

1. Common Triggers

In each of the thirteen case study investigations, analysts referred the claimant to CDI at least in part because of his or her association with B.L., a licensed family therapist with a Ph.D. in Psychology, who specializes in refugee mental health. Through a community support project, she treats a large number of Cambodian refugees, and frequently provides her treatment notes, when requested, to the DDS analysts who review her patients' SSI claims. CDI has flagged Dr. L.'s patients for referral primarily because of "a pattern wherein most patients are assigned the same diagnoses of Major Depression and [PTSD], often relating to traumatic experiences 20 or more years past in Cambodia."³² This rationale accords with SSA's POMS, which regards as suspicious same or similar medical findings for different claimants from the same provider.³³ In several cases, analysts referred claims because the claimant had family members who were also receiving disability benefits, and claimed similar impairments, again in accordance with POMS' guidelines.³⁴ Finally, analysts also noted "inconsistencies" in the applicants' evidence, often relating to their work history or daily functioning.³⁵

³² N.C. Report of Investigation (on file with Homeless Action Center). Hereinafter, to preserve the confidentiality of the claimants, I will refer to these ROIs only by (altered) initials. All ROIs cited hereinafter are on file with the Homeless Action Center, 2500 Martin Luther King Jr. Way, Suite 1, Berkeley, CA 94704, <http://www.homelessactioncenter.org>.

³³ POMS DI § 23025.010(E)(3).

³⁴ Q.R. ROI; M.S. ROI; *see also* POMS DI § 232025.010(D)(5).

³⁵ *E.g.* N.C. ROI; U.Q. ROI; T.J. ROI; L.B. ROI; L.L. ROI.

2. The Investigation

The typical investigation involved hidden surveillance, various records checks, “ruse” interviews and surprise visits to the claimant’s home. CDI agents secretly followed claimants to medical examinations or other errands to observe the claimant’s functional performance. “Ruse” interviews involved CDI agents pretending, for example, to take door-to-door traffic surveys, and testing the claimant’s language abilities.³⁶ CDI agents also asked claimants’ neighbors for their opinions of claimants’ functioning, and whether or not they had a disability.³⁷ CDI agents often visited the claimant’s home unannounced, identified themselves as federal agents, and questioned the applicant without legal representation and sometimes without a translator.³⁸

CDI investigations paid particular attention to the reports of Consultative Examinations (CEs), in which DDS provides for a medical examination of the claimant. Analysts usually order CEs when there is insufficient medical evidence in the file;³⁹ CEs have particular utility when the credibility of a medical provider is in question, since the state examiners are seen as a reliably neutral and credible source. In the refugee case studies, the CEs were often cursory, and failed to evaluate the claimant for PTSD or Major Depression.⁴⁰ In most cases, the Examiner tested for malingering using the Rey-15 Memory Test, a common test for malingering and/or memory

³⁶ *E.g.* D.J. ROI; *see also* Alan Bernstein, “Social Security unit uses lies to find fraud: Advocates of disability decry ‘ruse’ tactics,” 3/2/03 Hous. Chron. 1 (detailing ruse police interviews that pretend to investigate claimants for a fake crime); National Organization of Social Security Claimant Representatives (NOSSCR), *Handling a “CDI” Case at the Hearing Level*, SOCIAL SECURITY FORUM, 23(10) at 6 (Oct. 2001) (noting CDI’s use of sham Consultative Examinations for the sole purpose of claimant surveillance).

³⁷ *E.g.* F.R. ROI; L.B. ROI.

³⁸ *E.g.* F.R. ROI; S.A. ROI; N.C. ROI; L.L. ROI.

³⁹ MCCORMICK, *supra* note 23 at § 8:94.

⁴⁰ *E.g.* L.B. Consultative Examination (CE) Report (on file with Homeless Action Center); D.J. CE Report; S.A. CE Report.

impairments.⁴¹ The refugee claimants often scored extremely low on the Rey test, which CDI agents interpreted as evidence of malingering.⁴²

The ROIs summarized the results of these investigations and, while falling short of alleging any actual fraud or similar fault, implied as much through emphasis and innuendo, arranging the evidence in contradictions that ranged from the material to the highly artificial.⁴³ One ROI noted particularly that the claimant was “stylishly dressed.”⁴⁴ In another case, the claimant denied performing mechanical work on the cars parked behind his residence, and stated he only picked up after the mechanics, but “investigators observed grease under the Subject’s fingernails.”⁴⁵ At the same time, ROIs reported material contradictions in several cases, e.g., the claimant reported no work history in the U.S. but told investigators otherwise.⁴⁶

The ROIs also reveal a bewildering insensitivity, both human and cultural. One investigator reported, “the Subject began to cry to the extent that one might say he was bawling,” yet at the end of his report, stated, “He did not appear to be in any pain or discomfort.”⁴⁷ Similarly, another report described the claimant’s imprisonment in a slave labor camp as, “She quit working when she was taken custody by the Khmer Rouge.”⁴⁸ Another ROI recounted “The

⁴¹ See MURIEL D. LEZAK, *NEUROPSYCHOLOGICAL ASSESSMENT*, 802 (3d ed. 1995); see also *infra* at note 63 and accompanying text for further discussion.

⁴² E.g. N.C. ROI; T.J. ROI; Q.R. ROI; U.Q. CE Report.

⁴³ One administrative law judge remarked, in finding a particular ROI to have no probative value, that “rather than offering any clear and convincing reason to doubt the claimant’s credibility, or the credibility of the treating sources, the report tenders nothing but innuendo, non-sequiturs, and uneducated assumptions.” N.C. ALJ Decision (on file with Homeless Action Center) (internal quotes omitted).

⁴⁴ S.A. ROI.

⁴⁵ N.C. ROI.

⁴⁶ *Id.*; see also S.A. ROI; U.Q. ROI; M.S. ROI; T.J. ROI; L.L. ROI.

⁴⁷ T.J. ROI.

⁴⁸ L.L. ROI (emphasis added).

Subject . . . stated in clear English, ‘No speak English,’” and relied on this to insinuate that the claimant had lied about not speaking English.⁴⁹

Finally, the ROIs suggest a level of bias in the agents’ investigations, independent of their cultural insensitivity. Agents have been quick to exaggerate superficial contradictions or medical reports suggesting fraud. For example, under the heading “Malingered at Consultative Exam,” one ROI cited the Examiner as concluding, “[claimant’s] performance was consistent with ‘malingering,’” when what the Examiner actually said was “[claimant’s] impressions were consistent with a Posttraumatic Stress Disorder and Malingering.”⁵⁰ Similarly, another ROI justified investigating B.L.’s patients because “many times other examining doctors diagnosed malingering while [B.L.] had diagnosed PTSD and Major Depression,”⁵¹ when in fact this has happened only twice, out of twenty-six previously investigated cases.⁵² CDI agents also reported their own one-hour lay diagnoses of the claimant, e.g., “Subject did not appear to have any mental or physical ailments.”⁵³

3. Denial and Appeal

In all twenty-nine investigated cases, the DDS analyst denied applicants’ initial claims or terminated existing benefits. So far, at least sixteen out of twenty-one completed administrative appeals have reversed these denials. The ALJs who approved these claims alternatively rebutted, discounted, or simply disregarded the ROIs. Nationally, OIG reports that, from 1998-2004, CDI units received 9,300 allegations of fraud (though it is unclear whether each allegation was

⁴⁹ S.A. ROI.

⁵⁰ Q.R. ROI.

⁵¹ N.C. ROI.

⁵² N.C. CDI Referral (on file with Homeless Action Center).

⁵³ U.Q. ROI; *see also* M.S. ROI; T.J. ROI; N.C. ROI.

investigated) and caused 5,000 claims to be denied or terminated.⁵⁴ This translates to a 54% national denial rate for CDI-investigated claims. OIG also reports a 58% reversal rate for CDI-supported denials at the ALJ appellate level.

The difference in denial rates, between the national 54% rate and the case studies' 100% rate, and in ALJ reversal rates, 58% and 76%, raises several uneasy questions. Is the Oakland CDI unit especially effective in their anti-fraud investigations, or is there something damning about being a Cambodian refugee patient of Dr. L.? Has invidious discrimination entered into the calculations somewhere? Or are the denials and dubious ROIs an unfortunate byproduct of an imperfect, but necessary anti-fraud machinery? The next Parts address these questions, focusing less on individual wrongs and wrongdoers, and more on the institutional vulnerability of SSA and the CDI program to such wrongs, and the legal consequence of this vulnerability.

II. The Disadvantage to Cambodian Refugees

In the following Part, we examine three classes of disadvantages the CDI program creates for Cambodian refugee applicants. The first class, institutional disadvantages, includes policies and practices of CDI units and state Disability Determination Services that tilt the system against Cambodian refugee SSI applicants. The second class, judgment deficiencies, involve individual “bad choices” made by CDI agents and DDS analysts, which reveal the system’s vulnerability to such choices. The third subpart examines the concrete harms to refugee applicants.

⁵⁴ NADE Letter, *supra* note 17.

A. Institutional Disadvantages

Firstly, and perhaps most conspicuously, the triggers identified in the POMS as “high risk” indicators of fraud make DDS analysts more likely to refer Cambodian refugees to the CDI unit. For example, POMS DI § 23025.010 flags situations in which several applicants, assisted by a common “middleman,” claim similar impairments, especially “PTSD, anxiety, and depression.”⁵⁵ But given the extraordinary prevalence of PTSD and Major Depression among Cambodian refugees, this means that a set of Cambodian refugee applicants who, for example, use the same translator to fill out their SSI applications,⁵⁶ will very likely fall under suspicion. Similarly, the POMS considers situations in which the claimant’s family or household members also receive disability benefits as possible high fraud risks;⁵⁷ correspondingly, one ROI observed, “It obviously appears unusual for two close family members to be suffering from severe mental problems and the Subject herself is alleging the same.”⁵⁸ But again, PTSD and Depression’s high prevalence among Cambodian refugees indicates that it is not unusual at all for entire families to suffer deeply from the same shared traumas.

The POMS “high risk indicators” also cast suspicion on the community organizations and professionals that serve the Cambodian refugee community, leading to unwarranted investigative referrals of their patients. The POMS cautions against medical reports provided by a middleman that “are from the same source(s) as for others assisted by the middleman, and findings are similar or identical.”⁵⁹ But a professional who treats Cambodian refugees in significant

⁵⁵ DI § 23025.010(E)(2).

⁵⁶ This is not an uncommon situation, given the high rates of illiteracy (in English and often even Khmer) among Cambodian refugees, as well as the volume of forms required in an SSI application. See Marshall, *supra* note 3, at 575.

⁵⁷ DI § 23025.010(D)(5).

⁵⁸ Q.R. ROI.

⁵⁹ DI § 23025.010(E)(3).

numbers, or, like Dr. L., specializes in refugee mental health, will very likely diagnose PTSD and Depression in many of her patients. Given the correlation between mental impairment and poverty within the refugee community,⁶⁰ a responsible professional who makes such diagnoses will likely recommend applying for SSI.⁶¹ If so, the applicant will likely need assistance filling out the SSI claim forms,⁶² i.e., he will need a “middleman.” If this middleman specially serves the Cambodian refugee community—as would a Khmer translator, or an LCSW affiliated with a refugee community organization—then we arrive at the precise “suspicious” situation cited above: a middleman providing DDS with medical reports from the same source with similar or identical findings. While stated hypothetically, the above model perfectly describes several non-profit mental health organizations in the Oakland/Berkeley area, which combine translators, social workers, and mental health professionals to serve refugees, Cambodians, and/or the greater Asian community. It also exactly describes the pattern of investigative referrals for the twenty-nine Cambodian refugee SSI applicants.

The standards and tests commonly employed in fraud investigations further disadvantage traumatized applicants from Cambodian refugee communities. Notably, the Rey 15-Item Memorization Test’s utility as a malingering indicator depends on the subject’s familiarity with Western symbols. The Rey test gives the subject ten seconds to memorize “fifteen symbols.” In reality, these fifteen symbols are just five 1-2-3 sequences in different symbol sets (A-B-C, i-ii-iii, |,||,|||, etc.), with each triple on its own line. The crux of the test is that it sounds difficult

⁶⁰ See Marshall, *supra* note 3, at 575.

⁶¹ Such a recommendation would respond appropriately to Axis IV, Psychosocial and Environmental Problems, which include “inadequate social support,” “insufficient welfare support,” unemployment, and “extreme poverty.” See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 29 (4th ed. 1994) (hereinafter “DSM-IV”).

⁶² See Marshall, *supra* note 3, at 575.

(remembering fifteen items in ten seconds) when it is in fact easy (remembering five versions of the same sequence). The malingerer will perform poorly because he consciously or unconsciously believes he should, while the genuine subject will score average or moderately low.⁶³ But a Cambodian illiterate who cannot read or speak English will not recognize that “A-B-C” is the same sequence as “1-2-3” or “i-ii-iii,” and will spend ten seconds trying to memorize unfamiliar shapes. The test becomes as hard as it sounds, which destroys its usefulness as a malingering test. As one Examiner administering the Rey test to a Cambodian refugee applicant observed, “the culture-free tests that we use do not really transcend the test-taking set which people in the Western culture have.”⁶⁴ Similarly, the “basic questions” used by Examiners and CDI agents to test malingering (such as “Who is President?”⁶⁵) are only “basic” for a claimant sufficiently integrated in American or Western culture.

More fundamentally, the CDI investigators’ strict standards of consistency,⁶⁶ whether material or no, represent an extremely difficult test for any sufferer of PTSD and/or Depression, especially one with poor English ability, to survive. Confusion and memory loss are symptomatic of both PTSD and Depression,⁶⁷ and claimants suffering these impairments will likely confuse dates, omit work history, or provide inconsistent information to examiners, analysts, and investigators. For example, one claimant, when asked by CDI agents why she could not work, pointed to her hand; due to her PTSD, she believed the Khmer Rouge had shot

⁶³ LEZAK, *supra* note 41 at 802.

⁶⁴ N.C. C.E. Report.

⁶⁵ S.A. ROI.

⁶⁶ *See also* POMS DI § 23025.010(D)(7) (unresolved inconsistencies in a claimant’s evidence are high-risk fraud indicators); § 23025.010(G)(4) (reports containing inconsistent family history and other nonmedical information should be evaluated for fraud); § 23025.010(H)(1)(b) (mental impairment claims with conflicting daily functioning information may be high fraud risk).

⁶⁷ DSM-IV, *supra* note 61 at 322, 425.

her hand, though in fact the hand was physically undamaged.⁶⁸ Additionally, where CDI agents fail to provide translators to limited-English claimants, and rely either on the applicant's family member or an over-the-phone translator service, the risk of confusion is significantly amplified. Southeast Asian cultural perceptions of mental illness may also interfere with a claimant's ability to describe her impairments accurately.⁶⁹ All these factors indicate that CDI will very likely encounter some inconsistency in cases involving traumatized Cambodian refugees.

Finally, the institutional character of the anti-fraud program disadvantages these applicants. For example, the POMS warns against "impairments in which self-serving statements by an applicant may play a more important role in evaluating severity" as "particularly prevalent" in fraudulent claims.⁷⁰ PTSD and Depression are just such impairments, since their associated symptoms—flashbacks, nightmares, anhedonia, guilty/worthless feelings, and suicidal thoughts⁷¹—are necessarily self-reported. The anti-fraud machinery tends to treat applicants' ambivalent reactions to the application/investigation process as fraud indicators, rather than symptoms of trauma and disability. The POMS, and CDI agents in the field, particularly scrutinize claimants who cooperate poorly, such as those who "appear to be totally detached from the surroundings and have no interest in the application process."⁷² But this rather astutely describes a severely depressed claimant with *anhedonia*, a marked loss of interest in

⁶⁸ Matthew Hui, "Denying Cambodians Social Security Benefits," *Hardboiled: the Asian-American Newsmagazine* (Berkeley, CA), Vol. 9, No. 2, at 12 (Nov. 2005) (on file with author).

⁶⁹ See generally Wen-Shing Tseng, HANDBOOK OF CULTURAL PSYCHIATRY (2001); Anne Fadiman, THE SPIRIT CATCHES YOU AND YOU FALL DOWN: A HMONG CHILD, HER AMERICAN DOCTORS, AND THE COLLISION OF TWO CULTURES (1997).

⁷⁰ DI § 23025.010(H).

⁷¹ See 20 C.F.R. Part 404, Subpart P, Appendix 1 ("the Listings"), §§ 12.04, 12.06 (standard evaluative criteria for Depression and PTSD).

⁷² DI § 23025.010(E)(4). While the section cautions analysts to evaluate whether any mental impairment may be responsible for the claimant's poor cooperation, such a consideration has been noticeably absent from any of the thirteen case studies of Cambodian refugee applicants.

most activities. Failure to appear at Consultative Examinations or other appointments without sufficient explanation may also raise suspicion,⁷³ though the claimant's depression, anxiety, poor memory, or other functional impairments may have prevented him from appearing or phoning in an acceptable excuse. The very involvement of government agents may further evoke traumatic memories of Khmer Rouge persecution,⁷⁴ and cause the claimant to answer too confusedly, passively, or evasively to convey an accurate picture of her impairment and/or credibility.

B. Discretion and Judgment Deficiencies

Much of the perceived injustice at work in these case studies arises from actions that, while not clearly erroneous or unjustifiable, are still in some real sense bad decisions. Professor Mashaw terms these poor exercises of discretion as “judgment deficiencies.”⁷⁵ Because SSA's anti-fraud program necessarily allows DDS analysts and CDI agents broad discretion in referring and investigating applicants, these applicants are incredibly vulnerable to the prejudices, poor perceptions, and sloppy thinking that may affect a given analyst or agent's judgment.

The Social Security program's contradictory mandate, often described as “cautious benevolence,”⁷⁶ allows DDS analysts substantial discretion in referring ‘suspicious’ claims. For example, suppose an applicant alleging, *inter alia*, memory loss, has given contradictory statements regarding her work history. The POMS indicates that such conflicting evidence may be a high-risk fraud indicator, but simultaneously cautions that at applicant's impairment may

⁷³ POMS DI §§ 23025.010(E)(5), (F)(3).

⁷⁴ See Shavelson, *supra* note 2; see also *infra* Part II.C.

⁷⁵ JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY CLAIMS, 150 (1983).

⁷⁶ *Id.* at 35.

explain the contradiction.⁷⁷ This guideline incorporates directly competing policies: (1) an urgent mandate to root out fraud, and (2) a paternalistic mandate to account for the claimant's impairments. The result leaves the analyst perfectly justified (under the POMS) to decide either way: either refer the claimant to CDI (one never can be too careful about fraud), or find that the contradiction represents only a memory lapse (one has to help those who can't help themselves). Given the history of governmental pressure to crack down on fraud,⁷⁸ some analysts may feel pressured to assume the worst and refer suspicious cases *even when* there is a reasonable explanation. Such pressure may explain why analysts have continued to refer Dr. L.'s patients even after HAC spoke to analysts about PTSD prevalence among Cambodian refugees.⁷⁹

The CDI program's vulnerability to judgment deficiencies arises in part from its lack of a socially accountable mission. Somewhat counterintuitively, the CDI's mission is *not* primarily to bust fraud rings and arrest fraudulent applicants, but to "gather evidence" so that DDS analysts may make an accurate disability determination.⁸⁰ CDI agents thus have no responsibility to accuse or exonerate the claimants they investigate, or to hold their evidence to any standard of admissibility or, frankly, reliability. Thus, an ROI may report superficial contradictions in the evidence, potentially prejudiced testimony from uninformed third parties,⁸¹ and the agent's own

⁷⁷ DI § 23025.010(D)(7).

⁷⁸ See generally GAO Report to Rep. Waxman, *supra* note 16; GAO, *Supplemental Security Income: Long-Standing Problems Put Program at Risk for Fraud, Waste, and Abuse* (Mar. 4, 1997) (Testimony before the Subcomm. on Oversight, Comm. on Ways and Means, House of Representatives), available at <http://www.gao.gov/cgi-bin/getrpt?GAO/T-HEHS-97-88>.

⁷⁹ Homeless Action Center et al., *Policy Report: A Call for Heightened Protection of Mentally Disabled Claimants in the Social Security Administration's Fraud Referral Process and Cooperative Disability Investigations*, 2-3 (Sept. 22, 2005) (on file with HAC). Several ROIs indicate that the Oakland CDI unit may also have started investigating cases involving Dr. B.L. with or without previous DDS referral. See, e.g., L.B. ROI; Q.R. ROI; S.A. ROI; T.J. ROI.

⁸⁰ See *supra* note 16 and accompanying text.

⁸¹ For example, one CDI investigation "was instigated by the claimant's ex-wife following a bitterly contested divorce and that her statements were being taken as fact by the [CDI] agent."

lay diagnoses of the claimant’s psychological impairments.⁸² Such statements, despite their own unreliability, may prove extremely damaging to the claimant’s credibility, and carry significant persuasive appeal coming from a federal anti-fraud “special agent.”

The CDI program’s generous investigative discretion further permits its agents to disregard cultural barriers, the nature of mental impairment, and even Social Security’s own evaluative standards in collecting and reporting evidence. Indeed, one judge, reversing an initial denial based on a CDI report, remarked that the ROI was “unprofessional” and revealed “at best ignorance of and at worst indifference to the cultural realities of Cambodian refugees and refugee mental health.”⁸³ CDI agents have displayed marked suspicion regarding claimants’ limited English abilities and the prevalence of PTSD and Depression among claimant families.⁸⁴

Similarly, the ROIs’ preoccupation with functional ‘contradictions’—claimant can drive a car, shop for groceries, count change, etc.—reflect an inattention to Social Security’s standards, since these activities do not necessarily contradict a disability claim.⁸⁵ Daily functioning relates only secondarily to SSI eligibility; the crucial question is whether the claimant can *work*, and a thirty-minute errand requires far less functional ability than an eight-hour workday.⁸⁶

NOSSCR, *Dealing with the Office of Inspector General*, SOCIAL SECURITY FORUM, Vol. 27, No. 1, at 13 (Jan. 2005).

⁸² Lay diagnoses, i.e., the conclusions of an observer untrained in mental impairments, are likely to suffer from everyday stereotypes and misperceptions about disability and especially mental illness. See Michael Perlin, *Heuristics and “Ordinary Common Sense,”* in MENTAL DISABILITY LAW: CASES AND MATERIALS (1999).

⁸³ N.C. ALJ Decision.

⁸⁴ See *supra*, Parts I.D.2; II.A.

⁸⁵ See 20 C.F.R. § 416.905 (basic definition of disability as inability to perform substantial gainful activity).

⁸⁶ See *Vertigan v. Halter*, 260 F.3d 1044, 1050 (2001): “the mere fact that a plaintiff has carried on certain daily activities, such as grocery shopping, driving a car, or limited walking for exercise, does not in any way detract from her credibility as to her overall disability. One does not need to be ‘utterly incapacitated’ in order to be disabled.”

The very tactics employed by CDI show the same indifference to the realities of mental disability. PTSD and Depression are not impairments typically observable through hidden surveillance or a one-hour interview, so when an ROI states that a claimant “doesn’t appear to have any ailments,”⁸⁷ one may well ask whether the agent understands the disorder she is supposed to be investigating. But as one investigator remarks:

We’re not psychiatrists, we’re not medical doctors, we’re federal investigators, so, when you get a fraud investigation, you look at everything and you go where it takes you.⁸⁸

This lack of responsible investigative standards makes investigated claimants vulnerable to CDI agents who, for whatever reason, fail to take into account cultural, linguistic, or ability-related factors, or report unreliable and prejudicial evidence.

Finally, the DDS analyst’s discretion in *deciding* CDI-investigated claims fails to protect claimants from judgment deficiencies. Analysts may officially disregard evidence if, by a preponderance of the evidence, they find “reason to believe” that such evidence involves fraud or similar fault.⁸⁹ But there is no such evidentiary standard for *unofficially* disregarding evidence and denying the claim: even if an analyst fails to find the “reason to believe” standard satisfied, “factors nevertheless may exist that justify giving that evidence less weight ... [e.g.,] because of questions about the credibility or accuracy of the evidence.”⁹⁰

Whether one calls it “fraud or similar fault” or “questions about the credibility,” the result for the claimant is, functionally, the same. Usually, disability adjudicators must give

⁸⁷ See *supra* note 48.

⁸⁸ Shavelson, *supra* note 2.

⁸⁹ Social Security Ruling 00-2p (2000), available at <http://208.56.213.87/ssr.html>; POMS DI § 23025.025(C)(3).

⁹⁰ POMS DI § 23025.025(C)(1)(b).

“controlling weight” to well-documented medical opinions from the claimant’s treating source.⁹¹ Yet an ROI allows DDS analysts to circumvent this standard by citing an “inconsistency . . . with other substantial evidence in the case record,”⁹² however artificial and unreliable that inconsistency may be. The ROI thus effectively negates the claimant-friendly rules of weighing evidence, and submits claimants to the relatively unregulated discretion of the analyst.

C. Denial and Psychological Harm

In all of the twenty-nine Cambodian refugee SSI claims investigated by the Alameda County CDI unit, the DDS analyst denied the initial application. While such unanimity does not reflect the national rate of denial for CDI-investigated claims, claimant representatives nevertheless feel that “once OIG is involved, the claimant[] cannot possibly salvage the situation.”⁹³ Appeals can take years, leaving claimants with little resource; nor does the retroactivity of ALJ-approved benefits eradicate these months or years of desperation.⁹⁴ A fraud investigation also exposes claimants, if prosecuted and convicted for fraud, to fines and possible deportation.⁹⁵

⁹¹ 20 C.F.R. § 416.927(d)(2).

⁹² POMS DI § 24515.004(B)(2).

⁹³ NOSSCR, *supra* note 81 at 12.

⁹⁴ This may explain why, nationwide, only 37% of CDI-investigated applicants appealed their denials to the administrative hearing level. *See* OIG Audit Report, *supra* note 19 at Annex B, 2. Some claimants representatives suggest that the CDI investigation itself has a chilling effect on claimants’ decision to appeal. *See* NOSSCR, *SSA Stepping Up Its “Anti-Fraud” Program*, SOCIAL SECURITY FORUM, Vol. 22, No. 12, at 6 (Dec. 2000).

⁹⁵ 42 U.S.C. § 1320a-9(1) (civil monetary penalties up to \$5,000 for false or misleading statements in applying for SSI); 8 U.S.C. § 1101(a)(43)(M)(i) (offenses involving fraud or deceit with a loss in excess of \$10,000 are aggravated felonies); 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felonies are deportable offenses); *accord* Ferreira v. Ashcroft, 390 F.3d 1091, 1094-95 (9th Cir. 2004) (welfare fraud is an aggravated felony, and thus a deportable offense, where the loss to government exceeds \$10,000).

For Cambodian refugees in particular, experiencing a CDI investigation can be “psychological torture.”⁹⁶ The tactics employed by CDI—surveillance from unmarked vans, unannounced home visits, interviews with neighbors—may evoke traumatic memories of the refugees’ imprisonment, enslavement, and torture at the hands of their former government. Indeed, one claimant related that “in Cambodia, such actions were followed by imprisonment, and death.”⁹⁷ These tactics may also aggravate the claimant’s PTSD, causing hypervigilance, paranoia, and fear.⁹⁸ One treating source reports that “[s]ince these investigations started, all the symptoms came back: nightmares, flashbacks, panic attacks; their homes don’t feel safe anymore.”⁹⁹ One claimant reportedly became so upset that “he did not even feel comfortable in his own home anymore and wanted to commit suicide and kill his whole family.”¹⁰⁰

This section analyzes the disadvantages to Cambodian refugees in a (relatively) neutral light. Many may reasonably argue that, while unfortunate, these disadvantages are a necessary evil of the anti-fraud program; after all, fraud rings have exploited the same cultural, linguistic, and functional barriers cited earlier to cheat the system. The next sections explore how administrative, statutory, and constitutional law addresses these disadvantages, and whether there is a legitimate way to balance the refugees’ social and dignitary rights against the government’s anti-fraud interest.

⁹⁶ Shavelson, *supra* note 2.

⁹⁷ *Id.*

⁹⁸ Hui, *supra* note 68.

⁹⁹ Shavelson, *supra* note 2.

¹⁰⁰ Hui, *supra* note 68.

III. National Origin Discrimination

This Part evaluates the disadvantages discussed above according to the various legal and normative theories of national origin discrimination, under which a public agency may not discriminate against its beneficiaries according to characteristics associated with national origin. Specifically, I examine three distinguishable models of national origin discrimination: language accommodation, disparate impact discrimination, and animus against aliens with disabilities.

A. Language Accommodation as Non-Discrimination

Courts and federal agencies alike recognize that language is often an essential characteristic of national origin, and that policies disadvantaging persons of limited English proficiency (LEP) can constitute national origin discrimination.¹⁰¹ Accordingly, President Clinton, in passing Executive Order No. 13166, acknowledged a duty, deriving from Title VI of the Civil Rights Act, to ensure “meaningful[] access” to federally funded programs and services.¹⁰² Under this and similar half-legal, half-administrative standards, CDI agents have the duty first, to recognize language barriers, and second, to develop investigative approaches that reasonably accommodate them.

Federal and state courts, and the Social Security Administration itself, acknowledge a responsibility to recognize linguistic barriers in investigations and proceedings. In *United States v. Guerrero*, the Eight Circuit affirmed a motion to suppress evidence obtained in a search of an

¹⁰¹ See 29 C.F.R. § 1606.7 (EEOC regulations finding Speak-English-only policies presumptively discriminatory); *Garcia v. Spun Steak Co.*, 13 F.3d 296, 298 (9th Cir. 1993) (Reinhardt, C.J., dissenting from denial of rehearing en banc) (“Language is intimately tied to national origin”); *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980) (acknowledging that, for LEP persons, “language might well be an immutable characteristic” tied to national origin.)

¹⁰² 66 F.R. 50121 (Aug. 11, 2000) (still in effect); *but see Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (finding that Title VI prohibits “only intentional discrimination”).

LEP defendant’s car because “it [was] clear that a reasonable officer would have been aware that Guerrero was having difficulty understanding [the officer’s] questions” and thus did not knowingly and voluntarily consent to the search.¹⁰³ Federal and state courts similarly evaluate the extent to which language barriers may interfere with the justice of their own proceedings.¹⁰⁴ Finally, the POMS obliges SSA staff to “[b]e alert to the language needs” of claimants, and provide interpreters “when it is evident that language assistance is required to ensure that the individual is not disadvantaged, even if the individual does not request an interpreter.”¹⁰⁵

President Clinton’s Executive Order No. 13166 imposed an obligation on all federally-supported programs to develop policies to provide meaningful access to their services for LEP individuals.¹⁰⁶ For SSA, this means, in part, providing competent translators to LEP claimants.¹⁰⁷ The use of family members, and especially minor children, to translate is inappropriate, since these “untrained ‘interpreter[s]’ [are] often unable to understand the concepts or official terminology [they] are asked to interpret or translate,”¹⁰⁸ and because “the LEP client would naturally be reluctant to disclose or discuss intimate details of personal and family life in front of his or her child” or other close relative.¹⁰⁹

¹⁰³ 374 F.3d 584, 589 (2004); *accord* United States v. Benitez-Arreguin, 973 F.2d 823, 829 (10th Cir. 1992).

¹⁰⁴ Richard Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193, 198 (1997).

¹⁰⁵ DI §§ 23040.001(C)(2), (4); GN §§ 00203.011(C)(1), (3).

¹⁰⁶ 66 F.R. 50121; *see also* U.S. Department of Justice, “National Origin Discrimination Against Person with Limited English Proficiency,” 65 F.R. 50123, 50124-25 (Aug. 16, 2001) (hereinafter “DOJ Guidelines”).

¹⁰⁷ POMS DI §§ 23040.001(A), (B)(2); *compare* Cole & Maslow-Armand, *supra* note 104 at 194, 196 (courts’ duty to provide competent translators to LEP defendants).

¹⁰⁸ U.S. Department of Labor, “Policy Guidance on the Prohibition Against National Origin Discrimination as it Affects persons with Limited English Proficiency,” 66 F.R. 4596, 4597 (Jan. 17, 2001) (hereinafter “DOL Guidelines”); POMS DI § 23040.001(E) (5).

¹⁰⁹ DOL Guidelines, 66 F.R. at 4597.

The Oakland CDI unit's repeated indifference to cultural barriers¹¹⁰ and its repeated use of claimants' untrained family members as interpreters¹¹¹ indicate that its practices have fallen short of federal standards. While the POMS' standards for interpreters demonstrate a commitment to provide LEP claimants with meaningful access, it appears that more training and monitoring may be necessary to align CDI investigative units with this commitment. Moreover, the Oakland CDI agents' hostility towards third-party translators,¹¹² and their entrenched skepticism of our Cambodian refugee claimants' limited English proficiency,¹¹³ are inconsistent with a "meaningful access" policy and SSA's commitment to LEP non-discrimination.

Given past examples of Cambodian refugee fraud rings and their exploitation of cultural and linguistic barriers (including third-party translator fraud), CDI agents may feel justified in their skepticism. But then CDI's policy of disregarding cultural and linguistic barriers in their investigations¹¹⁴ is exactly the opposite approach to take. Given the limitations of translated interrogation, and Southeast Asians' different cultural perceptions regarding mental disability,¹¹⁵ cultural and language differences will present substantial barriers to accurate information-gathering.¹¹⁶ If CDI's mission is indeed to improve the accuracy of disability determinations, then agents should seek to understand and adjust for these barriers, not ignore them. Otherwise,

¹¹⁰ See *supra* Parts II.A, B.

¹¹¹ See *supra* notes 33, 35 and accompanying text.

¹¹² See M.S. ROI (concluding, without citing any evidence, and in spite of the claimant's statement that her non-profit translator had never implicitly or explicitly asked for payment, that claimant would probably pay kickbacks to the translator).

¹¹³ See *supra* notes 44, 79 and accompanying text.

¹¹⁴ See Michele Marcucci, "Refugees Denying Fraud Charges," 1/22/07 Oakland Tribune (CA).

¹¹⁵ See *supra*, note 65 and accompanying text.

¹¹⁶ See Cole & Maslow-Armand, *supra* note 104 at 196.

these Cambodian refugee applicants may well and rightfully describe the CDI investigation as a “Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.”¹¹⁷

B. Disparate Impact as National Origin Discrimination

The Social Security Administration’s anti-fraud machinery further raises institutional barriers to Cambodian refugee applicants that may constitute disparate impact discrimination under Title VI of the Civil Rights Act of 1964.¹¹⁸ “Virtually every executive agency” has promulgated regulations forbidding “criteria or methods of administration which have the effect of subjecting individuals to discrimination.”¹¹⁹ The Department of Health and Human Services, the agency which oversaw Social Security programs until 1995, has promulgated just such regulations,¹²⁰ as has the Department of Justice,¹²¹ “the principal federal agency for coordinating Title VI requirements,”¹²² and every major federal benefits program targeted towards vulnerable populations—including Medicaid (under the Dept. of HHS), JobCorps (Dept. of Labor), the

¹¹⁷ See *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (basing defendant’s right to an interpreter on her right against such a proceeding); see also *Cole & Maslow-Armand*, *supra* note 104 at 200 (describing potential confusion and anxiety of LEP subject interrogated in English).

¹¹⁸ 42 U.S.C. § 2000d forbids federal programs from excluding persons from services and benefits on the basis of national origin. While the Court has found this provision to forbid only intentional discrimination, *supra* note 97, it “assumes” that Title VI authorizes the cited federal regulations against disparate impact discrimination. *Alexander v. Sandoval*, 532 U.S. at 281-82.

¹¹⁹ DOJ Guidelines, 65 F.R. at 50123. For the paradigmatic case on disparate impact national origin discrimination, see *Lau v. Nichols*, 414 U.S. 564 (1973) (finding discrimination in the San Francisco public school system’s failure to accommodate LEP children of Chinese immigrants).

¹²⁰ 45 C.F.R. § 80.3.

¹²¹ 29 C.F.R. § 42.104(b)(2).

¹²² *Sandoval v. Hagan*, 197 F.3d 484, 496 (11th Cir. 1999), *overruled on other grounds by Alexander v. Sandoval*, 532 U.S. 275 (2001). The Supreme Court overturned the Eleventh Circuit’s decision solely on the ground that federal regulations promulgated under Title VI did not create any private cause of action, and declined to rule on the lower court’s finding of disparate impact discrimination. 532 U.S. at 279, 293. Accordingly, I cite *Sandoval v. Hagan* only on this latter issue.

Bureau of Indian Affairs (Dept. of the Interior), and all programs under the Departments of Veterans Affairs, Education, and Housing and Urban Development.¹²³

Since becoming an independent agency, however, SSA has not forbidden disparate impact discrimination in its services, but instead declares elusively, “we do not give inappropriate consideration to your race, color, national origin [etc.]”¹²⁴ Apparently, then, SSA has not prohibited itself from utilizing criteria or methods of administration that have the effect of discriminating on the basis of national origin. First and foremost, the Social Security Commissioner must correct this discomfiting deviation from the standards set by like federal agencies and by executive order. She must likewise forbid disparate impact discrimination in Social Security programs, even if she declines to provide a private cause of action against the Administration to enforce such a provision.

Judging SSA’s anti-fraud program by these normative standards, there are two “criteria or methods of administration” that have an adverse and disproportionate impact on the case-study Cambodian refugees as a class.¹²⁵ First, and most concretely, the Rey 15-Item Memory Test, discussed *supra* in Part II.A, disproportionately exposes many of these refugees, and other persons illiterate in Western alphabets, to false positives for malingering. Such a false positive

¹²³ See *supra* note 120 (HHS); 29 C.F.R. § 31.3(b)(2) (DOL); 43 C.F.R. § 17.3(b)(2) (DOI); 38 C.F.R. § 18.3(b)(2) (VA); 34 C.F.R. § 100.3(b)(2) (Dept. of Ed.); 24 C.F.R. § 1.4(b)(2)(i) (HUD); *but see* 13 C.F.R. § 112.3(b)(1)(v) (scope of Small Business Administration’s anti-discrimination regulations restricted to disparate treatment).

¹²⁴ 20 C.F.R. § 405.30.

¹²⁵ Cf. *Sandoval v. Hagan*, 197 F.3d at 508 (“To prove disparate impact, a plaintiff must demonstrate three essential elements: first, a facially neutral policy casts an effect a statutorily-protected group; second, the effect is adverse; and finally, the effect is disproportionate.”) (citing *Elston v. Talladega County Bd. of Ed.*, 997 F.2d 1394, 1407 (1993)).

substantially prejudices applicants' SSI claims, as CDI agents will likely cite the results of the test as a strong fraud indicator, probably leading to an initial denial and possible prosecution.¹²⁶

Second, the Oakland CDI agents' marked skepticism of applicants' limited English abilities reveals a curious double bind. The SSI application paperwork forces claimants to state either that they speak English, or that speak no English at all.¹²⁷ Claimants with limited English abilities—even severely limited abilities—must choose between receiving all notices and interviews in a language they, for all intents and purposes, do not understand, or exposing themselves to accusations of fraud when they demonstrate a *de minimus* knowledge of English: for example, when they say to investigators, “No speak English.”¹²⁸ This method of administration thus represents another false positive which disproportionately affects LEP applicants' claims on the basis of language, and constructively, national origin.

C. Exclusion and Animus against Aliens with Disabilities

Finally, these Cambodian refugee applicants may find themselves unlucky participants in America's long-standing discrimination against immigrants with disabilities. Put bluntly, CDI's continued targeting of Dr. B.L.'s Cambodian refugee patients, despite B.L.'s and community advocacy organizations' repeated attempts to meet with CDI and address their suspicions, suggests a kind of racial profiling. The cultural and language barriers largely ignored, and thereby preserved, by SSA's anti-fraud machinery may serve as proxy for more overt forms of

¹²⁶ Compare with *Sandoval v. Hagan*, 197 F.3d at 510 (affirming the district court's finding that a driving test given only in English screened out LEP individuals, and therefore constituted national origin discrimination).

¹²⁷ Social Security Administration, Online Adult Disability and Work History Report, available at <https://s044a90.ssa.gov/apps6z/i3369/ee001-fe.jsp> (click 'Start the Report' and keep clicking 'Continue' until arriving at the page title 'Should You Complete this Report?').

¹²⁸ See S.A. ROI.

xenophobia.¹²⁹ Especially given the highly publicized stories of Cambodian refugee fraud rings—which, in many ways, contributed to the CDI program’s very creation¹³⁰—it is no stretch of the imagination to believe that the Oakland CDI unit’s unprofessional and ferocious four-year preoccupation with B.L.’s Cambodian patients reflects institutional animus.¹³¹

The Oakland CDI unit’s interactions with Cambodian refugees, and the sensationalized press reports regarding Cambodian refugee fraud rings, align with a historical disfavor towards immigrants with disabilities. Beginning in 1882 with the Chinese Exclusion Act, immigration law has barred “lunatics, idiots, and persons likely to become a public charge.”¹³² Such exclusion formed part of a “broader picture . . . in which immigration met the economy’s demand for labor, and immigrants unsuited for labor were unwelcome.”¹³³ Just so, in 1996, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which severely restricted legal immigrants’ access to public assistance benefits until they had naturalized or contributed sufficiently to the American workforce.¹³⁴ PRWORA embodies both an ideology of self-support through labor, which cannot well accommodate

¹²⁹ See *Spun Steak*, 13 F.3d at 296, 299 (Reinhardt, C.J., dissenting) (“History . . . [attests] to the widespread tactic of using language as a surrogate for attacks on ethnic identity”); *id.* at 296 (linking the growing popularity of Speak-English-only employment rules with “anti-immigrant backlash”); DOJ Guidelines, 65 F.R. at 50124 (finding non-English language speakers may trigger “prejudice and xenophobia”); DENNIS BARON, *THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS?* 190 (1990) (governmental English-only policy would “set up a class of ‘outsiders’—unable to communicate with their government, and their government unable to communicate with them”) (quoting Rep. Norman Mineta of California).

¹³⁰ Cf. NOSSCR, *supra* note 94 at 5 (SSA’s Director of Disability Process Policy Division cited Southeast Asian immigrant fraud in California and Washington while presenting history of CDI).

¹³¹ Intentional discrimination on the basis of national origin or alienage is subject to strict scrutiny. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (invalidating Pennsylvania’s refusal to provide welfare assistance to aliens).

¹³² Mark C. Weber, *Opening the Golden Door: Disability and the Law of Immigration*, 8 J. GENDER RACE & JUST. 153, 156 at n.9. While immigration laws have changed, their exclusion of disabled immigrants likely to need public assistance has continued. See *id.* at 157-168.

¹³³ *Id.* at 161.

¹³⁴ *Id.* at 169-170. The restriction affects refugees to a lesser, but not insignificant extent.

persons with certain severe disabilities, and the anti-immigration fervor that helped pass the Act.¹³⁵ One may well consider the CDI program a sister initiative to the PRWORA, born from the same GAO reports, as it were, and from the same sensational narratives of immigrant fraud and the same animus towards immigrants with disabilities.

Ultimately, the national origin anti-discrimination paradigm can provide but little hope to our Cambodian refugee SSI applicants. On the one hand, the Supreme Court has precluded them from suing to enforce federal regulations barring disparate impact discrimination (standards which SSA has perhaps pointedly neglected to assume); and on the other, any allegation of institutional or individual animus would face serious evidentiary challenges, as the claim is admittedly more suggestive and deeply-felt than it is demonstrable. Nevertheless, the Social Security Administration would do well to live up to its aspirations regarding claimants with limited English proficiency, and pressure OIG to enforce these standards against its CDI agents. Just as the accommodation of language difference can reinforce political legitimacy, a disregard for linguistic and cultural barriers can inspire cynicism, alienation, and public contempt¹³⁶—and surely, Social Security has had enough of *that*.

IV. Disability Discrimination

A disability discrimination analysis proves more accommodating for the refugee applicants, given its incorporation of disparate impact examination into its standards. This section evaluates the disadvantages to our refugees under both the statutory standards of the

¹³⁵ *Id.* at 171-174; *see also* Polen, *supra* note 13 at 1463-66; Hing, *supra* note 13 at 168.

¹³⁶ *See* Cristina M. Rodriguez, *Language and Participation*, 94 CALIF. L. REV. 687, 729, 750 (2006).

Americans with Disability Act (ADA) and the Rehabilitation Act (RA), and more theoretical conceptions of disability discrimination. We do not here address the state DDS offices' Eleventh Amendment immunity and its implications for a potential ADA/RA suit, but certainly this issue is a current flashpoint in disability discrimination litigation and cannot be disregarded.¹³⁷

A. The Americans with Disabilities Act and the Rehabilitation Act

A disability discrimination claim against a state Disability Determination Services agency under the Americans with Disabilities Act (ADA)¹³⁸ would involve three elements: (1) plaintiff is an individual with a disability, who qualifies for SSI benefits; (2) DDS denied her SSI application “or otherwise discriminated against” her; (3) the denial or discrimination was by reason of her disability.¹³⁹ Similarly, a discrimination claim against the federal Social Security Administration or its Office of Inspector General, under the Rehabilitation Act (RA),¹⁴⁰ involves a plaintiff with a disability, “otherwise qualified” to receive SSI, who was denied benefits “solely by reason of” her disability.¹⁴¹ The “otherwise qualified” language seems out-of-place in the present context, considering that one qualifies for SSI *by being disabled*. This very dynamic complicates a refugee plaintiff's claim of facial or intentional discrimination “by [sole] reason”

¹³⁷ See generally *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001); *Tennessee v. Lane*, 541 U.S. 509 (2004).

¹³⁸ 42 U.S.C. § 12132 states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”

¹³⁹ See *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002); *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998).

¹⁴⁰ 29 U.S.C. § 794 provides: “No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, denied the benefits of, or be subjected to discrimination under any program or activity . . . conducted by any Executive agency.”

¹⁴¹ See *Lovell*, 303 F.3d at 1052; *Leslie v. Hee Man Chie*, 250 F.3d 47, 52-53 (1st Cir. 2001); *Layton*, 143 F.3d at 472.

of her disability: she cannot claim, per the archetypal discrimination model, that “had [she] been nondisabled, [she] would have received” SSI benefits.¹⁴²

Instead, the refugee plaintiff’s claim must turn on the ADA/RA’s limited recognition of disparate impact discrimination. The Department of Justice regulations implementing the ADA forbid public entities from using “criteria or methods of administration” that effectively discriminate by disability, or “substantially impair” the entity in accomplishing its objectives with respect to persons with disabilities.¹⁴³ While the Supreme Court has rejected an expansive notion of disparate impact, it has implicitly adopted a “meaningful access” standard, such that an “otherwise qualified” plaintiff with a disability may show discrimination by demonstrating that a policy’s disparate impact denies her “meaningful access” to the program’s services.¹⁴⁴

Plaintiffs may demonstrate disparate impact by pointing to a policy that employs “eligibility criteria that screen out or tend to screen out an individual with a disability” from a program’s services or benefits, unless the criteria form a “necessary element” of the service.¹⁴⁵ Such criteria include any “test, judgment, or trait that the handicapped as a class are less capable of meeting or less likely of having.”¹⁴⁶ Eligibility criteria that screen out a particular disability, rather than the disabled “as a class,” are also discriminatory, since an agency’s “appropriate treatment of some disabled persons does not permit it to discriminate against other disabled

¹⁴² See *Lovell*, 303 F.3d at 1053; see also *Leslie*, 250 F.3d at 54-55 (holding that a medical professional’s negligent decision to refer a patient with a disability is not discriminatory, unless the decision is so medically unreasonable as to demonstrate discrimination).

¹⁴³ 28 C.F.R. §§ 35.130(b)(3)(i)-(ii); see *Hunsaker v. Contra Costa County*, 149 F.3d 1041, 1042 (9th Cir. 1998) (applying the DOJ regulation to a county general assistance welfare program).

¹⁴⁴ *Alexander v. Choate*, 469 U.S. 287, 299 (1985) (assuming, without deciding, that the RA “reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped.”)

¹⁴⁵ 28 C.F.R. § 35.130(b)(8); *Hunsaker*, 149 F.3d at 1043; *Easley v. Snider*, 36 F.3d 297, 301-302 (3d Cir. 1994).

¹⁴⁶ *Alexander v. Choate*, 469 U.S. at 302. While *Alexander v. Choate* predates the DOJ regulation cited and the ADA itself, at least one court has used the Court’s opinion to give content to this particular regulation. See *Hunsaker*, 149 F.3d at 1043.

people.”¹⁴⁷ In order to show a cognizable impact, however, the plaintiff must still satisfy the Court’s “meaningful access” standard.¹⁴⁸

Finally, the ADA and the RA oblige agencies to make “reasonable modifications” to programs, policies, and procedures to avoid disparate impact on persons with disabilities.¹⁴⁹ An agency need not make modifications that “fundamentally alter” the service or benefits they provide; for example, a college nursing program was not required to “substantially lower[.]” its standards to admit and accommodate a hearing-impaired student.¹⁵⁰ At the same time, the Court has recognized that “situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory.”¹⁵¹

Three facets of SSA’s anti-fraud machinery have a discriminatory impact against the case-study refugee applicants by reason of their disability. First and foremost, the POMS’ listed fraud triggers bias DDS analysts and CDI investigators against Cambodian refugees with PTSD and Depression.¹⁵² The fraud triggers thus constitute eligibility criteria that tend to screen out these applicants, referring them to often baseless and irresponsible investigations that seriously prejudice, if not totally preclude, their initial claim.¹⁵³ Even if these refugees find success on

¹⁴⁷ *Lovell*, 303 F.3d at 1054; *see also* *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (“The effect of [an anti-discrimination] statute is not to be diluted because discrimination adversely affects only a portion of the protected class.”).

¹⁴⁸ *Hunsaker*, 149 F.3d at 1043.

¹⁴⁹ *See* 28 C.F.R. § 13.130(b)(7).

¹⁵⁰ *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979).

¹⁵¹ *Id.*

¹⁵² *See supra*, Part II.A.

¹⁵³ This disparate impact analysis depends on an intersection of disability and national origin: while the fraud triggers do not necessarily impact Cambodians as a class, or PTSD-sufferers as a class, they do impact the intersection of these classes. *Compare with* *Jefferies v. Harris Cty. Comm. Action Ass’n*, 615 F.2d 1025, 1032 (1980) (finding “discrimination against black females can exist even in the absence of discrimination against black men or white women”).

appeal, the uncertainty of such reversals, and the low appeal rates system-wide,¹⁵⁴ indicate that such prejudice can deny applicants “meaningful access” to the SSI program.

Second, the CDI units’ refusal to adapt their investigative practices to the claimant’s disability may constitute discrimination. As discussed earlier, CDI agents are not trained psychologists, nor do they change their tactics according to a subject’s alleged disability.¹⁵⁵ Their failure to account for disability has serious constitutional implications regarding law enforcement and consent,¹⁵⁶ and can create artificial and unnecessary inconsistencies in the claimant’s evidence.¹⁵⁷ Considering CDI’s mission to improve the accuracy of disability determinations, and the wealth of disability-related resources available to them through state DDS offices, some sort of CDI agent training program on how to recognize and interact with PTSD-sufferers is surely a “reasonable modification” within the ADA and RA. If it “fundamentally alters” the CDI program, it will do so only in a positive direction, increasing both the accuracy of CDI evidence and the dignitary experience of investigated subjects.

Third and most fundamentally, the institutional character of SSA’s anti-fraud machinery, which demands a meticulous consistency from investigated claimants, discriminates against claimants with PTSD, Depression, and other impairments involving memory loss and confusion. CDI agents’ and DDS analysts’ equation of minute inconsistencies with poor credibility perniciously denies meaningful access to the SSI program according to a “test, judgment or trait” that PTSD-sufferers and others are less likely to meet. The immediate, and immediately

¹⁵⁴ See *supra* note 94.

¹⁵⁵ See *supra*, Part II.B; Shavelson, *supra* note 2.

¹⁵⁶ See generally Brian S. Love, *Beyond Police Conduct: Analyzing Voluntary Consent to Warrantless Searches by the Mentally Ill and Disabled*, 48 St. Louis U. L.J. 1469 (2004); Christine Hopkins, *Cooperative Disability Investigation Tactics, Fourth Amendment Consent to Search Doctrine, and the Diminished Sanctity of Social Security Disability Claimants’ Homes* (2005) (unpublished student note, on file with author).

¹⁵⁷ See *supra*, Parts II.A, B.

appealing answer to such an assertion is that consistency of evidence is a “essential prerequisite” in the disability determination process, and especially in the anti-fraud program.¹⁵⁸ After all, CDI investigators have a duty to root out fraud in the SSI program: can they really afford to turn a blind eye to an inconsistent story? To respond to this admittedly compelling contention, we must turn to some theoretical underpinnings of disability and discrimination.

B. Credibility and the Social Model of Disability

The social model of disability recognizes the functional disadvantages of persons with disabilities as socially constructed, a product of an environment built by and designed for a majority that defines itself as abled.¹⁵⁹ Thus, “[i]f the majority of people, instead of just a few, wheeled rather than walked, graceful spiral ramps instead of jarringly angular staircases would connect lower to upper floors of buildings.”¹⁶⁰ Disability discrimination, therefore, results not so much from any particular animus, but rather from an indifference to these majority-constructed disadvantages, and an inertia to accommodate the differently abled. The Supreme Court has accordingly noted that Congress perceived “[d]iscrimination against the handicapped . . . to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect.”¹⁶¹ Moreover, certain societal decisions about the disabled, most notably, the

¹⁵⁸ See *Easley v. Snider*, 36 F.3d 297, 305 (3d Cir. 1994) (finding a participant’s mental alertness to be an “essential prerequisite” of a state’s attendant care program, a modification of which would fundamentally alter the program).

¹⁵⁹ ANITA SILVERS, *Formal Justice, in* DISABILITY, DIFFERENCE, DISCRIMINATION: PERSPECTIVES ON JUSTICE IN BIOETHICS AND PUBLIC POLICY 13, 74-75 (Anita Silvers et al. eds., 1998); see also CLAIRE LIACHOWITZ, *DISABILITY AS A SOCIAL CONSTRUCT* (1988).

¹⁶⁰ *Id.* at 74.

¹⁶¹ *Alexander*, 105 S.Ct. at 717.

institutionalization of persons with mental disabilities, “perpetuate[] unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.”¹⁶²

Likewise, the equation of consistency of evidence with credibility of evidence, so ingrained in the state DDS’s disability determinations and CDI’s fraud reports, is an “artificial and remediable”¹⁶³ social construct.¹⁶⁴ It is no surprise to find that our adjudicatory culture, in which cross-examining lawyers impeach a witness’s credibility by extracting inconsistencies from his story, has constructed the (apparently) consistent, focused, and complete narrative as the believable one.¹⁶⁵ But for those who deal daily with persons with mental impairments—who may suffer memory gaps, poor concentration, or, for that matter, schizophrenic influences and paranoid delusions—consistency, or even factual accuracy, is not a particularly useful measure of honesty. Rather, more subjective standards of genuineness, sincerity, and forthrightness better determine when a claimant is acts with integrity or deceit towards the system. CDI and DDS analysts should rely on these more nuanced, accurate indicators for credibility determinations, rather than the comfortingly objective, but often irrelevant considerations of consistency.

Given the overtly paternalistic mission of the SSI program to provide social support for persons with disabilities, it is particularly perverse to find disability discrimination at work in its policies and practices. While institutional concerns of welfare fraud are, of course, compelling,

¹⁶² *Olmstead v. Zimring*, 527 U.S. 581, 600 (1999).

¹⁶³ See Silvers, *supra* note 159 at 74-75.

¹⁶⁴ See also MASHAW, *supra* note 75 at 131 (DDS analysts’ demand for objective evidence “risks confusing objectivity with reality. Objectivity can be a fetish, and evidentiary requirements that insist on objective evidence may have unfortunate effects on outcome.”)

¹⁶⁵ See Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 LAW & SOC. REV. 197, 207-208 (1995).

the Social Security Administration must balance its anti-fraud efforts against the accessibility—and legitimacy—of its programs.

V. Due Process

Because much of the disadvantage to the case-study refugee applicants originates in the design and application of the disability determination procedures, and the procedures of the fraud investigations that supplement targeted claims, it is worthwhile to examine these case studies under a due process standard. However, the traditional model of due process holds little promise for aggrieved SSI applicants, because this model primarily protects assertive, procedurally savvy claimants, rather than traumatized aliens more or less dependent on the government’s goodwill. Nevertheless, a less orthodox due process analysis, concerned with the substantive fairness of administrative systems, would effectively address these applicants’ grievances without unduly burdening CDI’s investigative discretion or SSA’s determination procedures.

A. Procedural Due Process in its Traditional Form

The Fifth and Fourteenth Amendments protect against deprivations of life, liberty, and property without due process of law.¹⁶⁶ In analyzing any Due Process-based claim, then, three questions are relevant: 1) Is there a protected interest at stake? 2) If so, has there been a deprivation of this interest? 3) If so, what process must accompany such a deprivation?¹⁶⁷ While the answers to the first two questions are likely “yes,” *Mathews v. Eldridge*’s precedent stands in the way of affording any more procedural protections to our Cambodian refugee SSI

¹⁶⁶ U.S. Const., Am. 5 & 14.

¹⁶⁷ *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 195 (2001).

claimants. However, a truer look at the interests-balancing of *Mathews* suggests reevaluation, and reveals several possible procedural ways to mitigate the claimants' disadvantage.

1. Protected Interest

To invoke due process protections, a plaintiff must have more than a mere desire for a government benefit, but rather a "legitimate claim of entitlement" created by state or federal law.¹⁶⁸ In other words, the plaintiff must have a sufficiently concrete claim, which, if she proves, will oblige the government to confer that benefit on her. State or federal law creates a "*Roth* entitlement" when it restricts the government's discretion to confer or deny a benefit through specific criteria. For example, a state law stating specific criteria for granting a prisoner's parole creates a liberty interest invoking due process safeguards.¹⁶⁹

The Social Security Act creates a *Roth* entitlement in SSI benefits, using mandatory language to confer a benefit to eligible recipients, where eligibility is determined according to extremely specific, regulated criteria of medically determinable disability.¹⁷⁰ While the Supreme Court has refused to rule whether applicants for benefits possess a property interest, as recipients facing termination of benefits do,¹⁷¹ nearly every federal circuit has ruled that they do,¹⁷² and

¹⁶⁸ *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

¹⁶⁹ *Bd. of Pardons v. Allen*, 482 U.S. 369, 380-81 (1987).

¹⁷⁰ See 42 U.S.C. § 1381a, "Basic entitlement to benefits," ("*Every* aged, blind, or disabled individual who is determined . . . to be eligible . . . shall . . . be paid benefits by the Commissioner.") (emphasis added); see also *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

¹⁷¹ See *Lyng v. Payne*, 476 U.S. 926, 942 (1986); but see *Fuentes v. Shevin*, 407 U.S. 67, 87 (1972) (stating "[t]he right to be heard does not depend upon an advance showing that one will surely prevail at hearing"); *Bd. of Pardons v. Allen*, 482 U.S. at 381 (parole applicant has a liberty interest); *Gregory v. Town of Pittsfield*, 470 U.S. 1018, 1021 (1985) (O'Connor, J., dissenting from denial of certiorari) (arguing that "where state law creates an entitlement to general assistance based on certain substantive conditions, there similarly results a property interest [for applicants] that warrants at least some procedural safeguards").

there seems no reason why the *Roth* entitlement’s criteria apply any less to applicants than recipients. Thus, it is exceedingly likely that denied SSI applicants have a property interest in their prospective disability benefits.

2. Deprivation

If SSI applicants have a protected interest in their benefits, then an initial denial of benefits suffices as a deprivation of that interest. *Mathews v. Eldridge* states that, for courts to obtain jurisdiction over a constitutional challenge to SSA procedures, the plaintiff need only present (unsuccessfully) a claim for benefits.¹⁷³ Because the several appellate levels of administrative review concern themselves with disability determinations, not constitutional questions, an initial denial is “sufficiently final” for plaintiff to make a constitutional claim.¹⁷⁴

3. *Mathews v. Eldridge* and Due Process

Mathews v. Eldridge has long since ratified the procedural mechanics of the SSI administrative hearing, and their post-deprivation timing. Here, the Court held the post-deprivation ALJ appeal to be sufficient process for the termination of a Social Security Disability Insurance (SSDI) benefits.¹⁷⁵ The Court found the recipient’s private interest in benefits less

¹⁷² See *Raper v. Lucy*, 488 F.2d 748, 752 (1st Cir. 1973); *Basciano v. Kerkimer*, 605 F.2d 605, 609 (2d Cir. 1978); *Kelly v. Railroad Ret. Bd.*, 625 F.2d 486, 490 (3d Cir. 1980); *Mallette v. Arlington Cty Employees’ Supp. Ret. System II*, 91 F.3d 630, 632 (4th Cir. 1996); *Holbrook v. Pitt*, 643 F.2d 1261, 1278 (7th Cir. 1981); *Daniels v. Woodbury County*, 742 F.2d 1128, 1132 (8th Cir. 1984); *Ostlund v. Bobb*, 825 F.2d 1371, 1373 (9th Cir. 1987); *Haitian Refugee Center, Inc. v. Nelson*, 872 F.2d 1555, 1562 (11th Cir. 1989); *but see Gregory v. Town of Pittsfield*, 479 A.2d 1304, 1308 (Me. 1984); *Sumpter v. White Plains Hous. Auth.*, 29 N.Y.2d 420, 425 (1972); *Zobriscky v. Los Angeles County*, 28 Cal.App.3d 930, 932 (1972).

¹⁷³ 424 U.S. at 331-32.

¹⁷⁴ *Id.* at 330.

¹⁷⁵ 424 U.S. at 349.

compelling than that of the general welfare recipient's in *Goldberg v. Kelly*,¹⁷⁶ since disability insurance benefits were not based on financial need. Furthermore, additional process was unlikely to contribute to error reduction, since termination decisions “turn, in most cases, upon routine, standard, and unbiased medical reports by physician specialists,” and “the specter of questionable credibility and veracity is not present.”¹⁷⁷

The Cambodian refugees' present complaint, however, differs in several significant ways, which distinguish *Mathews v. Eldridge* and argue for a pre-deprivation hearing. First, unlike SSDI, SSI is means-tested,¹⁷⁸ so that the SSI applicant's financial need will likely be commensurate to the welfare recipient's. Second, when CDI involves itself in an initial disability determination, this determination will often turn precisely on questions of credibility; the medical reports themselves are often impugned, and must be scrutinized more closely. While the government's interest in limiting administrative costs is as strong as ever, the first two factors indicate that CDI-targeted SSI applicants are due more process than currently afforded. The pertinent question, of course, is what form and extent this process should have.

a. Neutral Decisionmaker

Due process demands a neutral decisionmaker.¹⁷⁹ A decisionmaker need not be legally trained,¹⁸⁰ but she must not occupy “two practically and seriously inconsistent positions, one partisan and the other judicial.”¹⁸¹ However, the same standards of neutrality do not apply to

¹⁷⁶ *Id.* at 340-341; *see also* *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

¹⁷⁷ *Id.* at 344 (internal quotes omitted).

¹⁷⁸ Title XVI of the Social Security Act, 42 U.S.C. § 1382(a)(1).

¹⁷⁹ *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

¹⁸⁰ *Parham v. J.R.*, 442 U.S. 584, 607 (1979).

¹⁸¹ *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972) (quoting *Tumey v. Ohio*, 273 U.S. 510, 532, 534 (1927)).

agency officials “acting in a prosecutorial or plaintiff-like capacity.”¹⁸² Even a “combination of investigative and adjudicative functions” does not necessarily create an “unconstitutional risk of bias.”¹⁸³ Lastly, “[w]here an initial determination is made by a party acting in an enforcement capacity, due process may be satisfied by providing for a neutral adjudicator to conduct a *de novo* review.”¹⁸⁴

Courts are unlikely to recognize an impermissible risk of bias at the initial determination stage. Due process requires no higher standard of CDI investigators than that they obey the law.¹⁸⁵ Although DDS analysts mix prosecutorial and adjudicative roles by referring applicants for investigation, and later deciding the same applicants’ claims, due process does not recognize an unconstitutional risk of bias in this role-mixing alone. Though the political and financial implications of approving even a conjecturally fraudulent claim may create strong incentives for denial, as may the relative ease of denying a suspicious claimant over carefully weighing the ROI against medical evidence, the Court has proved unwilling to recognize these less tangible institutional incentives, which often depend on far too cynical a vision of bureaucracy.¹⁸⁶

b. “Some Kind of Hearing”

Supposing that a court were to order a pre-denial hearing for CDI-targeted SSI applicants, what form should that hearing take? The possible meanings of the Court’s “some kind of

¹⁸² *Marshall v. Jerrico*, 446 U.S. at 248.

¹⁸³ *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

¹⁸⁴ *Concrete Pipe and Products of Cal., Inc. v. Constr’n Laborers Pension Trust of So. Cal.*, 508 U.S. 602, 618 (1993).

¹⁸⁵ *See Marshall v. Jerrico*, 446 U.S. at 249.

¹⁸⁶ *See, e.g., Parham*, 442 U.S. at 615-616 (rejecting the suggestion that mental health professionals who decide whether to admit committed children are susceptible to “institutional pressure” to admit these children); *Goldberg*, 397 U.S. at 271 (stating that prior involvement in a case will not necessarily bar a welfare official from acting as a decision maker).

hearing” requirement are legion,¹⁸⁷ but the deeply personal nature of the claimants’ protected interest, as discussed below, favors a ‘dignitary’ approach to process, in which the applicant’s meaningful participation in process is the critical benchmark.¹⁸⁸

The opportunity to present reasons and evidence, either in person or in writing, why a certain action should or should not be taken is a fundamental due process requirement.¹⁸⁹ CDI-investigated applicants should therefore have an opportunity to answer their ROI with evidence and argument *before* the analyst makes an initial determination. The analyst’s consideration only of the CDI’s findings, without rebuttal from the applicant, “invites arbitrariness and error,”¹⁹⁰ while an applicant’s response to an ROI contributes both to the analyst’s development of the case, and the applicant’s participation in the process.

A fraud investigation likely necessitates an *oral* hearing, in which an applicant may respond to the ROI in a face-to-face meeting with the person deciding her case.¹⁹¹ In *Califano v. Yamasaki*, the importance of ‘fault’ determination required a predeprivation oral hearing:

We do not see how [fault] can be evaluated absent personal contact between the recipient and the person who decides his case. . . . [W]ritten submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale.¹⁹²

¹⁸⁷ *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); *see also* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1270 (1975).

¹⁸⁸ *See generally* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885 (1981); *see also* *Marshall v. Jerrico*, 446 U.S. at 242 (stating a central concern of procedural due process to be “the promotion of participation and dialogue by affected individuals in the decisionmaking process”).

¹⁸⁹ *Loudermill v. Cleveland Bd. of Ed.*, 470 U.S. 532, 546 (1985); *accord* *Vlandis v. Kline*, 412 U.S. 441, 452 (1973) (plaintiffs had due process right to contest their status as non-residents for purposes of in-state tuition).

¹⁹⁰ *See* *Ford v. Wainwright*, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in judgment).

¹⁹¹ While the administrative hearing provides such an opportunity, this section assumes some form of *pre*-deprivation hearing, before an SSA analyst makes an initial determination.

¹⁹² 442 U.S. 682, 697 (1979); *see also* *Parham*, 442 U.S. at 607 (finding that, where parents seek to institutionalize a child, the decisionmaker must “of course” personally evaluate the child first).

Most of the time, neither the analyst who makes an initial determination, nor the medical expert who evaluates the evidence, has any personal contact with the applicant.¹⁹³ *Califano* indicates that, where the applicant's credibility is in question, such distance is improper.

“Where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so he has an opportunity to show that it is untrue.”¹⁹⁴ Currently, SSI applicants investigated for fraud see their ROI only after their analyst's initial decision.¹⁹⁵ A pre-deprivation hearing would necessarily require that SSA disclose ROIs and other adverse evidence to the applicant, so that she may meaningfully rebut them.

CDI-investigated applicants may also be entitled to counsel, though not necessarily legal counsel. *Vitek v. Jones* held that, where authorities believe a prisoner to suffer a mental disorder requiring involuntary treatment, it is “appropriate” to provide counsel for the prisoner's hearing, since “such a prisoner is more likely to be unable to understand or exercise his rights.”¹⁹⁶

Likewise, traumatized refugees with limited English will less likely be able to exercise their rights, assert their cases against state medical experts' testimony, and defend themselves against

¹⁹³ See *supra* note 27 and accompanying text.

¹⁹⁴ *Greene v. McElroy*, 360 U.S. 474, 496 (1959) (finding government contractor deprived of his security clearance for alleged Communist sympathies had a right to see evidence against him).

¹⁹⁵ See HALLEX I-1-5-15, I-2-1-35. The HALLEX are guidelines for ALJs at the administrative appellate level, and are available at http://www.ssa.gov/OP_Home/hallex. See also Matt Greenbaum & Charles E. Binder, *A Few Ideas on How to Handle an OIG Investigation of a Worthy Disability Claim*, NATIONAL SOCIAL SECURITY DISABILITY LAW CONFERENCE, Sec. C, 73, 75 (Oct. 2002): “The OIG has a reputation for making sure the [investigated claimant's] representative gets a copy of the [ROI] on the day of the hearing.”

¹⁹⁶ 445 U.S. 480, 496-497 (1980) (plurality opinion). Justice Powell wrote separately to state that Jones's appointed assistance need not be legal, but only competent and independent, acting in the prisoner's sole interest. *Id.* at 500 (Powell, J., concurring in part).

the threat of prosecution and deportation.¹⁹⁷ However, the Court has often rejected a duty to provide counsel in “non-adversarial” hearings, in an effort to preserve their “informality.”¹⁹⁸ But where government agents have challenged an applicant’s credibility, and exposed the applicant to fines or even deportation, the “non-adversarial” quality of the hearing is illusory.

These procedural mechanisms (notice, oral hearing, right to counsel), and their more adversarial cousins (such as cross-examination) have only limited relevance to SSI applicants. An uneducated refugee with sparse English will extract limited benefit from reviewing his ROI, or from his right to rebut its findings before the analyst.¹⁹⁹ More importantly, a PTSD-sufferer will have a psychological aversion to discussing his traumatic experiences,²⁰⁰ which may prevent him from presenting an adequate response to CDI’s conclusions. Although SSA-provided translators and claimant representatives may mitigate some of these difficulties, the administrative cost of extra procedures may increase the already substantial processing time for applications, and may result in underfunded, compromised, or sub-standard services.

Moreover, the paradigm of more-is-better hearing procedures is inappropriate for the SSI program. These procedural mechanisms advantage assertive and resourceful litigants, while the SSI program’s mission is overtly paternalistic and (albeit circumspectly) protective.²⁰¹ Shifting the protective role to counsel, or to empowering procedural mechanisms, subtly suggests that the

¹⁹⁷ Compare with *Lassiter v. Dep’t of Social Services*, 452 U.S. 18, 32-33 (1981) (finding an indigent mother in parental rights hearing did not have right to appointed counsel because she was not threatened with deprivation of liberty through criminal prosecution, no expert witnesses were involved, and appointed counsel would likely not have made a determinative difference).

¹⁹⁸ See *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 324; *Goldberg*, 397 U.S. at 270-71; Friendly, *supra* note 187 at 1287-90.

¹⁹⁹ See Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 788-90 (1974).

²⁰⁰ DSM-IV, *supra* note 61 at 428.

²⁰¹ Mashaw, *supra* note 199 at 780-82.

applicants or their representatives, not the Government, have the responsibility to protect their rights.²⁰² These procedural mechanisms also risk creating an “externally-oriented” agency culture, more concerned with guessing what mechanism a future court may or may not require than providing substantive justice to applicants.²⁰³

B. Substantive Fairness as Due Process

Rather than adding procedural mechanisms to an already highly regulated system, courts should concern themselves with how well the current mechanisms provide substantive fairness. Surely, due process encompasses not just the sufficiency of process, but the competent administration of process as well.²⁰⁴

A quick examination of the theoretical underpinnings of the SSI claimant’s so-called property interest confirms that the substantive fairness of process is indeed the true prize here. Professor Van Alstyne has claimed that the Court’s protection of government-dispensed benefits as property interests, based on Professor Reich’s “new property” thesis,²⁰⁵ was a misdirected pretext to get a “constitutional handle” on unfair agency actions.²⁰⁶ In order to invoke due process protections, Van Alstyne argues, courts gave novel, peculiar content to the property

²⁰² *See id.* at 782-783.

²⁰³ MASHAW, *supra* note 75 at 9.

²⁰⁴ While the administration of process is arguably a subject “committed to agency discretion by law,” and thus unreviewable by courts under the APA, *see Heckler v. Chaney*, 470 U.S. 821, 830 (1985), this standard does not preclude courts from examining the same subject constitutionally under the Due Process Clause, *see Webster v. Doe*, 486 U.S. 592, 603 (1988).

²⁰⁵ In 1964, Reich argued that government-conferred wealth, from public contracts to welfare benefits, had become so vital to modern citizenry that it should be surrounded with the same legal protections as real property. *See generally* Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

²⁰⁶ William Van Alstyne, *Cracks in “the New Property”*: *Adjudicative Due Process in the Administrative State*, 62 Cornell L. Rev. 445, 484 (1976).

interest,²⁰⁷ content which eventually stabilized as the *Roth* entitlement. For SSI applicants, the language of ‘property’ and ‘entitlements’ is indeed misleading: an applicant has no “entitlement” to benefits in the sense of ownership or any guarantee of receiving benefits; rather, the *Roth* entitlement, by invoking due process protections, fulfills a “promise-keeping” function: it is “an assurance that government will employ a decisionmaking protocol reasonably likely to yield correct application of the legally relevant substantive criteria.”²⁰⁸ The refugee applicants’ complaint, then, has less to do with protecting property, and everything to do with fairness.

1. Administrative Consistency as Due Process

The Administrative Procedure Act (APA) as well as common-law doctrines of administrative duty prohibit agencies from acting arbitrarily or capriciously, and obligate agencies to follow their own promulgated rules.²⁰⁹ In his dissent to *United States v. Caceres*, Justice Marshall argued persuasively that the Due Process Clause itself requires agency to adhere to its own rules and standards.²¹⁰ Justice Marshall noted that several landmark decisions uphold-

²⁰⁷ *Id.* at 456-57.

²⁰⁸ Cynthia Farina, *On Misusing “Revolution” and “Reform”: Procedural Due Process and the New Welfare Act*, 40 ADMIN L. REV. 591, 622 (1998).

²⁰⁹ 5 U.S.C. § 706; *United States v. Caceres*, 440 US 741, 753-54 (1979); *Morton v. Ruiz*, 415 U.S. 199, 232, 235 (1974); *Gardner v. Fed’l Comm. Comm’n*, 530 F.2d 1086, 1089-90 (D.C. Cir. 1976); *see also* *Central Laborers’ Pension Fund v. Heinz*, 541 US 739, 748 (2004) (agencies must follow their regulations over internal manuals or longstanding practice). At least one court has determined that this obligation extends to all self-adopted rules, not just formal regulations. *See* *Massachusetts Fair Share v. Law Enforcement Assistance Admin.*, 758 F.2d 708, 711 (D.C. Cir. 1985); *but see supra* note 26 (POMS does not bind Social Security Administration).

²¹⁰ 440 U.S. at 758, 764 (Marshall, J., dissenting).

ing this principle were based on due process,²¹¹ and recognized the government's protective responsibility, under the Due Process Clause, to ensure that its agencies act legitimately.²¹²

While Justice Marshall's conception of administrative consistency and legitimacy as a due process concern met with little support, the Court has stated that an agency's violation of its own rules raises due process issues when the plaintiff was "entitled to rely" on the violated rule,²¹³ the plaintiff is under investigation,²¹⁴ or the agency rule was designed to safeguard the plaintiff.²¹⁵ Specifically, due process requires that agencies, in prosecuting penalties against individuals, must follow their own rules of evidence and base these penalties on reliable, legitimate evidence.²¹⁶ Due process also forbids agencies from "entrapping" individuals by penalizing them for actions taken consistently with the agency's rules.²¹⁷ However, non-obvious agency errors do not raise constitutional issues.²¹⁸

Under these principles, CDI investigators and DDS analysts must scrupulously follow SSA's promulgated regulations, and possibly the standards set in the POMS. Specifically, DDS analysts must follow the rules of evidence, which give controlling weight to the claimant's credible treating sources.²¹⁹ While it may be unwise to restrict the scope of the evidence that CDI agents may report in the ROIs, it is imperative that the agents or some other SSA official

²¹¹ *E.g.* Morton v. Ruiz, 415 U.S. at 205, 235, 236; Bridges v. Wixon, 326 U.S. 135, 153, 154 (1945); *see* *Caceres*, 440 U.S. at 758 n.1 (Marshall, J. dissenting).

²¹² *See* *Caceres*, 440 U.S. at 762 (Marshall, J., dissenting).

²¹³ *Id.* at 752-753 (opinion of the Court); *but see* Gardner, 530 F.2d at 1090 (publishing rules creates a "reasonable expectation" that agency will follow such rules).

²¹⁴ Bridges v. Wixon, 326 U.S. at 152, 153.

²¹⁵ *Caceres*, 440 U.S. at 759.

²¹⁶ *Bridges*, 326 U.S. at 154, 156; *see also id.* at 159 ("[T]he more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence.") (quoting *ICC v. Louisville & Nashville R. Co.*, 227 U.S. 88, 93 (1913)).

²¹⁷ *See* *Cox v. State of Louisiana*, 379 U.S. 559, 571, 574 (1965).

²¹⁸ *Caceres*, 440 U.S. at 752.

²¹⁹ *See supra* note 91.

evaluate this evidence consistent with SSA’s standards of disability and evidentiary weight, and incorporate such an analysis into the ROI.²²⁰ Moreover, CDI agents must acknowledge that SSI paperwork and forms, by limiting the claimant’s response options, may be responsible for many of the “inconsistencies” they cite so insinuatingly.²²¹ To do otherwise might very well constitute the agency “entrapment” described and prohibited by the Court. Finally, CDI agents must take care to follow SSA’s rules on providing translators, even and especially when they doubt claimants’ limited English proficiency.²²²

2. “Bureaucratic Justice” as Due Process

In his 1983 study of SSI and SSDI disability determinations, Professor Mashaw measures the Social Security Administration against an administrative ideology of bureaucratic rationality, which prioritizes an accurate and transparent execution of legislative will.²²³ SSA mostly follows the rational model, as it creates transparent guidelines finely tuned to carry out Congress’s objectives.²²⁴ However, the CDI program, at least with respect to the case-study Cambodian refugee SSI applicants, falls miserably short. The case-study ROIs are not bureaucratically rational, as they disregard Congress’s and SSA’s evaluative standards of disability,²²⁵ present biased and superficial evidence riddled with cultural and ability-related

²²⁰ *See supra*, Part II.B. Although OIG and its sub-entities enjoy broad statutory discretion in their investigations, *see* OIG Audit Report, *supra* note 17 at ii, the SSA Commissioner’s promulgated rules provide binding legal standards against which a court may review CDI agents’ actions. *See* Greater Los Angeles Council on Deafness, Inc. v. Baldrige, 827 F.2d 1353, 1361 (9th Cir. 1987); Cal. Human Devel’t Corp. v. Brock, 762 F.2d 1044, 1049 n.28 (D.C. Cir. 1985).

²²¹ *See, e.g., supra* note 127 and accompanying text.

²²² *See supra*, Parts II.A, III.A.

²²³ MASHAW, *supra* note 75 at 25.

²²⁴ *Id.* at 35.

²²⁵ *See supra* Part II.B.

inaccuracies,²²⁶ and appear to circumvent SSA's rules of evidence-weighting.²²⁷ Systemwide, administrative law judges have expressed concern over the hearsay and out-of-context observations contained in the ROIs.²²⁸

Mashaw suggests an approach to substantive administrative fairness based on bureaucratic rationality, in which an internal Quality Assurance program, rather than external judicial interventions and claimant-driven procedural mechanisms, monitor and correct the agency's performance.²²⁹ In order to preserve beneficial agency discretion, he distinguishes between clear errors and "poor exercises of discretion," where an agency official's actions, while not clearly the wrong choice, are clearly not the right choice either.²³⁰ Such a program's success depends in part on its ability to engineer an agency culture with clear normative standards.²³¹ These norms are especially difficult to engineer in the SSI program, as Congress and Commissioners alike have stressed competing goals of benevolence and fiscal conservatism.²³²

Such a distinction well describes the dilemma of evaluating the Oakland CDI unit and its ROIs. Given past examples of translator fraud and refugee fraud rings, as well as the importance of protecting the SSI program against exploitation, one cannot rightly say that CDI agents clearly erred or abused their discretion in investigating the case-study claimants, or collecting the evidence they did. Rather, one may say that CDI agents have exercised their discretion less than optimally, to the detriment of these applicants and the accurate determination of their claims. A Quality Assurance monitoring and feedback program, applied to CDI, would preserve the agents'

²²⁶ See *supra* Part I.D.2.

²²⁷ See *supra* Part II.B.

²²⁸ OIG Audit Report, *supra* note 19 at 9.

²²⁹ See generally Mashaw, *supra* note 199 at 776-804.

²³⁰ MASHAW, *supra* note 75 at 150.

²³¹ *Id.* at 156, 159.

²³² *Id.* at 159, 160.

discretion to investigate fraud effectively, while improving these investigations' accuracy, judgment, and treatment of claimants. While the normative goals of such a CDI program—investigating fraud and protecting claimants—are indeed competing, they are not irreconcilable, as law enforcement agencies in general must bridge these goals every day.

Though nontraditional, the judicial imposition of a quality assurance program would be both reasonable and effective as a due process remedy.²³³ As Mashaw argues, the “realistic prospects” of traditional procedural protections should affect a court’s evaluation of what due process requires of social welfare programs.²³⁴ The existence of a sound quality assurance program necessarily plays into such an evaluation.²³⁵ Moreover, *Goldberg v. Kelly* directs courts to tailor due process to the agency’s context and the claimant’s capabilities;²³⁶ thus, “when due process cannot be assured by trial-type hearings, additional or different techniques for assuring fairness become appropriate.”²³⁷ Given the SSI program’s explicitly paternalistic mandate, and the vulnerability and functional limitations of SSI claimants, internal quality assurance measures are a sensible and attractive remedy.

Finally, the judicial imposition of a quality assurance program as a due process remedy may prove less of an intrusion into legislative and administrative authority than the imposition of

²³³ *But see Heckler*, 470 U.S. at 831-32, finding agency decisions not to bring enforcement actions presumptively unreviewable. *Heckler*, interpreted broadly, may preclude courts from reviewing (under the APA) an agency’s decision not to impose intra-agency enforcement mechanisms on its programs and personnel. *See id.* (noting agencies’ particular expertise to evaluate such multivariate decisions). But *Heckler* does not in itself bar judicial *remedies* calling for greater enforcement, however implicitly it may discourage them; more importantly, the reviewability standards of the APA do not apply to due process inquiries. *See supra* note 204.

²³⁴ Mashaw, *supra* note 199 at 810.

²³⁵ *Id.* at 807.

²³⁶ 397 U.S. at 267.

²³⁷ Mashaw, *supra* note 199 at 810.

more traditional, judicially delineated hearing requirements.²³⁸ Indeed, such a management-based approach evaluates “what process is due the social welfare claimant in the social welfare system’s own terms.”²³⁹

Policy Proposal and Conclusion

The Social Security Administration and its Inspector General have available numerous feasible and cost-contained remedies against the ongoing violations detailed above. These remedies strike a meaningful balance between the peremptory norms of anti-discrimination and due process and the government’s duty to protect its social welfare programs against fraud.

First and foremost, the Office of the Inspector General should train CDI agents to interact constructively and responsibly with persons with disabilities and culturally isolated individuals. Trained, professional CDI agents are essential to an anti-fraud program that not only respects applicants’ rights and dignities, but also reports the most accurate evidence to disability analysts. Reports of Investigations should present evidence neutrally, without over-emphasizing minor inconsistencies or slanting ambiguous facts as suspicious, and discuss the evidence in the context of the applicant’s linguistic or cultural limitations and claimed disability. This would still supply analysts with all the evidence gathered, but in a manner more consistent with Social Security’s mission to assist the most vulnerable populations. The Inspector General should further develop a Quality Assurance program to monitor, scrutinize and adjust the practices of CDI units, to ensure that they investigate claimants fairly, rationally, and responsibly. Given that there are

²³⁸ *Id.* at 816. One may even, similar to the plaintiffs in *Lau v. Nichols*, ask a court to declare the current situation a violation of due process, and compel the Social Security Administration to “apply its expertise” in addressing this violation. *See* 414 U.S. at 565.

²³⁹ *Id.* at 824.

currently only nineteen CDI units in the nation,²⁴⁰ and given the Social Security Administration's own elaborate Quality Assurance program,²⁴¹ the costs of training and monitoring the CDI units should fall well within fiscal constraints.

Similarly, the Social Security Administration should train and monitor state Disability Determination Services analysts to account for culture and ability in evaluating CDI Reports of Investigation and deciding the credibility of evidence. Such training and enforcement would add much-needed operational content to the POMS's ambiguous, and highly discretionary guidelines. This would also prevent unanticipated cultural traits—such as a large refugee family afflicted with the Post-Traumatic Stress Disorder—from unfairly triggering fraud investigations, or linguistic and ability-related impairments from creating artificial but prejudicial inconsistencies in the record. Again, because SSA already trains and monitors state analysts on a multitude of other concerns,²⁴² the cost to the agency would be minimal, and the benefit to applicants great.

The Social Security Administration should also revise its fraud triggers to account for mental health providers who specialize in certain impairments, and provide mechanisms for flagged providers to exonerate themselves. Not only will this protect specialists and the patients they serve, but it will also save CDI units considerable opportunity costs in pursuing false leads, as the Oakland CDI unit has done with Dr. B.L. and her patients for four years now. Finally, SSA must ensure that the tests employed by CDI agents and Consultative Examiners translate effectively to other cultures. Discrimination aside, simple prudence demands that the agency rely on tests that are as accurate as possible. Again, this will further CDI's investigative mission as much as it protects claimants from agency error.

²⁴⁰ OIG Audit Report, *supra* note 19 at 2.

²⁴¹ *See generally* Mashaw, *supra* note 199 at 791-804.

²⁴² *Id.*

The main cost associated with these measures is not the expense of implementation, but rather the cost of correcting false positives. For every initial claim denied due to an unfavorable Report of Investigation, the Social Security Administration saves an estimated \$66,500.²⁴³ The measures proposed above do nothing to correct false negatives; thus, CDI's improved accuracy would necessarily lead to approved claims that would otherwise have been denied, though denied inappropriately. However, this author is not yet so cynical as to think Social Security would countenance gross inaccuracy and unfairness to retain money from qualified claimants.

Given the doctrinal limitations of national origin discrimination, disability discrimination, and due process,²⁴⁴ as well as the ancillary barriers attached to any potential litigation based on these theories,²⁴⁵ it may prove more worthwhile for our aggrieved refugee applicants to seek relief through political channels rather than through the courts.²⁴⁶ Yet the disadvantages of litigation should not mislead one to think the Social Security Administration, its Cooperative Disability Investigations program, and state Disability Determination Services have not violated the legal norms represented by these three causes of action. The Social Security Administration may well find that, liability in court aside, it must ensure that its programs maintain legitimacy in the eyes of the public, and particularly, the public's representatives. Assuring the accessibility of the Supplemental Security Income program, and the fairness and responsibility of its anti-fraud efforts, is thus well worth these modest but vital measures.

²⁴³ OIG Audit Report, *supra* note 19 at 2 n.5.

²⁴⁴ *See, e.g., supra* notes 118, 122, 124, 142, 175 and accompanying text.

²⁴⁵ *See, e.g., supra* notes 124, 137, 171, 204 and accompanying text.

²⁴⁶ *See also* MASHAW, *supra* note 75 at 189 (discussing ineffectiveness of judicial intervention).