

DISABLING FASCISM: A STRUGGLE FOR THE LAST LAUGH IN TRUMP’S AMERICA

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*“The arts are an even better barometer of what is happening in our world
than the stock market or the debates in Congress.”*

—Hendrik Willem van Loon¹

I. INTRODUCTION	287
II. COREY LEWANDOWSKI’S SAD TROMBONE FOR CHILDREN IN CAGES: REFLECTIONS ON TRUMP AND THE DEBASED DISCOURSE OF HIS #BESTPEOPLE	288
III. THE POLITICS OF IMAGING THE DIS/ABLED IN THE STRUGGLE AGAINST THE DEPRAVITY OF FASCISM: THEN AND NOW	294
IV. LEGISLATIVE AND ADMINISTRATIVE ATTACKS ON THE CIVIL RIGHTS OF DISABLED PERSONS: SHRINKING THE DUTY TO ACCOMMODATE AND THE AVENUES OF REMEDIATION	298
V. THE POLITICS OF EXCLUSION MEETS THE POLITICS OF DISPOSSESSION: OF BORDER WALLS AND PILFERED BUDGETS	302
VI. DIS/ABLED PERSONS AND THE TRUMP ADMINISTRATION’S “PUBLIC CHARGE RULE”	305
VII. THE LAST LAUGH IN AMERICA	309

I. INTRODUCTION

Six years before the start of the Second World War and seven months after Hitler’s appointment as Chancellor of Germany, the German government instituted the “Law for the Prevention of Progeny with Hereditary Diseases.” The moral depravity that started as a sterilization program targeting “useless eaters” and lives “unworthy of life” degenerated into a “euthanasia” program that murdered at least 250,000 people with mental and physi-

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¹ HENDRIK WILLEM VAN LOON, THE ARTS 630 (1939).

cal dis/abilities as an “open secret” until 1941, when the Bishop of Munster, Clemens August Count von Galen, delivered a sermon protesting the killing of “unproductive people.”² Although the Trump Administration has not yet driven the United States to implement systematic killings of undesirables, informed reflection cautions that the cultural and legal shifts we are witnessing in the era of Trump arc back to pre-World War II Germany. In order to understand how and why that disturbed time resonates with our own, it is necessary but not sufficient to reflect on images and stories served up by the 24/7 news cycles of major cable networks or by the glitter of our contemporary art markets.³ Understanding the present requires understanding the past precisely because repetition is taking place. The Trump Administration’s policies target people with dis/abilities, veterans, the poor, the foreign and displaced—for exclusion and dispossession in ways that reveal the elements of a resurgent fascism. In this essay, I probe evidence linking the emergence of fascism to the treatment of these vulnerable groups and reflect on the implications of Trump’s current day policies for the future of Latinx peoples, both within the United States and beyond its borders. The linkages connecting the era of Trump to the period in Germany just before the rise of Hitler include the debasement of public discourse about vulnerable groups, the aggressive promotion of spectacular militarism, vilification of otherness and polarization of difference, as well as the use of state legislative and administrative power to exacerbate, rather than combat or remedy, the further dispossession and exclusion of political scapegoats targeted to distract and confuse a national majority disoriented by the consequences of military defeat and economic crisis.

II. COREY LEWANDOWSKI’S SAD TROMBONE FOR CHILDREN IN CAGES: REFLECTIONS ON TRUMP AND THE DEBASED DISCOURSE OF HIS #BESTPEOPLE

Aired on June 19, 2018, President Donald Trump’s former campaign manager Corey Lewandowski appeared on Fox News Channel’s television talk program “The Story with Martha MacCallum.” He appeared opposite former Hillary Clinton Senior Adviser Zac Petkanas. Petkanas was commenting on a recent story about a Mexican 10-year-old girl with Down Syndrome who was reportedly separated from her mother and placed in a cage. Petkanas raised the story, commenting: “I read today about a 10-year-old

² See *Nazi Persecution of the Disabled: Murder of the “Unfit,”* U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/information/exhibitions/online-exhibitions/special-focus/nazi-persecution-of-the-disabled>, archived at <https://perma.cc/9Q3R-ZBQP>; see also *German Bishop Condemns The Killing Of People With Disabilities*, U.S. HOLOCAUST MEM’L MUSEUM, <https://newspapers.ushmm.org/events/german-bishop-condemns-the-killing-of-people-with-disabilities>, archived at <https://perma.cc/SJJ2-2PUC>.

³ See generally Graham Bader, *THE BODY POLITIC: “GLITTER AND DOOM” AT THE METROPOLITAN MUSEUM OF ART* by Graham Bader, artforum.com, <https://artforum.com/inprint/issue=200701&id=12255>, archived at <https://perma.cc/HZ65-VELA> (this article appearing in Art Forum shows the arc back to fascism was already there to be seen in 2007).

girl with Down Syndrome who was taken from her mother and put in a cage.”⁴ As Petkanas was completing his sentence, Lewandowski blurted out “Womp, womp,” imitating a sad trombone sound. This was not the articulation of a reasoned argument, policy position or justification. It was the sound you might hear in a clown show, that “womp womp” sound made by a sad clown, who is mocking you, saying it must be really sad to be you. Visibly startled by the sound, Petkanas interrupted himself demanding, “Did you say, ‘womp womp,’ to a 10-year-old with Down Syndrome being taken from her mother?” Then spooling up and shouting, Petkanas added, “How dare you! How absolutely dare you, sir.”⁵

Lewandowski did not back down or apologize for the remark. Instead, he appeared the next evening as a guest on Fox News Network’s “America’s Newsroom” as a bit of a reprise, doubling down on his prior day blurted interjection. As FNN co-host Sandra Smith invited Lewandowski to address his comments, she opened the interview commenting that “dealing with children is very sensitive and obviously very highly charged subject.” She noted that Lewandowski had “gotten a lot of attention in the media” for his “womp womp” remark the prior evening. Lewandowski responded that Petkanas was “politicizing children” and that his own remark was directed at Petkanas:⁶

My comment was specifically about Zac [Petkanas] trying to politicize the use of children as a political football in this discussion because the law is very clear—when parents commit crimes when coming into this country regardless who their children are they are separated because we are a nation of laws. That has never changed. This is a policy that is implemented by the Obama administration and Congress can change this. But they’ve chosen not to do that. And so it doesn’t matter to me if you come with one child or ten children. Nobody wants to see their parents separated from their children. But the parents understand that by coming to this country illegally they are committing a crime and there are consequences just as there would be in any other country in the world. So let’s not make this about politicizing children. Let’s make it about the rules and the laws and Congress has the ability

⁴ *CNN Tonight: Children Still Being Taken From Their Parents At The Border As President Meets With House GOP; Seth MacFarlane, Judd Apatow And Other Fox Talent* (television broadcast, CNN Jun. 20, 2018), available at 2018 WLNR 18913264. The clip excerpted on CNN was originally a full broadcast on Fox News. However, the original clip of the show has been replaced on the Fox News video archive maintained on the FoxNews website with a follow-up interview held with only Mr. Lewandowski, where he was apparently given the opportunity to address the “attention” he had garnered in the media the day before.

⁵ *Lewandowski Mocks Girl Separated from Mom* (television broadcast, CNN Jun. 19, 2018), <https://www.cnn.com/videos/politics/2018/06/20/lewandowski-fox-news-womp-womp-ctn-sot.cnn>, archived at <https://perma.cc/3SPM-R3ND>.

⁶ *Corey Lewandowski Addresses Comment on Family Separations* (television broadcast, Jun. 20, 2018), <http://video.foxnews.com/v/5799739356001/>, archived at <https://perma.cc/9QRU-CEHL>.

to change that. I was mocking Zac [Petkanas], a liberal democratic national committee activist who is doing nothing but politicizing the issue of making an example of one particular child. If you want to talk about children illegal immigrants [sic]—let’s talk about Kate Steinle, let’s talk about Jameel Shaw, who is permanently separated from their families because they were killed by illegal immigrants. Let’s talk about Brian Terry and his family, the border agent who was killed. . . .”

Smith interrupts Lewandowski to inquire, “Do you feel that you owe an apology of any sort?” Lewandowski replies quizzically, “An apology? I owe an apology to the children whose parents are putting them in a position that is forcing them to be separated. We owe an apology to Jameel Shaw, and Brian Terry and Kate Steinle’s family who have allowed those individuals to be killed by illegal aliens. The American people owe an apology to those people because when you cross the border illegally you have committed a crime and there is accountability for committing crimes and there should be.”⁷

Notwithstanding Lewandowski’s non-apology and professed non-attack on children or disabled children in particular, his comments drew much ire and condemnation.⁸ Lewandowski was subsequently dropped by Leading Authorities, Inc., one of Washington DC’s top speaker’s bureaus, and his speaker’s bureau. Even Megyn Kelly, former corporate lawyer and news anchor at Fox News, condemned Lewandowski, calling him a “coward.”⁹ Indeed, Lewandowski was widely and sharply reproached for mocking an immigrant child with Down Syndrome, but still he refused to apologize for the comment.¹⁰ One might wonder at his steadfastness, perhaps, until one discovers the one major pillar of the Trump base that was actually quite happy with Lewandowski’s “womp womp.” That faction is literally the Nazi faction.¹¹ Racist online sites such as 4Chan’s /pol/ forum have been

⁷ *Id.* To see the archived video clip in its entirety, visit Fox News’ video library at the Network’s webpage.

⁸ *See, e.g.,* Matthew Haag, ‘Womp Womp’: Corey Lewandowski Mocks Child With Down Syndrome Separated From Mother, *THE NEW YORK TIMES*, Jun. 20, 2018, <https://www.nytimes.com/2018/06/20/business/media/corey-lewandowski-womp-womp-down-syndrome.html>, archived at <https://perma.cc/M5XQ-PU2G> (noting unmitigated criticism came swiftly from a multiplicity of prominent leaders in diverse sectors. Among these critics were Megyn Kelly, a former Fox News host, Bob Vander Plaats, a national co-chairman of Senator Ted Cruz’s 2016 presidential campaign, and current head of Family Leader, a conservative Christian organization, and Sara Hart Weir, the president of the National Down Syndrome Society).

⁹ Megyn Kelly (@megynkelly), *There is no low to which this coward Corey Lewandowski won’t sink. This man should not be afforded a national platform to spew his hate*, TWITTER (JUNE 19, 2018, 5:32 PM), <https://twitter.com/megynkelly/status/1009232450915008513>, archived at <https://perma.cc/J4DY-ZD3G>.

¹⁰ Luke Darby, *Corey Lewandowski Is Losing Work After Saying “Womp Womp” About a Detained 10-Year-Old with Down Syndrome*, *GQ*, Jun. 21, 2018.

¹¹ *Id.*

turning that video clip into countless memes.¹² The Daily Stormer, a Neo-Nazi site and online hub for American Nazis heralded that Lewandowski's "womp heard round the world" had ushered in "THE AGE OF THE WOMP," and empowered them.¹³

What bears noting is that these attitudes, these outlooks, and this depravity come from the top. According to [News Anchor] Don Lemon, "this is what Donald Trump wants."¹⁴ Lemon demonstrates his point by airing a video clip of Trump campaigning in South Carolina in late 2015. Then the Republican presidential front-runner, Trump attempted to defend his claim that "thousands" of Muslims in New Jersey cheered as the World Trade Center collapsed in the 9/11 attacks. In the course of doing so, Trump appeared to mock New York Times journalist Serge F. Kovaleski, a Times reporter with arthrogryposis, a congenital joint condition which impairs movement of his arms.¹⁵ Kovlaeski had written a series of pieces critical of Trump. "Now, the poor guy, you gotta see this guy," Trump gleefully shouted to the rally crowd.¹⁶ Eyes and mouth agape, Trump spastically flailed his forearms and curled his hands in front of him, his right hand angled in, apparently performing an imitation of Kovaleski. The crowd burst into laughter, showing their teeth at the mockery.¹⁷ When the President attacks a person on the basis of a dis/ability, he gives permission for the mob to prey on the supposed weak. History teaches this precedent is indeed a dangerous one.¹⁸

The rise of fascism in Italy, Spain, and Germany was characterized by the reorganization and regimentation of society and labor administered under the leadership principle.¹⁹ The organization and hierarchy of German fas-

¹² Will Sommer, *Corey Lewandowski's 'Womp Womp' Co-Opted by 4Chan*, *Daily Stormer*, *Reddit*, Jun. 21, 2018, <https://www.thedailybeast.com/corey-lewandowskis-womp-womp-co-opted-by-4chan-daily-stormer-reddit>, archived at <https://perma.cc/DS8W-P6L9>.

¹³ *Id.*

¹⁴ *Trump mocks reporter with disability—CNN Video*, <https://www.cnn.com/videos/tv/2015/11/26/donald-trump-mocks-reporter-with-disability-berman-sot-ac.cnn>, archived at <https://perma.cc/NX2V-PLAM>; Callum Borchers, *Meryl Streep Was Right. Donald Trump Did Mock a Disabled Reporter.*, *WASHINGTON POST*, Jan. 9, 2017, https://www.washingtonpost.com/news/the-fix/wp/2017/01/09/meryl-streep-was-right-donald-trump-did-mock-a-disabled-reporter/?utm_term=.34e57193d71e, archived at <https://perma.cc/37SG-8FMT> (widespread rebuke of Trump's impersonation of Kovaleski included Meryl Streep's condemnation in her Oscar acceptance speech for best actress).

¹⁵ *Trump mocks reporter with disability—CNN Video* (CNN Nov. 26, 2015), <https://www.cnn.com/videos/tv/2015/11/26/donald-trump-mocks-reporter-with-disability-berman-sot-ac.cnn>, archived at <https://perma.cc/XA2G-NCTQ> (this video was originally published on January 09, 2017 in the Los Angeles Times).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See, e.g., John Bowden, *NYPD creates special unit for far-right and neo-Nazi threats*, *Text, The Hill* (Dec. 11, 2019), <https://thehill.com/homenews/state-watch/474159-nypd-creates-special-unit-for-far-right-and-neo-nazi-threats>, archived at <https://perma.cc/LV8N-A264>.

¹⁹ *Fascism in Action: A Documented Study and Analysis of Fascism in Europe* (1947) 124, <https://heionline.org/HOL/P?h=hein.usccsset/usconset51365&i=1&a=bWlhbWkuZWR1>, archived at <https://perma.cc/6DEV-KANQ> (comparing Italy, Spain and Germany during the rise of fascism in the 1930' and 40's).

cism rejected the “democratic mass idea.”²⁰ Prior to his rise to power, Hitler developed his vision of a fascist utopia in *Mein Kampf* in which he boasted of a “view of life which, by rejecting the democratic mass idea, endeavors to give this world to *the best people*.”²¹ This principle of governance not by majority, but by a single “personality,” where “one man decides” surrounded by a “council” of the “*best heads of the national community*”²² has been revived. These boasts ring familiar in Trump’s insistence that Americans should leave the governing to him, because as then presidential candidate Trump crowed to Robert Costa in a phone interview at the time, “I’m going to surround myself only with *the best and most serious people*. We want top of the line professionals.”²³ Trump’s idea of the best people landed a bevy of strategic advisors within his circle who, if nothing else, certainly excel at making headlines for themselves. His campaign manager Corey Lewandowski, for instance, made headlines for allegedly yanking the arm of a female reporter, was chided for appearing drunk on air during an interview with Fox Business Network, and was accused of sexual assault for allegedly slapping the bottom of a female Donald Trump supporter while allegedly drunk at a party.²⁴

Similarly, Lewandowski’s successor Paul Manafort became a “perpetual headline machine” most notably for landing himself in federal penitentiary for tax and bank fraud.²⁵ Trump’s erstwhile chief strategist Stephen Bannon made news for multiple events including alleged sexual harassment, allegations of domestic violence, use of a homophobic slur, anti-Semitism, and for firing a dis/abled woman, “while she was on a protected Family and Medical Leave Act maternity leave, even though she had been forced to continue performing her job responsibilities from home throughout her ma-

²⁰ CARL COHEN, COMMUNISM, FASCISM, AND DEMOCRACY: THE THEORETICAL FOUNDATIONS 380 (2d ed. 1972).

²¹ *Id.* at 380–81 (emphasis added).

²² *Id.* at 381 (emphasis added).

²³ Philip Bump, *Donald Trump Only Hires the Best People (at Generating Unhelpful Headlines)*, WASHINGTON POST, Aug. 30, 2016, <https://www.washingtonpost.com/news/the-fix/wp/2016/08/30/donald-trump-only-hires-the-best-people-at-generating-unhelpful-headlines/>, archived at <https://perma.cc/99V9-DHWL> (emphasis added).

²⁴ Maggie Haberman & Michael M. Grynbaum, *Corey Lewandowski, Donald Trump’s Campaign Manager, Is Charged With Battery*, THE NEW YORK TIMES, Mar. 29, 2016, <https://www.nytimes.com/2016/03/30/us/politics/trump-campaign-manager-corey-lewandowski.html>, archived at <https://perma.cc/47RW-CS8N>; *Corey Lewandowski Accused of Being Drunk Live on Air, is Dismissed by Host in Fox Business Interview: “You Sound a Little Slurry”* (television broadcast, Brendan Cole dir., Oct. 3, 2019), <https://www.newsweek.com/lewandowski-kennedy-fox-business-slurring-drunk-1462834>, archived at <https://perma.cc/4KWP-8E2C>; Annie Karni, *Pro-Trump singer files assault claim against Lewandowski over butt-slap incident*, POLITICO (Dec. 12, 2017), <http://politi.co/2i40979>, archived at <https://perma.cc/K8N8-ZLE7>.

²⁵ Kevin Breuninger, *Paul Manafort gets additional 43 months in second Mueller sentence after ex-Trump campaign boss says he’s “sorry,”* CNBC (Mar. 13, 2019), <https://www.cnn.com/2019/03/13/paul-manafort-gets-additional-43-months-in-second-mueller-sentence.html>, archived at <https://perma.cc/627W-DPSC>.

ternity leave.”²⁶ Amidst an impeachment inquiry for his conduct regarding Ukraine, President Trump’s personal counsellor, Rudolph Giuliani, garnered headlines of his own, for reportedly running an irregular channel of communication outside normal U.S. policy and diplomatic channels with Ukraine. And yet, few and far between are the instances in which the Republican party dares to critique or challenge President Trump.²⁷ The frenzy of loyalty to Trump by his cabinet and colleagues in the Republican party reached a new level when Energy Secretary, Rick Perry, seconded Trump’s self-professed anointment as God’s “chosen one” to lead the United States.²⁸

Within hours after two articles of impeachment were announced against Trump, the President’s reelection campaign team posted a video of Trump appearing as the Marvel comics villain (The Mad Titan) Thanos—the most evil, bloodthirsty, and powerful villain in the universe, who believes he can ultimately save the universe by wiping out half of its population. The video taunted Congress’s announcement of his impeachment calling it a “sham impeachment.”²⁹ Observers, in turn, launched a thread discussing the President’s campaign-style advertisement under the hashtag #TheBestPeople on Twitter.³⁰

²⁶ Mark Hensch, *Report: Trump campaign CEO fired disabled new mom*, TheHill (Aug. 29, 2016), <https://thehill.com/blogs/ballot-box/presidential-races/293678-report-trump-camp-co-fired-disabled-new-mom>, archived at <https://perma.cc/AAN6-Y4WS>.

²⁷ John Bowden, *Romney: Republicans don’t criticize Trump because they fear it will help Warren*, Text, The Hill (Oct. 20, 2019), <https://thehill.com/homenews/senate/466659-romney-republicans-dont-criticize-trump-because-they-fear-it-will-help-warren>, archived at <https://perma.cc/MT36-MQ96>; Toluse Olorunnipa, *Republicans Deliver Rare Rebuke of Trump, Slamming His Syria Withdrawal Decision*, WASHINGTON POST, Oct. 7, 2019, https://www.washingtonpost.com/politics/mcconnell-joins-other-republicans-in-rebuking-trumps-syria-withdrawal/2019/10/07/aef0d11e-e914-11e9-9306-47cb0324fd44_story.html, archived at <https://perma.cc/KUE7-5JZU> (“Sitting GOP lawmakers are hesitant to outwardly criticize the president over his willingness to solicit foreign probes of a political rival, because it is the core of the Democrats’ case against him—and almost no issue strikes at Trump so personally as the prospect of becoming the third president in U.S. history to be impeached, according to current and former Republican lawmakers and officials.”).

²⁸ William Cummings, “*God’s used imperfect people all through history*”: Perry shares why he thinks Trump is the “chosen one,” USA TODAY, <https://www.usatoday.com/story/news/politics/2019/11/25/trick-perry-trump-gods-chosen-one/4295185002/>, archived at <https://perma.cc/2LCW-MJY5>.

²⁹ “*How Sick Is That?*” Says Thanos Creator After Trump Campaign Depicts US President as Fictional “Mass Murderer” in Bizarre Ad, Common Dreams, <https://www.commondreams.org/news/2019/12/11/how-sick-says-thenos-creator-after-trump-campaign-depicts-us-president-fictional>, archived at <https://perma.cc/55ZW-ZZBL>; *Thanos (The Mad Titan) In Comics Powers, History, Abilities — Marvel*, Marvel Entertainment, <https://www.marvel.com/characters/thenos>, archived at <https://perma.cc/6GKC-C8SM>.

³⁰ See, e.g., Gerry Duggan (@GerryDuggan), *Trump’s team is presenting him as a narcissistic child-abusing villain intent on wiping out half of all life, AND picked the moment right before Thanos was defeated. #TheBestPeople*, TWITTER (DEC. 10, 2019, 1:11 PM), <https://twitter.com/GerryDuggan/status/1204508938118418432>, archived at <https://perma.cc/H7DS-3FYJ>.

III. THE POLITICS OF IMAGING THE DIS/ABLED IN THE STRUGGLE AGAINST THE DEPRAVITY OF FASCISM: THEN AND NOW

The elements of fascism are afoot. The celebration of “strength,” and the condemnation of the “weak,” “race science,” social and racial Darwinism, the “weak” must be eradicated in the interest of the human race—these are all echoes of an earlier turn to fascism. In *Mein Kampf*, Adolf Hitler wrote, “nature’s will is to breed life as a whole towards a higher level. The stronger are to rule and not to amalgamate with the weaker. Only the weakling can consider this cruel[.]”³¹

Disturbing and extreme policies accreted fairly quickly into justifications for eugenics laws, such as “The Law for the Prevention of Progeny with Hereditary Diseases” as the basis for forced sterilization of the disabled; however, these were mere stepping stones to systematically-conducted state homicide of entire swaths of humanity.³² Ultimately, at least 250,000 mentally and physically dis/abled persons were murdered from 1939 to 1945 under “euthanasia” programs.³³ As the Bishop of Münster, Clemens August Count von Galen wrote in protest to the T-4 killings conducted by the Nazis, “Then, it is only necessary for some secret edict to order that the method developed for the mentally ill should be extended to other ‘unproductive’ people, that it should be applied to those suffering from incurable lung disease, to the elderly who are frail or invalids, to the severely disabled soldiers.”³⁴

Focusing on the art of this period, the imagery of the era includes paintings documenting the rise of fascism in pre-World War II Europe. Art from this era of *Neue Sachlichkeit* (“New Objectivity”) by George Grosz and Otto Dix in particular, strikes a strange resonance with images of our contemporary era. Common scenes after World War I in Germany were of war veterans in full military dress ambling along city streets with canes and crutches. These scenes of horrifically maimed and disfigured men were common after World War I, when 80,000 amputees returned to Germany from the front.³⁵

The vectors leading toward a complete breakdown of social, cultural, economic, and technological equilibrium can be seen in these images. George Grosz’s *Gray Day* (1921) depicts city life in Berlin in the early days

³¹ COHEN, *supra* note 20, at 375.

³² *Introduction to the Holocaust*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/introduction-to-the-holocaust>, archived at <https://perma.cc/PJ7A-SM2P>.

³³ *Id.* (at least 250,000 mentally or physically disabled patients, mainly German and living in institutions were murdered); see also *Euthanasia Program*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/euthanasia-program>, archived at <https://perma.cc/79HH-PDUX> (discussing euthanasia program to murder people with disabilities, both children and adults, predating Holocaust by approximately two years).

³⁴ *Bishop of Münster Protests Killings*, *supra* note 2.

³⁵ *Otto Dix. War Cripples (Kriegskrüppel). 1920 — MoMA, The Museum of Modern Art*, <https://www.moma.org/collection/works/69799>, archived at <https://perma.cc/2J8E-9SPZ>.

of an emergent fascism.³⁶ In this oil on canvas painting, Grosz depicts several figures crossing paths amid a factory setting—a factory worker, maimed soldier, business man, and a fourth figure. In the near foreground, we see a bespectacled stylishly dressed businessman briskly walking unimpeded, with a cane for fashion tucked under his arm; his plump cheeks and ruby lips reveal a generous diet. In the middle ground just beyond is the image of a defeated returning soldier. Deep lines mark this flat figure's sallow face. He is malnourished, rumpled, dirty, and jobless. He is an amputee, using a cane for support. The factory worker in the far background is entirely faceless, while another figure with a satchel peers from a geometric shaped white column. In one image, Grosz conjures the breeding ground of fascism: a plutocratic elite unphased by the suffering of others amidst economic immiseration and the shame of military defeat. A breeding group ripe for the rise of a leader that might make Germany great again.

Otto Dix was another German artist of the era. His work was known for apocalyptic images. His images depict the horrific injuries suffered by soldiers in the First World War. Common scenes of soldiers returned to Germany display shockingly disfigured faces, such as in *In Memory of the Glorious Time*, 1924. In 1920, his *Skat Players* depicts card playing amputees stripped of their senses and transformed into deaf and blind “invalids,” while that same year, his *Kriegskrüppel* (“War cripples”) depicts four soldier amputees merged with, and entirely dependent on, mechanized prosthetics that allow them to hobble or roll by as a procession of traumatized survivors, parading by a shop that hawks boots to the returning amputee-soldiers who no longer can use such items. In fact, the whole field of prosthetics in medicine was born from doctors trying to help integrate WWI soldiers who had suffered such injuries.³⁷

In *The Matchbox Seller*, painted in Dresden in 1920, Dix centers a blind, quadruple amputee who has no medals, and no uniform.³⁸ Wearing a field cap, the war vet is positioned upon the city sidewalk at buttocks height of the hurried passers-by, who hustle past him in stockings and elegant heels. The soldier sits with a matchbox laden tray perched on his stumps. A dachshund lifts his hind quarter to urinate on the soldier's stump. The dehumanized war veteran has been delivered to abject poverty and helplessness, flung to the cold pavement where he must beg in order to survive.

The Germany these artists depicted was effectively industrialized yet economically broken and had become a society that was riven with social

³⁶ *George Grosz Paintings, Bio, Ideas*, The Art Story, <https://www.theartstory.org/artist/grosz-george/>, archived at <https://perma.cc/6P28-LR7R>.

³⁷ See Allison C. Meier, *How Masks of Mutilated WWI Soldiers Haunted Postwar Culture*, JSTOR Daily (Nov. 19, 2018, 6:06 PM), <https://daily.jstor.org/how-masks-of-mutilated-wwi-soldiers-haunted-postwar-culture/>, archived at <https://perma.cc/LK9D-9MV3>; Jennifer E. Berry, *Otto Dix: a critical realist captured the horror of war*, MHQ: The Quarterly Journal of Military History (Sept. 22, 2008), <http://link.galegroup.com/apps/doc/A200387622/AONE?sid=lms>, archived at <https://perma.cc/34YN-HVA8>.

³⁸ Mike McKiernan, *Otto Dix, The Match Seller 1920*, 64 OCCUP MED (LOND) 148 (2014).

turmoil and violence. Their images provide a vivid record of the degeneration of German life and society during those disturbed times that might possibly serve as a warning in contemporary American society as we confront the implications of Trump's rhetoric and his administration's policies in a media landscape bursting with digital photographic imagery of injured soldiers returning from the Afghanistan and Iraq wars. In our time, the union of war and depravity is again evident in the maimed bodies of its human casualties—its veterans and their struggle a frontline in today's battle against fascism.

For example, Senator Tammy Duckworth, Democratic United States Senator representing Illinois, is an Army veteran and a Black Hawk helicopter pilot. Duckworth lost both of her legs when her helicopter was struck by a rocket-propelled grenade while serving in Iraq. In defending the honor, interests, and integrity of the United States military, Senator Duckworth has found cause to criticize President Trump for his five draft deferments during the Vietnam War. In a brilliant act of rhetorical appropriation, Duckworth turns Trump's practice of inventing disrespectful nicknames for his opponents against him. With all the authority of a wounded warrior, Duckworth nicknamed Trump "Cadet Bone Spurs," a reference to the foot diagnosis Trump invoked to avoid military service in the Vietnam War.³⁹

When Duckworth learned of Cadet Bone Spur's proposal to put on a grand military parade in 2018, she fearlessly challenged the perverted priorities reflected in Trump's policies toward the military. "It's a waste of resources," she said. "Why would we spend hundreds of thousands if not millions of dollars to put on a parade like this when we have troops who are in harm's way right now? Who don't have everything that they need to execute their mission?"⁴⁰ Duckworth said, "Many troops below the rank of sergeant have families that qualify for food stamps."⁴¹

In the years since the wars in Afghanistan and Iraq, the number of disabled veterans, suffering from both visible and invisible injuries, has skyrocketed. A few facts about our military reveal the profound challenges returning soldiers are confronting as they reenter their home communities. Experts estimate that the total monetary cost for the U.S.

³⁹ Duckworth & Senate Democrats Vow to Defeat House GOP-Led Effort to Curtail Civil Rights of Americans with Disabilities — U.S. Senator Tammy Duckworth of Illinois, <https://www.duckworth.senate.gov/news/press-releases/duckworth-and-senate-democrats-vow-to-defeat-house-gop-led-effort-to-curtail-civil-rights-of-americans-with-disabilities>, archived at <https://perma.cc/X3TE-K9G5>; *Sen. Tammy Duckworth Saves the Americans With Disabilities Act—For Now*, *Rewire.News*, <https://rewire.news/article/2018/04/03/sen-tammy-duckworth-saves-americans-disabilities-act-now/>, archived at <https://perma.cc/RPT4-EUDX>; David Smith, *Buttigieg Accuses Trump of Faking Disability to Avoid Vietnam Draft*, *THE GUARDIAN*, May 23, 2019, <https://www.theguardian.com/us-news/2019/may/23/pete-buttigieg-trump-vietnam-war-disability-accusation>, archived at <https://perma.cc/VF74-3EMJ>.

⁴⁰ *Tammy Duckworth, Senator and War Hero, Takes on President Trump, Aka "Cadet Bone Spurs"*, *LOS ANGELES TIMES*, Feb. 8, 2018, <https://www.latimes.com/nation/la-na-tammy-duckworth-20180207-story.html>, archived at <https://perma.cc/S4BJ-4TMW>.

⁴¹ *Id.*

- including long-term veterans care—of the conflicts in Afghanistan, Iraq and Pakistan may eventually total as much as \$4 trillion.
- 73.4 percent of all U.S. veterans have a VA service-connected disability rating.
- 76.3 percent of veterans with a VA service-connected disability rating believe that their disability is currently preventing them from getting or holding a job.
- From 2002 to December 2012, 253,330 service members were diagnosed with a Traumatic Brain Injury (TBI) of some kind.
- In 2010, the Army gave a diagnosis of post-traumatic stress disorder to 10,756 troops, up from 4,967 in 2005
- The number of active duty suicides in 2012 surpassed, not only the number of American troops killed in Afghanistan, but also the number who died in transportation accidents in 2012.
- The suicide rate for young male veterans increased significantly in three years; the rate is up by 44 percent.
- The Veterans Crisis Line has answered more than 890,000 calls and made more than 30,000 life-saving rescues since its launch in 2007.⁴²

Latinx made up about 6 percent of U.S. military veterans, according to a September 2014 report by the National Center for Veterans Analysis and Statistics. This number is rapidly increasing.⁴³ By 2030, the number of Latinx in the military is expected to double.⁴⁴ The increase can be seen historically. In World War II, Latinx comprised 2.6 percent of veterans, but by post-9/11 that number had increased to 12.2 percent.⁴⁵

Though military service offers Latinx a pathway out of poverty insofar as Latinx veterans were less likely to live in poverty (9.4 percent) than non-veteran Latinx (22.3 percent) and had much higher median personal incomes than non-veterans (\$14,796 compared to \$33,290),⁴⁶ still Latinx veterans have lower labor force participation than non-veteran Latinx.⁴⁷

At the officer rank, Latinx remain underrepresented. In 2011, Latinx were 15 percent of the U.S. population and 13 percent of enlisted personnel,

⁴² *Facts — Coming Back With Wes Moore — PBS, Facts — Coming Back With Wes Moore* — PBS, <http://www.pbs.org/coming-back-with-wes-moore/about/facts/>, archived at <https://perma.cc/3XJR-B2SE> (Coming Back with Wes Moore is a television series executive produced by former Army combat veteran Wes Moore. It aired in three parts beginning May 13, 2014, on PBS.).

⁴³ *As Numbers Grow, Recognizing Generations Of Latino Vets*, NBC News, <https://www.nbcnews.com/news/latino/numbers-grow-recognizing-generations-latino-vets-n245261>, archived at <https://perma.cc/3XJR-B2SE>.

⁴⁴ *Id.* (Statement of Barbara Ward, Director of the Department of Veterans Affairs Center for Minority Veterans).

⁴⁵ *Id.*

⁴⁶ National Center for Veterans Analysis and Statistics, *2014 Minority Veterans Report* (United States Department of Veterans Affairs), Apr. 2016 at 12–13.

⁴⁷ *Id.* The data raises but does not answer the question: Can this lower rate of labor force participation be attributed to disability?

but only 5 percent of the officer corps in the enlisted forces.⁴⁸ The implications of this extend far beyond the Military Leadership Diversity Commission's concern that "[c]urrent service leadership, however, does not reflect the demographics of those it leads or serves."⁴⁹ The disproportionate concentration of Latinx among enlisted forces rather than the officer corps, and in the army rather than proportionately throughout the navy and air force services, has profound implications for Latinx risk of dying or being wounded in action while serving in military.⁵⁰ Latinx are concentrated in the Army.⁵¹ The Army sustains by far the highest number of deaths and the highest number of total wounded in action across reported military operations. Consider, as an example, the casualty statistics for Operation Iraqi Freedom (OIF), which began on March 19, 2003 and ended on August 31, 2010.⁵² In OIF, there were total 4,419 deaths of which 3,237 were Army and total 31,994 wounded in action of which 22,248 were Army. Only 430 deaths were at the rank of officer, and 1,283 deaths were younger than age 22 years. Latinx deaths (including Latin American, Cuban, Mexican and Puerto Rican) in OIF totaled 367, and wounded in action totaled 2,031.⁵³ Thus the policies adopted toward dis/abled persons generally and dis/abled veterans specifically are of significant importance to the future of Latinx in the United States.

IV. LEGISLATIVE AND ADMINISTRATIVE ATTACKS ON THE CIVIL RIGHTS OF DISABLED PERSONS: SHRINKING THE DUTY TO ACCOMMODATE AND THE AVENUES OF REMEDIATION

If the treatment of dis/abled people both veteran and nonveteran, links the era of Trump to the troubled times of pre-WWII Germany, then initiatives and reforms targeting these groups are particularly significant frontlines in the battle against fascism. And, it should come as no surprise that legislative initiatives to "reform" the legal structure protecting the civil rights of persons with disabilities are indeed afoot in the era of Cadet Bone Spurs. On January 24, 2017, Representative Ted Poe of Texas introduced the ADA Education and Reform Act of 2017, which promised to eviscerate so-called "drive-by" lawsuits brought against businesses under the Americans

⁴⁸ *As Numbers Grow, Recognizing Generations Of Latino Vets*, *supra* note .

⁴⁹ MILITARY LEADERSHIP DIVERSITY COMMISSION, FROM REPRESENTATION TO INCLUSION: DIVERSITY LEADERSHIP FOR THE 21ST-CENTURY MILITARY 15 (2011), <https://www.hsdl.org/?view&did=11390>, archived at <https://perma.cc/4EHF-LBPL>.

⁵⁰ A U.S. Office of Management and Budget mandate, Directive No. 15, requires all federal record keeping and data presentation to use race and ethnicity categories. NESE F. DEBRUYNE, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS 49 (Congressional Research Services, 2019), <https://fas.org/sgp/crs/natsec/RL32492.pdf>, archived at <https://perma.cc/H7X5-YCN>.

⁵¹ *See generally id.* (This report has percentages of wounded [and dead] by race and ethnicity for each war. Tables 11, 21, and 23).

⁵² *Id.* OIF occurred in the Arabian Sea, Bahrain, Gulf of Aden, Gulf of Oman, Iraq, Kuwait, Oman, Persian Gulf, Qatar, Red Sea, Saudi Arabia, and United Arab Emirates.

⁵³ *Id.* (Table 13 and 14).

with Disabilities Act (ADA) for discrimination on the basis of disability.⁵⁴ On February 15, 2018, in a then Republican-controlled Congress, and by a vote of 225–192, the House passed the Reform Act.⁵⁵

The Reform Act imposed strict new preconditions on the ability of disabled persons to bring lawsuits by prohibiting civil actions based on a defendant’s failure to remove an architectural barrier to access into an existing public accommodation unless: (1) the aggrieved person has provided to the owners or operators a written notice specific enough to identify the barrier; and, (2) the owners or operators fail to provide the person with a written description outlining improvements that will be made to improve the barrier or they fail to remove the barrier or make substantial progress after providing such a description. The aggrieved person’s notice must specify the circumstances under which public accommodation access was denied.⁵⁶

These provisions are designed to establish a so-called “notice and cure” period during which the disability discrimination victim would have to furnish the business with a detailed written notice identifying the barrier to access, specifying how that barrier could be feasibly removed. Under the proposed reforms, the business would then have 60 days to communicate a plan to “improve” the barrier; and on top of that, the business would be entitled to an additional 120 days following the 60-day response period to “make substantial progress” in removing the barrier.

The Reform Act also imposed the additional requirement that the disability discrimination victim specify in detail the circumstances under which an individual was “actually denied access to a public accommodation[.]”⁵⁷ This provision would have required the plaintiff engage in the “futile gesture” of attempting to gain access to show actual injury.⁵⁸ The same disability discrimination victim would then be subsequently required to satisfy a pseudo-heightened pleading standard akin to Rule 8 of the Federal Rules of Civil Procedure in a non-court pre-suit setting.⁵⁹

A broad coalition of 236 disability rights groups joined House Representatives Jerry Nadler (NY), Sheila Jackson Lee (TX), Henry Calvin Johnson, Jr. (GA), David Cicilline (RI), Pramila Jayapal (WA), and Jamin Ben “Jamie” Raskin (MD) in opposing the Reform Act. Coalition members included the AFL-CIO, the Anti-Defamation League, Human Rights Cam-

⁵⁴ ADA Education and Reform Act of 2017, H.R. 620, 115th H.R. § 1 (1st Sess. 2017) (the bill was introduced to amend the Americans with Disabilities Act of 1990 to clarify the requirements for demand letters and to provide a notice and cure period before the commencement of a private civil action).

⁵⁵ VOTES PROFILE REPORT H.R. 620 CR# 80 14 FEB. 15, 2018, at 14.

⁵⁶ See H Amdt, ADA Education and Reform Act of 2017, 115 Bill Tracking H.R. 620 (2017).

⁵⁷ H.R. 620 § 1.3/14/2020 11:46 AM

⁵⁸ *Pickern v. Holiday Quality Foods*, 293 F.3d 1133, 1135–36 (U.S. 9th Cir. 2002) (“when a plaintiff who is disabled within the meaning of the ADA has actual knowledge of illegal barriers at a public accommodation to which he or she desires access, that plaintiff need not engage in the ‘futile gesture’ of attempting to gain access in order to show actual injury during the limitations period.”).

⁵⁹ 2017 Legis. Bill Hist. US H.B. 620 of 2017 (2017).

paign, the NAACP and the NAACP Legal Defense and Educational Fund, the American Foundation for the Blind, the Bazelon Center for Mental Health, the Christopher and Dana Reeve Foundation, the National Council on Independent Living, the National Disability Rights Network, the Paralyzed Veterans of America, and Vietnam Veterans of America.⁶⁰ But it was Senator Tammy Duckworth (together with 42 Senate colleagues) who ultimately saved the ADA by effectively threatening to filibuster the bill.⁶¹

Attacks on the civil rights of dis/abled persons have not stopped at legislative initiatives. On February 7, 2017, the United States Senate confirmed Trump's nominee for Secretary of Education. Betsy DeVos is Michigan school choice advocate and longtime Republican supporter.⁶² With DeVos at the helm, the Education Department has steadily eroded programs designed to integrate and mainstream students with dis/abilities in public education settings, further isolating students from non-dominant groups. Latinx, American Indian, and Native Alaskan students are disproportionately represented in special education classes.⁶³ Public schools guarantee compliance with federally-enacted civil rights laws protecting against discrimination based on dis/ability. Specifically, the Individuals with Disabilities Education Act (IDEA) requires public schools to make available to eligible children with dis/abilities a free and appropriate public education in the least restrictive environment appropriate to their individual needs.⁶⁴ In operation this means that such students in a public school setting are guaranteed two key rights: a) access to a public education and that schools must provide necessary accommodations, services, and auxiliary supports, and b) integration of children as much as possible. That is, education and related aids and supplementary services should be provided to these students in the regular

⁶⁰ *Id.*

⁶¹ *Sen. Tammy Duckworth Saves the Americans With Disabilities Act—For Now*, *supra* note 40; Duckworth & Senate Democrats Vow to Defeat House GOP-Led Effort to Curtail Civil Rights of Americans with Disabilities — U.S. Senator Tammy Duckworth of Illinois, *supra* note .

⁶² Betsy DeVos, Secretary of Education—Biography, Biographies (Jun. 27, 2019), <https://www2.ed.gov/news/staff/bios/devos.html?srcHP>, archived at <https://perma.cc/34MT-WA3T> (her biography pledges that she will “advocate for returning control of education to states and localities” and “is especially passionate about reforms that help underserved children gain access to a quality education.”).

⁶³ See Subini Ancy Annamma et al., *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, in *DISCRIT*, *supra* note 2, at 9, 11 (discussing subjectivity and arbitrariness in labelling of all dis/ability categories, segregated special classes populated with students from non-dominant racial and ethnic groups, from immigrant populations, and from “lower” social classes and status, and the intertwining of the legacy of historical beliefs about race and ability, based on White supremacy).

⁶⁴ A Guide to Disability Rights Laws, <https://www.ada.gov/cguide.htm>, archived at <https://perma.cc/5H6W-97TS> (provides an overview of Federal civil rights laws that ensure equal opportunity for people with dis/abilities); *Subpart B — State Eligibility*, Individuals with Disabilities Education Act, <https://sites.ed.gov/idea/regs/b/b>, archived at <https://perma.cc/5H6W-97TS> (U.S. Dep’t of Education outlining the protections afforded under the Individuals with Disabilities Education Act and other laws for children with dis/abilities).

classroom in which students without dis/abilities learn.⁶⁵ Widespread media accounts report variously and alternatively that Trump's Education Secretary DeVos has incompetently handled programs for dis/abled students because she is either "confused" about dis/ability law in the education setting or willfully has eliminated the access points available to families with dis/abled children.⁶⁶ Early in DeVos' tenure, the Department reportedly rescinded 72 guidance documents that explain students' rights under the Individuals with Disabilities Education Act and the Rehabilitation Act, among others.⁶⁷

On March 5, 2018, without providing notice or an opportunity to comment, the U.S. Department of Education's Office for Civil Rights (OCR) issued a revised Case Processing Manual (CPM) containing new instructions requiring mandatory dismissal of certain complaints and eliminating the right of complainants to appeal determinations reached by OCR.⁶⁸ Pursuant to the new CPM, the OCR undertook the dismissal of hundreds of complaints not on the merits, but rather because "too many complaints" had been filed imposing a burden or drain on the Office for Civil Rights' resources. The Office vested with investigative authority over civil rights violations was instructed to dismiss or disregard civil rights cases that reflect "a pattern of complaints previously filed with O.C.R. by an individual or a group against multiple recipients," or complaints "filed for the first time against multiple recipients that" place "an unreasonable burden on O.C.R.'s

⁶⁵ Protecting Students With Disabilities, FAQs; Educational Resources (Sept. 25, 2018), <https://www2.ed.gov/about/offices/list/ocr/504faq.html>, archived at <https://perma.cc/3XV3-HAMJ> ("An appropriate education for a student with a disability under the Section 504 regulations could consist of education in regular classrooms, education in regular classes with supplementary services, and/or special education and related services.").

⁶⁶ Valerie Strauss, *Betsy DeVos Apparently 'Confused' about Federal Law Protecting Students with Disabilities*, WASHINGTON POST, <https://www.washingtonpost.com/news/answer-sheet/wp/2017/01/17/betsy-devos-confused-about-federal-law-protecting-students-with-disabilities/>, archived at <https://perma.cc/6AHM-Q55S>; Taylor Link, *Betsy DeVos was "confused" about protections for students with disabilities—so she scrapped dozens*, News, Salon (Oct. 23, 2017), <https://www.salon.com/2017/10/23/betsy-devos-was-confused-about-protections-for-students-with-disabilities-so-she-scrapped-dozens/>, archived at <https://perma.cc/3WXZ-MBFF>; Ari Ne'eman, *Is Betsy DeVos against enforcing disability rights laws—or does she not understand them?*, Vox (Jan. 19, 2017), <https://www.vox.com/the-big-idea/2017/1/19/14314890/devos-disabilities-rights-idea-hassan>, archived at <https://perma.cc/V8DN-YM3M>.

⁶⁷ Office of Special Education and Rehabilitative Services List of Guidance Documents Rescinded (Outdated, Unnecessary, or Ineffective) (2017) <https://www2.ed.gov/policy/speced/reg/ea13777/ea13777-osers-outdated-guidance-list-reasons-20171020.pdf>, archived at <https://perma.cc/B66C-AQ5Q>; Moriah Ballingit, *DeVos Rescinds 72 Guidance Documents Outlining Rights for Disabled Students*, WASHINGTON POST, Oct. 21, 2017, <https://www.washingtonpost.com/news/education/wp/2017/10/21/devos-rescinds-72-guidance-documents-outlining-rights-for-disabled-students/>, archived at <https://perma.cc/3RQV-23NC>; Jack Moore, *Betsy DeVos Rescinds Guidelines That Help Disabled Students in School*, GQ, Oct. 23, 2017.

⁶⁸ *Nat'l Fed'n of the Blind v. United States Dep't of Educ.*, No. TDC-18-1568, 2019 U.S. Dist. LEXIS 142393, *3-4 (D. Md. Aug. 19, 2019) (the March revision to the CPM added § 108 (t) providing that OCR will dismiss an allegation, or, if appropriate, the complaint in its entirety, when a complaint is a continuation of a pattern of complaints previously filed with OCR by an individual or group against multiple recipients or a complaint is filed for the first time against multiple recipients that, viewed as a whole, places an unreasonable burden on OCR's resources).

resources.”⁶⁹ Litigation ensued as several national civil rights organizations filed a federal lawsuit alleging that OCR’s adoption of “arbitrary and capricious” and illegal rules eliminated legitimate anti-discrimination complaints.⁷⁰ In November 2018, OCR revised the CPM yet again rescinding section 108(t) mandatory dismissal provisions, but leaving in place a provision now found at section 108(l) that mirrors previous section 108(k) and would not limit the ability of OCR to dismiss complainants that had been dismissed under the rescinded section 108(t) of the March 2018 CPM.

On March 11, 2019, President Trump released his proposed budget for fiscal year 2020. The proposed budget called for overall cuts to the Education Department’s funding by \$7.1 billion, eliminating 29 programs, including summer and after-school programs.⁷¹ During a House of Representatives subcommittee panel, Secretary DeVos defended President Trump’s 2020 Department of Education budget proposal which entirely eliminates federal support (\$17.6 million) for the Special Olympics Education Programs and significantly reduces support to programs that serve children and students with dis/abilities, such as the Hellen Keller National Center for Deaf-Blind Youths and Adults, American Printing House for the Blind, National Technical Institute for the Deaf, and Gallaudet University, a school for students with hearing loss.⁷²

V. THE POLITICS OF EXCLUSION MEETS THE POLITICS OF DISPOSSESSION: OF BORDER WALLS AND PILFERED BUDGETS

An area of increased funding, much touted in the “Funding Highlights” section of the proposed 2020 budget, includes \$5 billion for construction of the border wall and \$506 million to hire over 2,800 additional U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforce-

⁶⁹ Erica L. Green, *DeVos Education Dept. Begins Dismissing Civil Rights Cases in Name of Efficiency*, THE NEW YORK TIMES, Apr. 20, 2018, <https://www.nytimes.com/2018/04/20/us/politics/devos-education-department-civil-rights.html>, archived at <https://perma.cc/Q3ZY-6BZ7>.

⁷⁰ See *Nat’l Fed’n of the Blind*, 2019 U.S. Dist. LEXIS 142393, at *3-4.

⁷¹ A Budget for a Better America Promises Kept. Taxpayers First. Fiscal Year 2020 Budget of the U.S. Government (2019) <https://www.whitehouse.gov/wp-content/uploads/2019/03/budget-fy2020.pdf>, archived at <https://perma.cc/3NMH-GZAR>; Sophie Tatum, *Trump administration proposes \$7.1 billion funding cut to Education Department*, ABC News (Mar. 11, 2019), <https://abcnews.go.com/Politics/trump-administration-proposes-71-billion-funding-decrease-education/story?id=61609098>, archived at <https://perma.cc/3WVH-BTEL>; Teresa Ghilarducci, *Trump’s Funding Cuts To The Disabled Are Bad Economic Policy*, FORBES (2019) (“Trump feels he can manipulate latent prejudice against people with impairments. That approach would hurt the economy.”).

⁷² Ellen Stumbo, *Betsy DeVos Defends Trump’s Proposed Budget Cuts to Special Olympics and Other Disability Programs* (Mar. 26, 2019), <https://www.yahoo.com/lifestyle/betsy-devos-defends-trumps-proposed-224937594.html>, archived at <https://perma.cc/WWT4-H794>; Department of Education Office for Civil Rights Fiscal Year 2018 Budget Request <https://www2.ed.gov/about/overview/budget/budget18/justifications/z-ocr.pdf>, archived at <https://perma.cc/YV8N-YWXD>.

ment (ICE) officers.⁷³ Indeed the words “border” and “wall” in connection with security and immigration are repeatedly referenced throughout the document—no fewer than 54 times.⁷⁴

The United States border with Mexico has been a site of trauma, exclusion, and diversion for Latinx exacerbated by policies as indecently brutal as Lewandowski’s “womp womp” dismissal of suffering children could ever conjure. On April 6, 2018, two years before the proposed 2020 budget, then Attorney General Jeff Sessions announced the implementation of a zero-tolerance policy for offenses under 8 U.S.C. § 1325(a), which prohibits both attempted illegal entry and illegal entry into the United States, declaring that “[t]he situation at our Southwest Border is unacceptable. . . . To the Department’s prosecutors, I urge you: promoting and enforcing the rule of law is vital to protecting a nation, its borders, and its citizens.”⁷⁵ In May of 2018, Department of Homeland Security (DHS) Secretary Kirstjen Nielsen reportedly signed a memorandum directing the DHS to refer 100% of all suspected southwest border crossings to the Justice Department for criminal prosecution.⁷⁶ This has led to the separation of parents from their children and has given rise to the term family separation—parents placed in federal custody under the U.S. Marshals Service, while their children are sent to detention centers, juvenile facilities, or foster care under the responsibility of the U.S. Department of Health and Human Services (HHS) Office of Refugee Resettlement.⁷⁷

By June 15, 2018, there were reportedly 11,517 minors in the “Unaccompanied Children’s Program,” and 2,342 accounted-for children had been separated from their parents.⁷⁸ HHS opened 100 shelters in 14 states, but did not allow members of Congress to enter the detention centers for immigrant children.⁷⁹ The effects of the trauma experienced by refugee and unaccompanied children globally, as well as concerns regarding the way that trauma

⁷³ A Budget for a Better America Promises Kept. Taxpayers First. Fiscal Year 2020 Budget of the U.S. Government, *supra* note .

⁷⁴ *Id.*

⁷⁵ *Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry*, Government, Attorney General Announces Zero-Tolerance Policy for Criminal Illegal Entry (Apr. 6, 2018), <https://www.justice.gov/opa/pr/attorney-general-announces-zero-tolerance-policy-criminal-illegal-entry>, archived at <https://perma.cc/2GWX-626S>.

⁷⁶ Ted Hesson, *Trump administration to step up family separation at the border*, POLITICO, <https://politi.co/2rrC5ND>, archived at <https://perma.cc/LF3F-V4VA>.

⁷⁷ Angelo Fichera, *Q&A on Border Detention of Children*, FactCheck.org (Jun. 19, 2018), <https://www.factcheck.org/2018/06/qa-on-border-detention-of-children/>, archived at <https://perma.cc/V9EC-F6MP>.

⁷⁸ *Id.*

⁷⁹ *Trauma at the Texas-Mexico Border: Families Separated, Children Detained & Residents Fighting Back*, Democracy Now!, https://www.democracynow.org/2018/6/14/trauma_at_the_texas_mexico_border, archived at <https://perma.cc/L2L4-HULZ>; Donna Shalala, Former head of DHHS together with other Democratic Congresswomen Debbie Wasserman Schultz, and Debbie Mucarsel-Powell said they were also barred entry to the facility located in Homestead, Florida, subsequently observing, “During our last visit to Homestead, we witnessed children living in cramped, prison-like conditions,” they said. “The idea to force even more children into an already full detention facility is not only unsafe, but is cruel and violates basic tenets of human decency.”

will affect their development and behavior in the near and long term future, are increasingly the subject of study in behavioral psychology, psychiatric and mental health literature published abroad.⁸⁰

The diversion of federal funding necessary to expand the U.S. Southwest Border Wall has given rise to vocal protests from within the U.S. military. Front page news in military literature in August 2019 denounced Trump's plan to enlarge the Border Wall budget by shuttling moneys intended for military facilities. "The U.S. Navy has been forced to stand down on construction projects meant to fix 'life safety violations' and fire risks at dilapidated ship maintenance buildings and hazardous materials warehouses in Virginia after funds were diverted to pay for President Donald Trump's border wall."⁸¹ Funding intended for schools, medical and dental clinics, and a water treatment plant located on military bases were reportedly targeted for defunding, specifically threatening the quality of water at the Camp Lejeune Marine base in North Carolina.⁸²

Diverting funds from supports programs dedicated to those with disabilities has been criticized as bad for the economy.⁸³ The roll-out of the federal budget in 2018 and 2019 has involved cuts to programs that are relied upon by the poor, elderly, and disabled.⁸⁴ The Supplemental Security Income Support is the only source of federal income support aimed to assist families caring for children with disabilities, and this support has supported the lowest-income and most severely disabled children.⁸⁵ And yet, each year the Trump Administration's federal budget makes it harder for millions of Americans with disabilities to afford basic items, such as food, housing, and access to health care, by eliminating \$72 billion in 2019 from disability programs, such as Social Security Disability Insurance and Supplemental Secur-

⁸⁰ Caecilie Böck Buhmann, *Traumatized Refugees: Morbidity, Treatment and Predictors of Outcome* 29; Aoife O'Higgins, *Analysis of Care and Education Pathways of Refugee and Asylum-Seeking Children in Care in England: Implications for Social Work*, 28 INTERNATIONAL JOURNAL OF SOCIAL WELFARE 53 (2019); Aoife O'Higgins et al., *What is the Impact of Placement Type on Educational and Health Outcomes of Unaccompanied Refugee Minors? A Systematic Review of the Evidence*, 21 CLIN CHILD FAM PSYCHOL REV 354 (2018).

⁸¹ Projects defunded for border wall include buildings with "life safety violations," hazmat concerns, STARS AND STRIPES, <https://www.stripes.com/news/navy/projects-defunded-for-border-wall-include-buildings-with-life-safety-violations-hazmat-concerns-1.597869>, archived at <https://perma.cc/X7VV-9N8D> (last visited Feb 23, 2020).

⁸² Greg Barnes et al., *Border wall could divert money targeted for NC military bases*, North Carolina Health News (Mar. 28, 2019), <https://www.northcarolinahealthnews.org/2019/03/28/border-wall-could-divert-money-targeted-for-nc-military-bases/>, archived at <https://perma.cc/6NZ3-UAMV>.

⁸³ Ghilarducci, *supra* note .

⁸⁴ Mark Sommerhauser — Wisconsin State Journal Journal Molly Beck — Wisconsin State, *Donald Trump budget would affect Wisconsin's poor, elderly and disabled, advocates say*, madison.com, https://madison.com/news/local/govt-and-politics/donald-trump-budget-would-affect-wisconsin-s-poor-elderly-and/article_bd0a8a70-d1e9-5005-bf82-3fd93a9338f8.html, archived at <https://perma.cc/4ZC9-UHA9>.

⁸⁵ *SSI: A Lifeline for Children with Disabilities*, Center on Budget and Policy Priorities (May 10, 2017), <https://www.cbpp.org/research/social-security/ssi-a-lifeline-for-children-with-disabilities>, archived at <https://perma.cc/JX5J-DSXC>.

ity Income (SSI).⁸⁶ Cuts to other supports such as Medicaid, food assistance, and housing vouchers further exacerbate the loss of SSI support relied upon by Americans with disabilities.

VI. DIS/ABLED PERSONS AND THE TRUMP ADMINISTRATION'S "PUBLIC CHARGE RULE"

While concerns about the impact of Trump's budgetary allocations may suggest reason to believe that the administration's obsession with the border wall has more to do with pilfering public moneys than promoting public interest, it is important to note that the enactment of legislation to remedy discrimination against the disabled was grounded on a very different understanding of the way to deal with walls. Compassionate conservatives, such as former President George H. W. Bush signed the Americans With Disabilities Act (ADA) into law in 1990, touting that like another wall (the Berlin Wall) the wall of discrimination against the dis/abled had fallen. The ADA was "tak[ing] a sledgehammer to another wall, one which has for too many generations separated Americans with disabilities from the freedom they could glimpse, but not grasp."⁸⁷ President Bush proudly declared that ADA's "passage has made the United States the international leader on this human rights issue."⁸⁸

In the era of Trump, refugees engaging in involuntary movement, fleeing their home countries not for a better life, but for life itself, encounter a very different United States. On August 14, 2019, the Department of Homeland Security adopted a new rule that redefines the definition of "public charge" for purposes of admission to the United States.⁸⁹ The new rule interprets § 212(a)(4) of the Immigration and Nationality Act (INA) pertaining to inadmissibility. The inadmissibility ground at issue provides that a person is inadmissible if they are likely to become a public charge.⁹⁰

The updated rule introduces two new criteria for consideration in making a public-charge determination. First, under the new rule an undocumented immigrant would be considered a public charge if the person "receive[d] one or more public benefits . . . for more than 12 months in the aggregate within a 36-month period." Second, the rule enlarges the list of benefits which may be considered in reaching a public-charge determination to include in-kind or non-cash programs.

⁸⁶ Kathleen Romig, *President's Budget Would Hurt People with Disabilities*, Center on Budget and Policy Priorities (Feb. 21, 2018), <https://www.cbpp.org/blog/presidents-budget-would-hurt-people-with-disabilities-0>, archived at <https://perma.cc/ZR5N-JJKJ>.

⁸⁷ Elena Hung & Katherine Perez, *Opinion — Trump's New Wall to Keep Out the Disabled*, THE NEW YORK TIMES, Nov. 29, 2018, <https://www.nytimes.com/2018/11/29/opinion/trumps-disability-public-charge.html>, archived at <https://perma.cc/PQ6S-WKEM>.

⁸⁸ *Id.*

⁸⁹ Inadmissibility on Public Charge Grounds, 84 C.F.R. § 41292 (United States 2019).

⁹⁰ Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(4) (2018).

Under this new policy, entry is denied to the U.S. or adjustment of status to persons applying for a green card or a certain visa may be denied if they have received non-cash benefits, such as Supplemental Nutrition Assistance Program (SNAP, formerly called “Food Stamps”);⁹¹ Section 8 Housing Assistance under the Housing Choice Voucher Program;⁹² Section 8 Project-Based Rental Assistance;⁹³ Medicaid,⁹⁴ or Subsidized Housing under the Housing Act of 1937.⁹⁵

The District Courts for the Southern District of New York, Northern District of California, Eastern District of Washington, Northern District of Illinois, and District of Maryland, enjoined DHS from enforcing the final rule on the public charge ground of inadmissibility under section 212(a)(4) of the Immigration and Nationality Act. The injunction had the effect of postponing the effective date of the final rule. The U.S. Citizenship and Immigration Services noted as an alert on its webpage: “Most of the injunctions are nationwide and prevent USCIS (U.S. Citizenship and Immigration Services) from implementing the [public charge] rule anywhere in the United States.”⁹⁶

On December 5, 2019, in an opinion by Judge Jay S. Bybee (author of the infamous “torture memo” during the Bush Administration), the Ninth Circuit issued an order staying the injunctions issued by the Northern District of California and the Eastern District of Washington.⁹⁷ Four days later, on December 9, 2019, Judge J. Harvie Wilkinson and Judge Paul Niemeyer of the Fourth Circuit (Judge Pamela Harris voted to deny) granted a stay to halt the Maryland district court’s preliminary injunction.⁹⁸

Then on February 21, 2020, the Supreme Court granted the application for stay of the Northern District of Illinois Court’s October 14, 2019 order granting a preliminary injunction pending disposition of the Government’s appeal in the United States Court of Appeals for the Seventh Circuit.⁹⁹ That

⁹¹ 7 U.S.C. §§ 2011 to 2036c.

⁹² As administered by the Department of Housing and Urban Development HUD under 24 C.F.R. pt. 984; 42 U.S.C. §§1437f and 1437u.

⁹³ 24 C.F.R. pts. 5, 402, 880 through 884, and 886.

⁹⁴ 42 U.S.C. §1396.

⁹⁵ 42 U.S.C. §1437.

⁹⁶ *Final Rule on Public Charge Ground of Inadmissibility*, USCIS (Oct. 16, 2019), <https://www.uscis.gov/legal-resources/final-rule-public-charge-ground-inadmissibility>, archived at <https://perma.cc/7J6S-D3JD>.

⁹⁷ *City & Cty. of San Francisco v. United States Citizenship & Immigration*, No. 19-17213, 2019 U.S. App. LEXIS 36137, at **81 (9th Cir. Dec. 5, 2019) (Owens, J., dissenting) (a “stay is an ‘intrusion into the ordinary processes of administration and judicial review,’” and “[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of [judicial] discretion”) (citation omitted) (a motion for reconsideration is currently pending before the court).

⁹⁸ *Casa de Maryland, Inc. v. Trump*, No. 19–2222 (9th Cir. Dec. 9, 2019); the district court decision was titled *Casa de Md., Inc. v. Trump*, 2019 U.S. Dist. LEXIS 177797 (D. Md. 2019); see Meghashyam Mali, *Second appeals court backs lifting injunction on Trump “public charge” rule*, The Hill (Dec. 9, 2019), <https://thehill.com/regulation/court-battles/473760-second-appeals-court-backs-lifting-injunction-on-trump-public-charge>, archived at <https://perma.cc/YX2L-WSN3>.

⁹⁹ *Wolf v. Cook County*, 2020 U.S. LEXIS 825 (U.S. 2020).

appeal was the most recent in a series of cases in which the Government had, only one month prior, sought and obtained emergency relief from the Court. Justice Sotomayor dissented from the grant of stay with sharp rebukes, noting that the narrow ruling in the Illinois-specific injunction would not affect the Government's ability to enforce its immigration goals in the 49 other states, and possibly only for the immediate term. Noting that "[i]t is hard to say what is more troubling: that the Government would seek this extraordinary relief seemingly as a matter of course, or that the Court would grant it."¹⁰⁰ Justice Sotomayor blamed the Court for the "breakdown in the appellate process" as the Court was "all too quick to grant the Government's 'reflexiv[e]' requests."¹⁰¹ There would be a price to pay Justice Sotomayor warned, "But make no mistake: Such a shift in the Court's own behavior comes at a cost."¹⁰²

While the majority's missteps in judgment and jurisprudence may certainly undermine the perceived stature and legitimacy of the United States Supreme Court, with grave consequences for the rule of law, still the immediate costs will fall disproportionately on Latinx refugees generally and the disabled in particular. "According to estimates, the number of international migrants had reached 232 million globally in 2013 (UNDESA, Population Division, 2013); of the 59.5 million people forcibly displaced worldwide in 2014, about 19.5 million are refugees and 1.8 million were asylum seekers (UNHCR, 2014)."¹⁰³ However, there is a lack of data regarding the number of migrants with dis/abilities, even as the few studies available point to the amplified risk experienced by refugees with disabilities forcibly fleeing conflict or natural disaster areas, family sexual abuse, exploitation, discrimination and exclusion from access to education, work, or public services.¹⁰⁴

In fact, the plaintiff's brief filed in support of the preliminary injunction before the Northern District of Illinois against the updated public charge rule going into effect, subsequently stayed by the Supreme Court in *Wolf v. Cook County*, was amply supported by data showing the negative impact and chilling effect the public charge rule would have on three affected entities: first, the Cook County Health and Hospitals System ("CCH"), one of the largest public hospital systems in America would suffer an annual loss of \$30 million in Medicaid reimbursement to CCH; second, harms to immigrants would flow from uncertainty and confusion surrounding the implementation of the new public charge rule, leading to broad disenrollment from benefits, based on fears that using those benefits will prevent them from adjusting their immigration status; third, persons with dis/abilities, including persons

¹⁰⁰ *Id.* at **2.

¹⁰¹ *Id.* at **8.

¹⁰² *Id.*

¹⁰³ Refugees and migrants with disabilities — United Nations Enable, https://www.un.org/development/desa/disabilities/refugees_migrants_with_disabilities.html, archived at <https://perma.cc/ERR7-VQYL>.

¹⁰⁴ *Id.*

living with HIV will forego assistance, worsening the HIV epidemic.¹⁰⁵ The parties agreed that “the Final Rule will cause immigrants to disenroll from, or refrain from enrolling in, critical public benefits out of fear of being deemed a public charge. Doc. 27-1 at pp. 330-332, ¶¶ 25, 30; *id.* at pp. 344-345, ¶¶ 19-20, 23[.]”¹⁰⁶

The District Court record contained hundreds of pages of evidence in appendices filed in support of the motion, including evidence that imminent harm to immigrants was presented by the public charge rule. The court noted, “Cook County adduces evidence showing, consistent with common sense, that where individuals lack access to health coverage and do not avail themselves of government-provided healthcare, they are likely to forgo routine treatment—resulting in more costly, uncompensated emergency care down the line. Doc. 27-1 at pp. 331-333, 335-337, ¶¶ 30-32, 41-50.”¹⁰⁷ The court reasoned that the cascade of consequences flowing from the chilling effect of the new rule would include raised public health, safety and welfare concerns, and higher costs to the state and federal fisc.

Both the costs of community health epidemics and of uncompensated care are likely to fall particularly hard on CCH, which already provides approximately half of all charity care in Cook County, *id.* at pp. 335-336, ¶¶ 42-43, including to non-citizens regardless of their immigration status, *id.* at p. 327, ¶ 11. Indeed, DHS itself recognizes that the Rule will cause “[s]tate and local governments . . . [to] incur costs” stemming from “changes in behavior caused by” the Rule. 84 Fed. Reg. at 41,389; *see also id.* at 41,300-01 (“DHS estimates that the total reduction in transfer payments from the Federal and State governments will be approximately \$2.47 billion annually due to disenrollment or foregone enrollment in public benefits programs by foreign-born non-citizens who may be receiving public benefits.”); *id.* at 41,469 (“DHS agrees that some entities, such as State and local governments or other businesses and organizations, would incur costs related to the changes.”). DHS specifically noted that “hospital systems, state agencies, and other organizations that provide public assistance to aliens and their households” will suffer financial harm from the Rule’s implementation. *Id.* at 41,469-70.¹⁰⁸

Among immigrants with children under age 19, the chilling effects of the news of implementation of a new public charge were higher (17.4 percent), than adults without children in the household (8.9 percent), though the proposed rule would only directly apply to

¹⁰⁵ Plaintiff’s Memorandum of Law in Support of Motion for Temporary Restraining Order And/OR Preliminary Injunction or Stay Pursuant to 5 U.S.C. § 705 at 10, 13–14, 17 *Cook Cnty v. McAleenan*, No. 1:19-cv-06334 (N.D. Ill. Oct. 14, 2019).

¹⁰⁶ *Cook Cnty. v. McAleenan*, No. 19 C 6334, 2019 U.S. Dist. LEXIS 177759, at *15 (N.D. Ill. Oct. 14, 2019).

¹⁰⁷ *Id.* at *15–16.

¹⁰⁸ *Id.*

adults.¹⁰⁹ “Adults in Latinx families in particular were more than twice as likely (20.6 percent) as non-[Latinx] white and non-[Latinx] nonwhite adults in immigrant families (8.5 percent and 6.0 percent, respectively) to report chilling effects in their families.”¹¹⁰

VII. THE LAST LAUGH IN AMERICA

When President Trump and his enablers mock children, and innocent vulnerable people, they disfigure the face of America. It is only through the rule of law, as enforced by the embodied apparatus of law—investigators, lawyers, and judges—that fascism will not revive itself, and the sad trombone “womp, womp” will play the world round, not for children in cages, but for fascism. Still, the institutions of constitutional government under the rule of law are not invulnerable to infiltration and corruption by the creep of fascism, and as is clear both then and now, the most vulnerable groups are regularly targeted by fascism’s preference for #thebestpeople.

¹⁰⁹ Plaintiff’s Memorandum of Law in Support of Motion for Temporary Restraining Order And/Or Preliminary Injunction or Stay, *Cook Cnty v. McAleenan*, (Affidavit Exhibits to Plaintiff’s Motion) (No. 1:19-cv-06334) at 632.

¹¹⁰ *Id.*

