CONSTITUTIONAL INCENTIVE TO CARE: IMMIGRANT CHILDREN'S MENTAL HEALTH

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INTRODUCTION

The United States immigration system places a tremendous toll on the mental health of young people who travel to the United States without a parent or guardian or who are separated from their parent(s) after arriving in the country.[1] One 17-year-old, who entered the United States at age 15 and was detained in a secure juvenile facility for over a year, described the impact immigration detention had on his mental health: "I had never cut myself before I came to the United States. I learned this from other kids while I was detained."[2] Despite the teen's documented mental health diagnoses, facility staff were inattentive to his medical needs.[3] He recalled that "[s]taff members saw the scars on my wrists and knew I was hurting myself" but said "they didn't care."[4]

Federal law defines an "unaccompanied alien child" (hereafter referred to as "unaccompanied migrant minor") as a person under the age of 18 who does not have lawful immigration status in the United States and has no parent or legal guardian who is available to provide care and physical custody to the minor in the United States.[5] Unaccompanied migrant minors often face traumatic events and adverse experiences in their home countries, throughout their journey to the United States, and once in the United States.[6] As a result, there is a great need for unaccompanied migrant minors to access competent, trauma-informed mental health care when in government custody.[7] Under the United States' legal and regulatory framework and the

1. JOANNE M. CHIEDI, U.S. DEP'T OF HEALTH AND HUM. SERVS., OFF. OF INSPECTOR GEN., OEI-09-18-00431, CARE PROVIDER FACILITIES DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY 9 (2019).

2. Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 242, Doe v. Shenandoah Valley Juv. Ctr. Comm'n, 355 F. Supp. 3d 454 (W.D. Va. 2018), *rev'd sub nom.*, Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327 (4th Cir. 2021) (No. 5:17cV00097), *cert. denied sub nom.*, Shenandoah Valley Juv. Ctr. Comm'n v. John Doe 5, 142 S. Ct. 583 (2021).

3. *Id.*

4. *Id.*

5. 6 U.S.C. § 279(g)(2).

6. CHEIDI, *supra* note 1, at 9.

7. HEATHER WASIK, OFF. OF PLAN. RSCH. AND EVALUATION, OPRE 2021-36, YOUTH MENTAL HEALTH IN THE UNACCOMPANIED REFUGEE MINORS PROGRAM: FINDINGS FROM A DESCRIPTIVE STUDY 9 (2021) ("Given high rates of traumatic events and mental health conditions in refugee and URM youth as a result of their migration experience, the need for high-quality mental health services is evident.").

terms of the *Flores* Settlement Agreement, unaccompanied migrant minors are entitled to receive necessary mental health care when in government custody.[8] However, the mental health care provided to unaccompanied migrant minors in immigration facilities is often inadequate.[9] In some instances, the subpar quality of mental health care provided to unaccompanied migrant minors is so egregious as to

8. *Id.* at 1–2. The *Flores* Settlement Agreement, discussed in greater detail in Section I.B.1 of this Note, is a court settlement agreement between the United States government and a class of migrant children. Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK(Px) (C.D. Cal Jan. 17, 1997) [hereinafter *Flores* Settlement Agreement]. The agreement established nationwide policies "for the detention, release, and treatment of minors in [immigration] custody" by the Immigration and Naturalization Service (INS). *Id.* at 6. The Department of Homeland Security and Department of Health and Human Services subsumed the INS's obligations under the agreement and it remains in effect today. Flores v. Sessions, 862 F.3d 863, 870 (9th Cir. 2017).

9. A 2019 Office of Inspector General Report explained that mental health clinicians caring for unaccompanied migrant minors expressed concerns that "they were not able to address the children's mental health issues," "high caseloads limited their effectiveness in addressing children's needs," and they felt "unprepared to handle the level of trauma that some children presented." CHEIDI, *supra* note 1, at 9–18. The report also noted that facilities struggled to find qualified mental health clinicians, "especially those who were fluent in the languages spoken by children in their care," and explained that "[c]hildren experienced treatment delays when [facilities] could not access external specialists." *Id.* at 14–15. Audits of programs contracted to care for unaccompanied migrant minors also revealed instances where facilities failed to conduct physical and mental health intake assessments in a timely manner. U.S. DEP'T OF HEALTH AND HUM. SERVS., OFFICE OF INSPECTOR GEN., A-06-17-07005, SOUTHWEST KEY PROGRAM DID NOT ALWAYS COMPLY WITH HEALTH AND SAFETY REQUIREMENTS FOR THE UNACCOMPANIED ALIEN CHILDREN PROGRAM 15 (2019); U.S. DEP'T OF HEALTH AND HUM. SERVS., OFFICE OF INSPECTOR GEN., A-06-17-07007, BCFS HEALTH AND HUMAN SERVICES. DID NOT ALWAYS COMPLY WITH FEDERAL AND STATE REQUIREMENTS RELATED TO THE HEALTH AND SAFETY OF UNACCOMPANIED ALIEN CHILDREN 11–12 (2018); U.S. DEP'T OF HEALTH AND HUM. SERVS., OFFICE OF INSPECTOR GEN., A-03-16-00250, YOUTH FOR TOMORROW—NEW LIFE CENTER, INC., AN ADMINISTRATION FOR CHILDREN AND FAMILIES GRANTEE, DID NOT COMPLY WITH ALL APPLICABLE FEDERAL POLICIES AND REQUIREMENTS 8 (2020). Furthermore, there have been numerous reports of detention centers inappropriately overmedicating unaccompanied migrant minors with psychotropic medications without informed consent. Caroline Chen & Jess Ramirez, *Zero Tolerance: Immigrant Shelters Drug Traumatized Teenagers Without Consent*, PROPUBLICA (July 20, 2018), https://www.propublica.org/article/
immigrant-shelters-drug-traumatized-teenagers-without-consent
[https://perma.cc/S8ED-245F].

warrant a constitutional challenge under the Due Process Clause.[10] However, there is no uniform standard guiding courts' analysis of the constitutional adequacy of mental health care provided to unaccompanied migrant minors in government custody, placing children at risk of receiving insufficient mental health care without a clear path for seeking legal recourse.

In *Doe 4 v. Shenandoah Valley Juvenile Center Commission*, the Fourth Circuit considered a constitutional challenge to the quality of mental health care provided to unaccompanied migrant minors held in a secure detention facility.[11] This was an issue of first impression before the court, and there existed no direct authority regarding what standard should guide the court's analysis.[12] In determining how to evaluate the claim, the court turned to standards applied to evaluate inadequate health care claims in other deprivation of liberty contexts. Specifically, the court considered whether to apply the professional judgment standard, which developed in response to a claim concerning the substantive due process rights of an involuntarily committed patient,[13] or the deliberate indifference standard, which originated in the context of a convicted incarcerated person's Eighth Amendment claim of subquality medical care.[14] The professional judgment standard

10. *See* Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327 (4th Cir. 2021), *cert. denied sub nom.*, Shenandoah Valley Juv. Ctr. Comm'n v. John Doe 5, 142 S. Ct. 583 (2021) (considering a 1983 claim that an immigration facility failed to provide a constitutionally adequate level of mental health care to unaccompanied migrant minors at the facility). In *Shenandoah Valley*, a class of unaccompanied migrant minors alleged that a facility provided constitutionally inadequate mental health care by, *inter alia*, isolating and punishing children engaged in self-harming behavior, taunting and harassing children exhibiting signs of distress, and failing to ensure mental health clinicians were trained in trauma-informed care. Second Amended Class Action Complaint. at 17–20, Doe v. Shenandoah Valley Juv. Ctr. Comm'n, 355 F. Supp. 3d 454 (W.D. Va. 2018) (No. 5:17cV00097).

11. *Id.*

12. *Doe 4*, 985 F.3d at 339.

13. *See generally* Youngberg v. Romero, 457 U.S. 307 (1982) (outlining the professional judgement standard).

14. Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (concluding that deliberate indifference to an incarcerated individual's serious medical need constitutes a violation of the Eighth Amendment). Courts have subsequently applied the deliberate indifference standard to evaluate claims raised by individuals in pretrial detention and juvenile detention. *See, e.g.*, Smith v. Knox Cnty. Jail, 666 F.3d 1037, 1039 (7th Cir. 2012) (per curiam) (evaluating a person in pretrial detention's claim under the deliberate indifference standard); A.M. *ex rel.* J.M.K. v. Luzerne Cty. Juv. Det. Ctr., 372 F.3d 572, 579 (3d Cir. 2004) (evaluating a child in juvenile detention's

imposes liability when the care provided represents a "substantial departure from accepted professional judgment."[15] In contrast, the deliberate indifference standard requires proof of an "objectively serious medical need" that was known to officials and disregarded.[16] Ultimately, the court decided to apply the professional judgment standard.[17]

This Note argues that the professional judgment standard is the appropriate legal framework for evaluating claims regarding constitutionally inadequate mental health care provided to unaccompanied migrant minors in government custody. Part I of this Note provides an overview of the history and legal background underpinning the treatment of unaccompanied minor children in the United States and discusses the mental health challenges often faced by this population. Part II identifies the various standards applied to evaluate challenges regarding the constitutional adequacy of health care afforded to individuals in government custody and highlights the gap in precedent related to the treatment of unaccompanied migrant minors in detention. Finally, Part III argues that the professional judgment standard is the most appropriate legal framework for measuring the adequacy of mental health care provided to unaccompanied migrant minors, because it sufficiently takes into account unaccompanied migrant minors' mental health needs and the theories underlying their placement in detention.

I. Migration Patterns, Legal Protections, and Mental Health Needs

The need for an articulate constitutional standard governing the level of mental health care provided to unaccompanied migrant minors is best understood within the broader context of unaccompanied migrant minors' experiences within the United States immigration system. Though each child's circumstances are unique, this Part discusses common factors which may impel an unaccompanied migrant minors' migration to the United States. It then summarizes the legal protections which, in addition to the Constitution, inform the standards of care required for unaccompanied

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claim regarding a failure to receive appropriate mental health care under a deliberate indifference standard).

15. *Doe 4*, 985 F.3d at 339 (quoting *Youngberg*, 457 U.S. at 320–23).
16. *Id.* at 340 (citing Farmer v. Brennan, 511 U.S. 825, 837 (1994)).
17. *Doe 4*, 985 F.3d at 339.

migrant minors in government custody. Finally, this Part connects the prevalent need for mental health services among unaccompanied migrant minors to trends in their experiences before, during, and after migration to the United States.

A. Trends in Migration of Unaccompanied Migrant Minors to the United States

The past decade witnessed a drastic increase in the number of unaccompanied migrant minors apprehended at the United States' borders.[18] Between 2011 and 2021, the number of unaccompanied migrant minors apprehended increased more than ninefold. In fiscal year (FY) 2011, the United States Border Patrol reported 16,067 apprehensions of unaccompanied migrant minors.[19] In FY 2021, an unprecedented 147,975 unaccompanied minors were apprehended.[20]

The influx of unaccompanied migrant minors coming to the United States is attributed to a variety of "push" and "pull" factors.[21] Push factors refer to the circumstances within a minor's country of origin that motivate their decision to leave, whereas pull factors refer to elements specific to the United States that attract migration.[22] Some

18. WILLIAM A. KANDEL, CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 1 (2021) [hereinafter CRS OVERVIEW].

19. U.S. BORDER PATROL, BP TOTAL MONTHLY UACS BY SECTOR FY10-19, https://www.cbp.gov/sites/default/files/assets/documents/2020-Jan/U.S.%20Border%20Patrol%20Total%20Monthly%20UAC%20Apprehensions%20by%20Sector%20%28FY%202010%20-%20FY%202019%29_0.pdf [https://perma.cc/PXM3-FRKY].

20. *Nationwide Encounters*, U.S. CUSTOMS AND BORDER PROT., https://www.cbp.gov/newsroom/stats/nationwide-encounters [https://perma.cc/W3QG-2TR3]. Apprehensions of unaccompanied migrant minors have ebbed and flowed over the past decade, but in general, the past ten years witnessed a significant uptick in the number of unaccompanied migrant minors apprehended at the Southwest Border. WILLIAM A. KANDEL, CONG. RSCH. SERV., IN11638, INCREASING NUMBERS OF UNACCOMPANIED ALIEN CHILDREN AT THE SOUTHWEST BORDER 2 (2021) [hereinafter INCREASING NUMBERS OF UACS] (noting that "UAC apprehensions have increased and fluctuated substantially in the past decade").

21. WILLIAM A. KANDEL ET AL., CONG. RSCH. SERV., IN11638, UNACCOMPANIED ALIEN CHILDREN: POTENTIAL FACTORS CONTRIBUTING TO RECENT IMMIGRATION 1 (2014) [hereinafter MIGRATION FACTORS] (delineating the motivations driving migration from Mexico and the Northern Triangle countries to the United States into two categories, "push factors" and "pull factors"); CRS OVERVIEW, *supra* note 18, at 2 (describing the analysis of "push factors" and "pull factors").

22. MIGRATION FACTORS, *supra* note 21, at 1.

push factors driving minors from their home countries include violence, gang activity, and poverty.[23] In recent years, most unaccompanied migrant minors apprehended at the Southwestern border have arrived from Mexico or the "Northern Triangle" countries of El Salvador, Guatemala, and Honduras.[24] A United Nations High Commissioner for Refugees (UNHCR) report analyzing the factors contributing to unaccompanied migrant minors leaving these countries found that violence commonly influenced migration patterns.[25] In the report, the UNHCR interviewed around 400 unaccompanied migrant minors.[26] Fifty-eight percent of the children interviewed were "forcibly displaced" from their home country due to conditions which suggested a "potential or actual need for international protection."[27] Forty-eight percent of the total children interviewed reported suffering from, or being threatened with, violence by "organized armed criminal actors," such as drug cartels, gangs, and State actors.[28] The UNHCR report also

23. *Id.* at 3–9 (explaining that economic conditions, violence, and crime appear to push unaccompanied migrant minors to emigrate from the "Northern Triangle" countries). A 2015 report observed that government officials in El Salvador, Guatemala, and Honduras viewed violence, crime, and economic concerns as the primary factors motivating migration of unaccompanied migrant minors to the United States. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-362, CENTRAL AMERICA: INFORMATION ON MIGRATION OF UNACCOMPANIED CHILDREN FROM EL SALVADOR, GUATEMALA, AND HONDURAS 4 (2015) [hereinafter GAO].

24. INCREASING NUMBERS OF UACS, *supra* note 20, at 2; *U.S. Border Patrol Southwest Border Apprehensions by Sector*, U.S. CUSTOMS & BORDER PROT. (June 10, 2021), https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters/usbp-sw-border-apprehensions [https://perma.cc/XX4X-98RQ].

25. UNHCR, CHILDREN ON THE RUN: UNACCOMPANIED MIGRANT MINORS LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 6 (2014).

26. *Id.*

27. *Id.* at 6. Specifically, 58% of children expressed that they "suffered, [were] threatened or feared serious harm" prior to emigrating, in a manner that indicated a potential need for international protection. *Id.* at 25. The UNHCR report explained that international protection may be necessary in situations where governments are "unwilling or unable to protect their citizens or others who reside in their territory[,]" and as a result "individuals may suffer such serious violations of their rights that they are forced to leave their homes and often even their families to seek safety in another country." *Id.* at 41.

28. *Id.* at 16, 26–27. For example, a 16-year-old from Guatemala described his experience escaping from a gang near his neighborhood: "They held my cousin and me three hours, tied up. My cousin was able to untie the rope and he helped me untie mine. We heard gun shots and we ran. They kept looking for us, but we escaped." *Id.* at 10. A 17-year-old from Honduras also described his grandmother's pleas for him to leave in order to escape violence: "She told me: 'If you don't join,

concluded that poverty and economic conditions contribute to increased migration of unaccompanied migrant minors, noting that some children left their home country at least in part due to fear of "a life of deprivation and desperation due to lack of food, education and hope."[29]

The pull factors which may draw unaccompanied migrant minors to the United States include improved economic outlooks, the prospect of reuniting with family, and educational opportunities.[30] Some anecdotal reports also hypothesize that misperceptions surrounding the United States' immigration policies may contribute to unaccompanied migrant minors' migration to the United States.[31] Most

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the gang will shoot you. If you do join, the rival gang will shoot you—or the cops will shoot you. But if you leave, no one will shoot you.'" *Id.*; *see also* McKayla M. Smith, *Scared but No Longer Alone: Using Louisiana to Build a Nationwide System of Representation for Unaccompanied Migrant Minors*, 63 LOY. L. REV. 111, 112–21 (2017) (describing the violence unaccompanied migrant minors often face in their home countries, frequently at the hands of gangs). In addition, 21% of children interviewed in the UNHCR study reported a history of violence or abuse in the home. UNHCR, *supra* note 25, at 6. Thirty-eight percent of children from Mexico specifically reported that they experienced or feared exploitation by smuggling. *Id.* at 25.

29. UNHCR, *supra* note 25, at 31. Fifty-three percent of the children interviewed in the UNHCR study highlighted issues associated with "poverty and lacking basic survival necessities, needing to provide support to family members, or lacking meaningful opportunity for work or education" as one reason for leaving their home country. *Id.* at 46; *see also* GAO, *supra* note 23, at 4–5 (reporting that United States officials stationed in the Northern Triangle countries attributed some of the increase in unaccompanied minors migrating to the United States to economic concerns); MIGRATION FACTORS, *supra* note 21, at 5–7 (describing economic conditions in El Salvador, Guatemala, and Honduras); Shani M. King, *Child Migrants and America's Evolving Immigration Mission*, 32 HARV. HUM. RTS. J. 59, 88–89 (2019) (explaining that, "[i]n addition to ranking among the world's most dangerous places, Honduras, Guatemala, and El Salvador are also among the poorest—with more than one-third of employed people surviving on incomes of less than $4 a day").

30. MIGRATION FACTORS, *supra* note 21, at 3–4; *see also* GAO, *supra* note 23, at 4–5 (noting that while violence and economic concerns were viewed by agency officials as the primary drivers of unaccompanied minors' migration to the United States, hopes for better educational opportunities and family reunification were also considered significant factors influencing migration patterns).

31. GAO, *supra* note 23, at 6 (citing five United States agency officials suggesting a belief, particularly among Honduran immigrants, that they may have a path to citizenship in the United States). United States agency officials identified that misinformation spread by smugglers in El Salvador and Guatemala may have contributed to increased migration to the United States among unaccompanied minors. *Id.*; *see also* Scott Rempell, *Credible Fears, Unaccompanied Minors, and the Causes of the Southwestern Border Surge*, 18 CHAP. L. REV. 337, 352 (2015)

of the children interviewed for the UNHCR report cited family reunification or economic opportunity as at least one factor contributing to their decision to leave home.[32] However, there is a risk in characterizing young people seeking economic or educational opportunity in the United States as merely "economic migrants."[33] The appeal of these apparent pull factors is often inextricably linked to structural poverty and lack of opportunity in home countries, which may be compounded by civil war, violence, and unrest.[34] Thus, the factors contributing to unaccompanied migrant minor migration to the United States are multifaceted.

B. Federal Requirements for the Treatment of Unaccompanied Migrant Minors

The United States immigration system was not designed with the interests of children at the forefront.[35] In the 1980s, an increase in unaccompanied migrant minors entering the United States directed new attention to the conditions in which they were confined, prompting the government to enact changes in the legal regime governing the care and processing of unaccompanied migrant minors.[36] The current legal requirements for the treatment of unaccompanied migrant children in the United States are primarily dictated by the *Flores* Settlement Agreement, the Homeland Security Act, and the Trafficking Victims Protection Reauthorization Act (TVPRA).[37]

(identifying the factors that have caused the extraordinary surge in border crossings by credible fear claimants and UACs).

32. Eighty-one percent of unaccompanied or separated children interviewed in the UNHCR Report cited joining a family member or pursuing better opportunities as a reason for their migration. UNHCR, *supra* note 25, at 24.

33. *Id.* (cautioning against categorically characterizing children who cite hopes of family reunification or economic opportunity as "economic migrants").

34. *Id.*

35. JACQUELINE BHABHA & SUSAN SCHMIDT, SEEKING ASYLUM ALONE: UNACCOMPANIED AND SEPARATED CHILDREN AND REFUGEE PROTECTION IN THE U.S. 7 (2006) (observing that "children were forgotten when national immigration legislation was drafted"). Child-specific guidelines were not published by the U.S. Immigration Court until 2004. *Id.*

36. OLGA BYRNE & ELISE MILLER, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM 6 (2012); CRS OVERVIEW, *supra* note 18, at 5.

37. CRS OVERVIEW, *supra* note 18, at 5. Though not the focus of this Note, international obligations, including the Universal Declaration of Human Rights and the International Bill of Rights, the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, and the 1989 United Nations Convention on the

1. Flores Settlement Agreement

The *Flores* Settlement Agreement (FSA)[38] is a pivotal agreement between the United States government and a class of migrant children that set the baseline standard of care for unaccompanied migrant minors in United States government custody.[39] The agreement is the culmination of a nine-year federal class-action lawsuit related to the treatment of minors under the custody of the former United States immigration agency, the Immigration and Naturalization Service (INS).[40] The lawsuit challenged the circumstances under which an unaccompanied minor could be released from government custody,[41] and the prison-like conditions unaccompanied migrant minors faced when in detention.[42]

Rights of the Child, add another layer of protections for unaccompanied migrant minors.

38. *Flores* Settlement Agreement, supra note 8.

39. LAURIE COLLIER HILLSTROM, FAMILY SEPARATION AND THE U.S.-MEXICO BORDER CRISIS 39 (2020); Rebeca M. López, Comment, *Codifying the* Flores *Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635, 1648 (2012) ("The FSA was the first document to establish guidelines for the treatment of children in the immigration detention system.").

40. *Flores* Settlement Agreement, *supra* note 8, at 3; HILLSTROM*, supra* note 39.

41. The class argued that an INS policy restricting children's release to a legal guardian or adult relative was unreasonably burdensome and asserted that children should not be detained when a responsible third-party adult was willing and able to take custody of them. *See* Flores by Galvez-Maldonado v. Messe, 942 F.2d 1352, 1355–57 (9th Cir. 1991), *rev'd sub nom.* Reno v. Flores, 507 U.S. 292, 113 (1993) (discussing the standards for releasing government detained migrant minors to adult custody). The challenged policy resulted in more children in detention because it narrowed the scope of people to whom the government would release a child in government custody. HUMAN RIGHTS WATCH CHILD'S RIGHTS PROJECT, SLIPPING THROUGH THE CRACKS: UNACCOMPANIED MIGRANT MINORS DETAINED BY THE U.S. IMMIGRATION AND NATURALIZATION SERVICE 29 (1997) [hereinafter HRW REPORT]. For additional context regarding the detention release policy at issue in *Reno*, see Lisa Rodriguez Navarro, Comment, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANO-LATINO L. REV. 589, 592–95 (1998).

42. The plaintiffs argued that the practice of routinely strip-searching unaccompanied minors in detention was unconstitutional. *See* Flores v. Messe, 681 F. Supp. 665, 667 (C.D. Cal. 1988), *aff'd sub nom.* Flores by Galvez-Maldonado v. Messe, 942 F.2d 1352 (9th Cir. 1991), *rev'd sub nom.* Reno v. Flores, 507 U.S. 292 (1993) (holding that the INS violated the fourth amendment by routinely strip-searching juveniles); *see also* HRW REPORT, *supra* note 41, at 30. The Supreme Court avoided using the term "detention" to describe the conditions

In 1987, the parties entered a consent decree applicable to the Western Region of the INS, in which the government agreed to improve conditions for minors held in immigration facilities and agreed to hold children in "non-secure" facilities more suited to their status as "non-criminal administrative detainees" rather than secure facilities typically used for criminal matters.[43] The Supreme Court subsequently ruled that the INS detention release policy was not unconstitutional,[44] but declined to evaluate the detention conditions subject to the prior consent decree.[45]

Following the Supreme Court decision, immigration rights advocates continued to raise concerns about children's detention conditions.[46] In response to these ongoing concerns and litigation over

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in which the children were held, observing that "the facilities in which immigrant minors are detained are 'not correctional institutions, but facilities that meet state licensing requirements for the provision of shelter care, foster care, group care, and related services to dependent children.'" Rodriguez Navarro, *supra* note 41, at 597 (quoting Reno v. Flores, 507 U.S. 292, 298 (1993)).

43. HRW REPORT, *supra* note 41, at 4. The decree also prohibited holding children in county detention facilities for longer than 72 hours with limited exceptions and set forth a number of requirements regarding the detention facility conditions. *Id.* at 135.

44. Reno v. Flores, 507 U.S. 292, 315 (1993). Though the Court rejected the constitutional challenge, it did not question the applicability of the Constitution to the unaccompanied migrant minors' claims. *Id.* at 306 ("It is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings.") (citing *The Japanese Immigrant Case*, 189 U.S. 86, 100–01 (1903)). Many provisions in the Constitution which refer broadly to "people" or "person[s]" apply to non-citizens. Gretchen Frazee, *What Constitutional Rights Do Undocumented Immigrants Have?*, PBS NEWS HOUR (June 25, 2018), https://www.pbs.org/newshour/politics/what-constitutional-rights-do-undocumented-immigrants-have [https://perma.cc/8XWP-GKW3]; *see, e.g.*, Yick v. Hopkins, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens."); Fong v. United States, 149 U.S. 698, 724 (1893) ("Chinese laborers . . . like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution . . . .").

45. *Reno*, 507 U.S. at 301 ("We will disregard the effort to reopen [claims which were addressed in the consent decree] by alleging, for purposes of the challenges to the regulation, that the detention conditions are other than what the consent decree says they must be.").

46. *See generally* HRW REPORT, *supra* note 41 (raising concerns about the conditions faced by migrant minors in government immigration detention); HILLSTROM, *supra* note 39, at 42 (describing the concerns raised in the Human Rights Watch Report).

the enforcement of the consent decree, the United States government agreed to the *Flores* Settlement Agreement in 1997.[47] The stipulated settlement agreement established the "nationwide policy for the detention, release, and treatment of minors" in INS custody.[48] It requires that minors in custody are treated "with dignity, respect, and special concern for their particular vulnerability as minors."[49] Under the settlement, minors must be placed in "the least restrictive setting appropriate to the minor's age and special needs" so long as the setting would not interfere with the child's appearance before immigration officials nor infringe on the well-being of others.[50] The settlement also dictates a number of basic standards relating to things such as food, water, hygiene, medical care, and adult supervision.[51]

The FSA sets minimum standards for the licensed facilities that care for unaccompanied migrant minors.[52] Several of these standards involve caring for children's mental health.[53] For example, facilities must provide appropriate medical care, including appropriate mental health interventions, to children as necessary.[54] Facilities are also required to provide children with one individualized counseling session per week and two group counseling sessions per week.[55] Furthermore, facilities must take care to avoid adversely affecting children's health and physical or psychological wellbeing when employing disciplinary sanctions.[56]

Beyond the mental health-specific components of the minimum standards, the FSA also dictates requirements related to education services, contact with family members, access to legal services, as well as general care and maintenance.[57] Despite the fact that the FSA is binding on the federal government, it was routinely violated after it

47. HILLSTROM, *supra* note 39, at 41.
48. *Flores Settlement* Agreement, supra note 8, at 6.
49. *Id.* at 7.
50. *Id.*
51. HILLSTROM, *supra* note 39, at 42; U.S. DEP'T OF HOMELAND SEC. OFF. OF INSPECTOR GEN., OIG-10-117, CBP'S HANDLING OF UNACCOMPANIED ALIEN CHILDREN 2 (2010).
52. *Flores* Settlement Agreement, supra note 8, ex. 1 at 1.
53. *Id.*
54. *Id.*
55. *Id.* at 2.
56. *Id.* at 4.
57. *Id.* at 1–4.

went into effect.[58] Subsequently, several legislative proposals were enacted to partially address the treatment of unaccompanied migrant minors in the United States' custody.[59]

2. The Homeland Security Act of 2002

The first significant legislative change relating to unaccompanied migrant minors came with the enactment of the Homeland Security Act of 2002 (HSA).[60] In the wake of 9/11, the HSA created a new executive department, the Department of Homeland Security (DHS), for the purpose of preventing and responding to terrorist attacks and other threats.[61] The HSA formally defined "unaccompanied alien children"[62] and divided INS's historic responsibilities in the processing and care of unaccompanied migrant minors between DHS and the Office of Refugee Resettlement (ORR).[63] The HSA tasked DHS with the responsibilities of apprehending, transferring, and repatriating unaccompanied migrant minors.[64] The ORR, which is an office within the Department of Health and Human Services (HHS), assumed INS's responsibilities related to the care,

58. López, *supra* note 39, at 1642; *see* Wendy Young & Megan McKenna, *Kids in Need of Defense, Special Project: The Measure of a Society: The Treatment of Unaccompanied Refugee and Immigrant Children in the United States*, 45 HARV. C.R.- C.L.L. REV. 247, 250–51 (2010) (noting that in some instances children were detained for nearly two years, improperly detained in secure facilities rather than less restrictive facilities, or placed in facilities that lacked the mental health services necessary to serve children with mental health needs); *see also* U.S. DEP'T. OF JUST. OFF. OF INSPECTOR GEN., UNACCOMPANIED JUVENILES IN INS CUSTODY, REP. NO. I-2001-009 (2001) (reporting "deficiencies with the implementation of the policies and procedures developed in response to *Flores* in INS districts, Border Patrol sectors, and at headquarters.").

59. Young & McKenna, *supra* note 58, at 251; López, *supra* note 39, at 1642.

60. Homeland Security Act of 2002, 6 U.S.C §§ 111–557.

61. 6 U.S.C § 101(b)(1); *Mission,* U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/mission [https://perma.cc/XX9T-6NWE].

62. An "unaccompanied alien child" is defined in the HSA as a child who:

> (A) has no lawful immigration status in the United States;
>
> (B) has not attained 18 years of age; and
>
> (C) with respect to whom—
>
> > (i) there is no parent or legal guardian in the United States; or
> >
> > (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2).

63. CRS OVERVIEW, *supra* note 18, at 6.

64. *Id.*

placement, and reunification of unaccompanied migrant minors.[65] As the INS's successors, the DHS and ORR inherited responsibility for complying with the FSA.[66]

The Director of ORR is responsible for "coordinating and implementing the care and placement" of unaccompanied migrant minors in federal custody for immigration purposes, and must ensure that the "interests of the child are considered in decisions and actions relating to the care and custody" of an unaccompanied migrant minor.[67] Furthermore, in determining child placements, the director is "encouraged to use the refugee children foster care system."[68] Given the ORR's expertise in refugee resettlement, the HSA represented a promising step towards improving the treatment of unaccompanied migrant minors in government custody.[69] One report studying the effectiveness of the HSA's transfer of responsibilities found that "the treatment of most unaccompanied children . . . greatly improved" under the new system; however, "significant child protection challenges remain[ed]."[70]

3. The Trafficking Victims Protection Act

65. Homeland Security Act of 2002 § 462, 6 U.S.C. § 279; CRS OVERVIEW, *supra* note 18, at 6. ORR is also responsible for maintaining statistical information regarding unaccompanied migrant minors and continuing to assess the suitability of children's placements, among other responsibilities. 6 U.S.C. § 279(b)(1).

66. The HSA contains a savings clause which preserved the FSA. Flores v. Sessions, 862 F.3d 863, 870 (9th Cir. 2017).

67. 6 U.S.C. § 279(b)(1)(A)–(B).

68. 6 U.S.C. § 279(b)(3).

69. López, *supra* note 39, at 1653. Section 462 of the HSA was inspired by the Unaccompanied Alien Child Protection Act (UACPA). BYRNE & MILLER, *supra* note 36, at 7. Advocates of unaccompanied migrant minors expressed strong support for the UACPA prior to the passage of the HSA. *See* Letter from Coalition in Support of the Unaccompanied Alien Child Protection Act to U.S. Senators (Feb. 26, 2002), https://www.aclu.org/letter/coalition-letter-urging-co-sponsorship-s121-unaccompanied-alien-child-protection-act-2001 [https://perma.cc/5P7A-JNQ7] (demonstrating the support of over sixty organizations).

70. WOMEN'S REFUGEE COMMISSION & ORRICK HERRINGTON & SUTCLIFF LLP, HALFWAY HOME: UNACCOMPANIED CHILDREN IN IMMIGRATION CUSTODY 1 (2009). The report highlighted improvements in the provision of medical care and the releasing of children to safe environments, but noted that the conditions of detention when children were in the custody of ICE and Border Patrol were inadequate and observed a general lack of oversight. *Id.* at 1–2.

In 2008, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008,[71] which further developed the law surrounding the care and treatment of unaccompanied migrant minors. The TVPRA tasks the Secretary of the DHS with developing policies and procedures to safely repatriate unaccompanied migrant minors to their home country or their country of last habitual residence.[72] The act also sets forth several requirements related to the procedures for screening unaccompanied migrant minors for evidence of persecution or human trafficking.[73]

The TVPRA created different processes for children arriving from contiguous countries and non-contiguous countries.[74] Unaccompanied migrant minors from Mexico or Canada undergo an expedited human trafficking screening and voluntary removal process in accordance with agreements negotiated with Mexico and Canada.[75] When an unaccompanied migrant minor from a non-contiguous country is apprehended, HHS must be notified within forty-eight hours of either the apprehension, or when the department or agency learns or suspects that an individual in custody is under the age of eighteen.[76]

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71. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Pub. L. No. 110-457, 122 Stat. 5044 (2008).

72. TVPRA, 8 U.S.C. § 1232(a)(1).

73. 8 U.S.C § 123(a)

74. CRS OVERVIEW, *supra* note 18, at 6.

75. TVPRA, 8 U.S.C. § 1232(a)(2). When unaccompanied migrant minors from Mexico or Canada are apprehended at the border, the TVPRA requires that within 48 hours of apprehension they are screened for evidence of human trafficking or persecution. 8 U.S.C. § 1232(a)(4). If no evidence of human trafficking or persecution is found and the child is considered capable of making an independent decision to withdraw their application for admission to the United States, the child may be voluntarily repatriated without legal penalty in accordance with agreements negotiated with Mexico and Canada. 8 U.S.C.§ 1232(a)(2); *see also* Lazaro Zamora, *Unaccompanied Alien Children: A Primer*, BIPARTISAN POL'Y CTR. (July 21, 2014) (summarizing the TVPRA's requirements with respect to the treatment of unaccompanied migrant minors apprehended at the border). If the screening reveals evidence that a child was a victim of human trafficking or faces a credible fear of persecution or human tracking if repatriated, the child will then be treated as an unaccompanied minor from a non-contiguous country for the purposes of the transfer of custody and removal proceeding procedures. CRS OVERVIEW, *supra* note 18, at 6. Although the TVPRA only requires human trafficking screening for unaccompanied migrant minors from contiguous countries, in 2009, DHS issued a policy requiring screenings for all unaccompanied migrant minors. CRS OVERVIEW, *supra* note 18, at 7.

76. 8 U.S.C. § 1232(b)(2).

The department or agency which holds the child in custody must then transfer custody to HHS no later than seventy-two hours after determining the child is an unaccompanied minor, except in the case of unusual circumstances.[77] The TVPRA requires that an unaccompanied minor in HHS custody be "promptly placed in the least restrictive setting that is in the best interest of the child," taking into account considerations of the child's "danger to self, danger to the community, and risk of flight."[78] Unless HHS determines the child poses a danger to themselves or to others, or was charged with a criminal offense, the child should not be placed in a secure facility.[79] Furthermore, the TVPRA specifies that when a child is placed in a secure facility, the placement must be reviewed on a monthly basis to ensure the placement is still warranted.[80] Ultimately, an unaccompanied migrant minor will remain in ORR custody until the minor is released to a sponsor, turns eighteen years old, or is returned to their home country through a removal order or grant of voluntary departure.[81]

Taken together, the FSA, HSA, and TVPRA establish the primary federal requirements governing the care and treatment of unaccompanied migrant children.[82] In theory, these legal requirements place an emphasis on prioritizing the interest and well-being of children caught up in the immigration system. In practice, however, the government fails to meet its obligations and unaccompanied migrant minors bear the costs.[83]

C. Mental Health Ramifications: Before, During, and After Migration

Unaccompanied migrant minors face a "high risk for repeated exposure to psychosocial stressors before, during, and after their migration to the United States."[84] A 2019 report by the United States

77. 8 U.S.C. § 1232(b)(3).
78. 8 U.S.C. § 1232(c)(2)(A).
79. *Id.*
80. *Id.*
81. BYRNE & MILLER, *supra* note 36, at 28.
82. CRS OVERVIEW, *supra* note 18, at 5.
83. *See infra* Section I.C (discussing the mental health ramifications of migration on unaccompanied minors).
84. Charles D. R. Baily et. al., *The Mental Health Needs of Unaccompanied Immigrant Children: Lawyers' Role as a Conduit to Services*, 15 GRADUATE STUDENT J. OF PSYCH. 3, 3 (2014).

Office of Inspector General highlighted the trauma children often encounter in their home countries, throughout their journey to the United States, and once they arrive in the country.[85] Many children come to the United States fleeing violence in their home country.[86] Children may have been physically or sexually abused or kidnapped, or may have witnessed extremely traumatizing events prior to migrating to the United States.[87] Children may also experience significant trauma throughout their journey to the United States—reports of abuse, kidnapping, robbery, assault, sexual exploitation, and forced labor along the journey to the United States are not uncommon.[88]

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85. CHEIDI, *supra* note 1, at 9.

86. *Id.*

87. *Id.*; *see also* Mary O'Neill et. al., Note, *Forgotten Children of Immigration and Family Law: How the Absence of Legal Aid Affects Children in the United States*, 53 FAM. CT. REV. 676, 681 (2015) (explaining that children may face psychological trauma in their home country due to armed conflict, abuse and gang violence, or impoverishment); Amanda NeMoyer et al., *Psychological Practice With Unaccompanied Migrant Minors: Clinical and Legal Considerations*, 5 TRANSLATIONAL ISSUES IN PSYCH. SCI. 4, 5 (2019) ("Before emigrating from their countries of origin, UIMs frequently experience physical and emotional abuse, poverty, and exposure to extreme violence."). The OIG Report described a few of the traumatic experiences reported by mental health clinicians and other staff working with unaccompanied minors in the United States:

> Staff in multiple facilities reported cases of children who had been kidnapped or raped, some by members of gangs or drug cartels. In one case, a medical coordinator reported that a girl had been held in captivity for months, during which time she was tortured, raped, and became pregnant. Other children had witnessed the rape or murder of family members or were fleeing threats against their own lives. In one case, a mental health clinician reported that, after fleeing with his mother from an abusive father, the child witnessed the murder of his mother, grandmother, and uncle.

CHEIDI, *supra* note 1, at 9.

88. O'Neill, *supra* note 87, at 681 (citing SARA SATINSKY ET AL., HUMAN IMPACT PARTNERS, FAMILY UNITY, FAMILY HEALTH: HOW FAMILY-FOCUSED IMMIGRATION REFORM WILL MEAN BETTER HEALTH FOR CHILDREN AND FAMILIES (2013)). For example, one child was abducted by a gang while attempting to cross into Mexico and witnessed multiple shootings. CHEIDI, *supra* note 1, at 9. Children may also experience hardships such as hazardous train rides, sexual violence, kidnapping, and hunger while traveling to the United States. Unaccompanied Migrant Children, THE NAT'L CHILD TRAUMATIC STRESS NETWORK (Dec. 2014).

Once unaccompanied migrant minors arrive in the United States, the immigration system itself may also be traumatic.[89] During the implementation of the Trump Administration's zero-tolerance policy, many children were forcibly separated from their parents.[90] Program directors and mental health clinicians working with separated children noted that these children often experienced heightened feelings of anxiety, fear, abandonment, acute grief, and post-traumatic stress.[91] Even children who were not forcibly separated from their parents face difficulties in the United States immigration system, where they are thrown into an unfamiliar environment without their traditional support system.[92] Longer stays in ORR facilities also appear to negatively impact children's mental health,[93] often correlating with greater frustration, increased levels of defiance and hopelessness, and increased instances of self-harm and suicidal ideation.[94]

The great need for mental health care appropriately tailored to unaccompanied migrant minors' experiences is apparent and, to some

89. *Id.*

90. *Id.* Under the Trump Administration's zero-tolerance policy, the Department of Justice (DOJ) began criminally prosecuting all adults apprehended when attempting to cross the border into the United States without authorization. WILLIAM A. KANDEL, CONG. RSCH. SERV., R45266, THE TRUMP ADMINISTRATION'S "ZERO TOLERANCE" IMMIGRATION ENFORCEMENT POLICY 7 (2018). As a result, parents charged with a criminal violation were transferred to an adult criminal detention setting unsuitable for children, and their children were transferred to ORR custody and processed as unaccompanied alien children. *Id.* at 8. In contrast, under prior administrations' enforcement policies, adults apprehended at the border with their children were typically placed in civil removal proceedings and alternatives to detention that helped maintain family unity. *Id.* at 6–7. At least 3,900 children were separated from their families as a result of the policy. Myah Ward, *At Least 3,900 Children Separated From Families Under Trump 'Zero-Tolerance' Policy, Task Force Finds*, POLITICO (June 8, 2021), https://www.politico.com/news/2021/06/08/trump-zero-tolerance-policy-child-separations-492099 [https://perma.cc/BW9P-HY5W].

91. CHEIDI, *supra* note 1, at 9–10; *see also* Jessie Hellmann, *Zero Tolerance Policy Stirs Fears in Health Community*, The Hill (June 18, 2018), https://thehill.com/policy/healthcare/392879-zero-tolerance-policy-stirs-fears-in-health-community?rl=1 [https://perma.cc/4GAT-3SLJ] (explaining that health care groups such as the American Psychological Association, the American Academy of Pediatrics, the American Public Health Association, the American Medical Association, and the American Psychiatric Association raised concerns about the negative mental and physical health ramifications of family separation).

92. CHEIDI, *supra* note 1, at 9.

93. *Id.* at 12.

94. *Id.*

extent, recognized by the United States' immigration legal system.[95] However, factors such as the level of trauma children have experienced, the unpredictable amount of time children spend in HHS care, and the diverse set of ages among children make it difficult for mental health care practitioners to adequately respond to unaccompanied migrant minors' needs.[96] Furthermore, mental health clinicians often face high caseloads and facilities struggle to recruit and maintain mental health clinicians.[97] As a result, the mental well-being of unaccompanied migrant minors is at risk.

II. The Development of Constitutional Standards for Adequate Mental Health Care

Unaccompanied migrant minors' mental health suffers because they receive substandard mental health care and because the conditions of immigration facilities are likely to induce trauma and exacerbate mental health conditions. In some instances, the failure to provide adequate mental health care may be so detrimental to a child's health and well-being as to violate the Due Process Clause of the

95. For example, the government's commitment to providing mental health care and counseling services to children in immigration facilities are dictated by the FSA, *Flores* Settlement Agreement, *supra* note 8, ex. 1, at 1, and the TVPRA's requirement that facilities must be "capable of providing for the child's physical and mental well-being." 8 U.S.C. § 1232(c)(3)(A).

96. CHEIDI, *supra* note 1, at 9–12.

97. *Id.* at 14.

Constitution,[98] which requires individuals who are detained to receive adequate health care, including mental health care.[99]

A constitutional right to health care is recognized in various detention contexts as a byproduct of the Constitution's prohibition of cruel and unusual punishment[100] and its guarantee of due process rights.[101] In general, the Supreme Court has articulated that the Constitution creates an affirmative duty for the government to provide people in custody with health care.[102] As the Court in *DeShaney v. Winnebago County Department of Social Services* explained:

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98. The Fifth and Fourteenth Amendments both guarantee "due process of law," which the Supreme Court interprets to include substantive due process. *See* Reno v. Flores, 507 U.S. 292, 301–02 (1993) (citing cases where the Supreme Court has held that due process includes "a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest."); *see also supra* note 44 and accompanying text (explaining that the Due Process Clause of the Constitution and various other Constitutional provisions apply to non-citizens, including unaccompanied migrant minors). This Note will primarily refer to due process under the Fourteenth Amendment, which applies to the states, because the precedent surrounding a right to health care when in detention typically arises in situations related to state deprivations of liberty, such as in jails or state prisons. Furthermore, though the ORR retains formal custody of unaccompanied migrant minors, most facilities receiving unaccompanied migrant minor placements are state-licensed facilities. *See* CRS OVERVIEW, *supra* note 18, at 11. However, challenges may be brought under both provisions.

99. *See, e.g.*, Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327 (4th Cir. 2021) (holding that a complaint alleging inadequate mental health care in violation of due process under the Fifth and Fourteenth Amendments survived a motion for summary judgment). The Supreme Court has explicitly acknowledged that involuntarily confined psychiatric patients have a substantive right to medical care under the Due Process Clause. Youngberg v. Romero, 457 U.S. 307, 315 (1982). Furthermore, the Court acknowledged that if a person in custody is denied medical care required for basic human needs, "it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199 (1989). Circuit courts interpret "health care" as inclusive of mental health. *See, e.g.*, Bowring v. Godwin, 551 F.2d 44, 47 (4th Cir. 1977) ("We see no underlying distinction between the right to medical care for physical ills and its psychological or psychiatric counterpart."). The Supreme Court also acknowledges that basic health care needs may include mental health care. *See* Brown v. Plata, 563 U.S. 493, 495 (2011) ("For years the medical and mental health care provided by California's prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners' basic health needs.").

100. U.S. CONST. amend. VIII.

101. U.S. CONST. amends. V, XIV.

102. *DeShaney*, 489 U.S. at 199.

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being . . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.[103]

The Supreme Court has not clarified the appropriate standard for reviewing the constitutional adequacy of mental health care provided to unaccompanied migrant minors in government custody.[104] However, the question may be informed by precedent related to the standards applied in other contexts. Specifically, the standards applied to claims of constitutionally inadequate health care raised by incarcerated individuals convicted of a crime,[105] individuals detained while awaiting trial,[106] individuals subject to involuntary commitment,[107] and youth in juvenile detention[108] provide potential guidance for the development of a standard specific to the circumstances of unaccompanied migrant minors in detention. The following section explains the development of a right to adequate health care in these various deprivation of liberty contexts and describes how the Fourth Circuit in *Shenandoah Valley* considered transplanting these precedents to evaluate a claim of inadequate mental health care raised by unaccompanied migrant minors.

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103. *Id.*

104. *Reno v. Flores* is currently the only case in which the Supreme Court addressed the constitutional rights of unaccompanied migrant minors in government custody. 507 U.S. 292 (1993).

105. *See* discussion *infra* Section II.A (discussing why convicted incarcerated persons are entitled to health care under the Eighth Amendment).

106. *See* discussion *infra* Section II.B (discussing how "claims regarding the detention conditions faced by individuals in pretrial detention are evaluated under the Due Process Clause of the Fifth Amendment").

107. *See* discussion *infra* Section II.C (discussing how the Supreme Court put forth a new due process analysis based on "professional judgment").

108. *See* discussion *infra* Section II.D (discussing the inconsistency of standards between circuits despite well documented need for mental health care in juvenile detention facilities).

A. Convicted Incarcerated Persons are Entitled to Health Care Under the Eighth Amendment

The Supreme Court recognizes an obligation to provide health care to incarcerated individuals convicted of a crime embedded within the Eighth Amendment's Cruel and Unusual Punishment clause.[109] In *Estelle v. Gamble*, the Supreme Court found that "deliberate indifference to serious medical needs of prisoners" infringes the Eighth Amendment's prohibition against cruel and unusual punishment actionable under 42 U.S.C. § 1983.[110] The Court held that the principles underlying the Eighth Amendment—namely preventing torture and barbarous punishment, which modern jurisprudence recognizes extends to punishments "incompatible with 'the evolving standards of decency that mark the progress of a maturing society'"[111] or involving "unnecessary and wanton infliction of pain"[112]—establish a government obligation to provide health care to individuals "punish[ed] by incarceration."[113] However, the Court's holding did not make allegations of *any* form of inadequate health care a cognizable claim. Rather, a claim "must allege acts or omissions sufficiently harmful to evidence *deliberate indifference* to serious medical needs" and such indifference must "offend 'evolving standards of decency.'"[114]

Since *Estelle*, the Supreme Court has further clarified the standard applied when assessing the constitutional adequacy of the medical care provided to an incarcerated individual. In *Wilson v. Seiter*, the Supreme Court noted that the Eighth Amendment's focus on *punishment* implies a deliberate action requiring "some mental element"[115] greater than negligence to establish a constitutional

109. Estelle v. Gamble, 429 U.S. 97, 104–05 (1976) (the Supreme Court ruled that deliberate indifference to prisoner's serious illness or injury constitutes cruel and unusual punishment in violation of the Eighth Amendment).

110. *Id.*

111. *Id.* at 102 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

112. *Id.* at 103 (quoting Gregg v. Georgia, 428 U.S. 153, 178 (1976)).

113. *Id.* at 103. The Court also observed that unnecessary suffering resulting from a failure to provide medical care would be unjust when an individual, by means of incarceration, is deprived of the liberty to receive his or her own medical care. *Id.* at 104–5.

114. *Id.* at 106 (emphasis added). For example, in *Estelle* the Court found that a doctor's failure to order an x-ray that could have helped diagnose the cause of a prisoner's back pain did not amount to "deliberate indifference" to a serious medical condition where the prisoner visited a doctor 17 times and was prescribed pain relievers, muscle relaxants, and bed rest. *Id.*

115. Wilson v. Seiter, 501 U.S. 294, 300 (1991).

violation related to conditions of confinement.[116] As applied to allegations of inadequate medical treatment, the mental component required by *Estelle* is "'deliberate indifference' to [a prisoners'] 'serious' medical needs."[117] Subsequent decisions recognized that after *Wilson*, a valid cause of action under the Eighth Amendment requires both an objective and subjective component.[118] The challenged condition or deprivation must objectively be "sufficiently serious" and the prison official must have acted with a subjective "deliberate indifference" to the prisoner's health or safety.[119] "Deliberate indifference" has been equated to subjective recklessness in the criminal law context.[120] In *Farmer v. Brennan*, the Supreme Court held that the Eighth Amendment "deliberate indifference" standard requires that an "official knows of and disregards an excessive risk to inmate health or safety."[121] Furthermore, deliberate indifference to both *current* health problems and conditions that are very likely to create *future* health problems constitute actionable violations of the Eighth Amendment.[122] Circuit courts recognize that the Eighth Amendment's health care guarantees are inclusive of mental health care.[123] The Supreme Court implicitly endorsed this position as well when it upheld a court order

116. *Id.* at 305.

117. *Id.* at 297.

118. *See, e.g.*, Helling v. McKinney, 509 U.S. 25, 35 (1993) (finding that the plaintiff-respondent needs "to prove both the subjective and objective elements necessary to show an Eighth Amendment violation"); Farmer v. Brennan, 511 U.S. 825, 834 (1994) (holding that a prison official violates the Eighth Amendment only when both the subjective and objective components are met).

119. *Farmer*, 511 U.S. at 834 (applying the deliberate indifference standard to a failure-to-protect claim).

120. *Id.* at 839–40.

121. *Id.* at 837.

122. *Helling*, 509 U.S. at 33–35; *see also Farmer*, 511 U.S. at 843 (examining whether "prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial 'risk of serious damage to his future health'") (quoting *Helling*, 509 U.S. at 35). In *Helling*, the Supreme Court found that allegations of deliberate indifference in exposing an incarcerated individual to environmental tobacco smoke, which could lead to serious future health problems, was a valid cause of action under the Eighth Amendment. 509 U.S. at 35.

123. *See* The Honorable K. Edward Greene, *Mental Health Care for Children: Before and During State Custody*, 13 CAMPBELL L. REV. 1, 12–13 n. 73 (1990) (collecting cases) (citing cases recognizing that the guarantee of health care includes mental health care).

issued in response to a constitutional violation of inadequate mental health care in the California prison system.[124]

B. Individuals in Pretrial Detention have a Right to Health Care under the Due Process Clause

Claims regarding the detention conditions faced by individuals in pretrial detention[125] are evaluated under the Due Process Clause instead of the Eighth Amendment.[126] The Supreme Court explained that the Due Process Clause prohibits any punishment "prior to an adjudication of guilt," whereas under the Eighth Amendment, punishment of an individual convicted of a crime may be permissible so long as it is not "cruel and unusual."[127] Thus, in *Bell v. Wolfish*, the Court held that "[i]n evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law . . . the proper inquiry is whether those conditions amount to punishment of the detainee."[128] To determine whether a "condition or restriction" serves to punish an individual in pretrial detention, a court first considers whether there was an intent to punish.[129] If there is no express intent to punish, the court then asks whether the challenged condition is "reasonably related to a legitimate governmental objective."[130] If a condition is reasonably related to a government purpose, it does not constitute punishment. However, if a condition is not "reasonably related to a legitimate goal" and thus "arbitrary or purposeless," it may not be imposed upon individuals in pretrial detention.[131]

The Supreme Court has not directly defined the breadth of a person in pretrial detention's right to health care while in government

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124. Brown v. Plata, 563 U.S. 493, 545 (2011) ("The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy . . . .").

125. Pretrial detention refers to circumstances in which an individual is detained prior to a formal adjudication of guilt.

126. Bell v. Wolfish, 441 U.S. 520, 535–36 & n.16 (1979).

127. *Id.*

128. *Id.* at 535; *see also* City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (recognizing that the Due Process Clause, not the Eighth Amendment, is the constitutional provision governing claims of inadequate medical care prior to a formal adjudication of guilt).

129. *Bell*, 441 U.S. at 538.

130. *Id.* at 539.

131. *Id.*

custody under the Due Process Clause.[132] The Court has expressly stated that the rights of a person apprehended but not yet convicted under the Due Process Clause are "at least as great as the Eighth Amendment protections available to a convicted prisoner,"[133] and noted that "deliberate indifference is *egregious enough* [for a person in pretrial detention] to state a substantive due process claim" related to unmet medical needs.[134] However, the extent to which due process requires a more protective standard of medical care than the standard developed under the Eighth Amendment remains an open question.

Most circuits have issued decisions importing the Eighth Amendment deliberate indifference standard to evaluate an individual in pretrial detention's due process health care claim.[135] The rationale may be rooted in the interpretation that any deliberate indifference to a serious medical issue would constitute punishment and thus be prohibited under the Fourteenth Amendment, or conversely, to constitute punishment, a mental state of "deliberate indifference" is required.[136] Though most circuits apply the deliberate indifference test, some have expressed hesitation in doing so, recognizing that due

132. *See City of Revere*, 463 U.S. at 244 (declining to define the due process rights of pretrial detainees requiring medical care).

133. *Id.*

134. City of Sacramento v. Lewis, 523 U.S. 833, 834 (1998) (emphasis added) (citing *City of Revere*, 463 U.S. at 244).

135. Only the D.C. Circuit has yet to issue a decision applying the deliberate indifference standard to an individual in pretrial detention's claim of constitutionally deficient medical care. *See* Catherine T. Struve, *The Conditions of Pretrial Detention*, 161 U. PA. L. REV. 1009, 1027–30 & n.96 (2013) (listing circuit court decisions applying the deliberate indifference standard to claims of inadequate medical care in pretrial detention); *see also, e.g.*, Groman v. Township of Manalapan, 47 F.3d 628, 637 (3d Cir. 1995) (applying the deliberate indifference standard to plaintiffs' claim regarding failure to provide necessary medical treatment during pretrial detention); Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010) (finding that an individual who was in pretrial detention "had a clearly established Fourteenth Amendment right not to be denied, by deliberate indifference, attention to his serious medical needs."). The Federal Circuit does not have jurisdiction to hear such claims. Struve, *supra* note 137, at 1018 n.50.

136. Kyla Magun, Note, *A Changing Landscape for Pretrial Detainees? The Potential of Kingsley v. Hendrickson on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059, 2072–73 (2016); *see also, e.g.*, Salazar v. City of Chicago, 940 F.2d 233, 239 (7th Cir. 1991) (applying the deliberate indifference standard to claims that an individual in pretrial detention was denied adequate health care, resulting in his death because "only intentional or criminally reckless conduct violates the due process clause" and "only intentional or criminally reckless conduct can amount to punishment" prohibited under the Due Process Clause).

process may require greater protection than the Eighth Amendment test provides.[137]

Historically, most circuits applied the deliberate indifference test to claims by individuals in pretrial detention in a subjective manner, as established under Eighth Amendment precedent.[138] However, in light of the Supreme Court's decision in *Kingsley v. Hendrickson*,[139] some circuits have held that when applied to the due process claims of individuals in pretrial detention, the deliberate indifference standard requires an objective, rather than subjective, analysis.[140] In *Kingsley*, the Supreme Court considered what standard to apply to an individual in pretrial detention's claim of unreasonable use of force under the Fourteenth Amendment. The Court identified two state of mind questions—first, the defendant's state of mind when engaging in a physical use of force, and second, the defendant's state of mind "with respect to whether his use of force was 'excessive.'"[141] The Court held that the second question, the excessiveness of a use of force, should be evaluated under an objective standard, without regard to the defendant's state of mind.[142] In reaching this conclusion, the Court emphasized *Bell*'s holding that even if there is no express intent to punish, a condition may nonetheless serve as a punishment without due process if the actions are not "rationally related to a legitimate nonpunitive government purpose" or "appear excessive in relation to that purpose." [143] Thus, the Court indicated that proof of intent is not

137. Jennifer A. Bandlow, *Constitutional Standards for the Care of Pretrial Detainees*, 35 L.A. LAW. 13, 14 (2011); *see, e.g.*, Nerren v. Livingston Police Dept., 86 F.3d 469, 474 (5th Cir. 1996) ("We contrast pretrial detainees and convicted prisoners because the due process clause of the Fourteenth Amendment accords pretrial detainees rights not enjoyed by convicted inmates under the Eighth Amendment prohibition against cruel and unusual punishment.").

138. Struve, *supra* note 137, at 1027 & n. 96 ("All circuits (except for the D.C. Circuit) have issued decisions applying the Eighth Amendment's subjective deliberate indifference test to pretrial detainees' medical care claims.").

139. *See generally* Kingsley v. Hendrickson, 576 U.S. 389 (2015) (adopting an objective analysis over the subjective analysis for pre-trial detention use of force claims).

140. *See, e.g.*, Miranda v. Cnty of Lake, 900 F.3d 335, 352 (7th Cir. 2018) ("Medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*.").

141. Kingsley, 576 U.S. at 397–98.

142. *Id.* at 398.

143. *Id.* (quoting Bell v. Wolfish, 441 U.S. 520, 561 (1979)).

required for a person in pretrial detention to prevail on a due process claim.

Circuits split on whether *Kingsley*'s holding is confined to use of force cases, or if it extends to pretrial detention due process claims more broadly.[144] Three circuit courts of appeal have issued rulings adopting an objective deliberate indifference standard to review claims of inadequate medical care in pretrial detention.[145] Under such a standard, the objective deliberate indifference analysis does not completely obliterate an intent requirement.[146] As articulated by the Ninth Circuit, it is still necessary to demonstrate that the defendant "made an intentional decision" with respect to the pretrial detainee's confinement conditions, which placed the detainee at a serious risk of harm.[147] However, the defendant's state of mind as to the consequences of his or her actions is an objective analysis.[148] The objective component asks whether a "reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious."[149] This is currently the minority approach; other circuits continue to rely on pre-*Kingsley* precedent to apply a subjective deliberate indifference standard to claims of inadequate medical care brought by people in pretrial detention.[150]

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144. *See* Strain v. Regaldo, 977 F.3d 984, 990 (10th Cir. 2020), *cert. denied*, 142 S. Ct. 312 (2021) ("[T]he circuits are split on whether *Kingsley* eliminated the subjective component of the deliberate indifference standard by extending to Fourteenth Amendment claims outside the excessive force context.").

145. Miranda v. Cnty of Lake, 900 F.3d 335, 352 (7th Cir. 2018); Gordon v. Cnty of Orange, 888 F.3d 1118 (9th Cir. 2018); Bruno v. Schenectady, 727 F. App'x 717 (2d Cir. 2018).

146. *See Gordon*, 888 F.3d at 1125 (holding that claims involving inadequate medical care for people in pretrial detention must be evaluated using the objective deliberate indifference standard and explaining that under this standard the plaintiff must show that the defendant made an intentional decision regarding the plaintiff's conditions of confinement).

147. *Id.*

148. *Id.*

149. *Id.*

150. *See, e.g.*, Whitney v. City of St. Louis, 887 F.3d 857 (8th Cir. 2018) (applying the deliberate indifference standard to a father's claim that his son was denied adequate mental health care when held in pretrial detention, resulting in his death by suicide); Dang v. Sheriff of Seminole Cnty., 871 F.3d 1272, 1279 n.2 (11th Cir. 2017) (applying deliberate indifference to an individual's claim that he received inadequate medical care while held in pretrial detention, resulting in a delayed diagnosis of meningitis); Alderson v. Concordia Parish Corr. Facility, 848 F.3d 415, 419 n.4 (5th Cir. 2017) (evaluating a plaintiff's claims regarding a delay

C. Involuntarily Committed Individuals' Due Process Rights Involve Professional Judgment

In 1982, the Supreme Court approved a new due process analysis premised on the exercise of "professional judgment."[151] In *Youngberg v. Romeo*, a mother brought a claim under 42 U.S.C. § 1983 on behalf of her son, who was involuntarily committed to a state institution in Pennsylvania, alleging violations of his Fourteenth Amendment due process rights, including violating an asserted "constitutional right to minimally adequate habilitation."[152] The Court found that the proper standard for an involuntarily committed individual's due process rights must balance an individual's liberty interests with the interests of the state.[153] In determining the proper standard, the Court observed that people "who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[154] However, the applicable standard is not as stringent as the "'compelling' or 'substantial' necessity tests" which, if adopted, the Court felt would place an undue burden on institutions and hinder the exercise of professional judgment.[155]

Ultimately, the Court adopted the position expounded in a concurrence opinion by the Third Circuit Court of Appeals' Chief Judge Seitz.[156] Chief Judge Seitz explained that an involuntarily committed individual "'has a constitutional right to *minimally adequate care and treatment*,'"[157] which merely requires that "'professional judgment in fact was exercised.'"[158] This standard, as articulated by Judge Seitz and adopted by the Supreme Court, asks whether the "defendants' conduct

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in medical treatment while held in pretrial detention under the deliberate indifference standard); Duff v. Potter, 665 F. App'x 242, 245 (4th Cir. 2016) (affirming a district court's grant of summary judgment under the deliberate indifference standard).

151. Youngberg v. Romeo, 457 U.S. 307 (1982).

152. *Id.* at 316 (quoting Brief for Respondent 8, 23, 45).

153. *Id.* at 321–22.

154. *Id.*

155. *Id.* at 322.

156. *Id.* at 321 ("We think the standard articulated by Chief Judge Seitz affords the necessary guidance and reflects the proper balance between the legitimate interests of the State and the rights of the involuntarily committed to reasonable conditions of safety and freedom from unreasonable restraints.").

157. *Id.* at 318–19 (emphasis added) (quoting Romeo v. Youngberg, 644 F.2d 147, 176 (3d Cir. 1980) (Seitz, J., concurring)).

158. *Id.* at 314 (quoting *Romeo*, 644 F.2d at 178 (Seitz, J., concurring)).

was 'such a substantial departure from accepted professional judgment, practice, or standards in the care and treatment of this plaintiff as to demonstrate that the defendants did not base their conduct on a professional judgment.'"[159]

Though *Youngberg* involved a protection-from-harm claim, most circuits now apply the professional judgment standard to involuntarily committed individuals' inadequate medical care claims as well.[160] Some circuits maintain that the deliberate indifference test and professional judgment test are functionally equivalent.[161] However, this position is difficult to square with the *Youngberg* court's assertion that involuntarily committed individuals are entitled to "more considerate treatment" than incarcerated persons.[162] Additionally, a few decisions collapse *Youngberg* into a broader "shocks-the-conscience test" articulated by the Supreme Court in

159. *Id.* (quoting *Romeo*, 644 F.2d at 178 (Seitz, J., concurring)).

160. *See, e.g.*, Rennie v. Klein, 720 F.2d 266, 269–70 (3d Cir. 1983) (applying the professional judgement standard to determine whether an involuntary committed patient had the Constitutional right to refuse psychiatric medication); Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989) (applying the professional judgement standard to evaluate whether the Constitutional rights of an involuntary committed person who was mistreated for many years and died due to a lack of supervision were violated); Kulak v. City of New York, 88 F.3d 63, 74–75 (2d Cir. 1996) (evaluating petitioners claims regarding his medication and treatment while involuntarily confined under the professional judgment standard); Patten v. Nichols, 274 F.3d 829, 838 (4th Cir. 2001) (evaluating whether the death of an involuntary committed psychiatric patient constituted a violation of her Constitutional right using the professional judgment standard). *But cf.*, Terrance v. Northville Reg'l Psychiatric Hosp., 286 F.3d 834, 850 (6th Cir. 2002) (applying *Youngberg* to an involuntarily committed individual's Fourteenth Amendment claims, but also considering the plaintiffs' Eighth Amendment claims under the deliberate indifference standard).

161. *See, e.g.*, Ambrose v. Puckett, 198 F. App'x 537, 539–40 (7th Cir. 2006) (evaluating a civilly committed patient's inadequate health care claim under the deliberate indifference standard after quoting a prior case finding "it convenient and entirely appropriate to apply the same standard" to claims arising under the Fourteenth Amendment and the Eighth Amendment) (quoting Board v. Farnham, 394 F.3d 469, 477–78 (7th Cir. 2005)); Lavender v. Kearney, 206 F. App'x. 860, 862–63 (11th Cir. 2006) (recognizing that under *Youngberg*, "the due process rights of the involuntarily civilly committed are 'at least as extensive' as the Eighth Amendment 'rights of the criminally institutionalized,' and therefore, 'relevant case law in the Eighth Amendment context also serves to set forth the contours of the due process rights of the civilly committed'") (quoting Dolihite v. Maughon, 74 F.3d 1027, 1041 (11th Cir. 1996)).

162. *Youngberg*, 457 U.S. at 321–22.

County of Sacramento v. Lewis.[163] However, the *Lewis* decision cited *Youngberg* as authority, suggesting it intended to supplement, rather than supersede *Youngberg*'s holding.[164]

D. Detained Youth Face Inconsistent Constitutional Standards

The juvenile legal system in the United States is a type of "hybrid" system where children are detained for acts which would constitute a crime if committed by an adult, but without the due process protections and resulting criminal convictions indicative of the adult criminal legal system.[165] The need for mental health care in juvenile detention facilities is well documented, but the standards governing such care are ill-defined and inconsistent between circuits.[166] Claims of inadequate health care in juvenile detention facilities are typically evaluated under either the Due Process Clause

163. Cnty. of Sacreamento v. Lewis, 523 U.S. 833 (1998) (holding that a police officer who caused a suspect's death in a crash resulting from a high-speed automobile chase did not violate the suspect's substantive due process rights because "the element of 'arbitrary conduct shocking to the conscience' necessary for a substantive due process violation only exists if the police officer acted with a purpose to cause harm unrelated to the legitimate object of arrest"). For example, in *Benn v. Universal Health Systems*, the court found that even if physicians inaccurately determined that an involuntarily committed patient exhibited suicidal ideation, the error would not be sufficiently "conscience-shocking" to constitute a due process violation, without considering whether or not the doctors exercised professional judgment. 371 F.3d 165, 175 (3d Cir. 2004).

164. *Lewis*, 523 U.S. at 852 n.12. For a thorough critique of decisions weakening the professional judgment standard following *Lewis*, see Rosalie Berger Levinson, *Kingsley Breathes New Life Into Substantive Due Process as a Check on Abuse of Government Power*, 93 NOTRE DAME L. REV. 357, 387–88 (2017).

165. *See* Sara McDermott, *Calibrating the Eighth Amendment: Graham, Miller, and the Right to Mental Healthcare in Juvenile Prison*, 63 UCLA L. REV. 712, 730 (2016) (describing the "hybrid" nature of the juvenile legal system, "in which youth are incarcerated without having been formally convicted of any crime"); *see also* Greene, *supra* note 123, at 32 (describing the rationale behind the limited procedural protections afforded to juvenile detainees).

166. McDermott, *supra* note 167, at 718–31 (describing the mental health needs of youth in juvenile prisons and noting that "despite the grave consequences for youth when juvenile prisons fail to provide adequate mental healthcare, the legal test for adjudicating their claims remains largely undefined"); *see also* Thomas L. Hafemeister, *Parameters and Implementation of a Right to Mental Health Treatment for Juvenile Offenders*, 12 VA. J. SOC. POL'Y. & L. 61, 65–71 (2004) (describing the demand for mental health services among children in the juvenile legal system).

or the Eighth Amendment, though some cases have considered challenges under both provisions simultaneously.[167]

Six circuits evaluate claims of inadequate health care in juvenile detention facilities under the Fourteenth Amendment.[168] In the 1970s, some courts recognized a due process "right to treatment" under theories of *parens patrie* and *quid pro quo*.[169] More recent opinions apply the Fourteenth Amendment after analogizing youth in juvenile detention facilities to either involuntarily committed

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167. *See* McDermott, *supra* note 167, at 729–44 (describing the variety of approaches courts take when evaluating incarcerated youth's claims of inadequate health care).

168. *Id.* at 730–31 & n.89 (collecting cases) (noting that "[t]he First, Eighth, Ninth, Tenth, and Eleventh Circuits explicitly apply the Fourteenth Amendment test" and highlighting district court cases in the Fourth Circuit applying the Fourteenth Amendment test).

169. Greene, *supra* note 123, at 32 & n.180 (collecting cases); *see, e.g.*, Nelson v. Heyne, 491 F.2d 352, 360 (7th Cir. 1974) ("We hold that on the record before us the district court did not err in deciding that the plaintiff juveniles have the right under the 14th Amendment due process clause to rehabilitative treatment."). The Court in *Nelson* held that the right to treatment "includes the right to minimum acceptable standards of care and treatment for juveniles and the right to individualized care and treatment." *Id.* at 360. In *Santana v. Collazo*, the First Circuit described, but ultimately rejected, the two concepts commonly leading courts to find that involuntarily detained juveniles were entitled to rehabilitative treatment:

> First, relying on the Supreme Court's insistence, in *Jackson v. Indiana* . . . that "the nature and duration of commitment must bear some reasonable relation to the purpose for which the individual is committed", courts have reasoned that because the state's authority over delinquent juveniles derives from its parens patriae interest in their welfare . . . , due process requires that juveniles confined under that authority be given treatment consistent with the beneficent purpose of their confinement. . . . Second, courts have relied on the fact that the juvenile justice system denies certain due process safeguards, which denials have been found constitutionally acceptable because the purpose of incarceration is rehabilitation, not punishment. . . . Thus, the "quid pro quo" for the denied safeguards is the promised rehabilitation.

714 F.2d 1172, 1176 (1st Cir. 1983) (internal citations omitted). The court in *Santana* rejected a "right to treatment," finding that these rationales were not credible because "rehabilitative treatment is not the only legitimate purpose of juvenile confinement" and "there is no legally cognizable quo to trigger a compensatory quid." *Santana*, 714 F.2d at 1176–77.

individuals[170] or individuals in pretrial detention.[171] Though courts reason that, like the claims of involuntarily committed individuals or individuals in pretrial detention, the claims of youth in juvenile detention facilities warrant "more exacting scrutiny"[172] or "more protect[ion]"[173] under the Fourteenth Amendment, in practice, courts' analyses typically subsume the characteristics of an Eighth Amendment deliberate indifference analysis.[174] Courts acknowledge

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170. *See, e.g.*, *Santana,* 714 F.2d at 1180 ("Thus, because the state has no legitimate interest in punishment, the conditions of juvenile confinement, like those of confinement of the mentally ill, are subject to more exacting scrutiny than conditions imposed on convicted criminals."); *see also* McDermott, *supra* note 167, at 738 n.143 (collecting cases).

171. *See, e.g.*, Gary H. v. Hegstrom, 831 F.2d 1430, 1432 (9th Cir. 1987) (observing that "the more protective fourteenth amendment standard applies to conditions of confinement when detainees, whether or not juveniles, have not been convicted," but recognizing that the due process clause "implicitly incorporates the cruel and unusual punishments clause standards as a constitutional minimum"). *But see* McDermott, *supra* note 167, at 740 (noting that "courts use the fact that neither youth nor adult pretrial detainees have been convicted of a crime to gloss over the different purposes of the two systems, as well as the differing levels of vulnerability present between both populations").

172. *See, e.g.*, *Santana*, 714 F.2d at 1180 (Analogizing claims regarding the conditions of juvenile detention facilities to those brought by involuntarily committed individuals and concluding the claims should be evaluated under a "more exacting scrutiny"); *see also* McDermott, *supra* note 167, at 738 n.143 (collecting cases).

173. A.J. by L.B. v. Kierst, 56 F.3d 849, 854 (8th Cir. 1995) (concluding the "more protective" Fourteenth Amendment should be used to evaluate conditions of juvenile detention); *see also Gary H.*, 831 F.2d at 1432 (evaluating the conditions in an Oregon juvenile detention facility under the "more protective" due process standard).

174. McDermott, *supra* note 167, at 739; *see also* Struve, *supra* note 137, at 1012 (explaining that often in the adult context "the lower courts have assimilated pretrial detainees' claims to those by convicted prisoners, applying the Eighth Amendment standards to both"). For example, in *A.M.* ex. rel. *J.M.K. v. Luzerne County Juvenile Detention Center*, the Third Circuit considered a claim that a juvenile detention center's lack of policies or procedures for responding to detainees' mental and physical health violated a detainee's constitutional rights. 372 F.3d 572, 584 (3d Cir. 2004). The court observed that "detainees are entitled to no less protection than a convicted prisoner is entitled to under the Eighth Amendment" and applied the Eighth Amendment deliberate indifference test to the claim. *Id.* at 584–85. This case was decided prior to the Supreme Court's decision in *Kingsley v. Hendrickson*, and the Third Circuit did not discuss whether it was employing the deliberate indifference analysis in a subjective or objective manner, though nothing in the opinion suggests an objective analysis was considered. McDermott, *supra* note 167, at 747–58, suggests that an objective deliberate indifference standard

that adjudicated youth are entitled to due process rights equal to or greater than those of adults with criminal convictions and then evaluate the juvenile claims under a deliberate indifference standard.[175]

A minority of circuits apply the Eighth Amendment directly to claims regarding juvenile detention conditions.[176] For example, in *Morales v. Turman*, the Fifth Circuit Court of Appeals took issue with the *parens patrie* and *quid pro quo* rationales for a "right to treatment," and instead turned to the Eighth Amendment's cruel and unusual punishment provision when evaluating the treatment of incarcerated juveniles.[177] Even less common, some courts in the 1970s maintained that both the Eighth Amendment and the Fourteenth Amendment are applicable to juvenile detention conditions.[178] The mode of analysis in

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would better address the unique needs and vulnerabilities of youth in the juvenile legal system.

175. McDermott, *supra* note 167, at 739; *see, e.g.*, A.M. *ex. rel.* J.M.K. v. Luzerne Cty. Juv. Det. Ctr., 372 F.3d 572, 584 (3d Cir. 2004) (acknowledging that the Fourteenth Amendment, rather than the Eighth Amendment should apply to a juvenile's claim of inadequate medical care while in detention, but nonetheless affirming the lower court's application of the deliberate indifference standard).

176. Morales v. Turman, 562 F.2d 993, 998–99, 998 n.1 (5th Cir. 1977); Nelson v. Heyne, 491 F.2d 352, 354 (7th Cir. 1974); *see, e.g.*, Betts v. New Castle Youth Dev. Ctr., 621 F.3d 249, 256–59 (3d Cir. 2010) (analyzing a juvenile's claim that a detention center placed him at a serious risk of harm under the Eighth Amendment); *see generally* McDermott, *supra* note 165, at 731–37 (describing the "Bare Eighth Amendment Approach").

177. *Morales*, 562 F.2d at 993; *see also Betts*, 621 F.3d at 249 (analyzing a juvenile detainee's claims regarding serious injuries sustained during a football game at a detention center under the Eighth Amendment deliberate indifferent test without explaining its rationale for applying the test). At least one court has interpreted *Betts* as requiring that the Eighth Amendment deliberate indifference standard, rather than a Fourteenth Amendment analysis, be applied to claims by juvenile detainees who were "adjudicated delinquent." *See* Troy D. v. Mickens, 806 F. Supp. 2d 758, 772 (D.N.J. 2011) (relying on *Betts* and applying the Eighth Amendment to claims of inadequate mental health care and medical treatment brought by juveniles who were "adjudicated delinquent").

178. *See, e.g.*, Morgan v. Sproat, 432 F. Supp. 1130, 1156 (S.D. Miss. 1977) ("[T]he denial of medical services to persons not committed under a criminal statute has been found to violate both the Eighth Amendment . . . and the right to habilitation embodied in the due process clause of the Fourteenth Amendment." (internal citations omitted)); *see also* Inmates of Boys' Training Sch. v. Affleck, 346 F. Supp. 1354, 1366 (D.R.I. 1972) (finding that solitary confinement in a juvenile corrections institute constitutes cruel and unusual punishment and violates equal protection and due process because its use is "anti-rehabilitative") ("The fact that

these opinions somewhat mirrors the modern approach of the professional judgment standard. Courts relied on expert testimony to determine the level of care required to satisfy constitutional standards; when experts determined the care provided was substandard, courts found a constitutional violation.[179]

Despite the great need for mental health care in juvenile detention facilities, the constitutional standard required is unsettled law.[180] The lack of a consistent standard makes it more difficult to enforce and incentivize the provision of appropriate mental health care services in juvenile detention facilities.[181]

E. Unaccompanied Migrant Minors in Detention Lack an Established Constitutional Standard for Mental Health Care

As disparate and inconsistent as the precedent surrounding young people in detention's constitutional right to mental health care may be, the constitutional standard applicable to claims of inadequate mental health care raised by unaccompanied migrant minors in government detention is even less clear. The Fourth Circuit's discussion in *Shenandoah Valley* demonstrates that the applicable

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juveniles are *in theory* not punished, but merely confined for rehabilitative purposes, does not preclude operation of the Eighth Amendment.").

179. *See, e.g.*, *Morgan*, 432 F. Supp. at 1156–57 (explaining that experts agreed "students committed to a juvenile institution must receive a full physical examination upon admission, including appropriate screening for eyesight and hearing problems," and then proceeded to find that because children at the facility do not receive the care outlined by the experts, the medical program did not "reach the minimum standards required by the Constitution").

180. McDermott, *supra* note 165, at 729. While this Note focuses on evaluating which constitutional standard should apply to claims of inadequate health care brought by unaccompanied migrant minors in detention, many of the arguments presented could similarly apply in the context of juvenile detention more broadly. For an argument that the *Youngberg* professional judgment standard should govern claims brought by all children detained in juvenile detention centers, including but not limited to those brought by unaccompanied migrant minors, see Taylor C. Joseph, Comment, *Revitalizing the Youngberg v. Romeo Professional Judgment Standard to Require Trauma-Informed Care for Detained Children*, 81 MD. L. REV. 1329 (2022), https://digitalcommons.law.umaryland.edu/mlr/vol81/iss4/7 [https://perma.cc/3QHR-B7XB]. Joseph's Comment argues that the application of the *Youngberg* standard could be used to require the provision of trauma-informed care to children in detention. *Id.* at 1356.

181. *Id.* at 715–16.

standard is far from settled law.[182] In *Shenandoah Valley*, the court considered a challenge by a class of unaccompanied immigrant children detained in a secure detention facility alleging that the mental health care provided at the facility was constitutionally inadequate.[183] Given the lack of precedent on the issue, the district court reasoned, by analogy to civil detainees, that the *Farmer v. Brennan* deliberate indifference standard should apply to the claims and granted the juvenile center's motion for summary judgment.[184] The plaintiffs appealed, arguing that the *Youngberg v. Romero* professional judgment standard should have instead been applied to evaluate the constitutional adequacy of the mental health care provided to unaccompanied immigrant children.[185]

For the purposes of determining the applicable standard to measure the constitutional adequacy of health care, the court of appeals found that unaccompanied migrant minors were more analogous to involuntarily committed patients than individuals in pretrial detention.[186] In *Patten v. Nichols*, the Fourth Circuit held that that the *Youngberg* professional judgment standard, which pertained to a protection-from-harm due process claim, was also the correct standard to apply to claims that involuntarily committed individuals received inadequate medical care.[187] In reaching this conclusion, the court observed several relevant distinctions between involuntarily committed psychiatric patients and individuals in pretrial detention, which justified a higher bar to establish the constitutional adequacy of treatment and conditions of confinement for involuntarily committed individuals.[188] The first, and in the *Patten* court's view, most important, distinction relates to the *purpose* of confinement—involuntarily committed patients are taken into custody for treatment purposes, whereas pretrial detainees are detained because they are

182. Lopez *ex rel.* Doe 4 v. Shenandoah Valley Juvenile Ctr. Comm'n, 985 F.3d 327, 339 (4th Cir. 2021) (observing that "[w]hile a detainee's right to adequate mental health is clear, [the Fourth Circuit] has not yet decided what standard to use to determine the adequacy of mental health care provided to a detained immigrant child").

183. *Id.* at 329.

184. Lopez *ex rel.* Doe v. Shenandoah Valley Juv. Ctr. Comm'n, 355 F. Supp. 3d 454, 468 (W.D. Va. 2018), *rev'd and remanded sub nom.*, Lopez *ex rel.* Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327 (4th Cir. 2021).

185. *Shenandoah Valley*, 985 F.3d at 339.

186. *Id.* at 339–43.

187. Patten v. Nichols, 274 F.3d 829, 838 (4th Cir. 2001).

188. *Id.* at 840–41.

suspected of committing a crime.[189] Second, the professionals charged with caring for individuals in custody differ.[190] Individuals in pretrial detention are typically housed in facilities overseen by law enforcement officials, while involuntarily committed patients are primarily placed in the care of medical professionals.[191] Finally, the length of time for which each population is detained is also a distinguishing feature—individuals in pretrial detention are usually incarcerated for a short time, while in contrast, involuntarily committed patients may be held in custody for a much longer time, sometimes indefinitely.[192] In *Shenandoah Valley*, the court found that when comparing these factors, the detainment of unaccompanied migrant minors was more akin to involuntary commitment than pretrial detention. The court then concluded that professional judgment, rather than deliberate indifference, should dictate the adequacy of mental health care provided to unaccompanied migrant minors in detention.[193]

The *Shenandoah Valley* decision represented a significant development in response to the mental health crisis among unaccompanied migrant minors. For the first time, an appellate court identified a clear standard by which to measure the constitutional adequacy of mental health care provided to unaccompanied migrant minors. Furthermore, the court applied the professional judgment standard rather than the deliberate indifference standard, which, as will be discussed in Section III.A, better incentivizes government agents to provide high quality, professionally-sound mental health care to unaccompanied migrant minors. Unfortunately, Judge Wilkinson's dissent reflects a concerning, but not unique, tendency to characterize unaccompanied migrant minors as "dangerous" criminals.[194] The dissent also highlights the inconsistent standards applied across circuits to evaluate children's claims of inadequate mental health care in detention facilities, noting that the Third Circuit applies the

189. *Id.* at 840.
190. *Id.* at 841.
191. *Id.*
192. *Id.*
193. Lopez *ex rel.* Doe 4 v. Shenandoah Valley Juvenile Ctr. Comm'n, 985 F.3d 327, 342 (4th Cir. 2021).
194. *See id.* at 348 (explaining that the juvenile detention center where the unaccompanied migrant minors were placed was a facility "specifically designed to house youths too dangerous to be safely housed elsewhere").

deliberate indifference standard to detained juveniles' claims of constitutionally inadequate health care.[195]

In 2021, a record 122,000 unaccompanied migrant minors were placed in HHS custody, and HHS' shelter capacity was already strained.[196] There is an urgent need for a consistent and transparent constitutional standard to ensure detention facilities are incentivized to provide quality health care services to children placed in their care, and to provide unaccompanied migrant minors with legal recourse if their mental health care is inadequate while in government custody.

III. Courts Should Apply the Professional Judgment Standard

Given the trauma unaccompanied migrant minors may experience before, during, and after their migration to the United States,[197] it is crucial that a clear constitutional criterium exists to govern the level of mental health care required when immigrant children are held in detention facilities. While the Fourth Circuit's *Shenandoah Valley* decision is significant, there is still no broadly established standard to apply to claims regarding the constitutionality of mental health care provided to detained unaccompanied migrant minors. Furthermore, analogies to existing standards regarding a constitutional right to mental health care in other contexts—such as those applied to claims by convicted prisoners, individuals in pretrial detention, involuntarily committed persons, and minors in juvenile detention—do not fully encapsulate the unique needs and status of unaccompanied migrant minors.[198]

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195. *Id.*; A.M. *ex rel.* J.M.K. v. Luzerne Cnty. Juv. Det. Ctr., 372 F.3d 572, 579 (3d Cir. 2004).

196. Camilo Montoya-Galvez, *U.S. Shelters Received a Record 122,000 Unaccompanied Migrant Children in 2021*, CBS NEWS (Dec. 23, 2021, 9:15 AM), https://www.cbsnews.com/news/immigration-122000-unaccompanied-migrant-children-us-shelters-2021/ [https://perma.cc/5495-PAYJ].

197. *See supra* Section I.C (describing the mental health consequences of migration).

198. This is not to say that different populations—such as children in juvenile detention and unaccompanied migrant minors in juvenile detention—should necessarily be evaluated under different constitutional standards. *See* Joseph, *supra* note 182 (arguing that both detained students and unaccompanied migrant minors' claims of inadequate health care should be evaluated under the *Youngberg* professional judgement standard). However, this Note intends to specifically emphasize the unique experiences of unaccompanied migrant minors and the elements of the United States' legal obligations to unaccompanied migrant minors which bolster the argument in favor of a protective

The increasing apprehensions of unaccompanied migrant minors over the past decade,[199] as well as the growing consensus that detention conditions are harmful to children's mental health,[200] necessitate a strong constitutional standard requiring mental health care that adequately protects unaccompanied migrant minors in detention from further harm. Broad immigration reform is necessary to address the full scope of traumas and psychological consequences that unaccompanied migrant minors are subjected to throughout the immigration process.[201] However, to curtail the harmful effects in the short term, courts should apply the due process "professional judgment" standard rather than the less protective Eighth Amendment "deliberate indifference" standard when evaluating the constitutional adequacy of mental health treatment provided to unaccompanied minors in government custody. The professional judgment standard sets a higher threshold of mental health care to best respond to unaccompanied migrant minors' needs and protect children's best interests while in the immigration system. Furthermore, this standard is more consistent with Supreme Court precedent viewing substantive due process rights under the Fourteenth Amendment as distinct and potentially more expansive than the Eighth Amendment's protections for individuals convicted of crimes.

A. The Professional Judgment Standard Provides Stronger Protection for Unaccompanied Migrant Minors' Mental Health

The great need for mental health care among unaccompanied migrant minors and the purposes informing the legal landscape governing the United States' care and treatment of unaccompanied migrant minors emphasize a normative preference for selecting a

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constitutional standard to ensure the mental health care provided to unaccompanied migrant minors is constitutionally adequate.

199. CRS OVERVIEW, *supra* note 18, at 1–2.

200. CHIEDI, *supra* note 1, at 9–12.

201. *See, e.g.*, Lucy Bassett & Hirokazu Yoshikawa, *Our Immigration Policy Has Done Terrible Damage to Kids*, SCI.AM. (Dec. 1, 2020), https://www.scientificamerican.com/article/our-immigration-policy-has-done-terrible-damage-to-kids/ [https://perma.cc/7R5J-DAQN] (arguing that immigration reform should prioritize family reunification and children's development, improve the model of care for children in custody, and provide immigrant children and families access to social safety nets).

constitutional standard that sets a high bar for the quality of mental health care required under the Constitution. The constitutional standard should incentivize proactive mental health care treatment, and, in the event that an unaccompanied migrant minor is deprived of the health care to which they are entitled, should not create an insurmountable hurdle for unaccompanied migrant minors to successfully seek legal recourse. The professional judgment standard would best protect unaccompanied migrant minors' mental health by incentivizing the provision of care consistent with professional standards and providing a less stringent constitutional standard under which unaccompanied migrant minors can challenge the quality of mental health care provided in immigration detention facilities.

1. A high constitutional standard is consistent with the policy purposes guiding the government's treatment of unaccompanied migrant minors in the United States

The current practices and procedures through which the U.S. government responds to unaccompanied migrant minors entering the country are guided by an underlying focus on caring for unaccompanied migrant minors' physical and psychological well-being throughout the immigration process. For example, the FSA specifically states that minors shall be treated "with dignity, respect and special concern for their particular vulnerability as minors"[202] and sets clear minimum requirements related to children's mental health.[203] The ORR is tasked with providing for the "care and placement," not the detention, of unaccompanied migrant minors; it is instructed to consider the "interests of the child" in care and placement decisions and "use the refugee children foster care system" when possible.[204] Furthermore, the TVPRA requires that "the best interest of the child" inform an unaccompanied migrant minor's placement and mandates monthly reviews of secure facility placements.[205] The overriding objective of the United States' immigration policy as it relates to unaccompanied migrant minors is caring for the safety and well-being of minors who do not have a parent or guardian available to care for them in the

202. *Flores* Settlement Agreement, *supra* note 8, at 7.

203. For example, the FSA requires children receive at least one individual counselling session and two group counselling sessions per week. *Id.* Exhibit 1, at 2.

204. 6 U.S.C. § 279(b)(1)(A)–(B); 6 U.S.C. § 279(b)(3).

205. 8 U.S.C. § 1232(c)(2)(A).

country. Given the extensive psychological impact that the immigration system can place on unaccompanied migrant minors in detention,[206] it is clear that the constitutional standard most consistent with the government's interests would provide the greatest possible protection to unaccompanied minors' mental health and wellbeing while in detention.

2. The professional judgment standard sets a higher bar for the level of mental health care to which unaccompanied migrant minors are entitled under the Constitution

The professional judgment standard requires a higher standard of mental health care and would better protect unaccompanied migrant minors' mental health. The professional judgment standard is more favorable than the deliberate indifference standard because it provides a less difficult evidentiary burden for plaintiffs to prove a constitutional violation. Under the most common application of the deliberate indifference standard, a plaintiff must demonstrate that the defendant was subjectively aware of a substantial risk of serious harm and nonetheless chose to disregard that risk.[207] Demonstrating that a defendant ""consciously disregard[ed]' a substantial risk of serious harm' . . . is considered difficult for plaintiffs."[208] This is especially true with regard to denial of mental health care, as mental health conditions are not always immediately obvious.[209] Furthermore, requiring deliberateness

206. *See supra* Section I.C. (discussing circumstances before, during, and after migration that place unaccompanied migrant minors' mental health at risk)

207. Farmer v. Brennan, 511 U.S. 825, 837 (1994).

208. Abby Dockum, *Kingsley, Unconditioned: Protecting Pretrial Detainees With an Objective Deliberate Indifference Standard in § 1983 Conditions-of-Confinement Claims*, 53 ARIZ. ST. L. J. 707, 719 (2021) (quoting *Farmer*, 511 U.S. at 839). *See* Katherine M. Swift, *A Child's Right: What Should the State Be Required to Provide Teenagers Aging Out of Foster Care*, 15 WM. & MARY BILL RTS. J. 1205, 1216 (2007) (explaining that the deliberate indifference standard "sets a relatively low bar for prison officials charged with the care and safety of prisoners"); *see also* Shevon I. Scarafile, *Deliberate Indifference or Not: That is the Question in the Third Circuit Jail Suicide Case of* Woloszyn v. Lawrence County, 51 VILL. L. REV. 1133, 1136 (2006) (explaining that in jail suicide cases, "[d]ue to the demanding nature of the 'deliberate indifference' standard, plaintiffs . . . rarely prevail").

209. McDermott, *supra* note 167, at 737 ("Particularly in the mental healthcare context, where health needs may be less obvious, further assimilating to the adult test in youth proceedings only invites inattention to the unique needs of young people once they have been locked up.").

disincentivizes professionals from affirmatively seeking out information regarding the mental health of the unaccompanied migrant minors in their care—if the individuals responsible for children's care never become aware of such a health care risk, they cannot be shown to be *deliberately* indifferent.[210] As one commentator similarly arguing that the deliberate indifference standard was inappropriate in the context of foster care observed, "[the] indifference should not have to be *deliberate* before liability attaches."[211]

In contrast, the *Youngberg* professional judgment standard does not require proof of subjective intent.[212] Therefore, the professional judgment standard "presents a lower standard of culpability compared to the Eighth Amendment standard for deliberate indifference."[213] Unlike the deliberate indifference standard, which can potentially disincentivize investigating health care problems, the *Youngberg* standard requires that professionals affirmatively provide care.[214] Judge Seitz's concurrence in the Third Circuit's decision in *Youngberg*, which the Supreme Court ultimately adopted, specifically stated that at a minimum, due process includes an "affirmative obligation to discover" a patient's needs and "to respond to those needs in an adequate manner."[215] The *Youngberg* professional judgment standard also instructs courts to look to "professional

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210. *See Farmer*, 511 U.S. at 837 (explaining the knowledge requirement of the deliberate indifference standard by stating that to establish liability, an official must "know[] of and disregard[] an excessive risk to inmate health or safety").

211. Swift, *supra* note 210, at 1226.

212. *Compare* Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (explaining that per the professional judgment standard, "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment"), *with Farmer*, 511 U.S. at 837 (adopting a subjective test for deliberate indifference requiring that an official "knows of and disregards an excessive risk to inmate health or safety").

213. Lopez *ex rel.* Doe 4 v. Shenandoah Valley Juvenile Ctr. Comm'n, 985 F.3d 327, 343 (4th Cir. 2021).

214. *See* Andrea Koehler, *The Forgotten Children of the Foster Care System: Making a Case for the Professional Judgment Standard*, 44 GOLDEN GATE U. L. REV. 221, 243 (2014) (explaining an interpretation of *Youngberg* which led one District Court to conclude "liability may not be avoided by showing a lack of knowledge of harm" under the professional judgment standard).

215. Romeo v. Youngberg, 644 F.2d 147, 177 (3d Cir. 1980) (Seitz, C.J., concurrence), *vacated*, 457 U.S. 307 (1982); *see also* Koehler, *supra* note 215, at 243 (discussing a court's interpretation of Chief Judge Seitz's concurrence as it relates to whether the professional judgment standard includes a knowledge requirement).

standards," which do not necessarily need to be mandated by law.[216] Thus, the standard is quickly responsive and adaptable to changing practices and resources intended to best care for children with mental health care needs, and provides an incentive for the professionals working with unaccompanied migrant minors to stay abreast of the most current professional standards.

3. Professional judgment is more protective than objective deliberate indifference

Beyond the context of unaccompanied migrant minors in detention, some scholars have argued that an objective deliberate indifference standard, stemming from the Supreme Court's holding in *Kingsley v. Hendrickson*, would provide greater protection to young people in juvenile detention.[217] While an objective deliberate indifference standard would certainly be preferrable to the Eighth Amendment subjective deliberate indifference standard, the professional judgment standard is nonetheless superior to both articulations of the deliberate indifference standard.

The benefit of the objective deliberate indifference standard as opposed to the subjective indifference standard is that it would impose liability not only when a serious medical need is *known* and disregarded, but also when a serious medical need *should have been known* but nonetheless was disregarded.[218] Like the professional judgment standard, applying an objective deliberate indifference standard would reduce the disincentive to proactively discover detained children's medical needs. However, the level of disregard required to establish liability under the objective standard is still "indifference," a nebulous term which is difficult for plaintiffs to prove. In contrast, the requirements under the professional judgment standard are straightforward: if professional judgment is not

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216. For example, in *Shenandoah Valley*, the court found that professional judgment could require practitioners to implement a "trauma-informed care" system, despite the fact that only twelve states formally promote a trauma informed care model. 985 F.3d at 345; *see also* Swift, *supra* note 210, at 1219 ("Perhaps more controversially, *Youngberg* allows a judge to find a violation of 'professional' standards—for instance, those promulgated by national organizations devoted to foster care advocacy but not necessarily mandated by the state.").

217. *See* McDermott, *supra* note 167, at 747–57 (arguing for a modified Eighth Amendment standard for youths in juvenile detention).

218. *See id.*, at 754 ("An objective test would require courts to look to whether staff or administration knew or should have known of the plaintiff's risk.").

exercised, liability may be imposed.[219] As the Fourth Circuit explained in *Shenandoah Valley*, "[t]o apply *Youngberg* to a claim of inadequate medical care, a court must do more than determine that some treatment has been provided—it must determine whether the treatment provided is adequate to address a person's needs under a relevant standard of professional judgment."[220] Thus, under the professional judgment standard, courts can ensure that unaccompanied migrant minors receive care tailored to their needs that is consistent with professional norms. In contrast, deliberate indifference merely requires the absence of indifference.

B. The Professional Judgment Standard Best Comports with the Supreme Court's Precedent Regarding a Right to Health Care Under the Fourteenth Amendment

The jurisprudence regarding a constitutional right to mental health care is convoluted and often inconsistent among circuits.[221] However, a closer look at the Supreme Court's decisions in this space helps draw a clearer distinction between the deliberate indifference and professional judgment standards, and reveals that the *Youngberg* professional judgment standard is more consistent with the constitutional basis of unaccompanied migrant minors' claims. The professional judgment standard acknowledges the distinction between the constitutional requirements applied to people who are detained for purposes of punishment as opposed to those who are detained for other purposes, such as treatment.[222] In contrast, the deliberate indifference

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219. *See* Ammons v. Washington Dep't of Soc. & Health Servs., 648 F.3d 1020, 1027 n.5 (9th Cir. 2011) (explaining that the *Youngberg* professional standard requires an assessment of "whether actions of the professional meet this objective standard").

220. Lopez *ex rel.* Doe 4 v. Shenandoah Valley Juvenile Ctr. Comm'n, 985 F.3d 327, 344 (4th Cir. 2021).

221. *See* Part II, *supra* (explaining, for example, that "[s]ix circuits evaluate claims of inadequate health care in juvenile detention facilities under the Fourteenth Amendment," and that "[d]espite the great need for mental health care in juvenile detention facilities, the constitutional standard required is unsettled law").

222. Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."); *see also* Patten v. Nichols, 274 F.3d 829, 840 (4th Cir. 2001) (justifying the alleged inconsistency created by applying the *Youngberg*

standard was formulated in the context of establishing what constituted a "cruel and unusual punishment" in violation of the Eighth Amendment[223] and therefore fails to encapsulate the full scope of rights to which unaccompanied migrant minors are entitled under the Due Process Clause. Given that unaccompanied migrant minors are not detained for punishment purposes, but rather for care and immigration processing,[224] the government's obligation to provide care exceeds the Eighth Amendment's floor prohibiting care that is so inadequate as to amount to cruel and unusual punishment. Therefore, the adequacy of mental health care provided to unaccompanied migrant minors should be assessed under the professional judgment standard rather than the Eighth Amendment deliberate indifference standard.

As described in more detail in Part II, a right to mental health care when in government custody can be extracted from two similar but different threads of constitutional requirements identified by the Supreme Court. One set of requirements is based on prohibited forms of "punishment" under the Eighth Amendment,[225] while the other set of requirements is based on the broader assertion that when the government deprives an individual of liberty, rendering them unable to care for themselves, due process under the Fourteenth Amendment requires that the government provide for their general well-being.[226] In the case of unaccompanied migrant minors held in detention facilities, the substantive constitutional element which obliges the government to provide children with adequate mental health care is derived from due process under the Fourteenth Amendment because unaccompanied minors are not detained for punishment purposes after

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professional judgment standard rather than the deliberate indifference standard to involuntarily committed psychiatric patients' denial-of-medical care claims by noting the "sufficient differences between pre-trial detainees and involuntarily committed psychiatric patients," the "most important" being "the reason for which the person has been taken into custody").

223. Estelle v. Gamble, 429 U.S. 97, 104 (1976) (finding that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary infliction of pain,' . . . proscribed by the Eighth Amendment" (internal citation omitted)).

224. *See Shenandoah Valley*, 985 F.3d at 339 ("The statutory and regulatory scheme governing unaccompanied children expressly states that these children are held to give them care.").

225. *Id.* at 331.

226. *See Youngberg*, 457 U.S. at 317 ("When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioners that a duty to provide certain services and care does exist.").

an adjudication of guilt.[227] Thus, the professional judgment standard developed in *Youngberg*, where the Supreme Court first acknowledged a substantive due process affirmative obligation to provide care in certain circumstances under the Fourteenth Amendment,[228] should govern constitutional claims brought by unaccompanied migrant minors held in government custody.

The Supreme Court provided an illuminating overview of its precedent regarding when the government has a constitutional obligation to care for a person's well-being in *DeShaney v. Winnebago County*.[229] In *DeShaney*, the Supreme Court described *Estelle v. Gamble* as recognizing that "the Eighth Amendment's prohibition against cruel and unusual punishment, made applicable to the States through the Fourteenth amendment's Due Process Clause, . . . requires the State to provide adequate medical care to incarcerated prisoners."[230] The Supreme Court then explained that in *Youngberg*, it "extended this analysis beyond the Eighth Amendment setting, holding that the substantive component of the Fourteenth Amendment's Due Process Clause requires the State to provide involuntarily committed . . . patients with such services as are necessary to ensure their 'reasonable safety' from themselves and others."[231] The Court additionally cited dicta in *Youngberg* acknowledging that following the same reasoning, the State is "obligated to provide such individuals with 'adequate food, shelter, clothing, and medical care.'"[232] Together, the Court explained, these cases stand "for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution

227. In a footnote in *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977), the Supreme Court explained that the applicability of the Eight Amendment to claims of unconstitutional punishment, as opposed to the Fourteenth Amendment, hinges on whether the government secured a guilty conviction. The Court stated that "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law," while the Fourteenth Amendment applies "[w]here the State seeks to impose punishment without such an adjudication." *Id.*

228. DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199 (1989).

229. *Id.* at 198–200.

230. *Id.* at 198 (internal citation omitted).

231. *Id.* at 199.

232. *Id.* (quoting Youngberg v. Romeo, 457 U.S. 307, 314–25 (1982)).

imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."[233]

While the principles espoused in *Estelle* and *Youngberg* are similar, the constitutional basis underlying the obligation to provide care differs in each case, as does the test applied to satisfy the requirement. Through emphasizing that *Youngberg* went beyond the Eighth Amendment context to find that a right to care is also imbued in the Fourteenth Amendment,[234] the Supreme Court signaled that the analysis applied to evaluate the quality of care provided depends on the constitutional basis for a claim to care while in custody. The right to care may arise under two separate circumstances—when a failure to provide health care would constitute a form of punishment prohibited by the Constitution,[235] and when, due to the government's deprivation of an individual's liberty, substantive due process under the Fourteenth Amendment creates an affirmative duty to care for the person's well-being.[236] To establish a claim of inadequate health care under the Eighth Amendment, it is undisputed that the deliberate indifference standard applies.[237] However, when a failure to provide adequate health care is alleged under the Fourteenth Amendment, it logically follows that the professional judgment standard set forth in *Youngberg*, where an affirmative right to care in the Fourteenth Amendment's substantive due process requirements was first recognized, should govern the claim.

The proposition that *Youngberg* provides the framework under which to evaluate claims of inadequate health care under the Fourteenth Amendment's substantive due process requirements is further supported by a broader analysis of the rights afforded under the Fourteenth Amendment as compared to the protections of the Eighth Amendment. In *Bell v. Wolfish*, a pre-*Youngberg* case evaluating challenges regarding the constitutionality of certain pretrial detention conditions, the Court distinguished the Eighth and

233. *Id.* at 199–200 (citing *Youngberg*, 457 U.S. at 317).

234. Youngberg v. Romeo, 457 U.S. 307, 314 (1982).

235. *See* Estelle v. Gamble, 429 U.S. 97 (1976) (holding that a failure to provide health care equates to subjecting an incarcerated person to cruel and unusual punishment, in violation of the Eighth Amendment).

236. *See* Youngberg v. Romeo, 457 U.S. 307 (1982) (holding that the Fourteenth Amendment creates a duty on the government to provide to institutionalized individuals' treatment and training programs as part of caring for their well-being).

237. *See supra* Section II.A (discussing the deliberate indifference standard that was first found in *Estelle,* 429 U.S. 97).

Fourteenth Amendments by observing that the Fourteenth Amendment bans *any* form of punishment without an adjudication of guilt,[238] as opposed to the Eighth Amendment, which focuses only on cruel and unusual punishment.[239] Thus, following *Bell*, an obligation to provide medical care to pretrial detainees was observed by courts insofar as a denial of medical care could constitute punishment prohibited under the Fourteenth Amendment.[240] In theory, if there is a spectrum of punishments only some of which reach the Eighth Amendment threshold of "cruel and unusual," the less severe punishments should still nonetheless be prohibited under the Fourteenth Amendment's due process protection prohibiting any punishment prior to an adjudication of guilt. Therefore, the protections provided under the Fourteenth Amendment should be greater than those provided under the Eighth Amendment.[241] However, because lower courts lacked a clear standard governing what level of health care was necessary to not constitute punishment prohibited by the Fourteenth Amendment, some courts turned to the deliberate indifference test as a proxy, recognizing that because the deliberate indifference test would reveal "cruel and unusual punishment," it would accordingly also reveal punishment more broadly which would be prohibited under the Fourteenth Amendment.[242] Thus, lower court precedent applying the deliberate indifference test to some Fourteenth Amendment claims does not reveal that the deliberate indifference test

238. Bell v. Wolfish, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

239. *Id.* at 535 n.16 ("Due process requires that a pretrial detainee not be punished. A sentenced inmate, on the other hand, may be punished, although that punishment may not be 'cruel and unusual' under the Eighth Amendment.").

240. *Id.* at 520 ("[T]he proper inquiry is whether those conditions amount to punishment of the detainee.").

241. *See* Loe v. Armistead, 582 F.2d 1291, 1293–94 (4th Cir. 1978); Norris v. Frame, 585 F.2d 1183, 1187 (3d Cir. 1978).

242. *See, e.g.*, Kost v. Kozakiewicz, 1 F.3d 176, 188 n.10 (3d Cir. 1993) (observing that it seemed "no determination has as yet been made" regarding the degree to which pretrial detainees' due process protections exceed the protections established under the Eighth Amendment, but noting that "[p]retrial detainees . . . are entitled to at least as much protection as convicted prisoners, so that the protections of the Eighth Amendment would seem to establish a floor of sorts"); Johnson-El v. Schoemehl, 878 F.2d 1043, 1055 n.8 (8th Cir. 1989) (recognizing that "a more stringent standard should be appropriate" to address an individual in pretrial detention's claim of inadequate medical care, however "[w]hat such a standard should be . . . is not yet clearly established," therefore "for the purposes of this appeal, we use the deliberate indifference standard.").

is the correct standard. To the contrary, this precedent originated with the express acknowledgement that the deliberate indifference test was not the appropriate test but was merely the next-best thing or a substitute test, until a more clearly defined standard was developed which encompassed the higher level of protections afforded under the Fourteenth Amendment.[243]

In *Youngberg*, the Supreme Court created such a standard when it held that the exercise of professional judgment was required to satisfy an involuntarily committed psychiatric patient's due process rights.[244] In contrast to the *Bell* decision's emphasis on the Fourteenth Amendment prohibiting health care which is so inadequate as to amount to punishment, the *Youngberg* ruling identified a distinct *affirmative* duty to provide care as a substantive due process right when the State significantly deprives a person of liberty rendering the individual "wholly dependent on the State."[245] Consistent with an understanding that the Fourteenth Amendment sets a higher constitutional threshold than the Eighth Amendment's prohibition on cruel and unusual punishment, the Court observed that "[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[246] This statement indicates that the "professional judgment" standard was articulated to be more expansive than the standard established in *Estelle* in order to encompass the more considerate conditions and treatment required under the Fourteenth Amendment when an individual is deprived of liberty without an adjudication of guilt.[247]

The Supreme Court's discussion in *City of Revere* further supports the notion that the Fourteenth Amendment's due process standard should be more expansive than the Eighth Amendment's deliberate indifference test. In *City of Revere*, the Supreme Court grappled with a municipality's obligation to pay for medical care

243. *See, e.g.*, Hamm v. DeKalb Cty., 774 F.2d 1567, 1573–74 (11th Cir. 1985) (distinguishing between the Eighth Amendment and Due Process analyses, but ultimately adopting the deliberate indifference test after recognizing that "[t]he Supreme Court . . . has not set forth a standard for determining what level of necessities the due process clause absolutely requires").

244. Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982).

245. *Id.* at 317; DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 199, 200 (1989) (citing *Youngberg*, 457 U.S. at 317).

246. *Youngberg*, 457 U.S. at 321–22 (comparing the level of care required for people who were involuntarily committed to the standard established in *Estelle*).

247. *Id.*

provided to an individual wounded during an arrest.[248] The Court recognized that because there was no formal adjudication of guilt, the Due Process Clause, rather than the Eighth Amendment, governed the municipality's obligation to provide medical care.[249] Despite acknowledging that the city was constitutionally required to provide medical care and citing *Bell*'s holding that an individual in pretrial detention's due process rights were "at least as great as the Eighth Amendment protections available to a convicted prisoner," the Court found it unnecessary to further define the due process obligation to provide medical care under the Fourteenth Amendment.[250] However, the Court's citations further support the concept that *Youngberg*'s professional judgment standard, rather than *Estelle's* deliberate indifference standard, should inform analyses of a substantive due process right to medical care under the Fourteenth Amendment.

Three citations followed the *City of Revere* Court's assertion that "[w]e need not define, in this case, [the city's] due process obligation to pretrial detainees or to other persons in its care who required medical attention."[251] First, the Court directly cited *Youngberg*, where it defined due process obligations for people involuntarily committed to an institution to require professional judgment. The Court then cited a case from the Third Circuit[252] and a case from the Fourth Circuit,[253] which both observed that the government's obligations to provide health care under the Eighth and Fourteenth Amendment were distinguishable. In *Norris v. Frame*, the Third Circuit recognized that while "[t]he protection afforded convicted felons under the eighth amendment is often useful 'by analogy' in determining the protection to be afforded detainees under the fourteenth amendment . . . [t]he two levels of protection . . . should not be thought of as co-extensive."[254] In *Loe v. Armistead*, the Fourth Circuit cited a Seventh Circuit decision holding that "state pretrial detainees were entitled to greater protection under

248. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 240 (1983).
249. *Id.* at 243–45.
250. *Id.* at 244.
251. *Id.*
252. Norris v. Frame, 585 F.2d 1183 (3d Cir. 1978).
253. Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978).
254. *Norris*, 585 F.2d at 1187 (internal citation omitted). The Third Circuit in *Norris* further reasoned that "[t]o limit [a pretrial detainee's] constitutional rights to a protection from cruel and unusual punishment would be to rely completely on an analogy to a constitutional provision that is not truly applicable at all." *Id.*

the Due Process Clause of the fourteenth amendment than that afforded them under the eighth amendment."[255] The *Loe* court ultimately declined to specify the scope of the due process protections of the Fourteenth Amendment, though the Fourth Circuit noted that "due process is at least as co-extensive as the guarantees of the eighth amendment."[256] Notably, when declining to expand upon the standard applicable to constitutionally obligated health care due under the Fourteenth Amendment, the Supreme Court in *City of Revere* did not cite *Estelle*.[257] This omission reveals that the Court did not view *Estelle* as relevant to the standard applicable to the due process obligation to provide medical care to individuals under the government's custody without a formal adjudication of guilt.

Given that the Fourteenth Amendment obliges the government to provide a greater level of care than required under the Eighth Amendment[258] and given that the professional judgment standard arose in the context of the Fourteenth Amendment[259] and is more protective than the Eighth Amendment deliberate indifference standard, it follows that the professional judgment standard is the more appropriate standard to apply to claims of constitutionally inadequate health care under the Fourteenth Amendment. [260] Unaccompanied migrant minors are not detained for punishment purposes[261] and have not been convicted or sentenced for any crime; therefore, unaccompanied migrant minors' constitutional right to mental health care arises under the Fourteenth Amendment.

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255. *Loe*, 582 F.2d at 1293–94.

256. *Id.* at 1294. In *Loe,* the court reasoned that facts alleging that officials were deliberately indifferent to a pretrial detainee's medical condition were sufficient to state a claim under the due process clause of the Fifth Amendment because due process provided *at least* as much protection as the Eighth Amendment. *Id.*

257. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983).

258. *See, e.g.*, *Norris*, 585 F.2d at 1187 (finding that the Fourteenth Amendment should be read to provide greater protection to people in pretrial detention than provided under the Eighth Amendment because a person in pretrial detention "may not be 'punished' at all" and "[t]o limit [their] constitutional rights to a protection from cruel and unusual punishment would be to rely completely on an analogy to a constitutional provision that is not truly applicable at all").

259. Youngberg v. Romeo, 457 U.S. 307 (1982).

260. *See supra* Section III.A (explaining that the professional judgment standard calls for greater mental health protections than the deliberate indifference standard).

261. Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977); *Youngberg*, 457 U.S. at 317.

Accordingly, the professional judgment standard should control judicial review of the constitutional adequacy of mental health care provided to unaccompanied migrant minors in detention facilities.

CONCLUSION

The current framework for assessing the constitutional adequacy of mental health care provided to unaccompanied migrant minors in government detention is nonexistent. The patchwork of inconsistent standards developed to review claims of inadequate health care in various detention contexts leaves unaccompanied migrant minors with an uncertain path to legal recourse when their mental health is placed at risk. To ensure that unaccompanied migrant minors receive the full scope of mental health care they need, a strong constitutional standard is required to incentivize quality care and provide unaccompanied migrant minors with a clear framework under which to seek relief if quality care is not provided. The standards developed in the context of convicted incarcerated persons were created to determine what level of inadequate mental health constitutes "cruel and unusual punishment" under the Eighth Amendment. Applying the deliberate indifference standard fails to take into account the greater rights afforded to non-criminal detainees under the Fourteenth Amendment and places an overly difficult burden on plaintiffs by requiring proof of subjective intent. Adopting the *Youngberg* "professional judgment standard" to unaccompanied migrant minors' inadequate mental health care claims better reflects unaccompanied migrant minors' status as non-criminal detainees and better embraces the full scope of protections afforded under the Fourteenth Amendment.

Shenandoah Valley revealed a gap in constitutional law that must be filled with specific attention to the circumstances under which unaccompanied migrant minors are deprived of their liberty. The United States immigration system unduly criminalizes unaccompanied minor children seeking refuge and places children at an increased risk for adverse mental health outcomes. To minimize harm under the current legal regime, courts should follow the Fourth Circuit's approach in applying the more protective professional judgment standard to constitutional claims about the adequacy of mental health care provided to unaccompanied migrant children in juvenile detention facilities, in order to better ensure that unaccompanied minors receive proper mental health care relative to their needs.