
Comment

REVITALIZING THE *YOUNGBERG V. ROMEO* PROFESSIONAL JUDGMENT STANDARD TO REQUIRE TRAUMA-INFORMED CARE FOR DETAINED CHILDREN

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There are nearly 37,000 children detained in juvenile detention centers in the United States.¹ Of those children, 14,500 are detained prior to a final adjudication on the delinquency charges against them.² There are an additional 14,000 immigrant children who are detained in care facilities after entering the United States unaccompanied.³ Most, if not all, of these children have experienced severe trauma.⁴ On average, each child who comes into contact with the juvenile justice system has experienced at least four distinct types of trauma, from domestic violence, to psychological maltreatment, to

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1. Melissa Sickmund et al., *Easy Access to the Census of Juveniles in Residential Placement*, NAT'L CTR. FOR JUV. JUST., <https://www.ojjdp.gov/ojstatbb/ezacjrp/> (click "National Graphs" tab, then hover over "19" within "Youth in residential placement – All offenses" graph) (last visited Feb. 20, 2022) (showing that 36,479 children were detained in the United States in 2019).

2. *Id.* (click "National Crosstabs" tab, then select "2019" for "Year of Census," and select "Await juvenile court adjudication"; "Adjudicated-await disposition"; "Adjudicated-await placement"; "Await transfer hearing"; and "Await criminal hearing," for "Detailed Status," then click "Show Table") (showing that 14,344 children were detained in 2019 while awaiting adjudication, disposition, placement, transfer, or a criminal court hearing).

3. *Latest UC Data – FY 2021*, U.S. DEP'T OF HEALTH & HUMAN SERV. (Nov. 15, 2021), <https://www.hhs.gov/programs/social-services/unaccompanied-children/latest-uc-data-fy2021/index.html>.

4. Kathleen K. Miller et al., *Applying Trauma-Informed Practices to the Care of Refugee and Immigrant Youth: 10 Clinical Pearls*, CHILDREN 1 (Aug. 20, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6721394/pdf/children-06-00094.pdf> (explaining the "repeated and prolonged exposure to trauma" that many refugee and immigrant youth experience, such as "significant trauma prior to migration, through civil war or unrest, destructive effects of climate change, gang or drug related violence, or poverty"); U.S. DEP'T OF JUST., REPORT OF THE ATTORNEY GENERAL'S NATIONAL TASK FORCE ON CHILDREN EXPOSED TO VIOLENCE 171 (2012) [hereinafter DOJ, TASK FORCE REPORT] (summarizing studies finding that children who "come into contact with the juvenile justice system . . . have almost always been exposed to several types of traumatic violence over a course of many years").

physical abuse.⁵ Similarly, unaccompanied immigrant children (“UCs”)⁶ often experience a variety of traumatic events prior to their arrival in the United States, from gang violence, to neglect, to physical abuse.⁷

The Supreme Court has not determined which constitutional standard should apply to determine whether the treatment of these children in detention is constitutionally adequate.⁸ There are two available options: (1) the Eighth Amendment “deliberate indifference” standard, adopted by the Third Circuit Court of Appeals; and (2) the Fourteenth Amendment “professional judgment” standard, adopted by the Fourth Circuit Court of Appeals.⁹ This Comment argues that the Fourteenth Amendment professional judgment standard should apply to both detained UCs and allegedly delinquent children held in pre-disposition detention.¹⁰

First, Part I explores the circuit split over which standard—the deliberate indifference standard or the professional judgment standard—should apply to detained children, and it summarizes the legal status of UCs and allegedly delinquent children.¹¹ Next, Part II explains why the professional judgment standard should apply to detained children, and argues that under a revitalized professional judgment standard, trauma-informed care should apply to both detained UCs and allegedly delinquent children held in pre-disposition detention.¹² Finally, Part III proposes concrete steps towards making trauma-informed care a reality for detained children.¹³

5. Carly B. Dierkhising et al., *Trauma Histories Among Justice-Involved Youth: Findings from the National Child Traumatic Stress Network*, 4 EUR. J. PSYCHOTRAUMATOLOGY (2013) (stating that justice-involved youth have experienced an average of 4.9 different trauma types, including “loss and bereavement,” “impaired caregiver,” “domestic violence,” “emotional abuse/psychological maltreatment,” “physical maltreatment/abuse,” and “community violence”).

6. *Children Entering the United States Unaccompanied: Guide to Terms*, U.S. DEP’T OF HEALTH AND HUMAN SERVS., OFF. OF REFUGEE RESETTLEMENT (Mar. 17, 2021), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-guide-terms> (identifying “UC” as a common abbreviation for “unaccompanied child”).

7. *Unaccompanied Migrant Children*, NAT’L CHILD TRAUMATIC STRESS NETWORK (2015), <https://www.nctsn.org/resources/unaccompanied-migrant-children> (listing traumatic events experienced by UCs, including “lack of consistent caregivers,” “homelessness,” “violence,” “physical injuries, infections, and diseases,” “forced labor,” “sexual assault,” “loss of loved ones,” “war,” and “torture”).

8. See *Ingraham v. Wright*, 430 U.S. 651, 669 n.37 (1977) (reserving the question of whether the Eighth Amendment’s cruel and unusual punishments clause applies to juvenile institutions).

9. See *infra* Sections I.B, I.C.

10. See *infra* Part II.

11. See *infra* Part I.

12. See *infra* Part II.

13. See *infra* Part III.

I. BACKGROUND

The United States Courts of Appeals for the Third and Fourth Circuits have diverged on whether to apply the professional judgment or deliberate indifference standard to determine whether the State's treatment of a detained child is constitutional.¹⁴ The Third Circuit applies the deliberate indifference standard,¹⁵ which originated in *Estelle v. Gamble*,¹⁶ a Supreme Court case concerning the constitutionality of a prison's treatment of a prisoner's injury under the Eighth Amendment.¹⁷ The Fourth Circuit relies on the professional judgment standard¹⁸ set out in *Youngberg v. Romeo*,¹⁹ in which the Supreme Court assessed the constitutionality of state medical treatment of an involuntarily committed intellectually disabled individual under the liberty prong of the Fourteenth Amendment's Due Process Clause.²⁰

This Part is divided into four Sections. Section I.A discusses the circuit split in detail.²¹ Section I.B examines the deliberate indifference standard.²² Section I.C examines the professional judgment standard.²³ Finally, Section I.D provides context for the legal status of detained children.²⁴

A. The Circuit Split

In *A.M. v. Luzerne County Juvenile Detention Center*,²⁵ the United States Court of Appeals for the Third Circuit held that the Eighth Amendment deliberate indifference standard established in *Estelle v. Gamble*²⁶ is the appropriate standard to judge the constitutionality of the State's treatment of a detained child charged with delinquency.²⁷ In *Doe v. Shenandoah Valley Juvenile Center Commission*,²⁸ the United States Court of Appeals for the Fourth Circuit held that the Fourteenth Amendment professional judgment

14. See *A.M. v. Luzerne Cnty. Juv. Det. Ctr.*, 372 F.3d 572 (3d Cir. 2004) (applying the deliberate indifference standard); *Doe v. Shenandoah Valley Juv. Ctr. Comm'n*, 985 F.3d 327 (4th Cir. 2021) (applying the professional judgment standard).

15. *A.M.*, 372 F.3d at 584.

16. 429 U.S. 97 (1976).

17. U.S. CONST. amend. VIII.

18. *Doe*, 985 F.3d at 342.

19. 457 U.S. 307 (1982).

20. U.S. CONST. amend. XIV, § 1.

21. See *infra* Section II.A.

22. See *infra* Section II.B.

23. See *infra* Section II.C.

24. See *infra* Section II.D.

25. 372 F.3d 572 (3d Cir. 2004).

26. 429 U.S. 97 (1976).

27. *A.M.*, 372 F.3d at 584.

28. 985 F.3d 327 (4th Cir. 2021).

standard established in *Youngberg v. Romeo*²⁹ is the appropriate standard to judge the constitutionality of the State's treatment of a detained UC.³⁰

1. Application of the Eighth Amendment Deliberate Indifference Standard to Allegedly Delinquent Children Held in Pre-Disposition Detention—A.M. v. Luzerne County Juvenile Detention Center

In *A.M. v. Luzerne County Juvenile Detention Center*, the Third Circuit applied the Eighth Amendment deliberate indifference standard to hold that a detention center housing delinquent children fails to provide a constitutionally adequate level of care if it acts with deliberate indifference to a child's serious health needs.³¹

The plaintiff, A.M., was arrested at the age of thirteen for indecent conduct.³² He was placed in a secure detention center for children charged with delinquency in Pennsylvania called "the Center," and he remained there for about a month, until his disposition hearing.³³ A.M. was previously hospitalized on eleven occasions for psychiatric and behavioral problems, including Attention Deficit Hyperactivity Disorder (ADHD), anxiety, depression, atypical bipolar disorder, and intermittent explosive disorder, all of which were disclosed to the Center's administrators and staff.³⁴ A.M. was physically assaulted by fellow juvenile detainees multiple times during his stay at the Center.³⁵ He was spit on, punched, hit, and punctured in the chest with an unknown object, causing him to suffer bruises, wounds, black eyes, and swollen lips.³⁶ The Center initially did not provide A.M. with his ADHD medication.³⁷ Although a doctor performed a psychiatric evaluation of A.M. about a week after his detention began and prescribed medication to reduce his impulsiveness and motor restlessness, no other mental health professional followed up or met with him for the duration of his time at the Center.³⁸

The juvenile court committed A.M. to the Northwestern Intermediate Treatment Facility ("Northwestern") in Pennsylvania at his disposition hearing.³⁹ Upon A.M.'s arrival at Northwestern, a counselor observed that he had a puncture wound on his chest, black and blue eyes, and that he was

29. 457 U.S. 307 (1982).

30. 985 F.3d at 342.

31. 372 F.3d 572, 584 (3d Cir. 2004).

32. *Id.* at 575.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 576–77.

fearful other children would hurt him.⁴⁰ The counselor filed a report of suspected child abuse, and A.M. filed suit against the Center under 42 U.S.C. § 1983 (“Section 1983”) and state tort law.⁴¹

The district court granted the Center’s motion for summary judgment on all counts because it found no evidence to show that the Center acted with deliberate indifference towards A.M.⁴² The Third Circuit held that A.M. had protected Fourteenth Amendment liberty interests in his personal security and well-being, and that the question of whether those interests were violated must be evaluated by the deliberate indifference standard, which it defined as a middle ground between negligence and conduct so egregious that it “shocks the conscience.”⁴³ The court reasoned that the standard “is sensibly employed only when actual deliberation is practical” and determined that the custodial setting of a juvenile detention center obligates the officials in charge to engage in forethought about detainees’ welfare.⁴⁴ The Third Circuit remanded the case to the district court because it found that A.M. had presented sufficient evidence “to survive summary judgment on whether the Center was deliberately indifferent to [his] mental health needs.”⁴⁵

*2. Application of the Fourteenth Amendment Professional Judgment Standard to Detained Unaccompanied Immigrant Children—
Doe v. Shenandoah Valley Juvenile Center Commission*

In *Doe v. Shenandoah Valley Juvenile Center Commission*, the Fourth Circuit applied the Fourteenth Amendment professional judgment standard to hold that a detention center housing UCs fails to provide a constitutionally adequate level of care if it substantially departs from accepted professional standards.⁴⁶

The plaintiffs in *Doe* were a class of UCs placed by the U.S. Department of Health and Human Service’s Office of Refugee Resettlement (“ORR”) at the Shenandoah Valley Juvenile Center (“SVJC”) in Staunton, Virginia.⁴⁷ Plaintiffs fled their native countries after experiencing extreme trauma.⁴⁸ Plaintiffs fell under the care of ORR pursuant to 6 U.S.C. § 279(a) because they were unaccompanied by a parent or legal guardian upon their arrival to the United States and had no parent or legal guardian in the United States

40. *Id.* at 577.

41. *Id.*

42. *Id.* at 577–78.

43. *Id.* at 579 (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998)).

44. *Id.* (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998)).

45. *Id.* at 584–85.

46. 985 F.3d 327, 342 (4th Cir. 2021).

47. *Id.* at 329.

48. *Id.*

who could care for them.⁴⁹ Under 8 U.S.C. § 1232(c)(2)(A), ORR must promptly place UCs “in the least restrictive setting that is in the best interest of the child,” and 8 U.S.C. § 1232(c)(3)(A) requires that such facility be “capable of providing for the child’s physical and mental well-being.”⁵⁰

SVJC was a secure juvenile detention center that housed both UCs and local children who were charged with delinquency.⁵¹ It employed licensed clinicians and provided some mental health services.⁵² However, SVJC was unable to provide treatment for severe mental illness.⁵³ The facility also allowed its staff to engage in the use of force as discipline: Staff were permitted to grab children, place children in handcuffs, shackles, or other restraints, and strap children to chairs.⁵⁴

The SVJC staff imposed extreme disciplinary measures on the UC plaintiffs, including punches to the ribcage and face, physical restraints, and solitary confinement.⁵⁵ At least forty-five children intentionally hurt themselves or attempted suicide at SVJC in a three-year period.⁵⁶ A former SVJC staff member testified that staff members allowed children to self-harm, joked about children’s erratic behavior, and made fun of children who were physically restrained.⁵⁷

The UC plaintiffs sought declaratory and injunctive relief under Section 1983 in federal court.⁵⁸ The plaintiffs alleged that SVJC engaged in unlawful conduct by its excessive use of force, physical restraints, and solitary confinement, and by its failure to provide a constitutionally adequate level of mental health care.⁵⁹ The district court granted SVJC’s motion for summary judgment with respect to the mental health care claim and applied the deliberate indifference standard.⁶⁰ The district court found that SVJC did not display deliberate indifference in its mental health treatment of the plaintiffs.⁶¹

49. *Id.*

50. *Id.*

51. *Id.* at 330.

52. *Id.*

53. *Id.* at 331.

54. *Id.*

55. *Id.* at 333.

56. *Id.* at 333–34.

57. *Id.* at 334.

58. *Id.*

59. *Id.*

60. *Id.* at 335. The district court’s rationale for using the deliberate indifference standard was simply that other courts had applied it to civil detainees.

61. *Id.*

The Fourth Circuit reversed and held that the professional judgment standard, not the deliberate indifference standard, governed.⁶² The court distinguished cases cited by SVJC where courts applied the deliberate indifference standard to immigrant detainees because the cases all involved adults detained for enforcement proceedings, not UCs.⁶³ The majority further distinguished two cases cited by SVJC (including *A.M. v. Luzerne County Juvenile Detention Center*, summarized above⁶⁴) that applied the deliberate indifference standard to detained children because the children involved were not UCs, but rather juvenile delinquent detainees.⁶⁵

The Fourth Circuit concluded that the statutory language in 8 U.S.C. § 1232(c)(2)(A) and 8 U.S.C. § 1232(c)(3)(A) clearly indicates that UCs are held in government custody for the purpose of giving them care.⁶⁶ Therefore, the court reasoned, the *Youngberg* professional judgment standard, which was predicated on the fact that the plaintiff was held in a state institution for the purpose of providing reasonable care and safety, governs the treatment of detained UCs as well.⁶⁷ The court further held that the professional judgment standard is particularly necessary because children have unique psychological needs that require a higher standard of care than adults.⁶⁸ The court suggested that trauma-informed care is a relevant standard of professional judgment to consider when evaluating the care of detained children.⁶⁹ However, it did not determine whether trauma-informed care should in fact be required for detained children under the professional judgment standard.⁷⁰

B. The Eighth Amendment Deliberate Indifference Standard

1. As Defined in Estelle v. Gamble

In *Estelle v. Gamble*, the Supreme Court held that a prison's deliberate indifference to a prisoner's serious illness or injury violates the Eighth Amendment's prohibition on cruel and unusual treatment.⁷¹

The plaintiff, J.M. Gamble, was an inmate of the Texas Department of Corrections.⁷² He was injured during prison work when a bale of cotton fell

62. *Id.* at 339.

63. *Id.* at 342.

64. *See supra* Section I.A.1.

65. *Doe*, 985 F.3d at 342 n.14.

66. *Id.* at 339.

67. *Id.*

68. *Id.* at 342.

69. *Id.* at 344.

70. *Id.* at 346.

71. 429 U.S. 97, 104 (1976).

72. *Id.* at 98.

on him while he was unloading a truck.⁷³ He soon developed severe back pain.⁷⁴ Numerous medical professionals examined Gamble over a period of nearly three months following the accident.⁷⁵ Gamble refused to work because of the pain and was kept in “administrative segregation” as a result.⁷⁶ A prison disciplinary committee placed Gamble in solitary confinement about two months after his injury and refusal to work.⁷⁷ Gamble filed a pro se Section 1983 complaint against prison officials because of their failure to provide him with proper medical treatment after his injury.⁷⁸ The district court dismissed the complaint for failure to state a claim, and the court of appeals reversed and remanded.⁷⁹

The Supreme Court held that Eighth Amendment jurisprudence—finding punishments that are incompatible with evolving standards of decency and punishments that involve unnecessary and wanton infliction of pain to be unconstitutional—establishes the government’s obligation to provide medical care for individuals who are punished by incarceration.⁸⁰ The Court reasoned that a prison’s failure to provide a prisoner with medical care could result in pain, suffering, and even death, which are unnecessary and indecent consequences.⁸¹ These consequences amount to punishment beyond the punitive sentence imposed by the court and are thus cruel and unusual.⁸² Therefore, the Court concluded that a prison’s deliberate indifference to a prisoner’s serious medical needs violates the Eighth Amendment.⁸³

2. Deliberate Indifference as Applied and Interpreted

An Eighth Amendment deliberate indifference claim must prove that the State’s conduct amounted to punishment of the detainee beyond the penalty

73. *Id.* at 99.

74. *Id.*

75. *Id.* at 99–101.

76. *Id.* at 100–01.

77. *Id.* at 101.

78. *Id.* at 98.

79. *Id.*

80. *Id.* at 102–03.

81. *Id.* at 103.

82. *Id.* at 103 (identifying “the government’s obligation to provide medical care for those whom it is punishing by incarceration” and noting that “a failure [to provide medical care] may actually produce physical ‘torture or a lingering death,’” though “[i]n less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose” (quoting *In re Kemmler*, 136 U.S. 436, 447 (1890))).

83. *Id.* at 104. The Court ultimately concluded that Gamble did not present a cognizable Section 1983 claim because he was seen by medical professionals on multiple occasions after his injury and because doctors diagnosed and treated his injury. *Id.* at 107.

formally imposed for the crime.⁸⁴ The Eighth Amendment is expressly about punishment.⁸⁵ To violate the Eighth Amendment, state conduct “that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner’s interests or safety.”⁸⁶ The State’s harmful treatment of the detainee must be wanton in order to violate the deliberate indifference standard.⁸⁷ “[I]nadvertence” or “error in good faith” do not suffice.⁸⁸ While “wantonness does not have a fixed meaning,” deliberate indifference to a detainee’s medical needs meets the definition because the State’s responsibility to provide medical care to those within its custody ordinarily does not clash with other responsibilities.⁸⁹ If there is a conflict between providing treatment to a detained individual and the State’s competing interests, such as prison safety, the deliberate indifference standard does not apply because it does not adequately account for the State’s need to make hasty decisions.⁹⁰

The deliberate indifference standard is a subjective, not objective, test.⁹¹ A detainee must show that the state official both knew of and disregarded an excessive risk to the individual’s health or safety.⁹² In other words, the state official “must both be aware of facts from which [an] inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”⁹³ This subjective intent requirement is based in the Eighth Amendment itself because of its ban only on cruel and unusual *punishment*.⁹⁴

84. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (referencing *Estelle* for its acknowledgment that the Eighth Amendment’s prohibition on cruel and unusual punishments “could be applied to some deprivations that were not specifically part of the sentence but were suffered during imprisonment”).

85. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual *punishments* inflicted.”) (emphasis added).

86. *Whitley v. Albers*, 475 U.S. 312, 319 (1986).

87. *Wilson*, 501 U.S. at 297–300 (summarizing cases explaining the wantonness requirement under the Eighth Amendment).

88. *Whitley*, 475 U.S. at 319.

89. *Wilson*, 501 U.S. at 302 (citing to *Whitley*, 475 U.S. at 312, 320, for its holding that deliberate indifference to medical needs constitutes wantonness).

90. *Whitley*, 475 U.S. at 320. When the State acts under such emergency circumstances, “the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on ‘whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm,’” instead of whether the officials acted with deliberate indifference. *Id.* (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (1973)).

91. *See id.* at 319 (“[I]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause.”); *see also* *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (rejecting the “petitioner’s invitation to adopt an objective test for deliberate indifference”).

92. *Farmer*, 511 U.S. at 837.

93. *Id.*

94. *Wilson*, 501 U.S. at 300 (stating that the source of the deliberate indifference subjective intent requirement “is not the predilections of this Court, but the Eighth Amendment itself If

The claimant must show that the state official actually intended to deliberately cause the harm as a form of punishment beyond the claimant's sentence in order for the action to qualify as deliberate indifference.⁹⁵ An adjudicator may infer that a state official's subjective state of mind exists if the risk of harm is obvious.⁹⁶ The deliberate indifference standard applies both to the State's failure to attend to a detainee's medical needs, and to allegations of inhumane conditions of confinement.⁹⁷

C. *The Fourteenth Amendment Professional Judgment Standard*

1. *As Defined in Youngberg v. Romeo*

In *Youngberg v. Romeo*, the Supreme Court held that intellectually disabled individuals who are involuntarily committed to state institutions have protected liberty interests of safety and freedom from unreasonable restraints under the Due Process Clause of the Fourteenth Amendment.⁹⁸ The Court held that courts should employ a professional judgment standard to evaluate whether the State violated an intellectually disabled individual's liberty interests.⁹⁹

The plaintiff, Nicolas Romeo, was an adult man whose mental capacity was equivalent to that of an eighteen-month-old child.¹⁰⁰ A Pennsylvania court committed Romeo to a state institution when he was twenty-six years old.¹⁰¹ Romeo suffered over sixty injuries during his first two years in the institution.¹⁰² Romeo's mother filed a Section 1983 action on Romeo's behalf against three administrators of the state institution, claiming damages for the alleged breach of Romeo's constitutional rights to (1) safe conditions of confinement; (2) freedom from bodily restraints; and (3) training or habilitation under the Due Process Clause of the Fourteenth Amendment.¹⁰³

The district court jury returned a verdict for the defendants, which the Third Circuit overturned.¹⁰⁴ The Third Circuit found that the Eighth

the pain inflicted is not formally meted out *as punishment* . . . some mental element must be attributed to the inflicting official").

95. *Id.* ("The infliction of punishment is a deliberate act intended to chastise or deter. . . . [I]f [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word. . . ." (alterations in original) (quoting *Duckworth v. Franzen*, 780 F.2d 645, 652 (7th Cir. 1985))).

96. *Hope v. Pelzer*, 536 U.S. 730, 738 (2002).

97. *Wilson*, 501 U.S. at 303 (quoting *LaFaut v. Smith*, 834 F.2d 389, 391–92 (4th Cir. 1987)).

98. 457 U.S. 307, 319 (1982).

99. *Id.* at 321.

100. *Id.* at 309.

101. *Id.* at 310.

102. *Id.*

103. *Id.* at 309.

104. *Id.* at 312.

Amendment deliberate indifference standard, which the district court had instructed the jury to rely on, was an inappropriate standard of liability because it applies to individuals convicted of crimes, not to individuals involuntarily committed due to intellectual disabilities.¹⁰⁵ Instead, the Third Circuit held that the Fourteenth Amendment's protection of liberty interests, including freedom of movement and personal security, was the proper basis for the rights of the involuntarily committed.¹⁰⁶

The Supreme Court affirmed the Third Circuit and held that the district court erred in applying the Eighth Amendment deliberate indifference standard.¹⁰⁷ Romeo was not held for a punitive purpose, and therefore the Eighth Amendment did not apply to him.¹⁰⁸ The Court based this conclusion in its understanding that Romeo was detained for the purpose of providing him care.¹⁰⁹ The Court affirmed that involuntarily committed intellectually disabled individuals have constitutionally protected liberty interests in personal safety and freedom from bodily restraint under the Due Process Clause of the Fourteenth Amendment.¹¹⁰

The Court acknowledged that certain restraints on these liberty interests may be necessary in the context of an institution for the intellectually disabled.¹¹¹ Thus, it sought to determine when a restraint on a liberty interest violates the Due Process Clause.¹¹² It concluded that the Constitution only requires the State to show that it exercised "professional judgment" in its treatment of the involuntarily committed intellectually disabled individual.¹¹³ A "professional" may be anyone who is competent by education, training, or experience to make the particular decision at issue about a committed individual's care.¹¹⁴ The Court held that a decision is presumptively valid if it is determined by a qualified professional, so long as the professional's

105. *Id.* at 312–13.

106. *Id.*

107. *Id.* at 312 n.11.

108. *Id.* at 312–13.

109. *Id.* at 320 n.27 (“[T]he purpose of respondent’s commitment was to provide reasonable care and safety.”).

110. *Id.* at 315–16. The Court also held that these protected liberty interests require the State to provide involuntarily committed intellectually disabled individuals with minimally adequate or reasonable training or habilitation to ensure their safety and freedom from undue restraint. *Id.* at 319. The Court left open the question of whether an involuntarily committed intellectually disabled individual has an independent constitutional claim to training or habilitation to preserve their self-care skills from deteriorating during their commitment. *Id.* at 327 (Blackmun, J., concurring).

111. *Id.* at 320.

112. *Id.*

113. *Id.* at 321.

114. *Id.* at 323 n.30.

decision does not substantially depart from accepted professional judgment, practice, or standards.¹¹⁵

2. *Professional Judgment as Applied and Interpreted*

Lower courts have applied and interpreted the *Youngberg* professional judgment standard as a balancing test.¹¹⁶ First, a plaintiff must demonstrate that the State restricted their Fourteenth Amendment due process liberty interest in freedom of movement.¹¹⁷ Second, a plaintiff must show that the State failed to exercise professional judgment in balancing the plaintiff's liberty interest against its own interest in restricting liberty.¹¹⁸

The professional judgment standard imposes a lower level of culpability than the deliberate indifference standard.¹¹⁹ It is an objective test; it does not require proof of subjective intent on the part of the state official.¹²⁰ The Ninth Circuit has described the professional judgment standard as "far more stringent" than an ordinary tort negligence standard.¹²¹ The professional judgment standard requires that "in the face of known threats to patient safety, state officials . . . must take adequate steps in accordance with professional standards to prevent harm from occurring."¹²²

The Second Circuit has held that an exercise of professional judgment does not relate to whether a course of action would make the detained individual safer, happier, or more productive; instead, it only determines whether a decision meets professionally accepted minimum standards.¹²³ The standard requires evaluating the judgment of the professional at the time the decision was made.¹²⁴ However, courts have also held that the presumption that a professional's decision was valid may be rebutted if there

115. *Id.* at 323.

116. *See, e.g.*, *Estate of Conners v. O'Connor*, 846 F.2d 1205, 1208 (9th Cir. 1988) (explaining that "[u]nder *Youngberg*'s balancing test, the risk of harm and the burden on the state are weighed"); *C.J. v. Dep't of Hum. Servs.*, 771 N.E.2d 539, 549 (2002) (stating that the *Youngberg* Court "found the appropriate standard for balancing the individual's liberty interests against the State's asserted reasons for restraining individual liberty is whether the State exercised professional judgment in restricting the liberty interest").

117. *C.J.*, 771 N.E.2d at 549 (citing *Youngberg*, 457 U.S. at 321).

118. *Id.*

119. *Doe v. Shenandoah Valley Juv. Ctr. Comm'n*, 985 F.3d 343 (4th Cir. 2021).

120. *Neely v. Feinstein*, 50 F.3d 1502, 1508 (9th Cir. 1995) ("[T]he *Youngberg* professional judgment standard is necessarily an objective test.").

121. *Estate of Conners*, 846 F.2d at 1208.

122. *Neely*, 50 F.3d at 1508.

123. *Soc'y for Good Will to Retarded Child., Inc. v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir. 1984).

124. *Id.*

is evidence, established by written policies or expert testimony, that those decisions substantially departed from accepted professional standards.¹²⁵

Lower federal courts and state courts have sharpened the professional judgment standard. The Illinois Appellate Court has interpreted *Youngberg* to mean that the State's treatment of an individual must be "guided and informed by 'normal professional standards.'"¹²⁶ The court acknowledged that some courts have interpreted *Youngberg*'s professional judgment standard to mean that any decision by a professional, "however outrageous it may be," is valid.¹²⁷ However, a "careful reading of *Youngberg* . . . explodes this interpretation" to reveal that "professional judgment" does not mean any decision made by a professional, "but rather [any decision] synonymous with accepted standards and practices within the relevant profession."¹²⁸

The U.S. District Court for the Eastern District of Wisconsin has similarly framed the professional judgment standard as constrained by constitutional values, such as the prevention of undue restraint, autonomy, self-determination, and freedom from intrusion.¹²⁹ To hold otherwise, by determining that any judgment is valid so long as it is made by a professional, would "substitute professional values for constitutional values and result in an abdication by the courts of their obligation to protect individual rights."¹³⁰

Other courts have found that administrative considerations should not factor into a court's determination of whether an official properly exercised professional judgment. For example, the U.S. District Court for the Western District of North Carolina has held that consideration of state budgetary constraints is inappropriate when determining whether an official exercised professional judgment.¹³¹ The U.S. District Court for the Eastern District of

125. See *Thomas S. v. Flaherty*, 902 F.2d 250, 252 (4th Cir. 1990) (explaining that "the decisions of the treating professionals are not conclusive"); see also *Wells v. Franzen*, 777 F.2d 1258, 1263 n.4 (7th Cir. 1985) (stating that the professional judgment standard is based on norms set by mental health professionals, and that state regulations constitute evidence of such norms); *Lucas v. Peters*, 741 N.E.2d 313, 324 (Ill. App. Dist. 2000) ("Deference to professional decisionmaking imposes a concomitant judicial duty to ensure that the professional's expertise was actually brought into play."); *West v. Macht*, 235 F. Supp. 2d 966, 981–82 (E.D. Wis. 2002) ("*Youngberg* does not accept entirely unconstrained professional discretion. Rather, *Youngberg* articulated a substantive standard that defines the limits within which professionals are authorized to exercise professional judgment.").

126. *Lucas*, 741 N.E.2d at 324 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)).

127. *Id.*

128. *Id.*

129. *West*, 235 F. Supp. 2d at 982.

130. *Id.* (citing Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 668 (1992)).

131. *Thomas S. v. Morrow*, 601 F. Supp. 1055, 1060 (W.D.N.C. 1984) (finding that a "[p]laintiff is entitled to treatment recommended by qualified professionals whose judgment is unsullied by consideration of the fact that the state does not now provide appropriate treatment or funding for appropriate treatment").

Pennsylvania has held that a professional judgment must be based “on medical or psychological criteria and not on exigency, administrative convenience, or other non-medical criteria” in order to merit deference from a reviewing court.¹³²

D. The Legal Status of Detained Children

The State has no affirmative duty to protect a child who is in their parent’s custody.¹³³ Only when the State affirmatively takes an individual into its custody and holds them there against their will does the Constitution impose a duty on the State to assume some responsibility for the individual’s safety and general well-being under the Eighth and Fourteenth Amendments.¹³⁴ The State’s affirmative duty to protect exists under these circumstances because it has imposed limitations on the individual’s freedom to act on their own behalf by depriving them of certain Fourteenth Amendment due process liberty interests.¹³⁵

1. Legal Standards Governing Allegedly Delinquent Children

Children charged with delinquency in juvenile court proceedings are entitled to constitutional rights akin to adults in criminal proceedings, including the rights to (1) notice of court hearings and the alleged misconduct; (2) counsel; (3) confrontation; and (4) the privilege against self-incrimination.¹³⁶ Additionally, the double-jeopardy clause of the Fifth Amendment prohibits the adult criminal prosecution of a child after a conviction in juvenile court for the same offense.¹³⁷ However, the Supreme Court has also held that trial by jury is not a constitutional requirement in juvenile court proceedings.¹³⁸

The Supreme Court has upheld “preventive” detention of children pending adjudication of an alleged delinquency charge if a judge finds there is a “serious risk” that the child “may . . . commit an act which if committed by an adult would constitute a crime.”¹³⁹ Moreover, the Court has determined that “children are constitutionally different from adults for purposes of

132. *Clark v. Cohen*, 613 F. Supp. 684, 704 (E.D. Pa. 1985).

133. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200–01 (1989).

134. *Id.* at 199–200 (first citing *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976); then citing *Youngberg v. Romeo*, 457 U.S. 307, 315–16 (1982)).

135. *Id.* at 200.

136. *In re Gault*, 387 U.S. 1, 33, 40, 55, 57 (1967).

137. *Breed v. Jones*, 421 U.S. 519, 541 (1975).

138. *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971).

139. *Schall v. Martin*, 467 U.S. 253, 255–57 (1984).

sentencing.”¹⁴⁰ The Court has recognized that children may be reckless, impulsive, and prone to risk-taking because of their lack of maturity and underdeveloped sense of responsibility.¹⁴¹ A child’s character is not as well-formed as an adult’s, and children may be more vulnerable to peer or family pressure than adults.¹⁴² Finally, several circuit courts and the federal government have acknowledged that the aim of the juvenile justice system is rehabilitation, not punishment.¹⁴³

2. Legal Standards Governing Unaccompanied Immigrant Children

To be classified as a UC, a child must have “no lawful immigration status in the United States,”¹⁴⁴ be under the age of eighteen,¹⁴⁵ and have either “no parent or legal guardian in the United States” or “no parent or legal guardian in the United States . . . available to provide care and physical custody.”¹⁴⁶

ORR is the main office charged with caring for UCs who have pending immigration proceedings.¹⁴⁷ ORR is required by statute to: (1) identify qualified individuals, entities, and facilities to house UCs; (2) place children in the care of those individuals or facilities; and (3) supervise those individuals and facilities to ensure that they provide adequate care.¹⁴⁸ ORR must promptly place a UC “in the least restrictive setting that is in the best interest of the child.”¹⁴⁹ ORR may not place a UC with a person or entity “unless the Secretary of Health and Human Services makes a determination

140. *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (barring mandatory life without parole sentences for children convicted of murder); *see also Roper v. Simmons*, 543 U.S. 551, 569 (2005) (prohibiting states from executing offenders for murder committed before they were eighteen years of age); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (extending *Roper* to prohibit states from imposing life without parole sentences on children convicted of nonhomicide offenses).

141. *Miller*, 567 U.S. at 471 (citing to *Roper*, 543 U.S. at 569).

142. *Id.*

143. *A.J. ex rel. L.B. v. Kierst*, 56 F.3d 849, 854 (8th Cir. 1995) (citing *Santana v. Collazo*, 714 F.2d 1172, 1178 (1st Cir. 1983)) (stating that allegedly delinquent juveniles “are in a system whose purpose is rehabilitative, not penal, in nature”); *see also Points of Intervention*, YOUTH.GOV, <https://youth.gov/youth-topics/juvenile-justice/points-intervention> (last visited Feb. 24, 2022) (“Detention [of children in the juvenile justice system] is not intended to be punitive.”).

144. 6 U.S.C. § 279(g)(2)(A).

145. *Id.* at § 279(g)(2)(B).

146. *Id.* at § 279(g)(2)(C).

147. *Id.* at § 279(a); *see also* Office of Refugee Resettlement; Statement of Organization, Functions, and Delegations of Authority, 80 Fed. Reg. 3614, 3615 (Jan. 23, 2015) (stating that the Office of the Director of the Office of Refugee Resettlement “oversees the care and custody of unaccompanied alien children”).

148. *Id.* at § 279(b)(1)(A)–(L).

149. 8 U.S.C. § 1232(c)(2)(A).

that the proposed custodian is capable of providing for the child's physical and mental well-being."¹⁵⁰

The 1997 *Flores v. Reno* settlement agreement mandates the standards of detention for UCs.¹⁵¹ The *Flores* settlement required the former Immigration and Naturalization Service¹⁵² to treat UCs with "dignity, respect and special concern for their particular vulnerability as minors."¹⁵³ If a UC cannot be released to a parent or other guardian, the *Flores* settlement requires that the government temporarily place them in a program "licensed by an appropriate state agency to provide residential, group, or foster care services for dependent children."¹⁵⁴ The *Flores* settlement mandates that facilities housing UCs provide for the child's basic needs, including medical assistance.¹⁵⁵ The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA") codified further protections to ensure the "safe and secure placements" of UCs, and it also included a catch-all provision requiring that subsequent regulations must "take into account the specialized needs" of UCs.¹⁵⁶

II. ANALYSIS

This Part argues that the *Youngberg v. Romeo*¹⁵⁷ professional judgment standard must apply to determine the constitutional adequacy of the State's treatment of both detained UCs and allegedly delinquent children held in pre-disposition detention. First, this Part explains that the purpose for an individual's detention is essential for determining whether the professional judgment or deliberate indifference standard applies.¹⁵⁸ Second, this Part argues that the Fourth Circuit in *Doe v. Shenandoah Valley Juvenile Center*

150. *Id.* at § 1232(c)(3)(A) ("[S]uch determination shall, at a minimum, include verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.").

151. Stipulated Settlement Agreement (*Flores* Settlement), No. CV 85-4544-RJK(Px) (C.D. Cal. filed Jan. 17, 1997).

152. The Homeland Security Act of 2002 transferred responsibility over immigration from the Immigration and Naturalization Service to Citizenship and Immigration Services and the Department of Homeland Security, effective March 1, 2003. The transfer also gave ORR the responsibility to care for UCs. See Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 § 462 (2002).

153. See *Flores* Settlement, *supra* note 151, at 7.

154. See *Flores* Settlement, *supra* note 151, at 4, 12.

155. See *Flores* Settlement, *supra* note 151, at 7-8 (requiring that officials caring for detained UCs must provide: (1) food and drinking water; (2) medical assistance in the event of emergencies; (3) toilets and sinks; (4) adequate temperature control and ventilation; (5) adequate supervision to protect minors from others; and (6) separation from unrelated adults whenever possible).

156. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5077, 5081 (2008).

157. 457 U.S. 307 (1982).

158. See *infra* Section II.A.

*Commission*¹⁵⁹ correctly applied the Fourteenth Amendment professional judgment standard to UCs because detained UCs may not be detained for a punitive purpose.¹⁶⁰ Third, this Part argues that the Third Circuit in *A.M. v. Luzerne County Juvenile Detention Center*¹⁶¹ erred in applying the Eighth Amendment deliberate indifference standard because allegedly delinquent children held in pre-disposition detention may not be detained for a punitive purpose.¹⁶² Fourth, this Part proposes that the professional judgment standard be revitalized to focus on the accepted practices within a professional field.¹⁶³ Finally, this Part explains why trauma-informed care is the appropriate standard of professional judgment that courts should use to evaluate the constitutional adequacy of the State's care of detained UCs and allegedly delinquent children held in pre-disposition detention.¹⁶⁴

A. The Purpose for an Individual's Detention Determines Which Standard Applies

The purpose for an individual's detention determines whether the *Estelle* Eighth Amendment deliberate indifference standard or the *Youngberg* Fourteenth Amendment professional judgment standard applies. The plaintiffs in both *Estelle* and *Youngberg* were detained by the State, were therefore dependent on the State for care, and were abused while in state custody.¹⁶⁵ Yet despite these similarities, the Supreme Court reached different holdings in *Estelle* and *Youngberg* because the plaintiffs were detained for different purposes: The *Estelle* plaintiff was detained for the purpose of punishment following a criminal conviction, whereas the *Youngberg* plaintiff was civilly committed for the purpose of providing care.¹⁶⁶

The Court in *Estelle* concluded that the purpose of the plaintiff's detention was punishment because the plaintiff was a convicted inmate sentenced to incarceration.¹⁶⁷ The Court reasoned that the State's failure to provide medical treatment to a detainee could result in unnecessary and

159. 985 F.3d 327 (4th Cir. 2021).

160. See *infra* Section II.A.1.

161. 372 F.3d 572 (3d Cir. 2004).

162. See *infra* Section II.A.2.

163. See *infra* Section II.B.

164. See *infra* Section II.B.

165. Rose Carmen Goldberg, *The Antidotes to the Double Standard: Protecting the Healthcare Rights of Mentally Ill Inmates by Blurring the Line Between Estelle and Youngberg*, 16 YALE J. HEALTH POL'Y L. & ETHICS 111, 114 (2015).

166. *Id.* at 115 (stating that the distinct purposes for the detentions in *Youngberg* and *Estelle* "dictate unequal treatment standards, with inmates entitled to less care than the civilly committed because the purpose of their confinement is punishment").

167. *Estelle v. Gamble*, 429 U.S. 97, 98 (1976).

wanton pain and suffering that would not “serve any penological purpose” consistent with the Eighth Amendment.¹⁶⁸ It developed the deliberate indifference standard as a tool to determine whether the State’s treatment of a detained individual exceeded the bounds of the punishment to which the individual was sentenced.¹⁶⁹ A necessary predicate for applying the standard, then, is that the detained individual has already been sentenced to punishment (i.e., is detained for a punitive purpose). The deliberate indifference standard is thus properly applied in situations where an individual is detained for a punitive purpose in order to determine if the State’s treatment of the individual exceeded the bounds of the punishment to which the individual was sentenced.

The Court in *Youngberg* determined that the purpose of the plaintiff’s detention was care and treatment by looking to the state statute governing the plaintiff’s commitment.¹⁷⁰ The trial court in *Youngberg* applied the *Estelle* Eighth Amendment deliberate indifference standard.¹⁷¹ However, the Supreme Court and Third Circuit explicitly rejected this approach because the purpose for the *Youngberg* plaintiff’s confinement was treatment, not punishment.¹⁷² The Supreme Court held that the Eighth Amendment deliberate indifference standard, rooted in the presumption that the individual is detained for a punitive purpose, cannot apply to an individual who is detained for a rehabilitative or nonpunitive purpose.¹⁷³ The professional judgment standard instead provides an individual detained for a nonpunitive purpose with “more robust protection” than the deliberate indifference standard because individuals detained for a nonpunitive purpose may not constitutionally be punished at all.¹⁷⁴ The professional judgment standard is thus properly applied in situations where an individual is detained for a nonpunitive purpose to determine if the State’s treatment of that individual

168. *Id.* at 103.

169. *Id.*

170. *Youngberg v. Romeo*, 457 U.S. 307, 310 (1982) (citing to 50 PA. CONS. STAT. § 4406(b) (1969), which states that a court may order the commitment of a mentally disabled person “for care and treatment”).

171. *Id.* at 312.

172. *Id.* at 321–22 (citing *Estelle*, 429 U.S. 97) (“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.”); *Romeo v. Youngberg*, 644 F.2d 147, 156 (3d Cir. 1980) (holding that the Eighth Amendment is inappropriate in the context of civil rather than criminal confinement).

173. *Youngberg*, 457 U.S. at 312 (affirming the lower court’s judgment that the Eighth Amendment is “not an appropriate source for determining the rights of the involuntarily committed,” and noting that the Fourteenth Amendment provides “the proper constitutional basis for these rights”); see also Goldberg, *supra* note 165, at 129 (explaining that *Estelle*’s “holding is explicitly rooted in the Eighth Amendment’s fundamental protections”).

174. Goldberg, *supra* note 165, at 124.

violated their Fourteenth Amendment due process liberty interests in personal safety and freedom from bodily restraint.¹⁷⁵

In sum, if the purpose for an individual’s detention is punitive, the Eighth Amendment deliberate indifference standard applies. If the purpose for an individual’s detention is nonpunitive, the Fourteenth Amendment professional judgment standard applies.

In order to determine which standard should apply, a court must first determine whether the purpose for the individual’s detention is punitive or non-punitive. There are various factors a court may consider in making this determination, including: “(1) legislative purpose clauses; (2) indeterminate or determinate sentencing laws; (3) judges’ sentencing practices; (4) institutional conditions of confinement; and (5) intervention outcomes.”¹⁷⁶ Factors a court may consider in order to determine whether a particular act is punitive include:

whether [it] involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.¹⁷⁷

As explained in the following Sections, consideration of these factors reveals that neither UCs nor allegedly delinquent children held in pre-disposition detention may be detained for a punitive purpose.¹⁷⁸ Therefore, the deliberate indifference standard cannot apply, and the Fourteenth Amendment professional judgment standard should control.¹⁷⁹

1. The Fourth Circuit in Doe v. Shenandoah Valley Juvenile Center Commission Correctly Applied the Professional Judgment Standard Because a UC May Not Be Detained for a Punitive Purpose

Children and adult immigrants alike have the right to seek asylum under international law.¹⁸⁰ An individual who unlawfully enters the United States

175. *Youngberg*, 475 U.S. at 315–16.

176. Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 MINN. L. REV. 473, 485 (2017) (listing factors the Supreme Court has used to distinguish punishment from treatment).

177. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963).

178. *See infra* Sections II.B, II.C.

179. *See infra* Sections II.B, II.C.

180. G.A. Res. 217A (III), Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”); *see*

for the first time is subject to civil, not criminal penalties.¹⁸¹ Neither an adult immigrant nor a UC may be punished for simply entering the United States to seek asylum.¹⁸²

The statutes and policy governing UCs make it explicit that a UC may not be detained for a punitive purpose, and that the government is instead responsible for their care and well-being.¹⁸³ The immigration system grants UCs more protections than other immigrants in four key ways: (1) by entrusting their custody to ORR; (2) by following the terms of the *Flores* Settlement; (3) by amendments to the Immigration and Nationality Act; and (4) by juvenile docket accommodations in immigration court.¹⁸⁴

By statute, ORR is required to ensure that UCs receive adequate care¹⁸⁵ and that individuals or detention centers charged with caring for UCs are “capable of providing for the child’s physical and mental well-being.”¹⁸⁶ Legislative history reveals that Congress granted ORR jurisdiction over the care of UCs because of its “‘child welfare expertise’ and ability to address ‘the psychological, emotional and other material needs’ of children.”¹⁸⁷ The *Flores* Settlement’s¹⁸⁸ standards of detention for UCs require the federal government to ensure that “children are detained for as short a period as possible” and that “detention facilities address young people’s special needs.”¹⁸⁹ Amendments to the Immigration and Nationality Act following

also Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 2 (Dec. 10, 1984) (stating that signatory parties are prohibited to “return . . . or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”). The United States signed the Convention Against Torture in 1988, but did not ratify it until 1994. *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf> (last visited Feb. 9, 2022).

181. 8 U.S.C. § 1325 (stating that any individual who “enters or attempts to enter the United States at any time or place other than as designated by immigration officers . . . shall, for the first commission of any such offense, be fined . . . or imprisoned not more than [six] months”).

182. *See supra* note 180.

183. *See infra* notes 186–190 and accompanying text.

184. Laila Hlass, *The Adulthood of Immigrant Children*, 34 GEO. IMMIGR. L.J. 199, 217 (2020).

185. 6 U.S.C. § 279(b)(1)(A)–(L).

186. 8 U.S.C. § 1232(c)(3)(A).

187. *See* Hlass, *supra* note 184, 184 at 218 (quoting *Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, the Homeland Security Act of 2002: Hearing Before Subcomm. on Immigration, Border Security, and Claims, H. Comm. on the Judiciary*, 107th Cong. 115 (2002) (statement of Kevin Appleby, Pol’y Dir. of the U.S. Conf. of Catholic Bishops Migration and Refugee Services)).

188. *Supra* note 151.

189. Hlass, *supra* note 184, at 219–20.

passage of the TVPRA¹⁹⁰ expanded UCs' access to forms of immigration relief.¹⁹¹ Finally, some immigration courts have separated UC cases from the regular docket in an effort to promote pro bono representation of UCs in their removal defense.¹⁹²

These intentional protections for UCs make it clear that the government recognizes it has a responsibility to ensure UCs' well-being, and that in doing so, it must also treat them differently from adults. The government's purpose for detaining UCs is in no way punitive; instead, its stated purpose is to provide care.¹⁹³ UCs are similar to foster children in that the government takes on the role of guardian because the UC by definition has "no parent or legal guardian in the United States . . . available to provide care and physical custody."¹⁹⁴ Like with foster children, the government's only legitimate purpose for taking custody of a UC is to protect them.¹⁹⁵ The reality of treatment of UCs in detention centers has been shown to differ greatly from the care-based purpose for their detention.¹⁹⁶ However, the legal purpose for their detention remains to provide care, not to punish.¹⁹⁷ Therefore, the Fourteenth Amendment professional judgment standard, not the Eighth Amendment deliberate indifference standard, should control.

The Fourth Circuit in *Doe v. Shenandoah Valley Juvenile Center*¹⁹⁸ correctly held that the district court erred in applying the Eighth Amendment deliberate indifference standard to the UC plaintiffs because UCs may only be detained for the purpose of providing care.¹⁹⁹ The district court applied

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

191. Hlass, *supra* note 184, at 220–21 (explaining that the TVPRA: (1) prohibited expedited removal of Mexican and Canadian UCs arrested at the border; (2) gave UCs the opportunity to first seek asylum before an asylum officer, rather than an immigration judge; (3) removed two bars to asylum for UCs; and (4) included a "catch-all provision" that regulations pursuant to the Act must consider the special needs of UCs).

192. Hlass, *supra* note 184, at 221–22.

193. 6 U.S.C. § 279(b)(1)(A).

194. *Id.* at § 279(g)(2)(C).

195. 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, 249 (2014) ("[F]oster children are not taken into state care for the purpose of punishment. In stark contrast, the singular societal interest in foster care is the protection of the child.").

196. Hlass, *supra* note 184, at 205 (arguing that "[i]nstead of addressing young people's unique vulnerabilities, the [immigration legal] system has permitted, and even supported, their physical abuse, racial subordination, and dehumanization"); see generally Rebeca M. Lopez, *Codifying the Flores Settlement Agreement: Seeking to Protect Immigrant Children in U.S. Custody*, 95 MARQ. L. REV. 1635 (2012) (providing an overview of the mistreatment of UCs in U.S. custody and the need for reform).

197. 6 U.S.C. § 279(b)(1)(A).

198. 985 F.3d 327 (4th Cir. 2021).

199. *Doe v. Shenandoah Valley Juv. Ctr. Comm'n*, 985 F.3d 327, 329 (4th Cir. 2021); see also 8 U.S.C. §§ 1232(c)(2)(A), (3)(A).

the deliberate indifference standard without inquiring into the purpose for the UCs' detention, even though it stated in a footnote that the professional judgment standard applies to "programs with a treatment or rehabilitation objective."²⁰⁰ It did not, however, inquire into whether the detention of the UCs had such an objective, or any objective at all.

The Fourth Circuit, by contrast, correctly examined the statutory and regulatory framework governing UCs, as well as the detention center's cooperative agreement with ORR, in order to determine that the UC plaintiffs could only be detained for the purpose of providing care.²⁰¹ As discussed earlier in this Section, the legal requirements for the detention of UCs support the Fourth Circuit's conclusion.²⁰² And, based on its conclusion that the government could only detain the UC plaintiffs to provide care, the Fourth Circuit correctly held that the Fourteenth Amendment professional judgment standard governed.²⁰³ This approach is consistent with the Supreme Court's purpose-focused analysis in *Youngberg*.²⁰⁴ The Fourth Circuit also emphasized that the professional judgment standard was "particularly warranted" because of the "unique psychological needs of children and the state's corresponding duty to care for them."²⁰⁵

1. *The Third Circuit in A.M. v. Luzerne County Juvenile Detention Center Improperly Applied the Deliberate Indifference Standard Because an Allegedly Delinquent Child Held in Pre-Disposition Detention May Not be Detained for a Punitive Purpose*

Under the Due Process Clause of the Fifth Amendment, it is unconstitutional for the State to punish an individual suspected of a crime prior to an adjudication that the individual is guilty of the alleged offense.²⁰⁶ The State may detain an individual prior to a final adjudication to ensure their presence at trial, but only so long as the conditions of such detention do not amount to punishment.²⁰⁷ Any condition of confinement that amounts to punishment prior to an individual's conviction and sentencing is unconstitutional.²⁰⁸

200. *Doe v. Shenandoah Valley Juv. Ctr. Comm'n*, 355 F. Supp. 3d 454, 468 n.12 (W.D. Va. 2018).

201. *Doe*, 985 F.3d at 339.

202. *See supra* notes 186–190 and accompanying text.

203. *Doe*, 985 F.3d at 339.

204. *See supra* Section II.A.

205. *Doe*, 985 F.3d at 342.

206. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

207. *Id.* at 536–37.

208. *Id.* at 535 (explaining that the "proper inquiry" to evaluate whether pretrial detention conditions deprive an individual of liberty without due process of law is "whether those conditions amount to punishment of the detainee").

The Eighth Amendment does not apply to individuals detained prior to a final adjudication of guilt and sentencing because it only governs individuals who may be lawfully punished.²⁰⁹ The Due Process Clause of the Fourteenth Amendment instead governs the conditions of confinement for an individual who has not yet been found guilty of a crime or sentenced to punishment.²¹⁰ Allegedly delinquent children held in pre-disposition detention may be subject to even greater Fourteenth Amendment protections than adults accused of crimes because of their vulnerable status as children.²¹¹

An allegedly delinquent child may be detained for a preventive, nonpunitive purpose.²¹² In fact, the purpose of the entire juvenile justice system is supposed to be rehabilitative, not punitive.²¹³ In 1974, Congress enacted the Juvenile Justice and Delinquency Prevention Act (“JJDP”),²¹⁴ which created the U.S. Department of Justice’s Office of Juvenile Justice and Delinquency Prevention (“OJJDP”), to support state and local efforts to improve the juvenile justice system.²¹⁵ Congress reauthorized the JJDP in 2002,²¹⁶ and recently amended it through the Juvenile Justice Reform Act

209. *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) (expressing “considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence” and defining “punishment” as treatment “deliberately administered for a penal or disciplinary purpose, with the apparent authorization of [the state]”).

210. *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977) (“[T]he 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 Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment.”); see *Gary H. v. Hegstrom*, 831 F.2d 1430, 1432 (9th Cir. 1987) (stating that the “more protective [F]ourteenth [A]mendment standard applies to conditions of confinement when detainees, whether or not juveniles, have not been convicted,” and citing to cases applying a Fourteenth Amendment standard, including *Youngberg v. Romeo*, 457 U.S. 307 (1982) (involuntarily committed mental patients); *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (adult pretrial detainees); and *Ingraham v. Wright*, 430 U.S. 651, 664 (1977) (students disciplined at school)); see also *A.J. ex rel. L.B. v. Kierst*, 56 F.3d 849, 854 (8th Cir. 1995) (stating that “the more protective Fourteenth Amendment, and not the Eighth Amendment,” governs the status of a pretrial detainee).

211. *A.J.*, 56 F.3d at 854 (differentiating allegedly delinquent children from adults because: (1) they have not had a judicial determination of probable cause; (2) they could be detained based on unverified petitions such as delinquency petitions filed on information and belief; (3) the purpose of the juvenile justice system is rehabilitative; and (4) juveniles may be detained for reasons separate from adjudication of charges, such as neglect or abusive home environments).

212. *Schall v. Martin*, 467 U.S. 253, 255 (1984).

213. *A.J.*, 56 F.3d at 854; see also *Points of Intervention*, YOUTH.GOV, <https://youth.gov/youth-topics/juvenile-justice/points-intervention> (last visited Feb. 23, 2022).

214. Juvenile Justice and Delinquency Prevention Act, Pub. L. No. 93-415, 88 Stat. 1109 (1975).

215. *Legislation*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <https://ojjdp.ojp.gov/about/legislation#:~:text=Authorizing%20Legislation&text=93%2D415%2C%2042%20U.S.C.,and%20improve%20juvenile%20justice%20systems> (last visited June 9, 2022).

216. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758 (2002).

(“JJRA”) of 2018.²¹⁷ The JJRA amends the JJDP in part by adding the following purpose: “to support a continuum of evidence-based or promising programs . . . that are trauma informed, reflect the science of adolescent development, and are designed to meet the needs of at-risk youth and youth who come into contact with the justice system.”²¹⁸

The federal government maintains that the “primary goals of the juvenile justice system, in addition to maintaining public safety, are skill development, habilitation, rehabilitation, addressing treatment needs, and successful reintegration of youth into the community.”²¹⁹ OJJDP works to “protect children” and aims to ensure that contact between a child and the juvenile justice system is “rare, fair, and beneficial to [the child].”²²⁰

Congress’s continuous attempts to improve juvenile justice systems to better protect children shows that it intends to foster rehabilitative, rather than punitive, juvenile justice systems.²²¹ Despite this intended purpose, courts have allowed a move towards a more punitive system for children who are found to be delinquent and who are sentenced to incarceration in juvenile detention centers.²²² However, regardless of the contemporary erosion of protections for children sentenced to “[p]unitive [d]elinquency [d]ispositions,”²²³ children who have yet to be found delinquent or who have not been sentenced to a punitive delinquency disposition may not be punished because, prior to a final disposition on the delinquency charges against them, the purpose of their detention remains indisputably preventive.²²⁴

217. Juvenile Justice Reform Act of 2018, Pub. L. No. 115-385, 135 Stat. 5123 (2018).

218. Juvenile Justice Reform Act of 2018, Pub. L. No. 115-385, § 101(4), 135 Stat. 5123, 5124 (2018).

219. *Juvenile Justice*, YOUTH.GOV, <https://youth.gov/youth-topics/juvenile-justice> (last visited Feb. 24, 2022).

220. *About OJJDP*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <https://ojjdp.ojp.gov/about> (last visited June 9, 2022); see also *Juvenile Justice System Structure & Process: Overview*, OFF. OF JUV. JUST. AND DELINQ. PREVENTION, https://www.ojjdp.gov/ojstatbb/structure_process/overview.html (last visited June 9, 2022) [hereinafter OJJDP, *Structure & Process*] (“The juvenile justice system was founded on and guided by the concept of rehabilitation through individualized justice.”).

221. See *supra* notes 213–218 and accompanying text.

222. Feld, *supra* note 176, at 478–79 (describing the evolution towards the contemporary juvenile justice policies of “extensive pretrial detention, punitive delinquency sanctions, increased transfer to criminal courts, and severe sentences as adults”). State legislative changes beginning in the 1980s and 1990s “have moved the [juvenile] court away from its rehabilitative goals and toward punishment and accountability” by allowing for punitive delinquency dispositions. *Id.* at 486–88.

223. *Id.* at 485.

224. See *Schall v. Martin*, 467 U.S. 253, 269 (1984) (holding that although preventive detention of children may serve a legitimate governmental purpose, punitive detention of children prior to final adjudication does not satisfy the fundamental fairness doctrine).

The abuse that the plaintiff in *A.M. v. Luzerne County Juvenile Detention Center*²²⁵ suffered took place while he was detained in a juvenile detention center between the time of his arrest and the final disposition of his case.²²⁶ The relevant Pennsylvania statutes governing A.M.’s detention, which were not cited or discussed by the Third Circuit, authorize only preventive detention of children.²²⁷ The statutes also require that if the court finds the child to be delinquent, it must immediately or within a matter of days determine whether the child should receive treatment, supervision, or rehabilitation, or whether the child should be discharged from detention altogether.²²⁸ In other words, the purpose for the child’s detention remains preventive until a determination by the court that the child should receive treatment, supervision, or rehabilitation.²²⁹ Therefore, A.M. was held in preventive detention for the entire duration of his time in the detention center, and thus for the entire duration of his abuse.²³⁰

Although the Third Circuit did not analyze the purpose for A.M.’s detention, or discuss when or if a child may be punished, it agreed with A.M. that A.M.’s claims were properly analyzed under the Fourteenth Amendment because he was “merely a juvenile detainee” and “not a convicted prisoner.”²³¹ And yet, the Third Circuit proceeded to apply the Eighth Amendment deliberate indifference standard without mentioning the Fourteenth Amendment professional judgment standard.²³² The Third Circuit reasoned that, because the Supreme Court has not defined states’ “due process obligations to detainees with respect to medical care,” it properly relied on deliberate indifference because “it is clear that detainees are entitled

225. 372 F.3d 572 (3d Cir. 2004).

226. *Id.* at 575.

227. 42 PA. CONS. STAT. § 6325 (2000) (stating that a child may not be detained prior to adjudication on the charges against them “unless [their] detention or care is required to protect the person or property of others or of the child”).

228. *Id.* at § 6341.

229. *Id.* Notably, “punishment” is not included in the list of three permissible purposes for a child’s continued detention.

230. *See A.M.*, 372 F.3d at 577. At A.M.’s disposition hearing, the court ordered him committed to a treatment facility, and he was removed from detention. *Id.* at 576–77. The Third Circuit is unclear as to what hearings, if any, the juvenile court held on A.M.’s case during the one-month period prior to the court’s final order; it only states that A.M. was arrested, held in the detention facility, and committed one month later to a treatment facility. *Id.* at 575–77. However, even if the juvenile court found A.M. delinquent at some point during his detention, A.M. still could not have been detained for a punitive purpose because the court had yet to determine whether any continued detention was for the purpose of treatment, supervision, or rehabilitation. 42 PA. CONS. STAT. § 6325 (2000).

231. *A.M.*, 372 F.3d at 584.

232. *Id.*

to no less protection than a convicted prisoner is entitled to under the Eighth Amendment.”²³³

However, a detainee may be entitled to *more* protection than a convicted prisoner²³⁴—especially if he is a child, like A.M., who is held in preventive detention while he awaits a final determination by the court on whether his detention will even be continued. A child in A.M.’s position may not be punished under any circumstances; both the statutory purpose of his detention and the purpose of juvenile detention more generally reveal as much.²³⁵ Therefore, the Eighth Amendment deliberate indifference standard was inapplicable, as the nonpunitive nature of A.M.’s detention necessarily meant the Eighth Amendment was irrelevant, and the Fourteenth Amendment governed.²³⁶ The Third Circuit correctly recognized this when it held that it should analyze A.M.’s claims under the Fourteenth Amendment.²³⁷ However, the Third Circuit went astray when it proceeded to apply the Eighth Amendment deliberate indifference standard, despite its holding that the Fourteenth Amendment applied.²³⁸ The Third Circuit failed to recognize that the deliberate indifference standard is inextricable from the Eighth Amendment, and therefore cannot serve as a test to determine whether A.M.’s Fourteenth Amendment rights were violated.²³⁹ Because the purpose for A.M.’s detention was preventive, not punitive, and thus governed by the Fourteenth Amendment, not the Eighth Amendment, the Third Circuit should have evaluated his claim under the professional judgment standard rather than the deliberate indifference standard.

B. The Professional Judgment Standard Must be Revitalized to Focus on the Accepted Practices Within a Professional Field

Both the professional judgment and the deliberate indifference standards are ambiguous.²⁴⁰ The only guidance that the Supreme Court gave

233. *Id.*

234. See *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015) (“[A] pretrial detainee can prevail [on a claim that their due process rights were violated] by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.”).

235. See 42 PA. CONS. STAT. § 6325 (2000) (the statutory basis for A.M.’s detention); *Schall v. Martin*, 467 U.S. 253, 269 (1984) (authorizing only preventive detention of children).

236. See *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973) (expressing “considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence”).

237. *A.M.*, 372 F.3d at 584.

238. See *id.* (analyzing A.M.’s claim under the deliberate indifference standard).

239. See *supra* Section II.A.

240. Brendan P. Kearse, *Abused Again: Competing Constitutional Standards for the State’s Duty to Protect Foster Children*, 29 COLUM. J.L. & SOC. PROBS. 385, 401 (1996) (arguing that in the context of the standards’ application to foster children, both the deliberate indifference and

to lower courts when it introduced the professional judgment standard was that a “professional” is anyone competent by education, training, or experience to make the decision about the individual’s care, and that a professional’s judgment is presumptively valid so long as it does not substantially depart from accepted professional judgment, practice, or standards.²⁴¹ This definition leaves courts with much deference but little guidance for how to exercise it.²⁴² Take the professional judgment standard’s deference to the professional too far, and a court could allow for unconstitutional treatment of the individual under the professional’s care.²⁴³ Courts should not accept a decision as valid under the professional judgment standard simply because it is made by someone who is a professional.²⁴⁴

Lower courts have confronted this conundrum and clarified the standard.²⁴⁵ Rather than allowing for unlimited discretion, the professional judgment standard “defines the limits within which professionals are authorized to exercise professional judgment.”²⁴⁶ And courts are “the most appropriate forum in which to arbitrate competing expert opinions” on what constitutes proper professional judgment because they enable compromise when professionals disagree.²⁴⁷ Courts should look to the accepted and standard practices within the professional’s field and determine whether the professional’s actions met those specific standards.²⁴⁸ If a professional’s

professional judgment standards “have been interpreted by the lower courts to establish so many different standards of liability that they have no practical constitutional meaning, and no ability to guide either courts or state administrators in their official duties”).

241. *Youngberg v. Romeo*, 457 U.S. 307, 323 n.30 (1982).

242. Susan Stefan, *Leaving Civil Rights to the “Experts”: From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 644 (1992) (arguing that the *Youngberg* professional judgment standard “does not clearly delineate the scope of a professional’s responsibilities,” “indicate who is a professional,” or “distinguish professional decisions that are subject to the professional judgment standard from those that are not”); see also Cathy Hershcopf, *Constitutional Law—Mental Health Law—Right to Treatment—Youngberg v. Romeo*, 29 N.Y. L. SCH. L. REV. 513, 534 (1984) (“[*Youngberg*’s] vague standard is a shortcoming of the case. . . . There is great tension between the right being recognized and the enormously powerful language concerning deference to professionals.”).

243. Stefan, *supra* note 242, at 645 (“Constitutional rights transcend professional judgment, and in many respects professional judgment is irrelevant or antithetical to the exercise of these rights.”). Stefan also contends that the professional judgment standard has allowed courts to “abdicate their fact-finding and decisionmaking responsibilities, creating a significant threat to the preservation of civil rights.” *Id.*

244. *Lucas v. Peters*, 741 N.E.2d 313, 324 (2000).

245. See *supra* Section I.C.2.

246. *West v. Macht*, 235 F. Supp. 2d 966, 981–82 (E.D. Wis. 2002).

247. Hershcopf, *supra* note 242, at 535–37.

248. See *West*, 235 F. Supp. at 984 (“[A] substantial departure from . . . standards [adopted by relevant professional organizations] may be evidence of the violation of the professional judgment rule.”).

decision falls outside of those bounds, the professional judgment standard has not been met.

This approach not only provides clearer guidance for courts in determining if a professional's conduct is acceptable, but also ensures protection of constitutional rights that could be neglected under the more ambiguous definition of the standard.²⁴⁹ A revitalized professional judgment standard must therefore ask whether the professional's decision conformed to the accepted and standard practices within their professional field as a whole.

1. Trauma-Informed Care Is the Appropriate Standard of Professional Judgment to Evaluate the Constitutional Adequacy of State Treatment of Detained UCs and Allegedly Delinquent Children Held in Pre-Disposition Detention

When applying the revitalized professional judgment standard to detained UCs and allegedly delinquent children held in pre-disposition detention, a court should look to the accepted and standard practices within the professional fields dedicated to those groups of children. Such an inquiry quickly confirms what the Fourth Circuit suggests in *Doe v. Shenandoah Valley Juvenile Center Commission*: Trauma-informed care is the proper standard for evaluating whether the State exercised professional judgment in its care of detained children.²⁵⁰

Trauma-informed care “realizes the widespread impact of trauma and understands potential paths for recovery; recognizes the signs and symptoms of trauma in clients, families, staff, and others involved with the system; and responds by fully integrating knowledge about trauma into policies, procedures, and practices, and seeks to actively resist re-traumatization.”²⁵¹ A 2012 U.S. Department of Justice task force organized by then-Attorney General Holder recommended that “trauma-informed screening, assessment, and care [be] the standard in juvenile justice services,” including for children diverted out of detention to other juvenile justice programs.²⁵² The task force

249. Stefan, *supra* note 242, at 645; *see also West*, 235 F. Supp. at 982 (E.D. Wis. 2002) (citing Stefan, *supra* note 242, at 668).

250. 985 F.3d 327, 345 (4th Cir. 2021).

251. SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., SAMHSA'S CONCEPT OF TRAUMA AND GUIDANCE FOR A TRAUMA-INFORMED APPROACH 9 (2014); *see also* Juvenile Justice Reform Act of 2018, Pub. L. No. 115-385, § 102(8), 135 Stat. 5123, 5126 (2018) (defining the term “trauma-informed” as: “(A) understanding the impact that exposure to violence and trauma have on a youth’s physical, psychological, and psychosocial development; (B) recognizing when a youth has been exposed to violence and trauma and is in need of help to recover from the adverse impacts of trauma; and (C) responding in ways that resist retraumatization.”).

252. DOJ, TASK FORCE REPORT, *supra* note 4, at 12, 14, 175 (recommending that “every professional and advocate serving children exposed to violence and psychological trauma learns and provides trauma-informed care”; that “professional societies develop, adopt, disseminate, and

advocated for the eradication of “correctional practices that traumatize children and further reduce their opportunities to become productive members of society.”²⁵³ It stated that a primary goal of the juvenile justice system must be to “address[] youths’ mental health needs to enable juvenile justice programs and facilities to successfully achieve their original goals of safety, justice, and rehabilitation.”²⁵⁴ The JJRA requires that, in order to receive federal funding for juvenile justice, states must create juvenile justice plans that, among other requirements, “promote evidence-based and trauma-informed programs and practices.”²⁵⁵

A 2015 ORR guide for UC care provider facilities similarly recommends that providers exercise trauma-informed care, including “trauma-informed interviewing, assessment, observation, and other techniques”; “[w]orkforce training on trauma and its impact on the developing brain and behavior”; and “incorporating an understanding of the prevalence and impact of trauma, as well as the complex paths to healing and recovery, into all aspects of service delivery.”²⁵⁶ ORR also dissuades the use of restraints and seclusion on UCs because it risks exacerbating their trauma.²⁵⁷

National professional organizations comprised of experts in child trauma, juvenile justice, and immigrant children agree that trauma-informed care is essential for detained children.²⁵⁸ A court applying a revitalized

implement principles, practices, and standards for comprehensive evidence-based treatment of children exposed to violence or psychological trauma”; and that “everyone in the juvenile justice system, including program staff and administrators, judges, attorneys, and probation officers . . . be educated about the importance and benefits of providing appropriate trauma-informed services to youth in the system”).

253. DOJ, TASK FORCE REPORT, *supra* note 4, at 177 (emphasizing that punitive sanctions must be abandoned “both to protect [the children] from further harm and to avoid teaching them by example that violence is an appropriate means to control other people’s behavior”).

254. DOJ, TASK FORCE REPORT, *supra* note 4, at 177.

255. Juvenile Justice Reform Act of 2018, Pub. L. No. 115-385, § 205(1)(E)(ii)(II), 135 Stat. 5123, 5133 (2018).

256. *Children Entering the United States Unaccompanied: Section 3*, U.S. DEP’T OF HEALTH AND HUMAN SERVS., OFF. OF REFUGEE RESETTLEMENT (Apr. 20, 2015), <https://www.acf.hhs.gov/orr/policy-guidance/children-entering-united-states-unaccompanied-section-3>.

257. *Id.* (“For children who have experienced traumatic events, the use of restraints and seclusion often replicates the experience of abuse and poses a barrier to healing and recovery. Therefore, every effort should be made to prevent the need for use of restraints and seclusion.”).

258. The National Council of Juvenile and Family Court Judges, the National Child Traumatic Stress Network, and the National Center for Mental Health and Juvenile Justice all recommend using trauma-informed care for children in detention. See *Resolution Regarding Trauma-Informed Juvenile and Family Courts*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, <https://www.ncjfcj.org/wp-content/uploads/2019/08/regarding-trauma-informed-juvenile-and-family-courts.pdf> (last visited June 9, 2022) (urging “juvenile and family courts to be trauma-informed by engaging stakeholders” and “by responding to the deleterious effects of trauma and associated conditions through proactive and consistent efforts to reduce potential trauma reminders,

professional judgment standard should take these organizations' mandates into account whenever it assesses a professional's care of a detained UC or an allegedly delinquent child held in pre-disposition detention. If a professional working with a detained UC or an allegedly delinquent child held in pre-disposition detention did not exercise trauma-informed care, the court should find that they did not satisfy the professional judgment standard because they failed to act in accordance with the accepted and standard practice of using trauma-informed care with detained children.

2. *The Revitalized Professional Judgment Standard Best Accounts for the Particular Vulnerabilities of Detained Children*

The Supreme Court has recognized that the government has an important interest in protecting the welfare of the nation's children²⁵⁹ and preventing child abuse and neglect.²⁶⁰ The State may have an interest in detaining a child for either a preventive purpose, as in the case of allegedly delinquent children held in pre-disposition detention, or for a caregiving purpose, as in the case of detained UCs.²⁶¹ At no time does the State have a valid interest in detaining these children for the purpose of punishment.²⁶²

ensure safety, nourish self-determination, and promote prosocial connections"); Sue Burrell, *Trauma and the Environment of Care in Juvenile Institutions*, NAT'L CHILD TRAUMATIC STRESS NETWORK 2, (Aug. 2013), https://www.nctsn.org/sites/default/files/resources//trauma_and_environment_of_care_in_juvenile_institutions.pdf (stating that "the empirical work on trauma exposure and PTSD holds great potential for juvenile system professionals as a tool to inform our decisions about the use of incarceration and institutional practices" and that "[r]ecent evidence of institutional abuses confirms the need for attention to trauma-informed care"); NAT'L CTR. FOR MENTAL HEALTH & JUV. JUST. AT POL'Y RSCH. ASSOCS. & TECH. ASSISTANCE COLLABORATIVE, STRENGTHENING OUR FUTURE: KEY ELEMENTS TO DEVELOPING A TRAUMA-INFORMED JUVENILE JUSTICE DIVERSION PROGRAM FOR YOUTH WITH BEHAVIORAL HEALTH CONDITIONS 1 (Jan. 2016), <https://ncoj.policyresearchinc.org/img/resources/2016-Publication-Strengthening-Our-Future-089881.pdf> [hereinafter STRENGTHENING OUR FUTURE] (explaining that a trauma-informed approach for the juvenile justice system is necessary because the "majority of youth in contact with the juvenile justice system in this country have a diagnosable behavioral health condition"). The American Academy of Pediatrics also recommends trauma-informed care when working with immigrant and refugee children. Julie M. Linton et al., *Detention of Immigrant Children*, PEDIATRICS 1, (May 2017), <https://publications.aap.org/pediatrics/article/139/5/e20170483/38727/Detention-of-Immigrant-Children> ("Children, especially those who have been exposed to trauma and violence, should not be placed in settings that do not meet basic standards for children's physical and mental health and that expose children to additional risk, fear, and trauma.").

259. See Koehler, *supra* note 195, at 245 n.179 (first citing *Reno v. ACLU*, 521 U.S. at 865; then citing *Maryland v. Craig*, 497 U.S. 836, 855 (1990); and then citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27 (1981)).

260. See Koehler, *supra* note 195, at 246.

261. See *supra* Section I.D.

262. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

Most, if not all, UCs have experienced trauma.²⁶³ The same is true for children entangled in the juvenile justice system.²⁶⁴ Exposure to trauma early in life has devastating effects on children and leads to negative outcomes as varied as “changes in brain size, structure, and function; alterations in neural pathways associated with learning, memory, and self-regulation; a heightened baseline state of arousal and anxiety; and increased sensitivity to internal and external trauma reminders.”²⁶⁵ Trauma also has “profound negative effects on emotional regulation, behavior, cognition, relationships, self-concept, and academic success.”²⁶⁶ Traumatized children have unquestionable interests not only in safety and security under the liberty prong of the Due Process Clause of the Fourteenth Amendment, but also in avoiding the exacerbation of the trauma they have already experienced.²⁶⁷

When weighed against the State’s interest in detaining children, the interests of these children clearly prevail.²⁶⁸ Such an analysis quickly confirms what this Comment has already argued: that the professional judgment standard must apply to detained UCs and allegedly delinquent children held in pre-disposition detention.²⁶⁹

It is clear that detention harms children.²⁷⁰ If and when the State has a valid interest in detaining a child, it has a duty to mitigate the harm that

263. Miller et al., *supra* note 4 (detailing the “repeated and prolonged exposure to trauma” that many refugee and immigrant youth experience before, during, and after migration).

264. See DOJ, TASK FORCE REPORT, *supra* note 4, at 171 (summarizing studies finding that children who “come into contact with the juvenile justice system . . . have almost always been exposed to several types of traumatic violence over a course of many years”); Elizabeth Stoffel et al., *Assessing Trauma for Juvenile and Family Courts*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES 7 (2019) (noting that “youth involved in the juvenile justice system tend to have higher rates of early adverse experiences” and that “nearly all youth who enter the juvenile justice system have histories of exposure to trauma, with many justice-involved youth reporting exposure to chronic trauma across childhood and adolescence”); Burrell, *supra* note 258, at 1 (stating that children in the juvenile justice system “are among the most vulnerable youth in our society” and noting that “[a]lmost all have experienced trauma in some form, and many suffer from Post Traumatic Stress Disorder”).

265. JASON BRENNEN ET AL., BUILDING A MULTI-SYSTEM TRAUMA-INFORMED COLLABORATIVE: A GUIDE FOR ADOPTING A CROSS-SYSTEM, TRAUMA-INFORMED APPROACH AMONG CHILD-SERVING AGENCIES AND THEIR PARTNERS 8 (2019), <https://www.chapinhall.org/wp-content/uploads/PDF/Multi-System-Trauma-Informed-Care-MSTIC-Guide.pdf>.

266. *Id.*

267. See Linton et al., *supra* note 258, at 1 (“From the moment [UCs] are in the custody of the United States, they deserve health care that meets guideline-based standards, treatment that mitigates harm or traumatization, and services that support their health and well-being.”).

268. Koehler, *supra* note 195, at 244 (arguing for a balancing test to determine the standard of care for foster children and concluding that the professional judgment standard should apply).

269. See *supra* Section II.A.

270. See DOJ, TASK FORCE REPORT, *supra* note 4, at 175 (summarizing studies reporting “nearly [ten] assaults a day, on average” suffered by children in juvenile detention facilities, as well as the ways in which routine detention practices “can bring additional harm to already traumatized

detention may cause, consistent with its own interest in protecting the welfare of children and the child's interest in avoiding re-traumatization.²⁷¹ The State must also ensure that the trauma of detention itself does not rob the child of self-care skills or coping mechanisms they may have developed prior to their detention.²⁷² These skills may include "planning, positive reframing, seeking emotional support, [and] seeking instrumental support," among others.²⁷³ In his *Youngberg* concurrence, Justice Blackmun left the door open for a future claim that the State must provide "such training as is reasonably necessary to prevent a person's pre-existing self-care skills from *deteriorating* because of his commitment."²⁷⁴ This claim is particularly relevant in the context of detained children who have experienced trauma because of the clear connection between detention and exacerbation of pre-existing trauma.²⁷⁵ The exacerbation of trauma caused by detention may lead to a deterioration in the child's overall condition, including the weakening or destruction of any coping mechanisms or self-care skills the child may have developed to address their pre-existing trauma prior to detention.²⁷⁶ The State's interest in detaining a traumatized child is inconsistent with these adverse outcomes if it also maintains its interest in protecting the welfare of children, and if it purports to only detain children for the purpose of providing care or rehabilitation.²⁷⁷ Thus, whenever the State detains a child who has experienced trauma, it must ensure that the child is able to maintain the self-care or coping skills they developed prior to their detention, in addition to ensuring that the detention itself does not further traumatize the child.²⁷⁸

youth"); see also Burrell, *supra* note 258, at 2 ("Removal of a child from the home . . . is itself a traumatic event. Loss of liberty, personal identity, and the familiar landscape of daily life is a frightening, disorienting, and life-changing event for a person of any age, but it is especially so for young people.").

271. See generally Burrell, *supra* note 258 (outlining the risks of re-traumatization of children in detention).

272. See *Youngberg v. Romeo*, 457 U.S. 307, 327 (1982) (Blackmun, J., concurring) (suggesting that an involuntarily committed individual may have an independent constitutional claim under the Due Process Clause of the Fourteenth Amendment to "training necessary to *preserve* . . . basic self-care skills").

273. Elizabeth P. Shulman & Elizabeth Cauffman, *Coping While Incarcerated: A Study of Male Juvenile Offenders*, J. RES. ADOLESC. 818, 820 (2011).

274. *Youngberg*, 457 U.S. at 327 (Blackmun, J., concurring).

275. See DOJ, TASK FORCE REPORT, *supra* note 4, at 85 ("Current treatment models, void of trauma-informed care components, in fact may actually exacerbate the child's symptoms, causing further harm to the child survivor . . .").

276. See Shulman & Cauffman, *supra* note 273, at 819 (finding that "incarceration may undermine the effectiveness of . . . coping strategies").

277. See *supra* Sections II.A.1, II.A.2.

278. See *Youngberg*, 457 U.S. at 329 (Blackmun, J., concurring) (expressing openness to a future argument that the State is "constitutionally required to provide" an involuntarily committed individual with training to maintain basic self-care skills, "even if [the individual]'s safety and mobility [are] not imminently threatened by [the State's] failure to do so").

Trauma-informed care best accommodates both the State's interest in limiting the adverse outcomes for detained children and the child's interests in safety, security, preservation of self-care and coping skills, and prevention of re-traumatization because its entire purpose is to "recognize and respond to trauma and to prevent and mitigate the negative effects of adversity."²⁷⁹ Trauma-informed care may even "reverse the adverse effects of violence and psychological trauma and put children back on a healthy developmental course."²⁸⁰ In other words, trauma-informed care has the potential to not only fulfill the State's duty of ensuring a child's condition does not deteriorate as a result of detention, but also to go beyond that duty and improve the child's pre-existing condition.²⁸¹ Widespread adoption of trauma-informed care for these vulnerable child populations could have enormous positive outcomes not only on the children themselves, but on society at large.²⁸² Trauma-informed care thus satisfies both the State's and child's interests in preventing further harm to the child. A revitalized professional judgment standard would make it clear to courts and the State that, in order to be constitutionally adequate, the State's treatment of detained UCs and allegedly delinquent children held in pre-disposition detention must comply with trauma-informed care.²⁸³

III. OPERATIONALIZATION

The question of how to make trauma-informed care a reality for detained children is a complicated one. This Part proposes the following three-step approach: (1) ORR and OJJDP should distribute trauma-informed care guidance to detention centers housing children;²⁸⁴ (2) attorneys representing detained children in Section 1983 and prospective injunctive relief claims should clearly present trauma-informed care as the relevant standard of professional judgment to the court;²⁸⁵ and (3) courts themselves must be trauma-informed.²⁸⁶

279. See BRENNEN ET AL., *supra* note 265, at 9.

280. See DOJ, TASK FORCE REPORT, *supra* note 4, at 81.

281. See *Youngberg*, 457 U.S. at 327 (Blackmun, J., concurring) (proposing that the State has a duty to prevent an involuntarily committed individual's self-care skills from deteriorating because of their commitment).

282. See STRENGTHENING OUR FUTURE, *supra* note 258, at 13 (explaining that implementing a trauma-informed approach in the juvenile justice system may lead to "reduced recidivism, reduced criminal and delinquent acts, fewer police and justice system contacts, greater adherence to probation supervision and diversion conditions, improved school performance and attendance, and improved relationships with families and peers").

283. See *supra* Section II.B.2.

284. See *infra* Section III.A.

285. See *infra* Section III.B.

286. See *infra* Section III.C.

A. The Office of Refugee Resettlement and the Office of Juvenile Justice and Delinquency Prevention Should Distribute Trauma-Informed Care Guidance to Detention Centers Housing Children

Government agencies that fund and oversee detention centers housing children should harness the expertise of independent organizations to create and distribute trauma-informed care implementation plans to detention centers.

Efforts are already underway to increase trauma-informed care for detained children. The JJRA requires states to create “plan[s] to promote evidence-based and trauma-informed programs and practices” in order to receive federal grants for juvenile delinquency prevention programs.²⁸⁷ ORR requires that facilities housing UCs train their staff in “techniques for child-friendly and trauma-informed interviewing, assessment, [and] observation.”²⁸⁸ ORR also encourages “[w]orkforce training on trauma and its impact on the developing brain and behavior,” creation of “a prevention first approach to the use of restraints and seclusion” by “incorporating an understanding of the prevalence and impact of trauma,” and implementation of “trauma-informed approaches promoting safety and respect.”²⁸⁹ However, neither the JJRA nor ORR guidelines provide specific steps for state officials who oversee detention centers housing children to take to implement trauma-informed care, and the process of “transform[ing] the guiding principles of trauma-informed care to concrete policies” is still underway.²⁹⁰

ORR and OJJDP should lead in implementing trauma-informed care for detained children. ORR is the federal government agency that oversees the care of detained UCs.²⁹¹ States, rather than the federal government, oversee detention centers housing allegedly delinquent children.²⁹² However, OJJDP provides hundreds of millions of dollars in grant funding to states, local governments, tribal jurisdictions, and community organizations each year to administer juvenile justice programs.²⁹³ Because of its wide reach and influence on the local administration of juvenile justice programs, OJJDP

287. Juvenile Justice Reform Act of 2018, Pub. L. No. 115-385, § 205(1)(E)(ii)(II), 135 Stat. 5123, 5133 (2018).

288. See *supra* note 256 and accompanying text.

289. See *supra* note 256 and accompanying text.

290. Nicole McKenna, *Trauma-Informed Care in Youth Detention: A National Portrait*, INT’L ASS’N FOR CORRECTION & FORENSIC PSYCH. (June 15, 2021), <https://www.myiacfp.org/2021/06/15/trauma-informed-care-in-youth-detention-a-national-portrait/>.

291. 6 U.S.C. § 279(a)–(b).

292. See OJJDP, *Structure & Process*, *supra* note 220 (describing the structure of the juvenile justice system).

293. *Funding*, OFF. OF JUV. JUST. & DELINQ. PREVENTION, <https://ojjdp.ojp.gov/funding> (last visited June 9, 2022).

may serve as a central reference point for the various state and local entities that oversee the detention of allegedly delinquent children.

There are a multitude of trauma-informed “interventions, instruments, and curriculums” that detention centers housing children might use to implement trauma-informed care.²⁹⁴ There is no consensus as to which program is best, or whether one program is better than another for a particular group of children.²⁹⁵ State officials who oversee detention centers housing children would benefit from having a central government agency to look to—ORR for centers housing UCs, OJJDP for centers housing allegedly delinquent children—for clear guidance on how to implement trauma-informed care.²⁹⁶ Absent such guidance, it will be difficult for individual state officials to evaluate the available options in order to determine which trauma-informed care implementation program best suits their detention center and child population.²⁹⁷

ORR and OJJDP should harness the expertise of organizations already working in the area of child trauma to curate trauma-informed care implementation plans for detention centers. ORR and OJJDP should start with the National Child Traumatic Stress Network (“NCTSN”), which is a leader in trauma-informed care implementation for children.²⁹⁸ NCTSN has already developed a plethora of trauma-informed care resources, including webinars, training curriculums, and e-Learning courses.²⁹⁹ A collaboration between ORR, OJJDP, and NCTSN could allow NCTSN to identify specific materials already within its catalogue that would best suit detention centers

294. Precious Skinner-Osei et al., *Justice-Involved Youth and Trauma-Informed Interventions*, JUST. POL’Y J., Fall 2019, at 1, 12 (providing an overview of the most common trauma-informed implementation plans, including “the Trauma and Grief Components Therapy for Adolescents (TGCTA), Cognitive Processing Therapy (CPT), Trauma-Adapted Multidimensional Treatment Foster Care (TA-MTFC), the Attitudes Related to Trauma-Informed Care [ARTIC] questionnaire, and the Think Trauma Curriculum,” as well as the “Sanctuary Model and [the] Trauma Affect Regulation Guide for Education and Therapy [TARGET]”).

295. See McKenna, *supra* note 290.

296. See Skinner-Osei et al., *supra* note 294, at 11.

297. See Skinner-Osei et al., *supra* note 294, at 12.

298. *Who We Are*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/about-us/who-we-are> (last visited Feb. 27, 2022) (explaining that “the NCTSN has trained more than two million professionals in trauma-informed interventions”).

299. See, e.g., *All NCTSN Resources*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/resources/all-nctsn-resources> (last visited Feb. 27, 2022); *Think Trauma: A Training for Working with Justice Involved Youth, 2nd Edition*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/resources/think-trauma-training-working-justice-involved-youth-2nd-edition> (last visited Feb. 27, 2022); *Complex Trauma: Facts for Directors, Administrators, and Staff in Residential Settings*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/resources/complex-trauma-facts-directors-administrators-and-staff-residential-settings> (last visited Feb. 27, 2022); *Screening and Assessment in the Juvenile Justice System*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/resources/screening-and-assessment-juvenile-justice-system> (last visited Feb. 27, 2022).

housing UCs and allegedly delinquent children.³⁰⁰ If ideal materials do not already exist, NCTSN could tap into its network of trauma-informed care professionals to develop what is needed.³⁰¹ Then, ORR and OJJDP could make NCTSN's recommended resources available on their respective websites, along with clear instructions for which trainings or programs the state officials who oversee the detention centers should implement and in what order. The centralized organization and distribution of trauma-informed care resources by ORR and OJJDP will save state officials the confusion of determining on their own what they need to do to comply with JJRA and ORR guidance and will enable them to actually take the necessary steps to implement trauma-informed care for detained children.³⁰²

B. Children's Rights Attorneys Should Clearly Document Trauma-Informed Care as the Relevant Standard of Professional Judgment in Claims Challenging the State's Treatment of a Detained Child Under the Professional Judgment Standard

If state officials who oversee detention centers housing children fail to implement or follow trauma-informed care, more detained children may bring Section 1983 claims alleging violations of their constitutional rights due to the State's failure to comply with the professional judgment standard.³⁰³ They may also seek prospective injunctive relief to prevent future violations of their constitutional rights.³⁰⁴ Courts that hear these cases would benefit from clear documentation with which to evaluate whether the State complied with the accepted practices (i.e., trauma-informed care) within the field of caring for detained children in order to determine if the State satisfied the professional judgment standard.³⁰⁵

One way to ensure the court receives the documentation it needs to evaluate a detained child's Section 1983 or prospective injunctive relief claim is to create advocacy packets that a child's attorney could submit to the court to demonstrate that trauma-informed care is the appropriate standard of professional judgment for detained children.³⁰⁶ Advocacy packets would

300. *See supra* note 299.

301. *See supra* note 298 (explaining that NCTSN includes a "unique network of frontline providers, family members, researchers, and national partners" in 116 NCTSN-funded centers throughout the United States).

302. *See supra* Section III.A.

303. *See supra* Section II.B.1.

304. *See Frew v. Hawkins*, 540 U.S. 431, 437 (2004) ("[T]he Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law. This standard allows courts to order prospective relief . . . as well as measures ancillary to appropriate prospective relief." (citing *Ex Parte Young*, 209 U.S. 123 (1908))).

305. *See supra* Section II.B.

306. *See supra* Section II.B.1.

compile reports and statements from professional organizations focused on detained children—such as the documentation relied upon in Section II.B.1, above—into a central database that could be accessed, downloaded, and modified as necessary by attorneys pursuing Section 1983 and prospective injunctive relief claims on behalf of detained children.³⁰⁷ The packets would also include documentation revealing that ORR and OJJPD both required detention centers to implement trauma-informed care and provided resources to enable implementation, which would demonstrate that the state officials overseeing the detention center had both the mandate and the means to practice trauma-informed care.³⁰⁸

Compiling documentation in this way would shorten research time for attorneys and ensure that they are able to present the court with robust evidence in support of their argument that trauma-informed care is the relevant standard of professional judgment for their claim.³⁰⁹ Additionally, filing the advocacy packet with the court would enable attorneys to overcome the presumption of validity traditionally afforded to a professional’s judgment.³¹⁰ The advocacy packet would also provide the court with a detailed record upon which to evaluate whether the State complied with trauma-informed care in its treatment of the child.

The advocacy packets should be housed on the websites of organizations that support attorneys who represent children charged with delinquency and attorneys who represent UCs. There are a variety of organizations involved in this work.³¹¹ The National Center for Youth Law

307. *See supra* Section II.B.1.

308. *See supra* Section III.A.

309. *See supra* Section II.B.1.

310. As explained above in Section I.C.2, the presumption of validity afforded to a professional’s decision under the professional judgment standard may be rebutted with evidence that the professional’s decision substantially departed from accepted professional standards. *See supra* note 125 and accompanying text. The advocacy packet would serve as that rebutting evidence.

311. *See, e.g., About, JUV. LAW CTR.*, <https://jlc.org/about> (last visited Feb. 25, 2022) (stating that the “Juvenile Law Center was the first nonprofit, public interest law firm for children” in the United States); *About NCYL, NAT’L CTR. FOR YOUTH LAW*, <https://youthlaw.org/about-us> (last visited May 1, 2022) (explaining that NCYL’s mission is to “[c]enter [y]outh through impact litigation, policy advocacy, collaboration and research”); *About NJDC, NAT’L JUV. DEFENDER CTR.*, <https://njdc.info/about-njdc/> (last visited Feb. 25, 2022) (stating that the National Juvenile Defender Center “was created . . . to respond to the critical need to build the capacity of the juvenile defense bar and to improve access to counsel and quality of representation for children in the justice system”); *Legal Services, KIDS IN NEED OF DEF.*, <https://supportkind.org/what-we-do/legal-services/> (last visited Feb. 25, 2022) (explaining that Kids in Need of Defense “helps immigrant and refugee children who come to the United States without a parent or legal guardian” by partnering with pro bono attorneys); *Legal Services for Unaccompanied Children, VERA INST. OF JUST.*, <https://www.vera.org/projects/legal-services-for-unaccompanied-children> (last visited Feb. 25, 2022) (stating that the Vera Institute of Justice “works to preserve the rights of tens of thousands of migrant children, by partnering with a network of legal service providers across the U.S. who inform these children of their rights under U.S. law and defend them in their legal proceedings”).

(“NCYL”) in particular is an excellent home base for the advocacy packets because of their expertise on issues facing both immigrant children and children in the juvenile justice system, as well as their advocacy and impact litigation work.³¹²

NCYL could tailor the advocacy packets to each child population (one packet for claims by UCs, one packet for claims by allegedly delinquent children) and monitor professional organizations focused on detained children for updates to the literature as needed. NCYL also appears to have the capacity to collaborate with attorneys who bring Section 1983 or prospective injunctive relief claims on behalf of detained children.³¹³ Litigation collaboration, combined with the advocacy packets, could encourage more attorneys to represent detained children in these claims, which could ultimately lead to fewer detained children being subjected to unconstitutional standards of care.

C. Courts Must be Trauma-Informed

Efforts to implement trauma-informed care for detained children must extend to the courts that oversee their legal claims. A UC may go before an immigration court to defend against their removal from the United States, and an allegedly delinquent child may go before a juvenile court for a hearing on the delinquency charges against them.³¹⁴ Either group of children may come before yet another court if they bring a Section 1983 or prospective injunctive relief claim alleging that the State failed to comply with the professional judgment standard.³¹⁵ A detained child’s need for trauma-informed care does not end when they exit the detention center; it follows them into the courtroom.³¹⁶ And the State’s interest in maintaining the welfare of children applies equally in a courthouse setting as in a detention

312. See *Immigration*, NAT’L CTR. FOR YOUTH LAW, <https://youthlaw.org/focus-areas/immigration> (last visited May 2, 2022) (summarizing NCYL’s immigration expertise); *Youth Justice*, NAT’L CTR. FOR YOUTH LAW, <https://youthlaw.org/focus-areas/youth-justice> (last visited May 2, 2022) (summarizing NCYL’s juvenile justice expertise); *Legal Advocacy & Impact Litigation*, NAT’L CTR. FOR YOUTH LAW, <https://youthlaw.org/legal-advocacy-impact-litigation> (last visited May 2, 2022) (providing an overview of NCYL’s current and previous impact litigation cases).

313. See *Legal Advocacy & Impact Litigation*, NAT’L CTR. FOR YOUTH LAW, <https://youthlaw.org/legal-advocacy-impact-litigation> (last visited May 2, 2022) (“[NCYL] work[s] strategically and collaboratively with co-counsel partners, community organizations, and named plaintiffs . . .”).

314. See *About the Office*, U.S. DEPT. OF JUST., EXEC. OFF. FOR IMMIGR. REV. (May 18, 2022), <https://www.justice.gov/eoir/about-office> (“[The Executive Office for Immigration Review] interprets and administers federal immigration laws by conducting immigration court proceedings, appellate reviews, and administrative hearings.”); OJJDP, *Structure & Process*, *supra* note 220 (describing the structure of the juvenile justice system).

315. See *supra* Section III.B.

316. See *supra* Section II.B.2.

setting.³¹⁷ Therefore, it is in the interest of both the child and the State that the judges and court staff who interact with detained children be trauma-informed.³¹⁸

Many juvenile courts have already begun to accept and implement trauma-informed approaches.³¹⁹ For courts that have not yet implemented trauma-informed approaches, or that seek ongoing trauma-informed education, NCTSN remains an excellent resource.³²⁰ NCTSN has multiple trauma-informed trainings and resources available for courts and judges, including self-assessments for courts to determine next steps for implementing trauma-informed practices and trauma-informed judicial decision-making guides.³²¹

As is true for detention centers and children’s rights attorneys, a central reference point for trauma-informed resources would be useful for courts.³²² The National Council of Juvenile and Family Court Judges (“NCJFCJ”) is already fulfilling this role for juvenile courts interacting with allegedly delinquent children by conducting court trauma assessments and suggesting improvements.³²³ In addition to its assessments and court-specific recommendations, NCJFCJ might also recommend and share NCTSN trauma-informed resources to help juvenile courts move towards trauma-informed approaches even before NCJFCJ is able to conduct an in-depth

317. See *supra* Section II.B.2.

318. See *supra* Section II.B.2.

319. *Trauma-informed Courts*, NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, <https://www.ncjfcj.org/child-welfare-and-juvenile-law/trauma-informed-courts/> (last visited Feb. 27, 2022) (explaining that the National Council of Juvenile and Family Court Judges conducts court trauma assessments “designed to promote research in the area of juvenile . . . courts’ responses to children, youth, and families who are exposed to violence and could be experiencing trauma”).

320. See *supra* note 298 and accompanying text.

321. See, e.g., *How to Create a Trauma-Informed Program to Help Young Children in Juvenile Court*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/resources/how-create-trauma-informed-program-help-young-children-juvenile-court> (last visited Feb. 27, 2022); *Trauma-Informed Juvenile Court Self-Assessment*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/resources/trauma-informed-juvenile-court-self-assessment> (last visited Feb. 27, 2022); *NCTSN Bench Cards for the Trauma-Informed Judge*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/resources/nctsn-bench-cards-trauma-informed-judge> (last visited Feb. 27, 2022); *NCTSN Bench Card for Juvenile Court Judges: Newcomer Immigrant Youth in Juvenile Justice Court Proceedings – A Trauma-Informed Approach*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/resources/nctsn-bench-card-newcomer-immigrant-youth> (last visited Feb. 27, 2022); *Ten Things Every Juvenile Court Judge Should Know About Trauma and Delinquency*, NAT’L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/resources/ten-things-every-juvenile-court-judge-should-know-about-trauma-and-delinquency> (last visited Feb. 27, 2022).

322. See *supra* Sections III.A, III.B.

323. See *supra* note 319 (“[T]he NCJFCJ has conducted more than [thirty-five] court trauma assessments in a diverse selection of juvenile and family, tribal, and state courts from around the country Each site received a report detailing concrete and tailored recommendations as to how they can be more trauma-responsive.”).

assessment. The U.S. Department of Justice's Executive Office for Immigration Review, which operates all the immigration courts in the United States,³²⁴ should implement a similar court-by-court evaluation and recommendation approach to NCJFCJ. It could also benefit from distributing NCTSN resources and trainings to its judges and court staff. Both the juvenile and immigration courts should do everything in their power to implement trauma-informed approaches to ensure their proceedings do not re-traumatize the children who come before them.

IV. CONCLUSION

When the State detains an individual against their will, it assumes the responsibility to ensure their safety and well-being.³²⁵ When the State detains a child, that responsibility is even more serious because of the inherent vulnerability of children, and the fact that the majority of detained children have experienced trauma.³²⁶ Courts, as well as the State, need a clear standard by which to measure whether the State's treatment of a detained child is constitutional.³²⁷ A revitalized professional judgment standard provides such guidance, and the trauma-informed care required by the revitalized standard best accounts for both the child's interest in preventing re-traumatization and the State's interest in protecting the welfare of children.³²⁸ Trauma-informed care is achievable for detained children: The State, attorneys, and courts just need to act.³²⁹

324. *See supra* note 314.

325. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

326. *See supra* Section II.B.1.

327. *See supra* Section II.B.

328. *See supra* Section II.B.2.

329. *See supra* Part III.