NORTH CAROLINA LAW REVIEW

Volume 100 | Number 4 Article 8

5-1-2022

Doing Less with More: Why the Fourth Circuit Missed Its Chance To Raise the Floor of Mental Health Care for Detained Persons

Joshua Philip Elmets

Doing Less with More: Why the Fourth Circuit Missed Its Chance To Raise the Floor of Mental Health Care for Detained Persons*

In the 2021 case Doe 4 v. Shenandoah Valley Juvenile Detention Center Commission*, the Fourth Circuit confronted the question of how to measure the minimum level of mental health care guaranteed by the U.S. Constitution for unaccompanied alien children ("UAC") in state custody. The plaintiffs, a certified class of UACs, argued that this question should be evaluated under the "professional judgment" standard—an approach that is more plaintiff-friendly, at least ostensibly, than the "deliberate indifference" standard applied by the district court. The Fourth Circuit Court of Appeals agreed with the plaintiffs, raising the baseline of mental health treatment for this narrow class of detainees. However, a closer look at the case reveals that the court's holding may not be the boon to detainees' rights as may appear at first blush.*

This Recent Development examines the implications of the majority's decision to apply the professional judgment standard to UACs and suggests the court could have achieved a greater effect on simpler and less fallible legal ground. This requires an honest look at the practical difficulties of applying this new standard, the court's commitment to outdated legal concepts, and the holding's long-term viability.

By glossing over these considerations, the Fourth Circuit missed an opportunity not only to raise the floor of mental health care for UACs, but for detained persons generally. In response, this Recent Development argues that by simply recalibrating the deliberate indifference standard to comport more with its application in adjacent circuits, the Fourth Circuit could have achieved a more administratively tenable result that reflects the realities of the contemporary state detention system. Perhaps even more importantly, this Recent Development argues that this strategy would have protected a broader class of detainees while immunizing the outcome from the prospect of judicial repeal.

INTRODUCTION

In August of 2018, a certified class of unaccompanied alien children ("UAC") filed suit against the Shenandoah Valley Juvenile Center ("SVJC") for failing to provide them with a constitutionally adequate level of mental

health care.[1] John Doe 4, the named plaintiff whose experience was emblematic of the class as a whole, was a teenage Honduran immigrant who fled his home country after he was the victim of and witness to a string of violent incidents, including beatings, stabbings, murders, and threats against his family.[2] After being apprehended at the border, he was shuttled through various outposts of the U.S. juvenile detention system.[3] By the time he arrived at SVJC, he had been diagnosed with a range of emotional disorders, ranging from post-traumatic stress disorder to attention deficit hyperactivity disorder, and had demonstrated a pattern of dangerous, self-harming behavior.[4] While under the SVJC's watch, the facility's staff ignored his symptoms, subjected him to hundreds of hours of solitary confinement, and targeted him with unprovoked physical violence.[5] One witness testified that the facility's shift supervisors responded to indications of self-harming conduct by detainees "with comments like 'let them cut themselves' and '[l]et them go bleed out.'"[6] On summary judgment, the district court ruled in favor of SVJC, holding that they had met their constitutional duty regarding the level of mental health care they were required to provide.[7] Central to their reasoning was where UACs fell on the boundary between the "civilly" and "penally" detained.[8]

The words "state custody" conjure images of arrest, prison, and the tangled appendages of the U.S. penal system. But there is a myriad of reasons why individuals might find themselves in government detention beyond having been convicted of a crime. Courts and legislatures rely on two rough categories when classifying individuals under state detention—civil detainees and penal detainees.[9] Civil detainees are characterized as the "involuntarily committed"

1. Doe v. Shenandoah Valley Juv. Ctr. Comm'n, 355 F. Supp. 3d 454, 458 (W.D. Va. 2018), *rev'd and remanded sub nom.* Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327 (4th Cir.), *cert. denied*, 142 S. Ct. 583 (2021).

2. *Shenandoah Valley*, 985 F.3d at 329–31.

3. *Id.* at 331–32.

4. *Id.* at 332.

5. *Id.* at 332–33.

6. *Id.* at 334 (quoting Joint Appendix at 1176, 1178, *Shenandoah Valley*, 985 F.3d 327 (No. 19-1910) (sealed)).

7. *Id.* at 327.

8. *See* Doe v. Shenandoah Valley Juv. Ctr. Comm'n, 355 F. Supp. 3d 454, 468 (W.D. Va. 2018), *rev'd and remanded sub nom.* Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327 (4th Cir. 2021), *cert. denied*, 142 S. Ct. 583 (2021).

9. *See generally id.* (relying on a "security" versus "treatment" framework); Youngberg v. Romeo, 457 U.S. 307, 321–22 (1982) (distinguishing the "involuntarily committed" from other forms of state detention traced to a legal infraction); Jordan v. District of Columbia, 161 F. Supp. 3d 45, 57 (D.D.C. 2016) (relying on a distinction between the "civilly committed" and criminally committed); Ellis M. Johnston, Note, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 GEO. L.J. 2593, 2621 (2001) (describing a "regulatory-punitive" dichotomy).

and might include minors with no legal guardian,[10] undocumented immigrants,[11] or the physically or mentally infirm.[12] Penal detainees, or the "voluntarily committed," include the criminally accused or convicted.[13] The group into which an individual falls has a material effect on the type and quality of baseline necessities the government is constitutionally required to provide.[14]

While the theoretical line between civil and criminal commitment makes intuitive sense, the distinction crumbles with a cursory look at the modern state detention system, where it is often impossible to draw a coherent line between the two classifications. Broadly, courts tend to defer to how state legislatures choose to define and differentiate between civil and criminal penalties,[15] meaning that the same action that demands criminal punishment in one state might only justify a civil penalty in another.[16] To complicate matters further, criminal and civil penalties are often identical "in contexts such as long-term civil commitment, in which the sanction is the same as that imposed after a criminal trial."[17] Finally, and most strikingly, civil and penal detainees are often housed together in state facilities.[18] Therefore, what qualifies as constitutionally adequate care for one detainee might be a constitutional violation for their cellmate, evidencing the difficulties of ensuring that each respective class of detainees receives the degree of mental health care to which they are constitutionally entitled.

The Fourth Circuit Court of Appeals grappled with these complications in *Doe 4 v. Shenandoah Valley Juvenile Center Commission*.[19] The central issue was which standard—"professional judgment" or "deliberate indifference"—courts should use to measure the constitutionally required minimum for mental health care in juvenile detention facilities.[20] In theory, the professional judgment

10. *Shenandoah Valley*, 985 F.3d at 329.

11. *Id.*

12. Patten v. Nichols, 274 F.3d 829, 831 (4th Cir. 2001).

13. *Id.* at 841.

14. *See, e.g.*, *Brown v. Harris*, 240 F.3d 383, 388 (4th Cir. 2001) (discussing the varying standards of minimally adequate mental health care for individuals under state custody). The Fourteenth Amendment standard, which governs "pretrial detainees," is objective in nature and asks if the victim had a verifiable medical need to which the detention center medical staff turned a purposeful blind eye. *See* Collignon v. Milwaukee County, 163 F.3d 982, 987–89 (7th Cir. 1998). The Fourteenth Amendment standard is ostensibly more demanding than the Eighth Amendment standard reserved for convicted prisoners and requires a showing of actual knowledge. *See id.*

15. *See, e.g.*, César Cuauhthémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1358 (2014); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1896 n.41 (2000) ("The States have long been able to plan their own procedures around the traditional distinction between civil and criminal remedies." (quoting Hicks v. Feiock, 485 U.S. 624, 636–37 (1988))).

16. *See* Kanstroom, *supra* note 15, at 1896 n.41.

17. *Id.* at 1926.

18. Hernández, *supra* note 15, at 1386–88.

19. 985 F.3d 327 (2021).

20. *Id.* at 339.

standard is more plaintiff-friendly.[21] However, in practice, the two standards tend to lead to the same results—tilting heavily in favor of defendants.[22] If the majority's goal was to establish a more plaintiff-friendly standard by deemphasizing the distinction between civil and penal detention, the court would have gotten more bang for its buck by refining the deliberate indifference standard rather than giving new life to the professional judgment standard, which has steadily trended toward dormancy in the decades since the U.S. Supreme Court introduced it.

This Recent Development analyzes the implications of the Fourth Circuit's decision to apply the professional judgment standard instead of the deliberate indifference standard in cases involving UACs. In doing so, the piece examines whether the application of the professional judgment standard is an administratively tenable result, how the two standards differ, and the holding's long-term viability. Ultimately, this Recent Development will question whether the court missed an opportunity to refine a single uniform standard that would have had a longer-lasting effect for a broader class of detained individuals.

Part I of this analysis discusses the background of *Shenandoah Valley*, and Part II examines the frayed distinction between civil and penal detainees. Part III evaluates the difference (or lack thereof) between the deliberate indifference and professional judgment standards and why favoring the professional judgment standard was a suspect decision by the Fourth Circuit. Lastly, Part IV looks at how a bolstering of the deliberate indifference standard would have both better achieved the court's goals and immunized it from backlash.

I. RELEVANT FACTS OF *SHENANDOAH VALLEY*

Plaintiffs in *Shenandoah Valley* were a class of UACs who filed a § 1983 claim against SVJC for failing to provide a "constitutionally adequate level of mental health care."[23] The trial court ruled in favor of SVJC's motion for summary judgment, holding that the facility met the deliberate indifference standard for "provid[ing] adequate care by offering access to counseling and medication."[24] On appeal, Doe 4 argued that because involuntarily committed psychiatric patients are (1) detained for the purpose of receiving treatment, (2) housed in facilities staffed by medical professionals, and (3) often subject to long-term confinement, the lower court should have applied the supposedly less

21. *See id.* at 343; Rosalie Berger Levinson, *Wherefore Art Thou* Romeo*: Revitalizing* Youngberg*'s Protection of Liberty for the Civilly Committed*, 54 B.C. L. REV. 535, 566–69 (2013).

22. *See, e.g.*, Patten v. Nichols, 274 F.3d 829, 846 (4th Cir. 2001) (holding that the difference between the deliberate indifference and professional judgment standards had no impact on the outcome of the case).

23. Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 329 (4th Cir.), *cert. denied*, 142 S. Ct. 583 (2021).

24. *Id.*

stringent professional judgment standard in assessing whether SVJC failed to meet its constitutional obligations to its detainees.[25] While both standards evaluate claims of inadequate medical care, deliberate indifference requires a *subjective* showing that a state official *actually* knew about a detainee's medical need and disregarded it.[26] In contrast, the professional judgment standard requires an *objective* showing that an official "*substantially*" departed from professional judgment.[27] The plaintiffs' lawyers argued that switching the evaluative standard would change the outcome of the case.

The court focused its analysis on the purpose for which the UACs had been detained. As mentioned, there is a wide spectrum of reasons for why the state might take custody of an individual. Identifying a precise, or even a primary reason for why an individual is detained is a difficult task. In *Shenandoah Valley*, the majority and dissent both agreed that the state had detained the plaintiff UACs, at least in part, to maintain safety.[28] They drew their battle line on the question of whether the UAC's need for adequate medical treatment was a coequal purpose for their detention.[29]

The court argued that "the aims of treatment and safety [were] intertwined in this case," meaning that the state's interest in security could not be divorced from the UAC's interest in adequate mental health care.[30] Therefore, the majority determined that UACs were entitled to a less draconian standard than their counterparts who were held for punitive purposes and held that the professional judgment standard should have been applied.[31]

The Fourth Circuit remanded the case to the trial court not only to assess the facts under the professional judgment standard but also to determine whether the "trauma-informed system of care" standard functioned as the low-water mark for the adequacy of mental health care for involuntarily committed UACs.[32] The court, relying on one of the plaintiff's expert witnesses, articulated the tenets of trauma-informed care in doctrinal fashion: "(1) 'appropriate [clinical or therapeutic] interventions,' (2) 'a more global or systems perspective' to consider less restrictive alternatives to detention, and (3) staff

25. *Id.* at 339.

26. *Id.* at 340.

27. *Id.* at 342 (emphasis added).

28. *Compare id.* at 340 (discussing safety as one of the aims of housing children in SVJC), *with id.* at 348 (Wilkinson, J., dissenting) (emphasizing that facilities like SVJC were "designed to house youths too dangerous to be safely housed elsewhere" (citing 45 C.F.R. § 411.5 (2020))).

29. *Compare id.* at 340–41 (majority opinion) ("If a child is held at SVJC until he no longer behaves aggressively, and this aggressive behavior arises from an underlying traumatic condition, then it follows that SVJC's efforts to improve a child's behavior should also treat the child's underlying trauma that gives rise to the misbehavior."), with *id.* at 348 (Wilkinson, J., dissenting) (discussing that SVJC's main priority is ensuring safety and controlling dangerous behavior).

30. *Id.* at 340–41 (majority opinion).

31. *Id.* at 344.

32. *Id.* at 342–44, 346.

'relying less on the use of restraint and seclusion.'"[33] There is little doubt that pegging these elements to the accepted standard of professional judgment would raise the minimum baseline of mental health treatment for involuntarily detained UACs. While this is a laudable step with the potential to improve treatment conditions for UACs, the legal basis for the majority's holding was vulnerable—and the dissent pounced.

Writing for the dissent, Judge Wilkinson covered the predictable arguments against remanding the case under the resuscitated professional judgment standard. Notably, he accused the court of putting judges in a position to evaluate substantive medical questions, a task that they are "utterly unqualified to do"[34] and criticized the creation of a circuit split by adopting the professional judgment standard over the deliberate indifference standard.[35] More importantly, implicit in the dissent's critique is a roadmap for how the majority could have reached the same outcome on more stable legal ground. By neglecting to adequately account for the weak points in its own reasoning, the court missed an opportunity to both fortify its position against backlash and protect a broader class of detained persons.

II. THE HAZY LINE BETWEEN CIVIL AND PENAL DETENTION

In *Shenandoah Valley*, the core tension between the majority and dissent revolves around why the members of the plaintiff class had been detained.[36] Both sides agree that the plaintiffs were placed at SVJC for security reasons.[37] The majority took the position that no matter how great the security risk that the plaintiffs represent, they are entitled to minimally adequate mental health care.[38] The dissent, however, argued that the state's interest in security outweighs the need to provide adequate mental health care because providing mental health care would interfere with keeping the detainees under control.[39] But what the dissent fails to realize, and the majority underemphasizes, is that the line between these two interests no longer exists within the modern state detention system. Before illustrating this point, it is helpful to understand the

33. *Id.* at 344–45 (quoting Joint Appendix at 1132–33, *Shenandoah Valley*, 985 F.3d 327 (No. 19-1910) (sealed)).

34. *Id.* at 352 (Wilkinson, J., dissenting).

35. *Id.* at 348.

36. *Id.* at 340 (majority opinion) ("[T]he need to institutionalize the plaintiff for security reasons did not undermine the fact that he also needed to be committed for treatment.").

37. *Id.* at 350–51 (Wilkinson, J., dissenting) (explaining that Doe 4 was transferred to SVJC because he was "dangerous" and that the majority "insist[s] that safety and rehabilitation are not mutually exclusive").

38. *Compare id.* at 340 (majority opinion) ("Indeed, the aims of treatment and safety are intertwined in this case."), *with id.* at 348 (Wilkinson, J., dissenting) ("SVJC . . . is not designed to be a mental health treatment center. It prioritizes detainee safety and controlling violent behavior.").

39. *Id.* at 351 (Wilkinson, J., dissenting) (explaining that SVJC's only priority is maintaining security and safety).

terminology because the courts use common phrases on both sides of the civil-penal dichotomy.

A. *Disentangling the Civil-Penal Dichotomy*

Civil detention is often described as "involuntary," presumably because the need for the state to take custody of the individual is beyond their control. Detainees falling under this category are guaranteed Fourteenth Amendment protections, including the right "to be free from harm and to receive appropriate medical treatment."[40] Individuals who face civil detention include the mentally disabled,[41] psychiatric patients,[42] sex offenders,[43] suicidal individuals,[44] and neglected youths.[45] Commonly cited rationales for taking members of these groups into state custody include the need for rehabilitation,[46] protection of others,[47] and protection from themselves.[48]

Contrarily, penal detention is synonymous with prison, drawing a clear connection between the detainee's intended conduct and the need for the state taking custody. Penal detainees include convicted criminals[49] and pretrial detainees.[50] Both criminal and pretrial detainees are protected by the Eighth Amendment, which prohibits cruel and unusual punishment and by extension "require[s] the state to provide . . . detained, committed, or incarcerated persons minimum levels of the basic human necessities," including medical care and reasonable safety.[51] Because there is an underlying punitive rationale for committing these classes to state custody, deprioritizing their medical care in the name of "maintaining institutional security" is seen as justified.[52]

With the theoretical underpinnings of the civil-penal dichotomy explained, one can more easily conceptualize that the actual distinction between the two classifications is practically meaningless. As discussed in the Introduction of this Recent Development, whether an offense is considered civil or criminal is not determined by the U.S. Constitution, but by the whim of a

40. A.M. v. Luzerne Cnty. Juv. Det. Ctr., 372 F.3d 572, 577 (2004).
41. Youngberg v. Romeo, 457 U.S. 307, 309–10 (1982).
42. Patten v. Nichols, 274 F.3d 829, 831 (4th Cir. 2001).
43. Matherly v. Andrews, 859 F.3d 264, 268 (4th Cir. 2017).
44. Collignon v. Milwaukee County, 163 F.3d 982, 985 (7th Cir. 1998).
45. Jordan v. District of Columbia, 161 F. Supp. 3d 45, 50 (D.D.C. 2016).
46. Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 350–54 (4th Cir.) (Wilkinson, J., dissenting), *cert. denied*, 142 S. Ct. 583 (2021).
47. *Id.* at 351.
48. *Id.*
49. Patten v. Nichols, 274 F.3d 829, 834 (4th Cir. 2001) (citing Estelle v. Gamble, 429 U.S. 97, 104–05 (1976)).
50. *Id.* at 841.
51. Collignon v. Milwaukee County, 163 F.3d 982, 987–88 (7th Cir. 1998).
52. *See* J.H. v. Williamson County, 951 F.3d 709, 719 (6th Cir. 2020).

state's legislature.[53] Furthermore, individuals in both civil and penal detention are often treated identically and for similar periods of time, making the civil and penal confinement indistinguishable.[54]

Albeit at different ends of the spectrum, both the majority and the dissent remain committed to upholding the civil-penal boundary in *Shenandoah Valley*. In doing so, both sides stumble over how to assess the constitutional minimum for the mental health care of UACs.

B. *Where UACs Fall: A Gray Area Within a Gray Area*

UACs find themselves at the intersection of two classes of detainees that straddle the already blurry civil-penal line: illegal immigrants and juveniles. A closer look at both classes punctuates the near complete erosion of the line between civil and penal confinement and sheds light on why the labored analysis in which the *Shenandoah Valley* court engages is futile.

Both courts and legislatures justify the widespread detention of undocumented immigrants on the grounds that they might flee the country or neglect to appear for their immigration hearings.[55] While undocumented immigrants are "almost universally" considered civil detainees,[56] once they funnel into the detention system,

> [p]eople serving time as a sanction for engaging in criminal activity are housed in the same facilities as people waiting to receive an immigration court's decision. . . . By so intertwining immigration detention and penal incarceration, Congress created an immigration detention legal architecture that, in contrast with the prevailing legal, characterization is formally punitive.[57]

Even more telling is the juvenile justice system itself, which was overtly based on a medical model.[58] By taking a medical approach to juvenile offenders, there is no way to disentangle the state's interest in security from the juvenile's interest in rehabilitation. In this context, the two interests are fused and likely overlap.

53. *See supra* Introduction.

54. *See supra* Introduction; Hernández, *supra* note 15, at 1386.

55. Johnston, *supra* note 9, at 2594 ("[T]he INS must detain all criminal aliens during the deportation process regardless of whether or not they pose a flight or safety risk."); Hernández, *supra* note 15, at 1353 ("[C]ivil detention is permissible to ensure that an accused appears for legal proceedings . . . .").

56. *See* Hernández, *supra* note 15, at 1351.

57. *Id.* at 1349.

58. Thomas L. Hafemeister, *Parameters and Implementation of a Right to Mental Health Treatment for Juvenile Offenders*, 12 VA. J. SOC. POL'Y & L. 61, 64–65 (2004) ("[A]s was the avowed purpose of its founders, juvenile justice administrators can be viewed as being required to triage the 'sickest' individuals within the system." (footnote omitted)).

Regardless of the terminology used, because the civilly and penally detained are all part of a system that does very little to distinguish between them, utilizing multiple standards to measure the adequacy of medical care is both unnecessary[59] and administratively untenable. For example, how can a county jail, which at any given time may hold pretrial detainees, undocumented immigrants, or convicted criminals, effectively and assuredly provide a constitutionally acceptable level of mental health care? The most efficient and just way to do this is to increase the minimum baseline of mental health care for all detained individuals—not to develop a slightly different standard for each class of detainee.

III. THE DIFFERENCE, OR LACK THEREOF, BETWEEN DELIBERATE INDIFFERENCE AND PROFESSIONAL JUDGMENT

In *Shenandoah Valley*, the Fourth Circuit's holding is flawed not only because it doubles down on the antiquated civil-penal distinction but also because it labors to differentiate the professional judgment standard from the deliberate indifference standard to the extent that it will yield different results. Prior to the *Shenandoah Valley* decision, the difference between the two standards fell somewhere between very small and nonexistent.[60] While the Supreme Court did apparently intend for the professional judgment standard to be an easier threshold for plaintiffs to meet, many jurisdictions interpreted the standard in subsequent decisions that effectively neutralized the test's bite.[61] In many cases, even when plaintiffs succeeded in convincing courts to apply the professional judgment standard, those same courts still ruled in favor of defendant detention facilities.[62]

To distinguish between these two standards, the Fourth Circuit took the controversial step of assigning trauma-informed care to the professional judgment standard, holding that a failure to consider this when interacting with SVJC detainees could be a constitutional violation.[63] By singling out trauma-informed care, the Fourth Circuit gave courts plenty of ammunition to ignore, peel back, or limit its holding in the future. First, this violates the basic legal

59. *See supra* Part II. If the application of the professional judgment or deliberate indifference standards depends on the civil or penal characterization, and if the standards functionally lead to the same results, the civil-penal distinction is unnecessary.

60. Levinson, *supra* note 21, at 561–65 (explaining that the deliberate indifference and professional judgment standards are either equivalent or not very different from each other).

61. *See id.* at 536–38. The Court noted that two Supreme Court decisions, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), have "fueled" the "erosion" of *Youngberg*'s protection of substantive due process. Levinson, *supra* note 21, at 536.

62. *See supra* note 22 and accompanying text.

63. Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 342–46 (4th Cir.), *cert. denied*, 142 S. Ct. 583 (2021).

underpinnings of the professional judgment standard, which is predicated on the standard used in medical malpractice cases that emphasize a deference to custom established by expert opinion. Second, it violates the Supreme Court's directive that "[i]t is not appropriate for the courts to specify which of several professionally acceptable choices should have been made."[64]

A. *Professional Judgment, Medical Malpractice, and Deference to Custom*

A closer look at the origins of the professional judgment standard reveals why it is a suspect mechanism to raise the constitutional minimum for mental health care for both UACs and detained persons in general. In *Youngberg v. Romeo*,[65] the case that established the professional judgment standard, the Supreme Court highlighted the professional judgment standard's close connection to the negligence standard applied in medical malpractice cases. There, the Supreme Court granted certiorari to consider "the substantive rights of involuntarily committed [intellectually disabled] persons under the Fourteenth Amendment."[66] The plaintiff had a severe intellectual disability, and although he was thirty-three years old at the time that the lawsuit reached the Supreme Court, he was operating with the mental capacity of an eighteen-month-old child.[67] After the plaintiff's father died, his mother petitioned to have him involuntarily committed to a state facility, and a local court committed the plaintiff to the Pennhurst State School and Hospital.[68] During his two years living at the facility, the plaintiff "suffered injuries on *at least* sixty-three occasions."[69]

At trial, after being instructed to apply the deliberate indifference standard, the jury returned a verdict in favor of the defendant facility.[70] On appeal, the Third Circuit remanded for a new trial on the grounds that it was not appropriate to evaluate an Eighth Amendment claim and a Fourteenth Amendment claim under identical standards.[71] The en banc court agreed on the need for a new Fourteenth Amendment standard, but they could not agree on which standard should apply.[72] The majority landed on what was in effect a medical malpractice standard, suggesting that any departure from what is "acceptable in the light of the present medical or other scientific knowledge"

64. Youngberg v. Romeo, 457 U.S. 307, 321 (1982) (quoting Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980) (en banc) (Seitz, C.J., concurring), *vacated*, 457 U.S. 307 (1982)).

65. 457 U.S. 307 (1982).

66. *Id.* at 314.

67. *Id.* at 309.

68. *Id.* at 309–10.

69. *Id.* at 310 (emphasis added).

70. *See id.* at 312.

71. *See id.* at 312–13.

72. *Id.* at 313.

could be grounds for a constitutional violation.[73] Chief Judge Seitz concurred in the judgment, but suggested that the medical malpractice standard offered too low of a threshold for plaintiffs challenging under the Constitution, and consequently tweaked the standard so that only a state facility's "*substantial departure*" from accepted medical or scientific custom would result in a violation.[74] Ultimately, the Supreme Court adopted Chief Judge Seitz's proposed standard, and the professional judgment standard was born.[75]

Because the professional judgment standard is a modified version of the medical malpractice standard, prior examples of courts attaching specific professional practices to the minimum duty of care provide a useful data point when assessing how similar decisions, like the majority in *Shenandoah Valley*, hold up over time. Examining this connection yields an important insight, which calls into question *Shenandoah Valley*'s long-term viability—when courts wade into specific medical care strategies and unilaterally raise the standard of care required, they are vulnerable to swift backlash. While the case law is limited here,[76] the few examples that do exist are revealing.

1. Potential Backlash for Misapplying the Professional Judgment Standard

Helling v. Carey,[77] a 1974 decision from the Washington Supreme Court, offers one of the few illustrations of a judicial body attaching a specific medical test to the standard of care.[78] In that case, the court held defendant-physicians liable for negligence[79] even though their actions were in accordance with what other qualified medical providers would have done at the time.[80] Although the very fact that most other physicians would have treated their patients similarly would have ordinarily been enough to discharge their duty of care,[81] the *Helling* court found that the practice of ophthalmologists generally had fallen below the

73. *Id.* at 313 (quoting Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980) (en banc), *vacated*, 457 U.S. 307 (1982)).

74. *Id.* at 314 (emphasis added) (quoting *Romeo*, 644 F.2d at 173 (en banc) (Seitz, C.J., concurring)).

75. *Id.* at 319.

76. *See* Philip G. Peters Jr., *The Quiet Demise of Deference to Custom: Malpractice Law at the Millennium*, 57 WASH. & LEE L. REV. 163, 171 (2000) ("No other court has endorsed the Washington Supreme Court's decision to take the issue of medical negligence away from the jury and to rule, without the benefit of expert testimony, that a customary practice is negligent as a matter of law.").

77. 519 P.2d 981 (Wash.) (en banc).

78. *Id.* at 983.

79. *Id.*

80. *Id.* at 982–83.

81. Peters, *supra* note 76, at 165 ("[T]raditional tort law 'gives the medical profession . . . the privilege . . . of setting their own legal standards of conduct, merely by adopting their own practices.'" (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 32, at 189 (5th ed. 1984))); *id.* ("Although physicians are expected to behave reasonably, the reasonableness of their conduct is determined by ascertaining their compliance with customary practices.").

minimum standard of care.[82] The majority invoked Justice Holmes to articulate its rationale, citing *Texas & Pacific Railway Co. v. Behymer*,[83] in which the former Chief Justice of the Massachusetts Supreme Court reasoned, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."[84]

With respect to the professional judgment standard, *Helling*'s aftermath is more revealing than its outcome. Within one year of the decision, the Washington state legislature repealed the decision via statute.[85] And within three years, courts in Washington, California, and Texas expressly refused to adopt the Washington Supreme Court's approach in *Helling*, effectively cabining the holding to "its own unique facts."[86] The impetus for such backlash is not well documented. Some legal commentary suggests that this was the result of a strong lobbying effort by the state's medical community.[87] Other sources point to the *Helling* court's misunderstanding of the medical data upon which it justified its mandate for a higher level of medical screening, which led to increased medical costs but no increase in the "efficacy of treatment."[88] If *Helling*'s aftermath is any indication for the potential of backlash to a medical malpractice tort claim, the future does not bode well for *Shenandoah Valley*—a decision that involves far more culturally and politically divisive issues than medical malpractice.

2. Fertile Ground for Judicial Backlash

Judicial backlash in future § 1983 cases is a legitimate threat to *Shenandoah Valley*'s holding. By delving into the vices and virtues of trauma-informed care, the Fourth Circuit "undertook the prohibited task of specifying"[89] what form of medical treatment should have been followed by the defendant, in direct contravention of how the Supreme Court intended for the standard to be applied.[90] What is more, the defendants in *Shenandoah Valley* made this the central point in their petition for certiorari to the Supreme Court.[91] Although

82. *Helling*, 519 P.2d at 982–83.

83. 189 U.S. 468 (1903).

84. *Id.* at 470 (citing Wabash Railway Co. v. McDaniels, 107 U.S. 454 (1882)).

85. Jerry Wiley, *The Impact of Judicial Decisions on Professional Conduct: An Empirical Study*, 55 S. CAL. L. REV. 345, 380–81 (1981).

86. *See id.* at 360 nn.80–82 (quoting Swanson v. Brigham, 571 P.2d 217, 219 (1977)).

87. *Id.* at 381.

88. Richard E. Leahy, Comment, *Rational Health Policy and the Legal Standard of Care: A Call for Judicial Deference to Medical Practice Guidelines*, 77 CALIF. L. REV. 1483, 1504–05 (1989).

89. Petition for Writ of Certiorari at 25–26, Shenandoah Valley Juv. Ctr. Comm'n v. Doe 4, 985 F.3d 327 (4th Cir.), *cert. denied*, 142 S. Ct. 583 (2021) (No. 21-48).

90. Youngberg v. Romeo, 457 U.S. 307, 321 (1982) (quoting Romeo v. Youngberg, 644 F.2d 147, 178 (3d Cir. 1980) (en banc) (Seitz, C.J., concurring), *vacated*, 457 U.S. 307 (1982)).

91. Petition for Writ of Certiorari, *supra* note 89, at 23–26.

the Court denied the petition,[92] the majority's application of the standard is directly out of line with the Supreme Court's instruction, offering a convincing out for any future court that may be hostile to *Shenandoah Valley*'s lead.

The prospect of plaintiffs similar to the UACs in *Shenandoah Valley* encountering a hostile court is not an abstract threat. The *Shenandoah Valley* majority took the controversial step of elevating the rights of a class of detainees that sits squarely at the center of two politically incendiary issues: detainees' rights and immigration. While the degree to which the judiciary is truly insulated from political and ideological considerations is beyond the scope of this Recent Development, much has been made regarding the trend towards the politicization of the court system, especially since 2016.[93] As of 2019, former President Trump had appointed more circuit court judges than any other president, making one in four circuit court judges a Trump appointee.[94] His appointees are likely to be committed to a political ideology and "have a . . . less cautious view about the costs of significant judicial interventions and the benefits of incremental conservativism."[95] With a judiciary stacked with new appointees with strong ideological worldviews, there is fertile ground for judicial backlash to either ignore, peel back, or severely limit the applicability of *Shenandoah Valley*'s holding.

If courts succeed in thrashing the Fourth Circuit's protection of the mental health of UACs in the future, they are back to square one, and government detention facilities will be free to ignore and thereby put detainees with mental illness at serious risk. To put this in perspective, the medical condition at issue in *Helling*, glaucoma in patients under forty, affects roughly 13,000 people in this country every year.[96] In 2020 alone, 60,000 UACs came into the United

92. Shenandoah Valley Juv. Ctr. Comm'n v. Doe 5, 142 S. Ct. 583 (2021) (mem.).

93. *See, e.g.*, Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES, https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html [https://perma.cc/E6PD-D3A8 (dark archive)] (Mar. 16, 2020); Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control over Immigration Adjudication*, 108 GEO. L.J. 579, 579 (2020); Peter L. Strauss, *Eroding "Checks" on Presidential Authority—Norms, the Civil Service, and the Courts*, 94 CHI.-KENT L. REV. 581, 589 (2019).

94. Rebecca Klar, *Trump Has Officially Appointed One in Four Circuit Court Judges*, HILL (Nov. 7, 2019, 6:05 PM), https://thehill.com/homenews/administration/469519-trump-has-officially-appointed-one-in-four-circuit-court-judges [http://perma.cc/FDG2-WTMN].

95. David Zaring, *The Organization Judge*, U. CHI. L. REV. ONLINE (Sept. 25, 2020), https://lawreviewblog.uchicago.edu/2020/09/25/zaring-judge/ [https://perma.cc/EKW8-9URW].

96. Helling v. Carey, 519 P.2d 981, 983 (Wash. 1974) ("[T]he instance of glaucoma under the age of 40 . . . is thought to be . . . one in 25,000 people or less."). The current population of the United States is roughly 330 million. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ [https://perma.cc/R9LF-5ZXE]. 330 million divided by 25,000 is about 13,200.

States,[97] 44% of whom have at least one medically recognizable emotional concern.[98]

In the next part, I argue that the Fourth Circuit could have reached a functionally identical outcome by simply refining the deliberate indifference standard without running afoul of the Supreme Court and preventing a clear opportunity to disregard its outcome. If illegal immigrants and juveniles occupy the gray area between the civil-penal divide,[99] UACs' status with respect to their constitutionally required level of mental health care is doubly uncertain. By categorizing UACs as civil detainees, the majority obfuscates the fact that remanding the case to be evaluated under the professional judgment standard—which is functionally equivalent to the deliberate indifference standard—does little to raise the constitutional minimum for mental health care for detained persons.

IV. WHY FORTIFYING THE DELIBERATE INDIFFERENCE STANDARD DOES MORE WITH LESS

Any update to existing law that works in favor of a vulnerable and underrepresented class should be applauded, and at least for the time being, the Fourth Circuit accomplished this in its *Shenandoah Valley* decision. However, the court missed an opportunity to make a more meaningful, widespread impact within a more doctrinally sound approach. By simply fortifying the deliberate indifference standard, they would have raised the bar for minimally adequate mental health care for all detainees in the Fourth Circuit—not just involuntarily committed UACs.

A. *Subjective Deliberate Indifference vs. Objective Deliberate Indifference*

The deliberate indifference standard affords a court more flexibility than what might be immediately apparent upon reading the *Shenandoah Valley* decision. The majority spent considerable time drawing a distinction between the standard applied in § 1983 claims brought under the Eighth Amendment and those brought under the Fourteenth Amendment.[100] What the Fourth Circuit failed to emphasize is that there are gradients within the deliberate

97. WILLIAM A. KANDEL, CONG. RSCH. SERV., R43599, UNACCOMPANIED ALIEN CHILDREN: AN OVERVIEW 4 (2021).

98. Sarah A. MacLean, Priscilla O. Agyman, Joshua Walter, Elizabeth K. Singer, Kim A. Baranowski & Craig L. Katz, *Mental Health of Children Held at a United States Immigration Detention Center*, 230 SOC. SCI. & MED. 303, 303 (2019).

99. *See supra* Section II.B.

100. Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 343–44 (4th Cir.), *cert. denied*, 142 S. Ct. 583 (2021).

indifference standard that include both a subjective and objective analysis.[101] Courts in other circuits apply the *objective* deliberate indifference standard in cases that involve municipal rather than individual liability.[102] This version of the standard replaces the requirement that a government official must have had *actual* knowledge that the detainee had a mental illness with the requirement that the government knew or *should have known* that the detainee had been diagnosed with a mental illness.[103] Here, since the defendant Shenandoah Valley Juvenile Center Commission is a municipality, the facts of this case would have been ideally suited for the court to apply such a standard.

The Third Circuit's decision in *A.M. v. Luzerne County Juvenile Detention Center*[104] employed a version of the objective deliberate indifference test without expressly saying so, offering a model for how the Fourth Circuit could have accomplished this.[105] In *Luzerne County*, the majority held that the lower court erred in granting summary judgment in favor of defendant Luzerne County Juvenile Detention Center and its supervisors and remanded for further proceedings based on its analysis of the deliberate indifference standard.[106] The majority applied the deliberate indifference standard more expansively than the Fourth Circuit, holding that "the custodial setting of a juvenile detention center presents a situation where 'forethought about [a resident's] welfare is not only feasible but obligatory.'"[107] With this backdrop, the court looked beyond the precise actions of individual state actors.[108] In the Third Circuit, the deliberate indifference standard can implicate a facility's training and general policies in evaluating whether a state detention center is liable for providing inadequate mental health care.[109]

Alternatively, had the *Shenandoah Valley* majority remanded the case to the trial court with instructions to apply the *objective* deliberate indifference standard in line with the Third Circuit's interpretation, there would have been no need to breathe new life into the dormant professional judgment standard. Had this case been brought in the Third Circuit, the facts of *Shenandoah Valley*

101. *See, e.g.*, Kyla Magun, Note, *A Changing Landscape for Pretrial Detainees? The Potential Impact of* Kingsley v. Hendrickson *on Jail-Suicide Litigation*, 116 COLUM. L. REV. 2059, 2061–62 (2016).

102. *See, e.g.*, Hare v. City of Corinth, 74 F.3d 633, 649 n.4 (5th Cir. 1996).

103. Magun, *supra* note 101, at 2062–63.

104. 372 F.3d 571 (3d Cir. 2004).

105. For more context regarding the facts of *Luzerne County*, see *supra* Part II.

106. *Luzerne County*, 372 F.3d at 579–85.

107. *Id.* at 579 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 851 (1998)).

108. *Id.* at 580–85.

109. *Id.* (concluding that the defendant juvenile detention center's policies pertaining to hiring, staffing, training, ensuring youth safety, and addressing residents' physical and mental health needs were inadequate).

suggest that it would have very likely survived a defendant's motion for summary judgment under the objective deliberate indifference standard.[110]

B. *Finding Steadier Legal Ground Under Objective Deliberate Indifference*

The *objective* deliberate indifference standard raises the constitutional minimum for mental health care, placing it on firmer legal and practical grounds. When applied to *Shenandoah Valley*, both the professional judgment and objective deliberate indifference standards likely lead to the same outcome—a remand to the lower court with instructions to take a more nuanced look at the minimum amount of mental health care guaranteed by the Constitution. However, the benefits of adopting objective deliberate indifference over professional judgment are both legal and practical.

1. Legal and Practical Benefits of the Objective Deliberate Indifference Standard

By mandating and adjusting the professional judgment standard, the majority put a target on its holding's back. The dissent was quick to point out that this standard had never been applied in the context of juvenile detention facilities and that doing so without any guidance from the legislature constituted a judicial overreach.[111] By adopting the objective deliberate indifference standard, the *Shenandoah Valley* majority would have softened the blow of the dissent's argument. If the majority would have applied the very deliberate indifference standard for which the dissent advocates, rather than blazing a new trail with the professional judgment standard, it would have shifted the categorical disagreement over *which* standard should apply to an interpretive disagreement over *how* the standard should apply.

An additional benefit to adopting the objective deliberate indifference standard is that it would have avoided a circuit split. Ironically, the dissent cites the Third Circuit's *Luzerne County* decision as an example of the standard that should have applied.[112] As discussed above in Section IV.A, the factual similarities between *Shenandoah Valley* and *Luzerne County* suggest that the Third Circuit still would have remanded with slightly different instructions. By avoiding the circuit split, the dissent's argument loses another important anchor, leaving opponents of raising the constitutional minimum for mental health care with little more than a personal preference for security over rehabilitation.

110. *See supra* Introduction (detailing the facility staff's treatment of UACs in their custody).

111. Doe 4 v. Shenandoah Valley Juv. Ctr. Comm'n, 985 F.3d 327, 348–49 (4th Cir.) (Wilkinson, J., dissenting), *cert. denied*, 142 S. Ct. 583 (2021).

112. *Id.* at 351 (citing *Luzerne County*, 372 F.3d at 579).

Finally, the administrative benefits of adopting a single standard for determining constitutionally adequate mental health care for civil detainees cannot be understated. Until federal and state detention facilities are better able to organize their populations, an issue that lies beyond the scope of this Recent Development, the demand to comply with a complex tapestry of varying standards is unrealistic.[113] Instead, the most sensible solution is to take the class of civil detainees who are entitled to the highest level of minimally adequate mental health care and apply that to all classes of detainees. Given that virtually any class of detainee may occupy the same physical space as another,[114] applying the least stringent standard is the only plausible way to guarantee a detained person's constitutional rights are protected.

By adopting the objective deliberate indifference standard, the Fourth Circuit would have forced a greater degree of administrative responsibility on state detention centers to provide a more viable form of minimally adequate mental health care not just to juvenile detainees, but to all detainees for whom the deliberate indifference standard is the accepted mode of analysis.

CONCLUSION

The professional judgment standard was intended to give civilly detained plaintiffs an easier burden when raising § 1983 claims against the government. On the one hand, the Fourth Circuit did reach an outcome that was true to the professional judgment standard's original purpose. The majority met its duty to protect the constitutional rights of a uniquely vulnerable class of juvenile detainees. It both raised the floor of minimally adequate health care and took an affirmative step towards recognizing the right independently of the state's punitive interests. On other hand, because the court took such a significant step in raising the constitutional minimum for adequate mental health care for UACs, it could have—and should have—done more to protect its holding from future attack. Ultimately, the court missed an opportunity to shore up the widely accepted deliberate indifference standard. The effect could have been a broad raising of the bar for minimally adequate mental health care while being less susceptible to future legal challenges. Instead, the court leaves access to adequate mental health care for detained persons at risk while also creating a circuit split vulnerable to either judicial or legislative backlash.

The Supreme Court christened the deliberate indifference standard in an era where the distinction between civil and penal detainees was less entangled. Today that boundary is not nearly as identifiable. By resuscitating the professional judgment standard over the deliberate indifference standard, the Fourth Circuit reinforces the reductive civil-penal divide while aiming for an

113. *See supra* Part I.

114. Hernández, *supra* note 15, at 1386–88.

enlightened outcome in an attempt to leap forward while keeping its feet firmly planted in the past.

JOSHUA PHILIP ELMETS**

** J.D. Candidate, Class of 2023. I would like to thank the *North Carolina Law Review* for selecting my piece for publication. I owe a special thanks to my Primary Editor, Caroline Lim, whose careful reading and thoughtful insights improved the piece immeasurably. To my wife Theresa and son Theo, I never would have found my way to the end of this piece without you both standing behind me. Finally, thanks to my parents, whose support and patience gave me the chance to pursue a legal education.