PROTECTING THE LEAST AMONG US: USING THE *FLORES* AGREEMENT AS A MODEL FOR AN ALTERNATIVE TO DETENTION FOR THE MENTALLY ILL IN ICE CUSTODY

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ABSTRACT

Mentally ill migrants are currently being detained in cells where noose-like bedsheets hang from vents and their "mental health treatment" often consists of solitary confinement. Mentally ill adult migrants detained by ICE in the United States do not receive the care their psychological conditions require because ICE facilities are ill-equipped, under-staffed, and unable to handle their unique needs. This Note outlines the current issues faced by this vulnerable population and suggests an alternative to standard detention for mentally ill migrants subject to detention by placing them in an environment conducive to their needs with mental health professionals instead of prison guards, modeled after the shelters used for Unaccompanied Alien Children in the custody of the Office of Refugee Resettlement. Even if the calls for administrative closure of immigration cases of the mentally ill are eventually heeded, as policy moves to provide additional safeguards to this population based on the Franco *decision, the reality is that many mentally ill migrants will still be detained at some point throughout their removal procedures. These individuals deserve better care and treatment during their civil detention than ICE can provide.*

Instead of standard ICE detention, mentally ill migrants should be detained in the least restrictive setting decided on a case-by-case basis, as modeled by the placement of Unaccompanied Alien Children. There, a team of staff members can work toward a variety of goals, including restoration of competency and the collection of documents necessary

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to the individuals' removal proceedings to both care for the migrant and assist the already overburdened immigration courts. We must do better to protect the least among us, including this vulnerable group, and the first step in doing so is to secure their safety and wellbeing throughout the immigration process.

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INTRODUCTION

Miguel[1] arrived at the shelter ready to start a life in the United States, ready to live with his mother for the first time in ten years, and ready to become a full-fledged adult in a month. He left El Salvador, the only country he knew, six weeks earlier. Miguel traveled by bus, train, and foot until he finally crossed the Mexico-United States border where he was apprehended by U.S. Customs and Border Patrol. After a few days in custody, Miguel was transferred to a shelter for Unaccompanied Alien Children ("UACs") in Pennsylvania. There he waited, eagerly anticipating reunification with his mother and his upcoming eighteenth birthday. Unbeknownst to him, this reunification needed to happen as soon as possible or Immigration and Customs Enforcement ("ICE") would arrive on his birthday with full discretion to either release him to his mother or to detain him as an adult in a prison-like setting.[2]

Before his birthday, Miguel would enjoy numerous protections because, for the first time in his life, a psychologist would diagnose his intellectual disability. It turned out that Miguel had the intellectual capacity of approximately a ten-year-old, despite being almost eighteen years old and looking like a full-grown young adult. He could not color inside the lines. He could not read. He was just learning how to write his name. He had no concept of numbers and could not do even the most basic mathematical equations.

While he remained under the age of eighteen, Miguel would enjoy one-on-one supervision,[3] regular counseling sessions

1. Miguel is a pseudonym for the author's client at a shelter for unaccompanied alien children contracted by the Office of Refugee Resettlement.

2. *See generally* John Burnett, *Migrant Youth Go from a Children's Shelter to Adult Detention on Their 18th Birthday*, NPR (Feb. 22, 2019, 5:00 AM), https://www.npr.org/2019/02/22/696834560/migrant-youth-go-from-a-childrens-shelter-to-adult-detention-on-their-18th-birth (discussing ICE's practices regarding migrants that have "aged out" of the child shelters where they were detained).

3. *See* OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 3: 3.5.2 PROHIBITION ON SEGREGATION AND ISOLATION (June 17, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-

with a bilingual therapist,[4] a personal safety plan to best care for his needs,[5] daily education structured to his unique learning style and needs,[6] and a legal requirement that he remain in the least restrictive setting possible.[7]

The day Miguel turned eighteen, however, he would lose all those protections and risk detention in prison with adult men, some of whom had serious criminal convictions.[8] If the ICE officer chose to detain him, there was little to be done to shield the young adult with the intellectual capacity of a ten-year-old from the abuses that might happen to him in prison.[9]

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united-states-unaccompanied-section-3#3.5.2 (noting that one-on-one supervision is the exception to the rule).

4. *See* OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 3: 3.3 CARE PROVIDER REQUIRED SERVICES (May 23, 2016), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.3 [hereinafter CARE PROVIDER REQUIRED SERVICES] ("Care providers must deliver services in a manner that is sensitive to the age, culture, native language, and needs of each unaccompanied alien child.").

5. *See* OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 3: 3.3.4 SAFETY PLANNING (Apr. 24, 2017), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.3.4 [hereinafter SAFETY PLANNING] ("Care providers must create in care safety plans for unaccompanied alien children for whom such plans are appropriate . . . .").

6. *See* OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 3: 3.3.5 ACADEMIC EDUCATIONAL SERVICES (Apr. 24, 2017), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3#3.3.5 ("Each unaccompanied alien child must receive a minimum of six hours of structured education, Monday through Friday, throughout the entire year in basic academic areas . . . . Care providers [will] . . . provide remedial education and after school tutoring as needed.").

7. *See* OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 1: 1.2.2 CHILDREN WITH SPECIAL NEEDS (Jan. 27, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.2.2 ("ORR places a child with special needs in a facility serving the general population but that is able to provide services and treatment for special needs. In all instances, ORR strives for a least restrictive setting in the best interests of the child.").

8. *See* OFFICE OF THE INSPECTOR GEN., OIG-18-32, CONCERNS ABOUT ICE DETAINEE TREATMENT AND CARE AT DETENTION FACILITIES 3 (2017) (reporting that detention facilities are known to misclassify immigrants—housing low-risk individuals whose only violation is immigration-related with detainees who have serious criminal convictions).

9. *See* Burnett, *supra* note 2; *see also* Dr. Edith Brancho-Sanchez, *For Unaccompanied Minors, Countdown to 18th Birthday Is Filled with Fear and Dread*, CNN, https://www.cnn.com/2019/03/28/health/unaccompanied-minors-18th-birthday/index.html (last updated Mar. 28, 2019, 12:04 PM).

A few hours, the difference between being seventeen years and three hundred and sixty-four days or eighteen years old, should not make a difference in how the mentally ill are treated. But in the world of migrants subject to detention, those few hours can change everything. Miguel's intellectual disability did not suddenly go away; his need for ongoing counseling and extra assistance did not disappear. The only thing that vanished was his right to additional protections. His safety depended on one ICE officer's decision.[10] The least among us deserve adequate protections no matter their age or nationality. This needs to change.

Mentally ill adult migrants detained by ICE in the United States do not receive the care their psychological conditions require because ICE facilities are ill-equipped, under-staffed, and unable to handle their unique needs. This Article proposes an alternative to standard detention for detained mentally ill migrants to better protect them throughout their immigration proceedings, modeled after the foundation laid to protect UACs like Miguel. Using the guidelines originally outlined in the *Flores* Agreement and still in use today by the Office of Refugee Resettlement, legislators should create similar solutions for seriously mentally ill migrant adults detained by ICE.[11] This would allow for alternatives to detention which would include care by mental health providers instead of prison guards to more appropriately care for the unique needs of immigrants with serious mental illness.[12]

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10. Luckily, Miguel was released on his own recognizance to his mother's care. This happened in 2014, under the Obama administration. The Trump administration has been increasingly detaining UACs on their eighteenth birthdays as a policy change, so Miguel likely would not have the same luck had this happened today. *See* Burnett, *supra* note 2.

11. *See* Donica Phifer, *What Is the Flores Agreement? Trump Admin to Dissolve Settlement, Keep Families in Custody While Immigration Cases Heard in Court*, NEWSWEEK (Aug. 21, 2019, 12:00 PM), https://www.newsweek.com/what-flores-agreement-trump-administration-dissolving-1455508.

12. *See* OFFICE OF THE INSPECTOR GEN., OEI-09-18-00431, CARE PROVIDERS DESCRIBED CHALLENGES ADDRESSING MENTAL HEALTH NEEDS OF CHILDREN IN HHS CUSTODY 3 (2019) (stating that ORR facilities employ mental health clinicians at every facility who "are responsible for conducting mental health assessments, providing counseling services, providing crisis intervention services, and recommending care from external providers).

Part I of this Note discusses the current issues experienced by mentally ill detained migrants in ICE custody. Part II details the historical context of immigration procedure concerning mentally ill migrants, along with the current regulations and the present-day procedure, along with its flaws, for determining competency in immigration proceedings. Part III delineates the current laws in place regarding the detention of noncitizens and the unsettled and concerning challenges faced by a subset of mentally ill detained migrants. Part IV describes a similar problem once faced by UACs and the solution formed to better protect them, the *Flores* agreement. Part V explains the proposed solution to better care for mentally ill migrants subject to detention by mirroring the solution formed for UACs in the *Flores* agreement.

I. CURRENT STATE OF AFFAIRS

There is a marked connection "between the experience of immigration detention practices and poor mental health."[13] In comparing studies performed in immigration detention centers in the United Kingdom, Australia, and the United States, a report from Cambridge found that all studies observed "[a]nxiety, depression and PTSD in particular" in detained noncitizens, as well as additional mental health issues such as psychosis, self-harm, and suicidal ideation.[14] The study analyzed the "numerous adverse circumstances on the mental health" of detained noncitizens, finding that the "high levels of emotional distress" among detained noncitizens stem from issues faced prior to detention that are then aggravated by the detention itself.[15]

13. Katy Robjant et al., *Mental Health Implications of Detaining Asylum Seekers: Systematic* Review, 194 BRIT. J. PSYCHIATRY 306, 310 (2009).

14. *Id.*

15. *Id.* ("[B]oth the psychological impact of detention as well as factors relating to the detention environment may adversely affect mental health.").

Studies in other countries outline the increased risk the detention of noncitizens can pose.[16] As stated in one Australian study, "immigration detention exacerbates existing mental disorders and can independently contribute to the onset of new mental disorders, in particular in cases of continuing indefinite detention."[17] Yet as the world struggles to handle the current migrant and refugee crisis, the oft-used solution is to continue to detain individuals for immigration violations.[18]

ICE facilities are meant to detain immigrants in civil, not criminal, detention.[19] One study found that 58% of detained migrants had no criminal conviction, while "four out of five[] either had no record, or had only committed a minor offense such as a traffic violation."[20] Even so, the detention centers look and feel like jails and prisons because almost all ICE facilities are buildings originally constructed to serve those purposes.[21] ICE itself only "owns five detention facilities,"[22] so many migrants are detained at local and county jails, meaning that migrants are detained for civil offenses together with inmates serving sentences for criminal convictions.[23] Additionally, 22% of ICE detention centers are owned by private companies and 71% are run by private companies who stand to profit off the business

16. *See generally* Stephen Brooker et al., *Challenges to Providing Mental Health Care in Immigration Detention* (Glob. Det. Project, Working Paper No. 19, 2016), https://www.globaldetentionproject.org/wp-content/uploads/2016/12/Brooker-et-al-GDP-paper-2016.pdf (discussing the psychological impacts immigration detention can have on migrants).

17. *Id*. at 4.

18. *See id*.

19. Harisiades v. Shaughnessy, 342 U.S. 580, 594 (1952) ("Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure.").

20. *Profiling Who ICE Detains – Few Committed Any Crime*, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE (Oct. 9, 2018), https://trac.syr.edu/immigration/reports/530/.

21. DORA SCHRIRO, IMMIGRATION & CUSTOMS ENF'T, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 1, 21 (2009), https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

22. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG 19-18, ICE DOES NOT FULLY USE CONTRACTING TOOLS TO HOLD DETENTION FACILITY CONTRACTORS ACCOUNTABLE FOR FAILING TO MEET PERFORMANCE STANDARDS 3 (2019) [hereinafter OIG 19-18] (stating that the rest of the detention centers stem from contracts with 206 other facilities).

23. *See id*.

of detaining migrants.[24] These privately-run detention centers can, and do, apply for waivers allowing them to "commingle high-custody detainees, who have histories of serious criminal offenses, with low-custody detainees, who have minor, non-violent criminal histories or only immigration violations, which is a practice the standards prohibit in order to protect detainees who may be at risk of victimization or assault."[25]

Detention centers are often located in remote areas inaccessible by public transportation, making it difficult for friends and family members without their own transportation to visit and support their loved ones.[26] More than one detention facility lacks windows and combines noncitizens with immigration violations with "pre-trial and sentenced inmates."[27]

Most concerning, however, is that these facilities and their staff members continuously fail to provide for the needs of their residents.[28] ICE detention centers occupied a large portion of the news in 2019 as the Trump Administration created tent cities to detain migrants at the border[29] and refused to provide basic needs like soap and toothbrushes to children.[30] Much of the attention focused on children, but another vulnerable group suffers due to ICE's substandard care—mentally ill migrants.[31]

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24. *See* Yuki Noguchi, *Under Siege and Largely Secret: Businesses That Serve Immigration Detention*, NPR (June 30, 2019, 10:23 AM), https://www.npr.org/2019/06/30/736940431/under-siege-and-largely-secret-businesses-that-serve-immigration-detention; *see also* Clyde Haberman, *For Private Prisons, Detaining Immigrants Is Big Business*, N.Y. TIMES (Oct. 1, 2018), https://www.nytimes.com/2018/10/01/us/prisons-immigration-detention.html (explaining that private prisons are "a roughly $4-billion-a-year American industry" that largely function by detaining immigrants).

25. *See* OIG 19-18, *supra* note 22, at 10.

26. *See* SCHRIRO, *supra* note 21, at 21.

27. *Id.*

28. *See id.* at 21–23.

29. *See* Courtney Kube, *U.S. Military to Build 6 Tent Cities Near Border for Migrants*, NBC NEWS (May 15, 2019, 4:34 PM), https://www.nbcnews.com/politics/immigration/u-s-military-build-6-tent-cities-border-migrants-n1006161.

30. Meagan Flynn, *Detained Migrant Children Got No Toothbrush, No Soap, No Sleep. It's No Problem, Government Argues.*, WASH. POST (June 21, 2019, 6:59 AM), https://beta.washingtonpost.com/nation/2019/06/21/detained-migrant-children-no-toothbrush-soap-sleep/.

31. *See* SCHRIRO, *supra* note 21, at 27.

The problems for detained mentally ill migrants begin as early as their intake and placement with ICE.[32] Assignments of noncitizens to detention facilities are finalized prior to the completion of a medical screening.[33] As such, the individuals making placement decisions do not yet have a full picture of the migrant's history and health.[34] Therefore the individual facilities on the receiving end must determine whether the noncitizen is in the appropriate detention center after placement is finalized.[35] As ICE reports, this means that vulnerable populations such as the mentally and medically ill, *inter alia*, "are not always in facilities where the staffing, proximity to emergency medical care, and physical space are most conducive to their conditions."[36]

Additionally, the main method through which ICE detention facilities "care for" mentally ill detainees is to subject them to disciplinary segregation, also known as solitary confinement.[37] The Project on Government Oversight ("POGO") found that ICE placed 2,565 immigrant detainees in solitary confinement in 2016 and 2,944 in 2017.[38] About 40% of them had diagnosed mental illnesses.[39] POGO estimated that, based on numbers available at the time of their report, this number would increase to 3,100 immigrant detainees in segregation in 2018.[40] Some detainees were kept in solitary for excessive amounts of time, with POGO identifying nine cases involving more than one full year of solitary confinement.[41] Its report highlighted one migrant woman with a diagnosis of "Other Specified Trauma and

32. *See id.* at 25.

33. *Id.* at 27.

34. *See id.*

35. *Id.*

36. *Id.*

37. *See id.*

38. NICK SCHWELLENBACH ET AL., PROJECT ON GOVERNMENTAL OVERSIGHT, ISOLATED: ICE CONFINES SOME DETAINEES WITH MENTAL ILLNESS IN SOLITARY FOR MONTHS (2019), https://www.pogo.org/investigation/2019/08/isolated-ice-confines-some-detainees-with-mental-illness-in-solitary-for-months/ [hereinafter POGO REPORT].

39. *Id.*

40. *Id.*

41. *Id.*

Stressor-related D/O [disorder]" who spent 454 days in solitary confinement, and another with Post-Traumatic Stress Disorder and severe Major Depressive Disorder who spent 372 days in isolation.[42] Although detention centers use solitary confinement for a variety of reasons, including as a response to consensual kissing and to separate hunger strikers, LGBTQ detainees, and people with disabilities,[43] mentally ill migrants face solitary confinement at the highest rates.[44] For example, two-thirds of detainees subject to solitary confinement at the Adelanto detention center have mental illness, despite the fact that only one-third of the population at Adelanto is "chronic medically ill, chronic mentally ill, or seriously mentally ill."[45]

ICE facilities resort to using segregation cells because it is unprepared to properly care for populations like the mentally ill.[46] These cells are meant to be used only for discipline and only after a noncitizen is found to have violated a rule or to have committed a prohibited act.[47] Despite this intended use, segregation is often the solution both for those with mental illnesses as well as those placed on suicide watch due to a lack of available beds for in-house psychiatric care.[48] This tactic is employed in order to provide the "enhanced supervision" owed to such individuals, despite knowing that this sort of segregation "is

42. *Id*.

43. Ellen Gallagher, *The Other Problem with ICE Detention: Solitary Confinement*, DENTON REC.-CHRON. (Aug. 31, 2019), https://dentonrc.com/opinion/columnists/ellen-gallagher-the-other-problem-with-ice-detention-solitary-confinement/article_279da6e4-3599-597a-ab6f-ffc877d62b9f.html.

44. *See* POGO REPORT, *supra* note 38 (finding that although one-third of detainees at the Adelanto detention center are "chronic medically ill, chronic mentally ill, or seriously mentally ill," two-thirds of the detainees subject to solitary confinement at that facility have mental illness).

45. *Id*.

46. *See, e.g.*, SCHRIRO, *supra* note 21, at 21 ("[S]egregation cells are often used to detain special populations whose unique medical, mental health, and protective custody requirements cannot be accommodated in general population housing.").

47. *See* U.S. IMMIGRATION & CUSTOMS ENF'T, PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011 171–72 (2011), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf [hereinafter PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011].

48. *See* SCHRIRO, *supra* note 21, at 26–27; *see also* POGO Report, *supra* note 38.

not conducive to recovery."[49] In fact, the negative effects of solitary confinement on mental health have been well-documented;[50] these effects are only exacerbated when segregation is used for those with pre-existing mental illness.[51] The United Nations says solitary confinement "should be banned by States as a punishment or extortion technique."[52] It goes on to call for a "complete ban on its use for juveniles and persons with mental disabilities."[53]

The use of disciplinary segregation goes against ICE detention standards, which serve to "ensure[] that detainees have access to appropriate and necessary medical, dental and mental health care, including emergency services."[54] Yet ICE continues to use segregation as both a punishment for behavioral issues and a so-called solution to issues posed by detaining the mentally ill.[55]

Additionally, ICE officials frequently fail to meet the oversight requirements when segregating detainees with mental

49. *See* SCHRIRO, *supra* note 21, at 27.

50. *See, e.g.*, Ashley Halvorsen, Note, *Solitary Confinement of Mentally Ill Prisoners: A National Overview & How the ADA Can Be Leveraged to Encourage Best Practices*, 27 S. CAL. INTERDISC. L. J. 205, 207 (2017) ("Solitary confinement is devastating to the mental health of all inmates who endure it, and the effect is compounded when an inmate lands in solitary confinement in large part due to active mental illness."); CLARA LONG, HUMAN RIGHTS WATCH, CODE RED: THE FATAL CONSEQUENCES OF DANGEROUSLY SUBSTANDARD MEDICAL CARE IN IMMIGRATION DETENTION (2018), https://www.hrw.org/report/2018/06/20/code-red/fatal-consequences-dangerously-substandard-medical-care-immigration#6c7be7 (noting that solitary confinement for any amount of time constitutes "cruel, inhuman, or degrading treatment" yet is part of a persistent pattern of abuse for people with mental health needs in US immigration detention).

51. *See, e.g.*, POGO REPORT, *supra* note 38 ("[P]lacing individuals with preexisting mental illness in solitary confinement can make the psychological issues they are grappling with worse and can increase the risk they will die by suicide.").

52. *Solitary Confinement Should Be Banned in Most Cases, UN Expert Says*, UN NEWS (Oct. 18, 2011), https://news.un.org/en/story/2011/10/392012-solitary-confinement-should-be-banned-most-cases-un-expert-says [hereinafter *Solitary Confinement*].

53. *Id.*

54. U.S. IMMIGRATION & CUSTOMS ENF'T, 2011 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS: 4.3 MEDICAL CARE 257 (2011), https://www.ice.gov/doclib/detention-standards/2011/4-3.pdf [hereinafter 4.3 MED. CARE].

55. *See, e.g.*, SCHRIRO, *supra* note 21, at 21, 27; *see also* POGO REPORT, *supra* note 38.

health conditions.[56] As the public became aware of these issues, many groups called for increasing oversight of ICE operations; unfortunately, ICE prefers to keep the details hidden.[57]

As expected, this system of segregation fails to protect the most vulnerable populations in detention, particularly those with mental illnesses. The lack of specialized care and low resources mean that the individuals who require the most protections suffer the most.[58] Between 2010 and 2017, five noncitizens detained in ICE facilities with psychosocial disabilities like schizophrenia died by suicide "after prolonged periods in solitary confinement and inadequate mental health care."[59] Instead of receiving the mental health care they need, the mentally ill are locked in solitary confinement while they wait for the backlogged immigration courts to decide their fate.

Unfortunately, the risks for the mentally ill detained noncitizens do not begin and end with solitary confinement. In a concerning report issued in September 2018, the Office of the Inspector General detailed the results of an "unannounced

56. *See generally* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-17-119, ICE FIELD OFFICES NEED TO IMPROVE COMPLIANCE WITH OVERSIGHT REQUIREMENTS FOR SEGREGATION OF DETAINEES WITH MENTAL HEALTH CONDITIONS 8 (2017) [hereinafter OIG-17-119] (stating that "[p]lacing detainees with mental health conditions in segregation is a serious step that requires careful review and oversight" while recommending improvements in the record-keeping system utilized by ICE in response to failures to comply with current requirements); *see also* POGO REPORT, *supra* note 38 ("A December 2017 Department of Homeland Security inspector general report raised concerns that ICE detention centers may have 'misused' their solitary confinement units by isolating detainees without proper documentation and failing to provide assurance to the inspector general that the detainees in solitary had received daily meals and medical care.").

57. In 2017, ICE sought permission from the National Archives and Records Administration (NARA) to destroy records related to its detention operations. *See* Victoria López, *ICE Plans to Start Destroying Records of Immigrant Abuse, Including Sexual Assault and Deaths in Custody*, ACLU (Aug. 28, 2017, 4:00 PM), https://www.aclu.org/blog/immigrants-rights/ice-and-border-patrol-abuses/ice-plans-start-destroying-records-immigrant. Though they received preliminary approval, a campaign of opposition led by the ACLU successfully caused NARA to review the proposal more carefully. *Id.* As of May 2018, ICE had not submitted a new proposal.

58. *See, e.g.*, POGO REPORT, *supra* note 38.

59. Grace Meng, *Stint in Solitary Preceded Death in US Immigration Detention*, HUM. RTS. WATCH (July 31, 2018, 8:00 AM), https://www.hrw.org/news/2018/07/31/stint-solitary-preceded-death-us-immigration-detention; *see* POGO REPORT, *supra* note 38; *see also* LONG, *supra* note 50 (noting that "the placement of people with psychosocial disabilities in solitary confinement," constitutes "cruel, inhuman or degrading treatment," which "makes it a violation of US obligations under the Convention Against Torture.").

inspection" of the aforementioned immigration detention center in Adelanto, California.[60] The report documents multiple highly concerning issues "relating to safety, detainee rights, and medical care" in violation of standards set in 2011.[61] These standards require "face-to-face clinical contact" with a mental health provider for any detainee placed in restrictive housing, such as segregation, to assess their well-being.[62] The Inspector General's report documents medical providers, including mental health providers, performing these checks without any actual contact with the detainees at the Adelanto detention center.[63] The report states that two doctors went so far as stamping their names on the noncitizens' records hanging outside their cells, indicating that they met with each individual detainee, when in reality they had no contact "with 10 of the 14 detainees in disciplinary segregation."[64]

Furthermore, in the four cases observed in Adelanto where the doctors actually spoke with the detainee, the doctor inquired whether the individual was "ok" in English, making no attempts to determine whether the individual actually spoke English.[65] In the report, the inspectors verified that zero of those four detainees spoke or understood English.[66] Even so, the doctors moved on "without any acknowledgement or response from the detainee," satisfied that they had completed their task and cared for their patients.[67] The suicide of an ICE detainee in March 2017 raised similar concerns, but appropriate changes have yet to be made.[68] The immigrants are locked away and

60. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-18-86, MANAGEMENT ALERT – ISSUES REQUIRING ACTION AT THE ADELANTO ICE PROCESSING CENTER IN ADELANTO, CALIFORNIA 2–8 (2018) [hereinafter ADELANTO REPORT]. The Adelanto detention center held the second highest number of individuals as of June 30, 2018. *See Profiling Who ICE Detains – Few Committed Any Crime*, *supra* note 20.

61. ADELANTO REPORT, *supra* note 60, at 2.

62. *See* PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 2011, *supra* note 47, at 183.

63. *See* ADELANTO REPORT, *supra* note 60, at 7.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

overlooked as their mental health deteriorates. Though this report focused on issues at Adelanto, immigration prisons throughout the country experience similar issues.[69] The Supreme Court stated that deportation is not a punishment and immigration detention is civil detention.[70] The reality of ICE detention appears to constitute a form of punishment, as there is no other way to describe these practices other than punitive.[71]

This same report also notes another disturbing trend in the Adelanto detention center particularly dangerous for those with mental health conditions—the overwhelming majority of units in the male wing had "braided bedsheets, referred to as 'nooses' by center staff and detainees, hanging from vents."[72] Various explanations for the nooses are noted in the report.[73] Most concerning, one detainee stated, "I've seen a few attempted suicides using the braided sheets by the vents and then the guards laugh at them and call them 'suicide failures' once they are back from medical."[74] These nooses were noted in weekly deficiency reports beginning in March 2018.[75] Reports show that one man died in March 2017 after he was found hanging from such a noose in his Adelanto cell.[76] Following that completed suicide, at least three additional suicide attempts were reported in Adelanto by hanging, two specifically using

69. A detention officer at York County Prison in Pennsylvania complained that "she'd observed colleagues falsifying log sheets to make it seem as though they were properly monitoring inmates at high risk of suicide." Lawyers also filed a complaint against a Northern California county jail, "claiming that overuse of solitary confinement and generally poor conditions have led to 41 suicide attempts in the past two and a half years." Max Siegelbaum, *Detention Centers, Bracing for Flood of New Arrivals, Are 'Set Up to Fail' Immigrants with Mental Illness*, STAT (Dec. 16, 2016), https://www.statnews.com/2016/12/16/immigrants-mental-health/.

70. *See* Fong Yue Ting v. United States, 149 U.S. 698, 728–30 (1893) (stating that removal proceedings are "in no proper sense a trial and sentence for a crime or offense").

71. The United Nations considers solitary confinement to be "cruel, inhuman or degrading" punishment. *Solitary Confinement*, *supra* note 52.

72. *See* ADELANTO REPORT, *supra* note 60, at 2–3 ("These issues [in the facilities] not only constitute violations of ICE detention standards but also represent significant threats to the safety, rights, and health of detainees.").

73. *See id.* (noting additional explanations such as unfurling the bedsheets to create privacy in the cell and that they sometimes function as clotheslines).

74. *Id.* at 3.

75. *Id.*

76. *Id.* at 4.

bedsheet nooses.[77] Despite these numbers, "local ICE management at Adelanto does not believe it is necessary or a priority to address the braided sheets issue."[78]

These issues are not isolated to the Adelanto detention center.[79] On February 13, 2019, the Office of the Inspector General issued another report highlighting an equally concerning incident seen at an ICE detention center in Newark, NJ.[80] "Interviews with detainees and facility management revealed that an Essex County Department of Corrections guard left a loaded handgun in the facility staff bathroom stall in April 2018."[81] Detainees have access to this bathroom, as cleaning it is part of their job duties.[82] Merely bringing this gun into the bathroom violates ICE standards, as officers must "store all weapons in individual lockers before entering the facility."[83] In reviewing the incident, the facility "did not interview the detainee who found the weapon."[84] It then went on to "[tell] the detainee not to discuss the matter with anyone else" and failed to document "that the detainee found and reported the loaded weapon."[85]

Twenty-three men and women died in ICE facilities during 2016 and 2017.[86] That number remains steady, with a subsequent report putting the number at twenty-two immigrants between 2017 and 2018, though this does not include at least three

77. *Id.*

78. *Id.* at 3.

79. *See* Michaelangelo Conte, *New Board to Review Health Care at Hudson County Jail*, JERSEY J., https://www.nj.com/jjournal-news/2018/11/new_board_to_review_health_car.html (last updated Jan. 29, 2019).

80. *See generally* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., OIG-19-20, ISSUES REQUIRING ACTION AT THE ESSEX COUNTY CORRECTIONAL FACILITY IN NEWARK, NEW JERSEY (2019) (highlighting "serious issues that violate U.S. Immigration and Customs Enforcement's (ICE) 2011 *Performance-Based National Detention Standards*").

81. *Id.* at 3.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Robin Urevich, *Deadly Detention: Why Are Immigrants Dying in ICE Custody?*, CAP. & MAIN (Dec. 20, 2017), https://capitalandmain.com/deadly-detention-why-are-immigrants-dying-in-ice-custody-1220.

reported deaths that have occurred in 2019.[87] Although these numbers do include individuals who died due to unaddressed medical concerns, many of these deaths were suicides.[88]

Under the Obama administration, ICE made changes to improve this dismal situation for detained migrants.[89] Realizing that detaining individuals in a criminal prison setting for civil detention posed significant issues, ICE tried to transition to new buildings that better reflect a civil detention model.[90] They began detaining migrants in "converted hotels . . . , nursing homes, and other residential facilities."[91] ICE successfully reduced the number of detention contracts "from 341 to 255 by 2010" and opened "new facilities in underserved areas."[92] Unfortunately, the Trump administration has reversed course and is instead looking to open more detention space to detain more migrants.[93] The target daily population of detained migrants remained steady at 30,539 from fiscal year 2015 through fiscal year 2017, but that target number then jumped to 51,379 for fiscal year 2018.[94]

A recent report from the Office of the Inspector General also noted a concerning workaround when ICE facilities fail to meet the standard of care they are required to provide migrants.[95]

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87. *See* Lisa Riordan Seville, Hannah Rappleye & Andrew W. Lehren, *22 Immigrants Died in ICE Detention Centers During the Past 2 Years*, NBC NEWS (Jan. 6, 2019, 7:10 AM), https://www.nbcnews.com/politics/immigration/22-immigrants-died-ice-detention-centers-during-past-2-years-n954781.

88. *See* Urevich, *supra* note 86.

89. THOMAS ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 973 (8th ed. 2016).

90. *Id.*

91. *Id.*

92. *Id.*

93. *See* Julia Ainsley & Heidi Przybyla, *Why the Trump Admin Wants More Detention Space for Migrants and Democrats Want a Limit*, NBC NEWS (Feb. 11, 2019, 12:06 PM), https://www.nbcnews.com/politics/immigration/why-ice-wants-more-detention-space-migrants-democrats-want-cap-n970071.

94. U.S. IMMIGRATION & CUSTOMS ENF'T, U.S. DEP'T OF HOMELAND SEC., BUDGET OVERVIEW 14 (2018), https://www.dhs.gov/sites/default/files/publications/ICE%20FY18%20Budget.pdf [hereinafter BUDGET OVERVIEW]. This report has not been updated to reflect the actual average daily count for fiscal years 2017 or 2018.

95. *See generally* OIG 19-18, *supra* note 22 (discussing the waivers ICE issued "to facilities with deficient conditions, seeking to exempt them from complying with certain standards").

Over two-and-a-half years, "ICE paid contractors operating the 106 detention facilities subject to this review more than $3 billion.[96] Despite documentation of *thousands of deficiencies* and *instances of serious harm to detainees that occurred at these detention facilities*, ICE rarely imposed financial penalties."[97] Instead, ICE issued waivers to these private, for-profit companies, allowing the facilities to proceed without consequences in the face of "thousands of deficiencies."[98]

In December 2019, ICE released a new version of its National Detention Standards ("NDS") for state and local facilities.[99] The new NDS eliminated many important requirements regarding detainees' health, including: maintaining current accreditation with the National Commission on Correctional Health Care;[100] requiring health care and medical facilities to be under the direction of a licensed physician;[101] and restricting "'hog-tying, fetal restraints, [and] tight restraints, improperly applied against immigrant detainees."[102] The new standards also alarmingly increase "allowable reasons to place a detainee in solitary confinement," including for refusing medical examination or treatment, while "remov[ing] specific protections for detainees in disciplinary proceedings facing solitary confinement."[103] ICE marketed the new NDS as "streamlin[ing] many of the original requirements and provid[ing] additional requirements to

96. *Id.* at 15.

97. *Id.* (emphasis added).

98. *Id.*

99. *See generally* U.S. Immigration & Customs Enf't, 2019 National Detention Standards for Non-Dedicated Facilities (2019), https://www.ice.gov/doclib/detention-standards/2019/nds2019.pdf [hereinafter 2019 NATIONAL DETENTION STANDARDS] (discussing changes in NDS standards).

100. *See id.* at 111 (stating that facilities "will strive for accreditation" instead of requiring it).

101. *See id.*

102. Eunice Cho, *The Trump Administration Weakens Standards for ICE Detention Facilities*, ACLU (Jan. 14, 2020), https://www.aclu.org/news/immigrants-rights/the-trump-administration-weakens-standards-for-ice-detention-facilities/?initms_aff=nat&initms_chan=soc&utm_medium=soc&initms=200114_fb&utm_source=fb&utm_campaign=&utm_content=200114&ms_aff=nat&ms_chan=soc&ms=200114_fb.

103. *Id.*; *see also* 2019 NATIONAL DETENTION STANDARDS, *supra* note 99, at 53.

account for important changes in relevant law, policy, and practice."[104] Immigrant advocates largely decry the new NDS, arguing that it "weakens critical protections and lowers oversight requirements" in local and state jails and prison housing immigrant detainees.[105] Instead of moving to provide greater protections for mentally ill detainees, ICE is loosening standards, ultimately making standard detention more dangerous for this vulnerable group.

ICE is not capable of providing a basic level of care or meeting the basic needs of mentally ill migrants, arguably the most vulnerable population within their detention centers. This is unacceptable; these individuals deserve access to the mental health care ICE is mandated to provide, including therapists and psychiatrists who can adequately treat their health needs instead of solitary confinement as a last resort. Something must be done to better protect this group by giving the government the tools and the structure necessary to care for this group of individuals.

II. THE HISTORY OF THE UNITED STATES AND THE MENTALLY ILL MIGRANT

The history of immigration law shows progress in the understanding and treatment of mentally ill migrants. The language of the laws has been updated and refreshed to reflect the changing vocabulary used to describe the mentally ill.[106] This section will explore the evolution of immigration laws surrounding mentally ill migrants as well as the newly enacted procedures

104. *Id.* at i.

105. Cho, *supra* note 102; *see* Isabela Dias, *ICE Quietly Lowers (Already Low) Standards at Some Immigrant Detention Facilities*, TEX. OBSERVER (Jan. 21, 2020, 5:32 PM), https://www.texasobserver.org/ice-immigrant-detention-low-standards/; Peter Wade, *ICE Dangerously Lowered Its Standards for Immigration Detention Centers and Hoped You Didn't Notice*, ROLLING STONE (Jan. 22, 2020, 4:03 PM), https://www.rollingstone.com/politics/politics-news/ice-lowered-standards-for-immigrant-detention-centers-941398/.

106. *See generally* James E. Moore, *Mental Illness Exclusions in United States Immigration Procedure*, 3 CASE W. RES. J. INT'L L. 71 (1970) (discussing the history of the treatment of mental illness in relation to immigration laws).

created to protect mentally ill migrants during their removal proceedings.

A. *The Evolution of Immigration Laws Regarding the Mentally Ill*

Mistreating mentally ill migrants is nothing new to the United States and it is important to understand the context and progression of immigration laws regarding mental illness.[107] Legislators have slowly updated the language and terminology used as society's understanding and acceptance of mental illness has progressed.[108] Terminology aside, the laws began by broadly excluding individuals with illnesses that were misunderstood and even feared.[109]

The first laws governing entry to the United States were passed in 1882 and "excluded 'all idiots' and 'lunatics.'"[110] This ground of exclusion was then expanded in 1903 to include "epileptics, persons who have been insane within 5 years previous, and persons who have had two or more attacks of insanity at any time previously."[111] Subsequent versions banned "imbeciles," the "feeble-minded,"[112] and, eventually, "persons who have had more than one attack of insanity at any time."[113] Some of these bans, such as one on "constitutional psychopathic inferiority,"[114] remained in our laws until as late as 1952, having been included in the Immigration Act of 1924 and equated with "loathsome or dangerous contagious disease[s]," reflecting

107. *See id.* at 73–79.

108. *See id.* at 76.

109. *Id.* at 73.

110. *Id.*

111. *Id.*

112. *Id.* The term "feeble-minded" is often tied to the eugenics movement and referenced "individuals exhibiting a lack of productivity or other behaviours viewed as 'backward.'" Wendy Kline, *Feeble-Mindedness*, EUGENICS ARCHIVE (Apr. 29, 2014), http://eugenicsarchive.ca/discover/tree/535eebe87095aa0000000227. Inspectors at Ellis Island had immigrants assemble a wooden puzzle as a test for feeble-mindedness and denied entry to those who could not complete the puzzle. Adam Cohen, *This Jigsaw Puzzle Was Given to Ellis Island Immigrants to Test Their Intelligence*, SMITHSONIAN MAG. (May 2017), https://www.smithsonianmag.com/history/puzzle-given-ellis-island-immigrants-test-intelligence-180962779/.

113. Moore, *supra* note 106, at 74.

114. *Id.* at 73.

society's views at the time that mental illness was a "loathsome disease."[115] There was also a blanket ban on individuals whose mental incapacity "may affect the ability . . . to earn a living."[116]

The Immigration and Nationality Act of 1952 finally removed the term "imbecile,"[117] though it kept the ban on the feeble-minded,[118] and changed "constitutional psychopathic personality" to "psychopathic personality."[119] This caused additional issues in interpretation, eventually allowing its use as a broad term to also include "sexual deviates," which, at the time, was Congress's way to exclude "homosexuals and sex perverts" as homosexuality was considered a mental illness at the time.[120]

In the Immigration and Nationality Act of 1965, among other changes, "mentally retarded" replaced the exclusionary ground against the "feeble-minded."[121] This change was regarded as serious progress because "mental retardation" was based upon intelligence quotient, developmental history, and adaptive behavioral capacity.[122] This Act also provided the first opportunity for the mentally ill to seek a waiver of this ground of inadmissibility.[123]

The legislation surrounding mentally ill migrants has continued to evolve as society learns more about mental illness and its proper treatment. Some may look back at this misunderstanding of an entire class of people with incredulity,[124] yet we

115. *See* Immigration Act of 1924, Pub. L. No. 68-139, § 26, 43 Stat. 153, 156 (1924) (prior to 1952 amendment) ("That it shall be unlawful for any person . . . entering the United States from foreign contiguous territory . . . to bring to the United States from a foreign country . . . any alien afflicted with idiocy, insanity, imbecility, feeble-mindedness, epilepsy, constitutional psychopathic inferiority, chronic alcoholism, tuberculosis in any form, or a loathsome or dangerous contagious disease.").

116. Moore, *supra* note 106, at 73.

117. *Id.* at 75.

118. *Id.* at 76.

119. *Id.* at 75.

120. *Id.*

121. *Id.* at 76.

122. *Id.*

123. *Id.* at 77.

124. This incredulity may be misplaced, however, when considering that these exclusionary grounds were in effect during the same time period as the Jim Crow laws. *See* Gabriel J. Chin &

should applaud the advancements we have made in psychology. Modern advancements have led us to better understand the complexities of mental illness and, as a society, the United States has evolved to better protect those afflicted with mental illness even in our day-to-day vocabulary.

Today's immigration laws have evolved, now containing health-related grounds of inadmissibility if a person "[has] a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior."[125] It seems that the immigration laws now show a better understanding that a diagnosis for a mental illness alone does not make an individual dangerous; it only seeks to keep out those whose mental illnesses has been coupled with dangerous behavior.[126]

But has the United States really come that far in its treatment of mentally ill migrants? Though the language in the immigration laws has evolved, the way in which the mentally ill are treated in detention has not progressed.[127] Instead of receiving the psychiatric care they deserve, individuals are locked away due to a lack of resources.[128] In the future, students learning about the imprisonment and detention of mentally ill migrants and about the use of solitary confinement on the mentally ill due to a lack of resources[129] may be just as appalled at how barbaric this treatment sounds as students in 2019 feel looking back at the original 1924 exclusionary grounds.

Daniel K. Tu, *Comprehensive Immigration Reform in the Jim Crow Era: Chinese Exclusion and the McCreary Act of 1893*, 23 ASIAN AM. L. J. 39, 40 (2016) (describing how "[f]ederal immigration law, like naturalization law, was race-conscious" during the Jim Crow era). The United States has a sordid history in its treatment of those seen as "different" from the founding fathers. *See id.*

125. 8 U.S.C. § 1182(a)(1)(A)(iii)(II) (2018).

126. *See id.*

127. *See* Halvorsen, *supra* note 50, at 209–10.

128. *See, e.g.*, *id.* at 209.

129. *See supra* Part I.

B. *Determining Competency, or Lack Thereof, During Immigration Proceedings*

Another important issue affecting mentally ill migrants is the process to determine competency of individuals in removal proceedings. Until recently, there was no established procedure to determine a respondent's competency.[130] In fact, the regulations had no mechanism for this process, meaning that Immigration Judges had no basis or authority to do anything when confronted with a respondent who was of questionable competency.[131] The Immigration and Nationality Act stated that the Attorney General could implement safeguards once incompetency was determined,[132] but provided no guidance as to how to make that initial determination.

In general, the respondent in immigration proceedings, or her representative, carried the burden to raise issues of competency; there was no burden on the Immigration Judge to order an evaluation.[133] This contrasts with criminal procedure, which states:

> [T]he defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and

130. *See In re* M-A-M-, 25 I. & N. Dec. 474, 477 (B.I.A. 2011) (describing the competency procedure for migrants).

131. AM. IMMIGRATION COUNCIL, REPRESENTING CLIENTS WITH MENTAL COMPETENCY ISSUES UNDER *MATTER OF M-A-M-* 1 (2011), https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/Mental-Competency-Issues.pdf ("Until recently, attorneys and immigration judges had limited guidance about safeguards that might be available to ensure a fair hearing in immigration court for noncitizens with mental competency issues.").

132. 8 U.S.C. § 1229a(b)(3) (2018).

133. *See* Munoz-Monsalve v. Mukasey, 551 F.3d 1, 6 (1st Cir. 2008).

> consequences of the proceedings against him or to assist properly in his defense.[134]

In 2012 in *Matter of M-A-M-*, the Board of Immigration Appeals ("Board") balanced immigrants' Due Process rights against the agency's needs to form a process for Immigration Judges to assess an immigrant's mental competency.[135] The Board stated that in order to satisfy the fairness requirement owed to noncitizens under the Fifth Amendment, "Immigration Judges must accord aliens the specific 'rights and privileges' prescribed in the Act,"[136] including the right to legal representation "at no expense to the Government"[137] and "a reasonable opportunity to examine the evidence against the alien" and "to cross-examine witnesses" presented by the government."[138] The Board went on to say that the test for sufficient mental competency in this setting is "whether [the respondent] has a rational and factual understanding of the nature and object of the proceedings, can consult with the attorney or representative if there is one, and

134. 18 U.S.C. § 4241(a) (2018).

135. *See generally In re M-A-M-*, 25 I. & N. Dec. at 474–75 (setting forth a framework "to determine whether a respondent is sufficiently competent to proceed and whether the application of safeguards is warranted"). The Board explains that under the Fifth Amendment, noncitizens are entitled to due process of law, including "the right to a full and fair hearing." *Id.* at 479; *see also* Shaughnessy v. United States, 345 U.S. 206, 228 (1953) ("The only limitation is that [Congress] may not . . . authoriz[e] United States officers to take without due process of law the life, the liberty or the property of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with fair notice of the charges.").

136. *In re M-A-M-*, 25 I. & N. Dec. at 479.

137. *Id.* (citing 8 U.S.C. §§ 1229a(b)(4)(A), 1362 (2018)). Unlike criminal law, noncitizens in immigration proceedings have no right to court-appointed representation and must seek counsel on their own. *See* Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, AM. IMMIGR. COUNCIL (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court. Proceedings may, and often do, continue with Respondents representing themselves *pro se*, even in situations where the Respondent is a young child. *See, e.g.*, Christina Jewett & Shefali Luthra, *Immigrant Toddlers Ordered to Appear in Court Alone*, USA TODAY, https://www.usatoday.com/story/news/nation/2018/06/27/immigrant-children-deportation-court/739205002/ (last updated July 2, 2018, 2:47 PM); Dan MacGuill, *Do Children in Immigration Proceedings Have No Right to Court-Appointed Representation?*, SNOPES (June 29, 2018), https://www.snopes.com/fact-check/children-immigration-court-deportation-attorney/.

138. 8 U.S.C. § 1229(b)(4)(B) (2018).

has a reasonable opportunity to examine and present evidence and cross-examine witnesses."[139]

The opinion includes various indicia of incompetency the Immigration Judges might encounter throughout the immigration proceedings, including, *inter alia*: difficulties comprehending and answering questions; high levels of distractibility; evidence in the record indicating mental illness or incompetency; proof of previous applications for disability benefits; and the testimony of individuals close to the respondent.[140] If there is any indication that the respondent may be mentally incompetent, the Immigration Judge has discretion to use one or more procedures to determine whether the respondent can participate in proceedings with the use of additional safeguards.[141] Therefore, if the respondent's competency concerns the judge, there is no requirement that the respondent undergo an actual psychological evaluation to test for competency.[142]

If the Immigration Judge finds the respondent to lack the mental competency to continue the hearing, she "shall prescribe safeguards to protect the rights and privileges of the alien."[143] Adequate safeguards include, *inter alia*, refusal to accept an unrepresented respondent's concession of removability,[144] personal service of the Notice to Appear,[145] allowing the attorney, friends, or family members "to appear on behalf of the

139. *In re M-A-M-*, 25 I. & N. Dec. at 479. It is important to note that the Rules of Evidence do not apply to immigration proceedings; instead, "[t]he general rule with respect to evidence in immigration proceedings favors admissibility as long as the evidence is shown to be probative of relevant matters and its use is fundamentally fair so as not to deprive the alien of due process of law." DEP'T OF JUSTICE, EOIR IJ BENCHBOOK, EVIDENCE GUIDE, 3, https://www.justice.gov/eoir/page/file/988046/download.

140. *In re M-A-M-*, 25 I. & N. Dec. at 479–80.

141. *Id.* at 480–82 (listing potential measures to be taken including the use of simple and direct questions, asking whether the Respondent takes medication for mental illness, a mental competency evaluation, the assistance of friends or family members, or additional administrative options to assist the Respondent in obtaining legal counsel).

142. *See id.* (noting that Immigration Judges have discretion on which safeguards are appropriate for those who may be incompetent).

143. 8 U.S.C. § 1229a(b)(3) (2018).

144. *See* 8 C.F.R. § 1240.10(c) (2019).

145. 8 U.S.C. § 1229(a)(1) (2018).

respondent,"[146] as well as the assistance of the Immigration Judge in "the development of the record."[147] While various courts have found that migrants' due process rights were not violated when represented by counsel or family, there remains a question whether there are any adequate safeguards for the Immigration Judge to employ in cases of unrepresented migrants found to be mentally incompetent.[148]

Litigation addressed this exact issue in a Ninth Circuit class action suit in 2013: how to handle removal proceedings for mentally incompetent *pro se* respondents.[149] The class of plaintiffs included "detainees with serious mental disabilities . . . in California, Arizona, and Washington."[150] The suit alleged Due Process violations due to their forced participation in removal proceedings despite their disabilities.[151] The named plaintiff, José Antonio Franco González, languished in detention for nearly five years as he struggled to find legal representation due to his intellectual disability leaving him with the "cognitive ability of a two-year-old."[152] The Immigration Judge acknowledged that Franco-Gonzalez could not adequately present his case, but there were no additional safeguards in the Immigration Judge's toolbox to allow him to help José.[153] The Judge ordered that all class members be afforded "Qualified Representatives" to handle their immigration matters.[154] In future cases, Immigration Judges must consider whether respondents can

146. 8 C.F.R. §§ 1240.4, 1240.43 (2019).

147. *In re* J-F-F-, 23 I. & N. Dec. 912, 922 (B.I.A. 2006).

148. *See supra* Part V.

149. *See generally* Franco-Gonzalez v. Holder, No. CV 10-02211 DMG (DTBx), 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013) (demonstrating how cases are handled involving *pro se* respondents in immigration proceedings).

150. First Amended Class-Action Complaint for Declaratory and Injunctive Relief and Petition for Writ of Habeus Corpus at 7, Franco-Gonzalez v. Holder, No. 10-CV-02211 DMG (DTB) (C.D. Cal. Aug. 2, 2010) [hereinafter First Amended Complaint].

151. *Id.* at 1–3.

152. *See* Christie Thompson, *Finally, Mentally Ill Immigrants Are Getting Access to Lawyers*, VICE (July 6, 2017, 11:36 AM), https://www.vice.com/en_us/article/vbmvka/finally-mentally-ill-immigrants-are-getting-access-to-lawyers; *see also* First Amended Complaint, *supra* note 150, at 10–11.

153. *Franco-Gonzalez*, 2013 WL 3674492, at *8–9.

154. *Id.* at *15.

"meaningfully participate in the proceeding" as outlined in *Matter of M-A-M-*.[155] The Immigration Judge must also ensure that the respondent

> [has] sufficient present ability to: (a) exercise the rights [outlined in *Matter of M-A-M-*]; (b) make informed decisions about whether to waive the rights listed above; (c) respond to the allegations and charges in the proceeding; (d) present information and evidence relevant to eligibility for relief; and (e) act upon instructions and information presented by the Immigration Judge and government counsel.[156]

If the respondent cannot do any of the things required by these provisions, the respondent cannot represent himself in his removal proceedings.[157]

This order originally only applied to three states, but "[a]s of March 2017, 21 immigration courts across the country were operating a federal program that provides lawyers" to *pro se* respondents deemed mentally incompetent to represent themselves.[158] Though this is a significant step in protecting the rights of the mentally ill, this is a relatively small step forward, as there are currently sixty-four immigration courts nationwide.[159]

Courts are increasingly finding that additional safeguards and protections are necessary for mentally ill migrants due to their unique needs during removal proceedings. Legislators should take this progress one step further to also protect the mental health of this same group while in ICE custody.

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155. *In re* M-A-M-, 25 I. & N. Dec. 474, 482 (B.I.A. 2011).

156. *The* Franco *Pro Se Competency Standard*, ACLU S. CAL., https://www.aclusocal.org/sites/default/files/wp-content/uploads/2015/06/Franco-Pro-Se-Competency-Standard.pdf (last visited Jan. 24, 2020).

157. *Id.* ("A respondent is incompetent to represent him- or herself in an immigration proceeding if he or she, because of a mental disorder . . . is unable to satisfy any of the provisions above.").

158. *See* Thompson, *supra* note 152.

159. *See EOIR Immigration Court Listing*, U.S. DEP'T JUST., https://www.justice.gov/eoir/eoir-immigration-court-listing (last updated Jan. 23, 2020).

III. THE DETENTION OF MIGRANTS AND THE MENTALLY ILL MIGRANT

A. *Overview*

The number of people claiming a credible fear of asylum after either crossing the border illegally or presenting themselves at a port of entry is rising – in 2018, nearly 93,000 migrants passed their credible fear interviews,[160] "up from nearly 56,000 migrants" in 2017.[161] So when does the United States government detain noncitizens, and why?

The Immigration and Nationalities Act[162] treats individuals differently depending on whether they are arriving at the border and seeking admission or whether they were apprehended in the United States having already been admitted.[163]

160. Yeganeh Torbati et al., *U.S. Will Assign Dozens of Border Agents to Migrant Asylum Interviews*, THOMSON REUTERS (May 9, 2019, 6:09 PM), https://www.reuters.com/article/us-usa-immigration/us-will-assign-dozens-of-border-agents-to-migrant-asylum-interviews-idUSKCN1SF2N0. Upon apprehension at the border, migrants can be removed without a hearing "unless the alien indicates either an intention to apply for asylum or a fear of persecution." BILL ONG HING ET AL., IMMIGRATION LAW AND SOCIAL JUSTICE 869 (5th ed. 2018). After stating their fear, the migrant is then "referred to an asylum officer for a credible fear screening. The function of credible fear screening is to quickly identify potentially meritorious claims to protection and to resolve frivolous ones with dispatch. If an alien passes this threshold-screening standard, the claim for protection will be further examined by an immigration judge." *Id.* at 869–70.

161. Ron Nixon, *Asylum Claims Jump Despite Trump's Attempt to Limit Immigration*, N.Y. TIMES (Dec. 10, 2018), https://www.nytimes.com/2018/12/10/us/politics/trump-asylum-border-.html (adding that "[n]early 60 percent of all foreigners asking for asylum were people in families.").

162. The following analysis reflects the statutory framework of immigration detention, though it is not conceding the legitimacy of things like mandatory detention as there are constitutional concerns about such issues.

163. Historically, immigration law has treated arriving noncitizens differently than noncitizens already present in the United States, which explains the difference seen here in the detention of individuals. It is generally assumed that arriving aliens do not have as many ties to this country as noncitizens present in the United States, and so stricter standards are used for arriving aliens as reflected in the different procedure for detention of the two groups. *See generally* ALEINIKOFF ET AL., *supra* note 89 (discussing immigration and nationality law in the legal classroom).

Arriving noncitizens "shall be detained"[164] but can be paroled at the discretion of the Attorney General for various reasons.[165] This means that the Department of Homeland Security ("DHS") has discretion to decide whether an arriving migrant will be detained or released upon entry.[166] There is no judicial review of this process and the decision is not made by an Immigration Judge.[167]

On the other hand, noncitizens who have already entered the United States and are not seeking admission are subject to a different set of rules. "Immigration law enforcement officers have broad authority to detain migrants suspected of violating immigration law."[168] They can interrogate anyone they have reasonable suspicion is a noncitizen regarding their "right to be or to remain in the United States."[169] They can also issue administrative warrants if they have "reason to believe" the individual is in violation of immigration law and "is likely to escape before a warrant can be obtained."[170] From there, ICE decides whether the individual will be detained, released on their own recognizance, or released on bond.[171]

The criteria examined to determine whether the noncitizen will be released on their own recognizance, or whether they will be detained, include a flight risk analysis as well as a determination as to the possible danger the noncitizen poses to the

164. 8 C.F.R. § 235.3 (2019).

165. 8 U.S.C. § 1182 (2018) ("on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States"); *see also* 8 C.F.R. § 212.5(b) (2019) (enumerating groups of individuals eligible for parole such as individuals with "serious medical conditions" that may be worsened by prolonged detention, pregnant women, juveniles, witnesses in proceedings in the United States, and "aliens whose continued detention is not in the public interest as determined by . . . officials").

166. It is important to note that a special process has been created for detained "juveniles" due to concerns about the children's safety, which is at the heart of the issue discussed in this Note.

167. *See* 8 C.F.R. § 236.1(c)(11) (2019); 8 C.F.R. § 1003.19(h)(2)(i)(B) (2019); *see also* HING ET AL., *supra* note 160, at 609.

168. CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW 95 (2015).

169. 8 U.S.C. § 1357(a)(1) (2018); *see also* GARCÍA HERNÁNDEZ, *supra* note 168, at 95.

170. 8 U.S.C. § 1357(a)(2) (2018); 8 C.F.R. § 287.8(c)(2) (2019); *see also* GARCÍA HERNÁNDEZ, *supra* note 168, at 96.

171. 8 U.S.C. § 1252(a)(3) (2018); 8 U.S.C. § 1226(e) (2018); 8 C.F.R. §1103.19(h)(2)(i)(B) (2019).

community.[172] This analysis reflects the main policy reasons for detaining individuals who have been living in the United States. While this decision is made by an ICE field office director, unlike arriving noncitizens, here the noncitizen may ask an Immigration Judge for "bond redetermination"[173] which can then be reviewed by the Board of Immigration Appeals.[174] While the minimum bond is $1,500, "the average immigration bond is $5,941," though other jurisdictions, such as New York, have average bonds as high as $9,831.[175]

Additionally, migrants, including those living in the United States as lawful permanent residents, "can be placed in 'mandatory detention' with no right to a bond hearing before an Immigration Judge or judicial body."[176] In these cases, "discretionary assessments of dangerousness or flight risk are largely irrelevant."[177] The mandatory detention can be triggered by "minor, non-violent crimes (such as receiving stolen property) committed years ago" as well as more serious crimes.[178] The mandatory detention provisions were added to the INA in 1996 and require the detention of "any migrant whom there is reason to believe is removable for almost every crime-based reason, including crimes involving moral turpitude, controlled substance offenses, and aggravated felonies."[179] The Immigration Judge "cannot consider releasing someone" subject to mandatory detention.[180] This process of mandatory detention has been highly

172. *In re* Guerra, 24 I. & N. Dec. 37, 38 (B.I.A. 2006).

173. 8 C.F.R. § 1003.19(b) (2019); 8 C.F.R. § 1236.1(c)(6)(iv) (2019); *see also* GARCÍA HERNÁNDEZ, *supra* note 168, at 97 ("Immigration Judges have independent authority to decide whether continued determination is appropriate or required, and, if not, setting a bond amount.").

174. *See* Rebecca Scholtz & Michelle Mendez, *Practitioner's Guide: Obtaining Release from Immigration Detention* 31–35, CATH. LEGAL IMMIGR. NETWORK, INC., http://immigrationcourtside.com/wp-content/uploads/2018/06/A-Guide-to-Obtaining-Release-from-Immigration-Detention.pdf (last updated May 2018).

175. HING ET AL., *supra* note 160, at 609.

176. *Id.* at 610.

177. GARCÍA HERNÁNDEZ, *supra* note 168, at 99.

178. HING ET AL., *supra* note 160, at 611.

179. GARCÍA HERNÁNDEZ, *supra* note 168, at 99–100.

180. *Id.* at 100.

criticized, as "at least 117 people have been held in mandatory detention for crimes that were ultimately determined not to be deportable offenses."[181] Equally concerning, "322 individuals . . . with potential claims for U.S. citizenship" were subject to mandatory detention in 2007.[182]

On a different note, ICE is increasingly using "alternatives to detention" ("ATDs") to cut down on the cost of detaining migrants.[183] ATDs currently include "enhanced supervision, periodic reporting, and usually either telephone or ankle bracelets (GPS monitoring)."[184] This reflects a lesser intrusion on liberty than detention, although there are also concerns about the corporate profiteering and whether these new technologies are truly effective.[185] Considering the countless problems occurring in immigration detention, ATDs should be used as often as possible when release is not an option. But when the use of ATDs is not possible for a mentally ill migrant and he or she must be detained, the government needs an alternative to standard detention.

B. *Unique Risk of Indefinite Detention for the Mentally Ill*

Mentally ill immigrants face a unique risk of indefinite detention when their illness causes them to behave violently or appear to affect the public's safety. There is an inherent tension when considering these constitutional standards governing detention. It is well-settled that deportation is a civil sanction, not

181. HING ET AL., *supra* note 160, at 611.

182. *Id.* Individuals born to U.S. citizens outside the U.S. are not always granted citizenship immediately; they must apply for it. Many individuals do not realize they qualify for citizenship and can end up detained as immigrants, as described here. Additionally, ICE does not always believe individuals who claim U.S. citizenship upon apprehension and, because they are detained, they are unable to access their birth certificate to prove their claim. *Id.*

183. ALEINIKOFF ET AL., *supra* note 89, at 977; *see also* Colleen Long et al., *ICE Issuing More Immigrant Ankle Monitors. But Do They Work?*, ASSOCIATED PRESS (Aug. 25, 2018), https://www.apnews.com/dfcdc6302e154753a526c04706df45d6 (stating that there were nearly 84,500 individuals participating in ATDs, with 45 percent of those involving GPS monitors).

184. *See* ALEINIKOFF ET AL., *supra* note 89, at 963.

185. *See* Long et al., *supra* note 183 (citing concerns that individuals assigned ankle monitors could just "cut those things off" while also stating that only five percent of those involved in the intensive supervision program in 2012 "absconded").

criminal punishment,[186] and detention is necessary "to prevent individuals from fleeing or endangering public safety."[187] But even this has its limits, as "freedom from physical restraint 'lies at the heart of the liberty that [the Due Process] Clause protects,' and if the circumstances of detention become excessive in relation to these noncriminal purposes, then detention may be improperly punitive and therefore unconstitutional."[188]

In *Zadvydas v. Davis,* the Supreme Court stated that if a noncitizen is subject to detention following an order of removal, whether they entered illegally and were later apprehended or they were inspected and admitted and later placed in removal proceedings, the noncitizen is entitled to a bond hearing after six months.[189] This does not guarantee release from detention, but instead allows the individual an opportunity to make an argument as to why he or she merits release, as long as the individual was already present inside the United States.[190] An analysis follows as to whether continued detention serves any purpose. But this does not remove the possibility of indefinite detention because "an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future."[191] For example, the individuals at the heart of the decision in *Zadvydas* both had removal orders in their names, but the government was unable to find a country willing to accept them.[192] It was impossible to carry out their deportations and both individuals were subject to indefinite detention in a U.S. detention center.[193]

However, the Supreme Court separately decided that if a noncitizen already inside the United States is subject to mandatory detention while in removal proceedings, the noncitizen has

186. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (stating that removal proceedings are "in no proper sense a trial or sentence for a crime or offense").

187. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44 (2010).

188. *Id.* (quoting Zadvydas v. Davis, 533 U.S. 678, 682 (2001)).

189. *Zadvydas*, 533 U.S. at 701.

190. *See id.*

191. *Id.*

192. *See id.* at 684–86.

193. *See id.*

no right to a bond hearing.[194] This includes lawful permanent residents while they are in removal proceedings.[195] To support its conclusion, the Court stated, "in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[196] This decision created tension with the previous decision in *Zadvydas*—individuals subject to an order of removal but unable to be returned to their country are afforded more protections than individuals pending a final decision on their removability.[197]

The Supreme Court approached this issue most recently in *Jennings v. Rodriguez*, ruling that if an arriving noncitizen is detained and subject to mandatory detention before and throughout their proceedings, the noncitizen has no right to a bond hearing.[198] The Court concluded this by way of a statutory analysis while ultimately avoiding the constitutional concerns raised by *Jennings*, remanding the case for further consideration.[199]

Aside from the general constitutional concerns outlined here, these decisions complicate the detention of mentally ill migrants specifically. The Court "upheld preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections," clarifying that the "dangerousness rationale be accompanied by

194. *See* Demore v. Kim, 538 U.S. 510, 528–31 (2003).

195. *See id.* at 532.

196. *Id.* at 521 (quoting Mathews v. Diaz, 426 U.S. 67, 79–80 (1976)).

197. *See Zadvydas*, 533 U.S. at 701.

198. This case considered applicants for admission under 8 U.S.C. § 1225(b)(1) (2018) and 8 U.S.C. § 1225(b)(2), "aliens initially determined to be inadmissible due to fraud, misrepresentation, or lack of valid documentation," and "other aliens designated by the Attorney General in his discretion," who claim a fear of returning to his or her home country and is pending further consideration. Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018).

199. *Id.* at 851 ("Because the Court of Appeals erroneously concluded that periodic bond hearings are required under the immigration provisions at issue here, it had no occasion to consider respondents' constitutional arguments on their merits. Consistent with our role . . . we do not reach those arguments.").

some other special circumstance, such as mental illness, that helps to create the danger."[200]

Following the decision in *Zadvydas*, ICE updated its regulations to include a provision specific to "specially dangerous" migrants:

> [T]he Service shall continue to detain an alien if the release of the alien would pose a special danger to the public, because . . . [d]ue to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is like to engage in acts of violence in the future; and . . . [n]o conditions of release can reasonably be expected to ensure the safety of the public.[201]

Using the language laid out in *Zadvydas*, ICE effectively allows the indefinite detention of a sub-class of mentally ill migrants under the guise of protecting the public.[202]

The courts have differing opinions as to whether this regulation should be upheld. The Fifth Circuit[203] and Ninth Circuit[204] emphatically stated that ICE cannot use this portion of *Zadvydas* to justify the indefinite detention of mentally ill migrants; however, the Tenth Circuit upheld this provision, giving *Chevron* deference to the agency and stating that the regulation was sufficiently tailored to a small group of migrants "whose release would particularly endanger the public's health or safety, or the nation's foreign relations."[205]

This is problematic because, as already discussed, mentally ill migrants lack adequate care and specialized treatment and face unique difficulties in immigration detention.[206] It would follow that those who suffer from mental illnesses that cause behaviors

200. *Zadvydas*, 533 U.S. at 691.

201. 8 C.F.R. § 241.14(f)(1)(ii) (2019); 8 C.F.R. § 241.14(f)(1)(iii) (2019).

202. *See Zadvydas*, 533 U.S. at 690–91.

203. Tran v. Mukasey, 515 F.3d 478, 483 (5th Cir. 2008).

204. Thai v. Ashcroft, 366 F.3d 790, 798 (9th Cir. 2004).

205. Hernandez-Carrera v. Carlson, 547 F.3d 1237, 1253 (10th Cir. 2008).

206. *See* SCHRIRO, *supra* note 21, at 26–27.

that would endanger the public, as described here, would be the same individuals for whom ICE cannot care and would instead put in solitary confinement to minimize fallout. While the safety of the public is of the utmost concern, the safety and well-being of the detained migrant should also be recognized and considered, and measures should be taken to protect both the public and the migrant.

IV. THE FLORES AGREEMENT: PROTECTING THE UNACCOMPANIED ALIEN CHILDREN

Additional protections are necessary to better protect mentally ill migrants subject to detention by ICE. First, currently detained migrants deserve to be detained in safer facilities that are sufficiently equipped to handle their needs, staffed with workers trained to handle the myriad of situations that arise when caring for the mentally ill. Second, mentally ill immigrants deserve a psychological evaluation in order to determine their mental competency or ability to represent themselves in immigration court, not a decision following a few questions, well-intentioned though they may be, posed by Immigration Judges. Finally, until the courts agree that even "specially dangerous" migrants cannot be held indefinitely, those that are detained for any length of time deserve a safer environment and a safe space to work toward rehabilitation and eventual release.

A model for these protections already exists—the system in place for UACs following the *Flores* Agreement.[207] By following the guide already in place under the Office of Refugee Resettlement, the United States can better protect a vulnerable group of its society. The *Flores* Agreement has faced many challenges in court by both the Obama and Trump Administrations.[208] Recently, the Trump Administration has tried to work around the agreement, going so far as expressing a desire to withdraw from

207. *See* Veronica Stracqualursi et al., *What Is the Flores Settlement that the Trump Administration Has Moved to End?*, CNN POL., https://www.cnn.com/2019/08/21/politics/what-is-flores-settlement/index.html (last updated Aug. 23, 2019, 1:36 PM).

208. *See* Phifer, *supra* note 11.

it.[209] But the twenty-two-year-old agreement still stands and serves as a guide to protecting the least among us, including the mentally ill migrant.

A. *The Problem Faced by UACS Prior to Flores*

The mentally ill are not the first group to experience inadequate protections in detention, and face steeper risks while detained than the general population. UACs, before they were recognized and protected as their own unique group, faced arguably better conditions than mentally ill migrants currently in detention, though they were able to win a class-action suit that would spur the creation of an entire new system full of procedures meant to better protect the children.[210]

In 1985, Jenny Lisette Flores, a fifteen-year-old girl and the face of the class action suit, fled El Salvador for the safety of the United States to live with her aunt, but was apprehended at the border by the former Immigration and Nationalities Service ("INS").[211] She wanted to be released to the custody of her aunt, but at that time regulations restricted such a release because her aunt was considered to be a "third-party adult," and the INS preferred release to a parent or legal guardian.[212] As such, Jenny was detained by the INS, "handcuffed, strip searched," and placed in a detention facility that "provided few opportunities for recreation, had no educational programs, and [where] some of the minors had to share bathrooms and sleeping quarters with unrelated adults of both sexes."[213] Jenny had no criminal conviction and was not considered to be a flight risk or a danger to herself or the public, but was nonetheless detained for two

209. *See* Katie Reilly & Madeleine Carlisle, *The Trump Administration's Move to End Rule Limiting Detention of Migrant Children Rejected in Court*, TIME, https://time.com/5657381/trump-administration-flores-agreement-migrant-children/ (last updated Sept. 30, 2019, 1:16 PM).

210. *See generally* Lisa Rodriquez Navarro, *An Analysis of Treatment of Unaccompanied Immigrant and Refugee Children in INS Detention and Other Forms of Institutionalized Custody*, 19 CHICANA/O LATINA/O L. REV. 589 (1998) (discussing the treatment of unaccompanied immigrant and refugee children in INS detention).

211. *See id.* at 596–97.

212. *Id.*

213. *See id.*

months.[214] Jenny and the others who joined her class action eventually reached a settlement with the federal government, creating the *Flores* Agreement to better protect unaccompanied alien minors.[215]

B. *The Solution*

Three specific requirements for the INS arose from this agreement:

> [T]o: (1) ensure the prompt release of children from immigration detention; (2) place children for whom release is pending, or for whom no release option is available, in the 'least restrictive' setting appropriate to the age and special needs of minors; and (3) implement standards relating to care and treatment of children in U.S. immigration detention.[216]

Though the rollout of these new requirements did not originally go as smoothly as planned,[217] once the INS was absorbed by the Department of Homeland Security in 2003,[218] the agreement was finally put into action. After the absorption, "the former INS functions that pertain[ed] to the custody of minors were transferred to the Director of [the Office of Refugee Resettlement]" ("ORR") where they remain today.[219] Though the Trump Administration has recently attempted to amend and even withdraw from the *Flores* Agreement in order to

214. *See id.*

215. *See* MATTHEW SUSSIS, CTR. FOR IMMIGRATION STUDIES, THE HISTORY OF THE FLORES SETTLEMENT 3–5 (2019), https://cis.org/Report/History-Flores-Settlement.

216. Jessica G. Taverna, *Did the Government Finally Get It Right? An Analysis of the Former INS, the Office of Refugee Resettlement and Unaccompanied Minor Aliens' Due Process Rights*, 12 WM. & MARY BILL RTS. J. 939, 953 (2004).

217. *See id.* at 954 (noting inconsistent applications of the *Flores* agreement).

218. *Id.* at 965–66 (explaining the new structure of DHS and ORR).

219. *Id.* at 966.

indefinitely detain immigrant families,[220] the three standards listed above remain in place with regard to UACs.

Years later, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, ("TVPRA"), which mandated that minors be "placed in the least restrictive setting that is in the best interests of the child"[221] while extending additional protections to UACs.[222]

Under the custody of the ORR, UACs now enjoy numerous protections and the facilities housing UACs must comply with the ORR's policies and procedures. The ORR works to release the children as quickly as possible to a qualified and thoroughly assessed sponsor who will take responsibility for the child throughout his or her removal proceedings.[223] Though some problems still arise,[224] this is a preferred method of caring for the children while working toward their release over juvenile detention, as seen in Jenny's case.

V. APPLYING THE SOLUTION FOR UNACCOMPANIED ALIEN CHILDREN TO A SIMILARLY VULNERABLE GROUP: THE MENTALLY ILL MIGRANT

Many of the policies and procedures in place to protect UACs, if applied to mentally ill migrants subject to detention, would

220. Victoria Kim, *Trump Seeks Changes in Landmark Agreement Limiting How Long Migrant Children Can Be Detained*, L.A. TIMES (Sept. 6, 2018, 4:30 PM), https://www.latimes.com/local/lanow/la-me-ln-flores-agreement-trump-immigration-20180906-story.html.

221. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457 § 235(c)(2), 122 Stat. 5044, 5078 (2008).

222. For example, the children had a child advocate appointed to them to "effectively advocate for the best interest of the child." § 235(c)(6).

223. OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 2: 2.1 SUMMARY OF THE SAFE AND TIMELY RELEASE PROCESS (June 18, 2019), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.1.

224. *See generally* Aura Bogado et al., *Migrant Children Coming to the US Are Being Sent to Shelters with Histories of Child Abuse Allegations*, PUB. RADIO INT'L (June 20, 2018, 11:00 AM), https://www.pri.org/stories/2018-06-20/migrant-children-coming-us-are-being-sent-shelters-histories-child-abuse.

ameliorate or solve the problems described earlier in this Note.[225]

A. *UAC Standards*

The DHS has a special placement process for UACs and the transference of custody from DHS to ORR.[226] Individuals who appear to be UACs are initially placed in DHS detention.[227] After determining that the individual is "under the age of 18 and unaccompanied . . . it has three to five days to refer that child to ORR custody. . . . [T]he DHS thus serves as the 'gatekeeper' for admission to ORR custody . . . ."[228]

Once under ORR's care, there are many safeguards in place to best protect UACs. In general, the ORR has different levels of care, listed in order from lease restrictive to most restrictive, for UACs to best serve their needs: "shelter facility,[229] foster care or

225. In general, not detaining the mentally ill would be preferable to any other solution. But as long as mentally ill migrants are being detained, and especially in situations that deal with public safety or the wellbeing of the noncitizen, an alternative to detention in prison-like settings is necessary to ensure the respect and dignity of the noncitizen. Additionally, some may question the costs associated with running a separate program for mentally ill migrants. It could be said, however, that the costs of the current way the mentally ill are treated—completed suicides, solitary confinement for days, ignoring medical concerns, and individuals being forgotten in the system for five years—is a much higher cost to pay and that this alternative system would decrease governmental liability and increase productivity as far as the noncitizen's removal proceedings are concerned.

226. *See* OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 1: PLACEMENT IN ORR CARE PROVIDER FACILITIES (Jan. 30, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1.

227. HING ET AL., *supra* note 160, at 664.

228. *Id.* at 664–65.

229. OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: GUIDE TO TERMS (Mar. 21, 2016), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-guide-to-terms#Shelter%20Care [hereinafter GUIDE TO TERMS] ("A shelter is a residential care provider facility in which all of the programmatic components are administered on-site, in the least restrictive environment.").

group home[230] . . . , staff-secure[231] or secure care facility,[232] residential treatment center,[233] or other special needs care facility."[234] The policies and procedures lay out the considerations that must be taken when placing a UAC, whether it be the initial placement or a transfer.[235]

While at the shelter, each UAC is entitled to a variety of services, including: living accommodations, food, clothing, medical and dental care, educational services, activities dedicated to recreation, leisure, and exercise, at least one individual session with a counselor per week and two group sessions per week,

230. *See id.* ("A group home is a care provider facility that offers a group home setting and that specializes in caring for specific populations (e.g., teen mothers). A group home, which is run by 24-hour staff or house parents, typically houses 4 to 12 unaccompanied alien children.").

231. *See id.* ("A staff secure care provider is a facility that maintains stricter security measures, such as higher staff to unaccompanied alien children ratio for supervision, than a shelter in order to control disruptive behavior and to prevent escape. A staff secure facility is for unaccompanied alien children who may require close supervision but do not need placement in a secure facility. Service provision is tailored to address an unaccompanied alien child's individual needs and to manage the behaviors that necessitated the child's placement into this more restrictive setting. The staff secure atmosphere reflects a more shelter, home-like setting rather than secure detention. Unlike many secure care providers, a staff secure care provider is not equipped internally with multiple locked pods or cell units.").

232. *See id.* ("A secure care provider is a facility with a physically secure structure and staff able to control violent behavior. ORR uses a secure facility as the most restrictive placement option for an unaccompanied alien child who poses a danger to self or others or has been charged with having committed a criminal offense. A secure facility may be a licensed juvenile detention center or a highly structured therapeutic facility.").

233. *See id.* ("A residential treatment center is a sub-acute, time limited, interdisciplinary, psycho-educational, and therapeutic 24-hour-a-day structured program with community linkages, provided through non-coercive, coordinated, individualized care, specialized services and interventions. Residential treatment centers provide highly customized care and services to individuals following either a community based placement or more intensive intervention, with the aim of moving individuals toward a stable, less intensive level of care or independence. ORR uses a RTC at the recommendation of a psychiatrist or psychologist or with ORR Treatment Authorization Request (TAR) approval for an unaccompanied alien child who poses a danger to self or others and does not require inpatient hospitalization.").

234. OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 1: 1.2 ORR STANDARDS FOR PLACEMENT AND TRANSFER DECISIONS (Jan. 27, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.2.

235. *See id.* at 1.2.1.OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION1: 1.2.1 PLACEMENT CONSIDERATIONS (Jan. 27, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied.

among others.[236] Additionally, certain UACs must have a safety plan established to best care for their individualized needs.[237]

Though reunification is ideally achieved quicker than thirty days, every thirty days after the initial placement the team of workers[238] assigned to each individual UAC will review the current placement of the UAC and determine whether "a new level of care is more appropriate."[239] Once a viable sponsor has been screened and approved, some UACs are released with post release services, "services provided to an unaccompanied alien child based on the child's needs after he/she leaves ORR care."[240] Through post release services, a social worker located near the sponsor continues to work with the family after the UAC's release; assistance can continue until the UAC turns eighteen.[241]

Advocates lobbied for "the transfer of the responsibility for the care and custody of UACs away from the INS (now DHS) and to an agency that was not also charged with enforcing immigration law" due to concerns about the wellbeing of the children.[242] "Almost all observers" have documented improvements in the treatment and care of UACs since custody was transferred to the ORR.[243] Reports cite reductions in "the overall use of detention, the average amount of time spent in detention,

236. CARE PROVIDER REQUIRED SERVICES, *supra* note 4.

237. SAFETY PLANNING, *supra* note 5 (detailing circumstances in which UACs require a safety plan, including those with "behavioral issues or violence" and those with "special needs, disabilities or medical or mental health issues").

238. Each UAC will have a team of staff members of the facility, a third-party contractor who oversees the reunification process, and a supervisor from the ORR monitoring all decisions made in relation to the case. OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 2: 2.3 KEY PARTICIPANTS IN THE RELEASE PROCESS (June 18, 2019), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-2#2.3.

239. OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 1: 1.4.2 30 DAY RESTRICTIVE PLACEMENT CASE REVIEW (Oct. 10, 2018), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-1#1.4.2.

240. GUIDE TO TERMS, *supra* note 229.

241. *Id.*

242. HING ET AL., *supra* note 160, at 667.

243. *Id.*

and the proportion of children placed in detention facilities alongside children who are involved with the juvenile justice system."[244] These echo the same concerns cited for mentally ill migrants subject to detention.

B. *Applying UAC Standards to Mentally Ill Adults*

Each of these services would be applicable to ensure a higher quality of care for mentally ill migrants subject to detention. If mentally ill noncitizens were detained in a less restrictive setting than that seen in immigration detention, complete with safety plans and a team working toward their release, fewer abuses would occur and the noncitizens would be better protected than they currently are.[245] If eligible for bond, time at the shelter could be limited to the time of apprehension or transfer to the facility to the day bond is granted. Simultaneously, a case manager could work toward release to a sponsor who would agree to ensure the migrant's attendance at his or her court hearing; additionally, ARDs could be used to ensure compliance with all court dates. Individuals could be released with similar post-release services to help connect them to the resources in their own communities so they can receive proper treatment for their mental health needs.

As modeled by the *Flores* agreement, the priorities for mentally ill migrants would be threefold.[246] The first priority would be prompt release whenever possible to an individual who would take responsibility to insure that the respondent attends his or her hearings.[247] During the period of detention, as well as

244. *Id.*

245. *Compare* OFFICE OF REFUGEE RESETTLEMENT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN ENTERING THE UNITED STATES UNACCOMPANIED: SECTION 3 (Apr. 20, 2015), https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied-section-3 (explaining detailed procedures providing for education, health care, recreation, vocational training, mental health services, and access to legal services for unaccompanied minor children in U.S. custody), *with* POGO REPORT, *supra* note 38 (detailing ICE's treatment of detained individuals with mental health issues, including their continued reliance on the use of solitary confinement).

246. *See* Taverna, *supra* note 216, at 953.

247. *Id.*

in cases where no adult could assume responsibility for the respondent, the second priority would be to detain the individuals in the least restrictive level of care that individual circumstances allow.[248] Third, each level of care would have special standards to insure the general health and wellbeing as well as any mental health needs of the migrants were being met.[249] Teams could meet every thirty days, or an amount of time considered to be appropriate, to determine whether the current level of care is appropriate on an individual basis, always striving to keep individuals in the least restrictive level of care. If necessary, individuals could be "stepped up" to a higher level of care, such as secure or staff secure, to ensure the safety of all involved.

If the noncitizen was declared to be mentally incompetent by the Immigration Judge, additional safeguards could then be used by the Immigration Judge to continue the proceedings. If the individual is represented, the team could work to keep him or her in the least restrictive setting possible until the judge makes her final decision on the case, either granting relief to the noncitizen or ordering removal. If the noncitizen is not represented, the case manager could work to find legal counsel[250] or to coordinate his or her family and friends to tell the noncitizen's story and advocate for him or her in front of the Immigration Judge. Additionally, the shelter staff, manned with mental health professionals and social workers instead of prison guards, would work toward rehabilitating the noncitizen and conducting an evaluation every thirty days to see whether competency has been restored and removal proceedings can continue. This is preferable over the current system, where a respondent can be forgotten for five years without any progress made toward restoration of competency.[251]

248. *Id.*

249. *Id.*

250. Once EOIR finishes rolling out the provisions required by the *Franco* settlement, the case manager could work with the attorney to access necessary documentation for the noncitizen, such as identity documents.

251. *See* Thompson, *supra* note 152.

Finally, if an immigrant was subject to indefinite detention under 8 C.F.R. 241.14(f)(2) for being "specially dangerous," they could be removed from the prison environment and placed in either a secure facility, a staff secure facility, or a residential treatment center, depending on the needs of the immigrant. Once again, that facility would be equipped with a team of mental health professionals who would work to rehabilitate the individual. The team would reevaluate the situation every thirty days to ensure the correct placement of the noncitizen. Additionally, if the immigrant could remove the classification of being "specially dangerous" due to mental health concerns, they would no longer be subject to the possibility of indefinite detention and could be eligible for a bond hearing under *Zadvydas*, giving them a chance at full rehabilitation and release from detention.[252]

In light of the current dire situation of detained mentally ill migrants, something must be done to better protect them. Protections for such a vulnerable group should not disappear simply because the individual is one day older, as was almost the case for Miguel. In the case of the UACs, a lawsuit was initiated after an entire class of children suffered abuses while in the government's care.[253] It should not take a class action lawsuit to create an adequate system that meets the needs of a unique and vulnerable subset of detained migrants. Something must be done now.

C. *Additional Reasons Supporting this Alternative to Standard Detention*

In general, the legal framework is moving to extend greater rights and protections to mentally ill migrants, as exemplified by the *Franco* case and the provision of pro-bono representation

252. *See* Zadvydas v. Davis, 533 U.S. 678, 691 (2001) (noting that the court upheld detention of aliens based on dangerousness when "*only* limited to specially dangerous individuals" (emphasis added)).

253. *See generally* Reno v. Flores, 507 U.S. 292 (1993) (holding that minors held in INS custody must be placed in facilities that meet certain standards).

to respondents with mental illnesses.[254] Greater protections while these individuals are detained, insuring proper care that meets their unique needs, is a logical next step until other calls for immigration and detention reform are put into action. But there are additional justifications showing that this system would benefit more than the migrant. In the end, it will be more cost-effective for the United States to detain mentally ill migrants in the suggested setting instead of standard ICE detention centers because this alternative is less expensive than the remedies currently used by ICE and because this solution will cut down on the time mentally ill migrants are detained, overall cutting costs.[255]

ICE reported an estimated average cost of $133.99 per adult bed per night at detention centers in its Budget Overview for fiscal year 2018, though the actual cost has yet to be reported,[256] while in 2014 the estimated average cost per UAC bed was $248.[257] However, the ICE report does not include information as to the costs of solitary confinement of adults in its Budget Overview.[258] In the criminal context, "[i]t is well-established . . . that it costs more to incarcerate maximum security prisoners, compared to low security prisoners."[259] In a press release following a Congressional hearing on the use of solitary confinement, Senator Dick Durbin stated that "it is extremely costly to house a prisoner in solitary confinement."[260] Solitary can cost

254. *See supra* Part III.

255. *See* BUDGET OVERVIEW, *supra* note 94, at 14.

256. *Id.*

257. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-521, UNACCOMPANIED ALIEN CHILDREN: ACTIONS NEEDED TO ENSURE CHILDREN RECEIVE REQUIRED CARE IN DHS CUSTODY 66 (2015).

258. *See generally* BUDGET OVERVIEW, *supra* note 94 (highlighting the budget for the 2018 fiscal year).

259. N.M. CTR. ON LAW & POVERTY & ACLU OF N.M., INSIDE THE BOX: THE REAL COSTS OF SOLITARY CONFINEMENT IN NEW MEXICO'S PRISONS AND JAILS 9 (2013), https://www.prisonpolicy.org/scans/solitary-confinement-report-FINAL.pdf.

260. Press Release, Senator Dick Durbin, Durbin Chairs First-Ever Congressional Hearing on Solitary Confinement (June 19, 2012).

about three times as much as regular detention.[261] Without published data on the financial costs of solitary confinement in ICE detention centers, it is difficult to establish an exact cost comparison. However, the numbers on solitary confinement generally support the conclusion that this alternative to standard detention would cost the government less than the frequent use of segregation.[262]

Perhaps a more important consideration than the daily cost of detaining migrants is the overall length of time individuals are detained, as those daily costs add up as individuals are detained for longer amounts of time. As previously explained, mentally ill migrants risk longer detention than the average respondent in removal proceedings.[263] A respondent's ability to access important and relevant documentation for his or her defense to deportation is complicated by detention in general; "aliens in removal proceedings have an additional interest in avoiding confinement, beyond anything considered in *Zadvydas*: detention prior to entry of a removal order may well impede the alien's ability to develop and present his case on the very issue of removability."[264]

Putting aside the migrant's interest in presenting the best case possible to avoid removal, such a solution will also benefit the inundated immigration courts. Mentally ill respondents and their attorneys face even greater difficulties than the average respondent in collecting evidence to present his or her case from detention.[265] "Even where represented, the mentally ill are less able to contribute to their defense or understand the

261. Carrie Johnson & Bill Chappell, *Solitary Confinement Costs $78K Per Inmate and Should Be Curbed, Critics Say,* NPR (Feb. 25, 2014, 9:44 PM), https://www.npr.org/sections/thetwo-way/2014/02/25/282672593/solitary-confinement-costs-78k-per-inmate-and-should-be-curbed-critics-say.

262. *Id.*

263. *See* discussion *supra* Part III.

264. Demore v. Kim, 538 U.S. 510, 554 (2003) (Souter, J., dissenting); *see also* HING ET AL., *supra* note 160, at 652.

265. *See* Amelia Wilson & Natalie H. Prokop, *Applying Method to the Madness: The Right to Court Appointed Guardians* Ad Litem *and Counsel for the Mentally Ill in Immigration Proceedings*, U. PA. J. L. & SOC. CHANGE 1 ,2 (2013).

proceedings against them. This lack of meaningful participation has cascading deleterious effects . . . on our already overburdened immigration courts by creating docket delays, prolonged detention, and constitutional problems."[266] Placement in an alternative to detention, with a case manager working to obtain necessary documentation as required by the judge such as birth certificates, would expedite cases and decrease the amount of time the individuals are actually detained, ultimately cutting costs and decreasing the burden placed on the immigration courts in general.

CONCLUSION

As it stands, the United States is failing to protect one of the most vulnerable groups in our midst–mentally ill migrants. ICE facilities are ill-equipped, understaffed, and unable to properly care for this subset of its population. Many voices call for reform of the detention of mentally ill detainees; however, with the current state of our immigration laws, certain subsets of this group will still be subject to detention. While our immigration systems are moving toward additional protections for mentally ill migrants in removal proceedings, including the provision of legal counsel at no cost to the respondents, we must take this progress a step further and implement safeguards to protect the health and wellbeing of the mentally ill while they are in ICE custody. Before additional deaths, troublesome reports, and other issues experienced in immigration detention hijack the news cycle again, changes need to be made.

By following the policies and procedures originally laid out in the *Flores* Agreement and expanded upon by the Office of Refugee Resettlement, the United States can better protect mentally ill migrants while also working to make their removal proceedings as efficient as possible, leading to a satisfactory

266. *Id.* at 1; *see also Immigration Court Backlog Tool*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, https://trac.syr.edu/phptools/immigration/court_backlog/ (last visited Jan. 23, 2020) (reporting that 1,007,155 immigration cases are pending throughout the United States as of August 2019).

solution for all. This solution would prioritize the release of mentally ill migrants when possible, diminishing costs of ongoing detention. It would also create a legal requirement to place mentally ill migrants in the least restrictive level of care, accounting for the unique needs of this population. Finally, staff could work toward the rehabilitation of those deemed "specially dangerous." This could allow these individuals to no longer be subject to the possibility of indefinite detention and therefore be eligible for a bond hearing, giving them a chance at full rehabilitation and release from detention. We must provide adequate protections for the least among us, specifically the mentally ill migrant, securing the safety and wellbeing of this vulnerable population throughout the immigration process. Legislators do not need to reinvent the wheel; they need only follow the example laid out in *Flores* to adequately protect the most vulnerable in ICE custody.