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Abstract

On a national level, the objectives of family law and immigration law conflict, particularly when the parents of a minor child are being deported and the family decides it is in the child’s best interest to remain in the United States without their biological parents. An overall systemic response is needed to protect the family unit while maintaining the natural rights of American citizens who remain in the U.S. after their parents are deported. This Note proposes the creation of a federal sub agency to the Department of Homeland Security, called United States Citizen Minors with Deported Guardians (USCMDG) to protect the rights and interests of American children who have been placed in this often traumatic situation. This agency will have a staff of professionals, including psychiatrists, social workers, and attorneys to ensure a smooth transition into and out of the foster care system, and facilitate the best interests of the child, and by association, the family as well. USCMDG will also serve as a link to maintain contact between the child and the deported family members, and reunify the family when possible.

Introduction

Imagine Alyssa, a fourteen year old girl living in California. She is an American citizen, born in Los Angeles (L.A.) in 1996. Alyssa is faced with leaving the country with her parents who are being deported. Her father is an “outstanding professor”\(^1\) of chemistry and after teaching at a university in his native country, he was given one of the limited number\(^2\) of employment-based visas\(^3\) in 1994, which enabled him to enter the U.S. with his wife\(^4\) and teach

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\(^1\) 8 U.S.C.A. § 1153(b)(1)(B) considers “outstanding professors and researchers” to be within the second of five categories of priority workers in terms of receiving the limited number of employed-based visas.


\(^3\) See 8 U.S.C.A. § 1151(a)(2).
at the University of California, Los Angeles (UCLA). Soon after, the couple had two children — Alyssa, and her eleven year old brother Paul, creating a “mixed status” family. Alyssa’s father was able to extend his visa only once and it expired in 2009. Due to the fact that he and his wife, both noncitizens, have overstayed their visas for more than one year, they are “unlawfully present.” As a result of their extended and unlawful stay of more than 365 days, they are in violation of the Immigration and Nationality Act of 1952 and are likely to be deported and barred from U.S. admission for the next decade.

Alyssa’s parents’ home country is one with a different language, culture, religion and political views from that of the U.S. Alyssa and Paul were raised as typical American children, and speak only English because their parents wanted to assimilate and are fluent in English themselves. The children were never exposed to a language other than English in their home and

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4 Certain types of employment-based visas allow the noncitizen to have their spouse and children “follow” them to the U.S. 8 U.S.C.A. § 1153(d).


7 One who is “unlawfully present” is any noncitizen that has either overstayed a legally obtained visa or has entered the U.S. illegally, by avoiding inspection and approval by the Department of Homeland Security. 8 U.S.C.A. § 1182(a)(9)(B).

8 See 8 U.S.C.A. §§1101-1624. The Immigration and Nationality Act (INA) of 1952 is a collection of provisions detailing how and when noncitizens may enter the U.S. based on categories, and the consequences of violating immigration law. The Act is codified in Title VIII of the U.S. Code and also provides bases for exclusion and deportation. U.S. Citizenship and Immigration Services, Immigration and Nationality Act, http://www.uscis.gov/portal/site/uscis/menuitem.4eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextchannel=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=f3829c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited Oct. 10, 2010).

9 8 U.S.C.A. § 1182(a)(9)(B)(i)(II) (stating that an alien is inadmissible if he or she “has been unlawfully present in the United States for one year or more, and ... again seeks admission within 10 years of the date of such alien’s removal or departure”). Additionally, aliens who are unlawfully present in the U.S. for more than 180 days, but less than one year, are inadmissible for a period of three years. 8 U.S.C.A. § 1182(a)(9)(B)(i)(I).
are unfamiliar with the language spoken in their parent’s country of origin. As a consequence of their American accents and upbringing, they face overwhelming difficulties and a dangerous period of adjustment if they leave the U.S. with their parents. Due to ideological differences, the country they would be living in has a hostile political past with the U.S. and the natives have a generally anti-American sentiment, due to an extended period of American military occupation. Alyssa’s parents strongly believe their children would be persecuted for being Americans. However, the situation would not place Alyssa’s parents in danger, and therefore, they are unable to claim political asylum in order to obtain a Green Card and remain in the states. Additionally, the official and majority religion of Alyssa’s family’s home country is a religion with values that are unfamiliar to her, as her parents did not raise her with any specific religious affiliation, though they recognize a few commonly celebrated American holidays without religious involvement. Furthermore, she and Paul attended public school in L.A. and as a result of living in a metropolitan area, they were always surrounded by people of various races and national origins, as well as differing religious and political viewpoints. By contrast, Alyssa’s parent’s societal upbringing was almost completely racially homogenous, with a strict social economic hierarchy closely tied to the national religion enforced by the current government regime.

Alyssa has always dreamed of attending UCLA, where she has spent much of her childhood due to her father’s position as a professor of science. Alyssa plans to study business

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10. Elise Foley, *What Happens to Children When Their Parents Are Detained or Deported?*, WASHINGTON INDEPENDENT (Nov. 16, 2010) (noting that in some instances when children move to their parents home country, they may not “speak the language or be allowed to work legally when they grow older”).

11. Grants of asylum are given at the discretion of the Attorney General and may only be claimed by a noncitizen if he or she is unwilling to return to their home country as a result of “persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion” by the government of their country of citizenship. 8 U.S.C.A. § 1158(a)(1).

12. Furthermore, Alyssa's parents cannot apply for a waiver of deportation under the “extreme hardship” to an American citizen, as this allowance is limited to persons with a spouse or parent who is a U.S. citizen or permanent resident. 8 U.S.C.A. § 1254a(a)(1).
and fashion, because she hopes to design apparel and open her own boutique in L.A. one day. In her parent’s birth country, women commonly marry and start a family during their late teenage years and are forbidden to attend university or work outside of the home.

Given the facts as described, under current domestic law, Alyssa cannot be reunified with her parents in America for many years. At the earliest, Alyssa will be twenty-five when she becomes eligible to petition an immediate family member to obtain a visa to come to America and ultimately, to apply for U.S. citizenship. Under the current system, Alyssa must spend the next four years, until she is eighteen years old in foster care, assuming she has no family members in America who are either U.S. citizens or Legal Permanent Residents. After turning eighteen, Alyssa will remain in the U.S. for another seven years until she can file a petition for her parents to receive a visa. This waiting period assumes she has satisfied other requirements and that the country specific backlogs are only four years and have not been extended due to increased immigration or future changes in government policy.

13 8 U.S.C.A. § 1183a(a)(1)(A) allows for a U.S. citizen over the age of twenty-one to sponsor a parent to come to the U.S. if the citizen ensures the noncitizen will not become a “public charge” as defined in 8 U.S.C.A. § 1182(a)(4).
14 “Immediate family member” includes U.S. citizen spouses, children under the age of twenty-one, and parents if the child is over the age of twenty-one. 8 U.S.C.A. § 1151(b)(2)(A)(i).
15 As parents of a U.S. citizen, Alyssa's mother and father do not fall into a preference category for family-based immigration and no visa is immediately available. 8 U.S.C.A. § 1153(a).
16 8 U.S.C.A. § 1182(h)(1)(B) allows for a U.S. citizen or permanent resident to argue that the deportation of a noncitizen parent would cause “extreme hardship” onto him or her, unfortunately the hypothetical situation is unlikely to rise to a level that meets the extreme hardship standard.
17 Child Welfare Information Gateway, Foster Care Statistics, at 7, http://www.childwelfare.gov/pubs/factsheets/foster.pdf (stating, “Children can enter foster care at any age, from infancy up to age 18 years, and most exit by the time they are 18 years old.”) (last visited Nov. 20, 2010).
18 Elise Foley, What Happens to Children When Their Parents Are Detained or Deported?, WASHINGTON INDEPENDENT (Nov. 16, 2010) (noting, “children of undocumented parents … live with family members or are placed in foster care”).
19 See 8 U.S.C.A. § 1183a(a)(1)(A); At twenty-one years of age, a U.S. citizen may petition for his or her parents to obtain a visa by filing an affidavit. However, with the current average visa backlogs (which vary according to the country in question but our hypothetical assumes the worldwide average backlog of four years) and necessity of the petitioning citizen or Legal Permanent Resident to have a job, be able to provide financial stability to the parent in order to prevent the parent from being considered a public charge, completion of the process takes many years, delaying family unity by up to two and a half decades. “United States citizens and lawful permanent residents may file a visa petition on behalf of immediate relatives to obtain lawful permanent residency in the United States. The
This Note proposes the creation of an administrative sub agency within the Department of Homeland Security (DHS) to ameliorate the hardships that American citizen children face when their parents are deported. In 2010, 245,424 individuals were removed from the U.S.\textsuperscript{22} The children that some of these noncitizens left in America is an issue that must be addressed,\textsuperscript{23} otherwise it will become a much larger problem due to ever-increasing immigration rates in the U.S.\textsuperscript{24} While it may be in the best interest of the child to leave the U.S. with his or her parents, for the purposes of this Note, it is assumed the parents may recognize that as a U.S. citizen, their child has a right to stay in the U.S. and their quality of life, including education, civil liberties, and career opportunities may be best served in America. It is difficult to confirm or even estimate the number of minors in this situation, as this issue remains largely unexamined. Essentially, nothing is proactively being done to help these children in need.\textsuperscript{25}

The basis for the sub agency lies in the values reflected in the U.S. Constitution\textsuperscript{26} and in the comprehensive view of children’s rights\textsuperscript{27} and human rights\textsuperscript{28} at the international level.\textsuperscript{29}

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\textsuperscript{23} Elise Foley, \textit{What Happens to Children When Their Parents Are Detained or Deported?}, \textit{Washington Independent} (Nov. 16, 2010) (discussing the broad impact that detention and deportation has on families, “particularly where U.S.-born children are allowed to stay in the county but their parents are not”).


\textsuperscript{25} Elise Foley, \textit{What Happens to Children When Their Parents Are Detained or Deported?}, \textit{Washington Independent} (Nov. 16, 2010) (noting that it is “difficult to say exactly how many parents of American child have been deported.”).

\textsuperscript{26} U.S. Const. amend. VIII (discussing a prohibition against cruel and unusual punishment); U.S. Const. amend. XIV § 1 (the equal protection clause).
The proposed federal sub agency ("the agency") has similar goals to United States Citizen and Immigration Services (USCIS), but would deal with the minor citizen and have expansive functions to facilitate a smooth transition into and out of foster care for the minor involved. The purposes of the proposed sub agency would include assisting the family as a whole by advocating for the children to ensure a less negative experience with the period of adjustment after deportation, assuming the child ultimately stays in the U.S. Additionally, the agency will work closely with state and local authorities to fulfill its purposes and have long lasting positive community-building effects, particularly in areas of the U.S. with a lot of immigration activity.

Part I of this Note explains the background of the problem including immigration trends, the current system, and how U.S. citizen children remaining in the U.S. are affected by the inefficiencies of this system. Part II discusses the use of international law in a domestic context, in order to provide the necessary mode of thinking about children’s rights that the proposed sub agency will promulgate. Provisions of the Convention on the Rights of the Child, United

29 Christopher L. Blakesley, Edwin B. Firmage, Richard F. Scott, & Sharon A. Williams, The International Legal System: Cases and Materials 1 (5th ed. 2001) (stating, the “view of the ‘international legal system’ includes not only the tradition and evolving body of international law in the public sector but also extends to the surrounding areas of national law that bear on a state’s conduct of foreign relations: the domestic constitutional systems treatment of international law and particularly of treaties, and the domestic legislature and regulatory measures employed to implement international law.”).
31 The Convention on the Rights of the Child was an international effort on the part of “governments, non-governmental organizations, human rights advocates, lawyers, health specialists, social workers, educators, child development experts and religious leaders from all over the world, over a 10-year period,” and as of November 2005, 192 countries were parties to the treaty. UNICEF, Convention on the Rights of the Child: Frequently asked questions, http://www.unicef.org/crc/index_30229.html (last visited Oct. 10, 2010).
Nations Charter,32 Universal Declaration of Human Rights,33 and the International Covenant on Civil and Political Rights34 will be examined to obtain a global view on how the rights of children are upheld in other parts of the world. Part III will introduce the proposal to create a federal sub agency. This section will include a description of the agency’s creation, structure, source of authority, functions, and a discussion regarding which specific situations trigger agency involvement. Part IV refutes several contrary arguments to the proposal. Part V discusses the long-term implications, positive and negative, that this federal law will have, both in the fields of family law and immigration law in the U.S. Part VI will conclude the Note and reiterate why this sub agency is necessary and how its operation will benefit the rights of children while furthering the distinct goals of family and immigration courts.

I. Background: The Disconnect Between Child Advocacy and Immigration Procedure

While examining the current system, one can easily identify problems with how U.S. citizen minors are treated, or in many cases, ignored, after their family members have been deported. These children and their complex situation commonly fall between the cracks as a result of the deficiencies and inefficiencies of immigration proceedings and child advocacy. Due to the fact that there is no government entity monitoring this issue, one cannot know how many children of deported parents stay in the U.S. verses how many leave with their families.35

35 Elise Foley, supra note 25.
Essentially, the family court does not have proper standing to intervene, unless the child is seeking emancipation or is being neglected or abused. The immigration court only deals with the procedures involved with the parents deportability, and does not have power over the U.S. citizen child. Due to the intense trauma of separation from otherwise fit parents, most U.S. minor citizens remaining in the U.S. after their parents’ deportation experienced “behavioral changes” including changes in eating or sleeping habits, aggressiveness, and crying.

a. Recent Trends and Projected Statistics Regarding Immigration in America

The Pew Research Center is a nonpartisan “fact tank,” which provides statistics and other information on international trends involving immigration through seven separate projects. A DHS study from 2009 determined that approximately 108,434 parents of U.S. citizen minors were deported from 1998 to 2007. According to the PEW Research Center, “of the 142 million people added to the population from 2005 to 2050, according to projections, 50 million will be the children or grandchildren of new immigrants.” While there are approximately 23 million

36 “The National Council of Juvenile and Family Court judges recommends that the following should be included within the jurisdiction of the family court” and discusses “family court jurisdiction should include all child dependency related matters including abuse and neglect, including termination of parental rights, family violence including protective orders, children and persons in need of services (CHINS and PINS) and adoption” and that “family court jurisdiction should include adult and juvenile guardianships and conservatorships, … paternity, emancipation and name change.” Mark H. Moore & Stewart Wakeling, Juvenile Justice: Shoring Up the Foundations, 22 Crime & Just. 253, 276 (1997) (citing National Council of Juvenile and Family Court Judges 1989, app. A, pp. 25-31).


38 Elise Foley, What Happens to Children When Their Parents Are Detained or Deported?, WASHINGTON INDEPENDENT (Nov. 16, 2010) (“A parents immigration detention or removal poses risks to a childs safety, economic security and long-term well-being” as shown by the Urban Institutes’ study of 190 children who were separated from their deported guardians).


40 Elise Foley, What Happens to Children When Their Parents Are Detained or Deported?, WASHINGTON INDEPENDENT (Nov. 16, 2010) (noting that despite this 2009 study, the “number could be higher, due to incomplete ICE records on parental status”).

41 Furthermore, “82% of the nation's population growth through 2050 will be accounted for by immigrants who arrived in the U.S. after 2005 and their descendants, assuming current trends continue.” Pew Research Center, The
illegal immigrants in the U.S., there have been approximately 5,114,778 children born in the U.S. of noncitizen parents since 2002. A Pew Hispanic Center study from August 2010 determined that “of the 5.5 million children of illegal immigrants residing in the country in 2009, about four million were American-born.” “Anchor baby” is a commonly used and often disparaging phrase that has been defined as “a derogatory term for a child born in the U.S. to an immigrant. Since these children automatically qualify as American citizens, they can later act as a sponsor for other family members.” However, it is important to recognize that regardless of the potential for these children to bring their close family members to the U.S., they still deserve to have their constitutional rights preserved as American citizens.

b. The Situation American Minors of Deported Parents Face

Currently, there is no agency or other federal government entity advocating on a U.S. citizen child’s behalf when his or her parents are deported. The immigration judge cannot have power over a U.S. citizen, and typically family court is not involved unless the child seeks emancipation from his or her parents. If the parents country of citizenship is one where religious, political, and civil freedoms are restrictive, and the child would not be able to attain a comparable education, social life or have the ability to choose how they proceed in starting a family or career, the child may be better off staying in the U.S. without their parents. After a

42 Immigration Counters.com, supra note 24.
43 Elise Foley, What Happens to Children When Their Parents Are Detained or Deported?, WASHINGTON INDEPENDENT (Nov. 16, 2010) (stating, “Eight percent of the 4.3 million babies born in the country in 2008 (340,000 in total) were born to one undocumented parent”).
44 Vicki Martin, Category: Opinion, The Spectrum (Oct. 11, 2010) (the “14th amendment was ‘interpreted’ to bequeath citizenship to babies born to illegal aliens as anchors against parents being deported”).
46 Craig B. Mousin, supra note 37.
47 National Council of Juvenile and Family Court, supra note 36.
child’s parent or parents have been deported, assuming that child does not have other family
members remaining in the states to care for him or her, the child is placed in the custody of the
state and lives with a foster care family. This continues until the child is either adopted or ages
out of the system upon turning eighteen, presuming the child is not reunited with his or her
biological parents before that time.

c. The Gap in the Legal System Regarding American Citizen Children of Noncitizens

The goals of family law and immigration law conflict, particularly when the parents of a
minor child are being deported. The court system is left to determine what is in the best interest
of the child, essentially attempting to preserve his or her rights as an American citizen while
maintaining family unity whenever possible. Recently, some attention has been drawn to the
citizen children who are many times, removed with their parents, as many parents are unwilling
to leave their children behind in the U.S. for an indefinite period of time. Particularly, the
standard that is used to cancel orders of removal, namely, “exceptional and extremely unusual
hardship,” is said to be too high, because it “violates the constitutional rights” of the children,
“who were born in the U.S. and have citizenship.” This high standard is similar to a type of
“forced expulsion.” The standard that needs to be met in order to file for cancellation of
removal requires that the claimant have “lived in the U.S. for at least 10 years, be ‘a person of

48 Elise Foley, supra note 18.
49 Child Welfare Information Gateway, supra note 17.
50 Santosky v. Kramer, 455 U.S. 745, 748 (1982) (“Once removed, a child under the age of 18 customarily is placed
‘in the care of an authorized agency,’ usually a state institution or a foster home. … But if convinced that ‘positive,
nurturing parent-child relationships no longer exist,’ the State may initiate ‘permanent neglect’ proceedings to free
the child for adoption.”) (quoting N.Y. SOC. SERV. LAW § 384-b (McKinney Supp. 1981-1982). This situation
and its complexities are discussed in S. Adam Ferguson, Note: Not Without My Daughter: Deportation and the
52 Martha Bellisle, Reno Lawyer Challenges Constitutionality of Deportation Laws, Reno Gazette-Journal, Nov. 25,
2008.
53 Id.
good moral character,’ and have a clean criminal record.”54 Based on these facts, an individual who is new to the U.S., has been convicted, has failed to pay taxes, or even traffic tickets, many not benefit from this remedy.

II. An International Perspective on the Rights of Children

While the U.S. Constitution protects the individual from abuses of the state, one may ask if the international legal system can protect the individual when the “machinery of domestic law fails or even violates” the person.55 The U.S. Supreme Court has discussed the applicability of international law,56 and sometimes even the reasoning used by foreign states may be useful in deciding domestic cases.57 In recent Supreme Court opinions, Justices controversially58 chose to apply reasoning used in global law and treaties, including the Convention on the Rights of the Child,59 United Nations Charter,60 Universal Declaration of Human Rights,61 and the International Covenant on Civil and Political Rights62 in order to grasp the scope of human rights and the rights of children, as well as how these rights are upheld and enforced abroad.63 In other countries, governments have been less deferential to international principles because

54 Id. As the case of Aguirre-Guerra discussed in the Reno Gazette – Journal discusses, most times, “the standard offers ‘no relief at all’ because it ‘is almost never met’”; 8 U.S.C.A. § 1229b(b) (listing the requirements needed for cancellation of removal available to nonpermanent residents).
56 See The Paquete Habana, 175 U.S. 677, 700 (1900) (Justice Gray reasons that “where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations”) (discussed in M.N.S. Sellers, Section IV.C: Human Rights: Universal Human Rights in the Law of the United States, 58 Am. J. Comp. L. 533, 546 (2010)).
57 See Reid v. Covert, 354 U.S. 1, 18 (1957) (establishing and discussing the “later in time” rule in order to determine how and when a domestic statute may alter a treaty).
59 Convention on the Rights of the Child, supra note 27.
60 Charter of the United Nations: Introductory Note, supra note 32.
62 Christopher L. Blakesley, Edwin B. Firmage, Richard F. Scott, & Sharon A. Williams, supra note 34.
63 See, e.g., Roper v. Simmons, 543 U.S. 551 (2005) (where the U.S. Supreme Court utilized treaties, even those of which the U.S. is not a party, in order to adequately understand human rights).
immigration regulation is considered “part of the public order,”\textsuperscript{64} and it is believed that immigration should be monitored by domestic codes, as opposed to international principles as communicated in treaties.

International, federal and state\textsuperscript{65} declarations define and defend universal human rights.\textsuperscript{66} Many times, these different levels of authority have overlapping obligations to safeguard individual rights.\textsuperscript{67} The decision by U.S. courts and officials to use “non-American authorities to better understand fundamental rights protected by the U.S. Constitution reflects a broader American tradition of looking beyond purely American precedents to clarify the requirements of international law.”\textsuperscript{68} In addition to using doctrines of international law as both a means of interpretation and an end to justify American rules of law, foreign law is also a tool that has been increasingly used when dealing with domestic issues involving constitutional liberties.\textsuperscript{69}

\textbf{a. The Place of International Law in a Domestic Context}

\textsuperscript{64} Angela M. Banks, \textit{Comprehensive Immigration Reform Symposium: Problems, Possibilities and Pragmatic Solutions: Proportional Deportation}, 55 Wayne. L. Rev. 1651, 1680 (2009) (describing that in Europe, Canada and Australia, immigration is handled differently because the national government does not have an equivalent to the American concept of separation of powers).

\textsuperscript{65} M.N.S. Sellers, \textit{Section IV.C: Human Rights: Universal Human Rights in the Law of the United States}, 58 Am. J. Comp. L. 533, 536 (2010) (describing the five most influential state constitutions that list fundamental rights including Massachusetts (Constitution of the Commonwealth of Massachusetts, Part the First, A Declaration of the Rights of the Inhabitants of Massachusetts); Pennsylvania (Constitution of the Commonwealth of Pennsylvania, Article 1, Declaration of Rights); Virginia (Constitution of Virginia, Article 1, Bill of Rights); Texas (The Texas Constitution, Article 1, Bill of Rights) and; California (Constitution of California, Article 1, Declaration of Rights)).

\textsuperscript{66} Id. at 534.

\textsuperscript{67} Id.

\textsuperscript{68} Id. at 545 (citing Janis, Mark W., \textit{The American Tradition of International Law: Great Expectations}, 1789-1914 (2004)).

\textsuperscript{69} This trend of using not only international law doctrine but also foreign law as a way to decide wholly domestic legal issues is reflections a legal perspective that encourages the Court to reach beyond American case law to better understand the implications of domestic rules of law. \textit{Roper}, 543 U.S. at 575-78 (reasoning that aside from the U.S., only seven countries have executed juvenile offenders since 1990 and discussing the interpretation of the Eighth Amendment in accordance with the notion that “yet at least from the time of the Court’s decision in \textit{Trop}, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment...” (citing \textit{Trop v. Dulles}, 356 U.S. 86, 102–03 (1958) (plurality opinion))); Harold Hongju Koh, \textit{Agora: The United States Constitution and International Law: International Law As Part of Our Law}, 98 A.J.I.L. 43, 46 (2004) (quoting \textit{Printz v. United States}, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) which states, “Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own.... But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem...” \textit{Cf.} The Federalist No. 20, pp. 134-138 (C. Rossiter ed. 1961) (J. Madison and A. Hamilton) (emphasis in original)).
As a result of economic interdependence and the increased movement of people, American law has faced questions of the applicability of international law. Including treaties and other forms of customarily accepted principles of global law in domestic law has been an issue of controversy because in many instances, international modes of thought have either greatly expanded the rights guaranteed to Americans by the U.S. Constitution, or even contradicted the way in which the American government upholds law in the states. However, in *Roper v. Simmons*, the Supreme Court used a provision from the *Convention on the Rights of the Child* to influence the determination that imposing the death penalty on a juvenile convicted of a crime was unconstitutional. *Roper* sets the stage for the argument that international law mechanisms may and perhaps should be used to justify remedies in support of individual rights, particularly children. In a five to four decision, Justice Kennedy used treaties as well as foreign law in his opinion to affirm the notion that the *Convention on the Rights of the Child* should be examined in order to interpret the rights of American juveniles, even though the U.S. is not a party to the treaty. Significantly, the *Roper* Court looked to parallel provisions of

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71 Id.
72 *Roper*, 543 U.S. at 578-79 (setting aside the judgment of the Missouri Supreme Court to impose the death penalty for a juvenile who committed a crime, in this instance murder, while under the age of eighteen, as capital punishment would violate the convicted individual’s eighth and fourteenth amendment rights).
73 *Roper* overturned *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding similar sentences imposed on juvenile offenders ages sixteen and older as constitutional under the Eighth and Fourteenth Amendments), finding that *Stanford* was “no longer controlling on this issue,” *Roper*, 543 U.S. at 574, because the “differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.” *Roper*, 543 U.S. at 572-73.
similar treaties used in other regions of the world as a basis of establishing an international understanding of the rights of children.\textsuperscript{75}

The \textit{Roper} Court was revolutionary in that it “cited international instruments and other nations’ practices as indicating evolving attitudes against capital punishment.”\textsuperscript{76} In the \textit{Paquete Habana} decision, Justice Gray proclaimed,

\begin{quote}
International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or jurical decision, resort must be had to the customs and usages of civilized nations…\textsuperscript{77}
\end{quote}

The assertion by the U.S. Supreme Court that international law may be consulted with regard to questions of human rights, in particular child advocacy, adds an additional layer of protection to children’s rights.

b. \textit{The United Nations Convention on the Rights of the Child}

The \textit{Convention on the Rights of the Child} is an instrument of international law that was created to recognize and protect the rights of all people under the age of eighteen around the world.\textsuperscript{78} An international perspective assists in delineating the ways in which the rights of children are upheld in other parts of the world. This convention provides a mode of thinking about children’s rights that has been adopted and enforced by much of the international


\textsuperscript{78} \textit{Convention on the Rights of the Child}, supra note 31.
The Convention has been widely adopted, and although the U.S. has signed the treaty, the U.S. is not a party to it. This is significant because despite the influence this treaty and its principles have around the world, the U.S. government may be apprehensive to its notions.

For the purposes of the matter at issue, Article 18 of the Convention focuses on a point that the federal government needs to address in terms of American children whose parents have been deported. The provision states, in relevant part:

For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

If the U.S. were a member of the Convention, the government would be obligated to assist guardians with their “child-rearing responsibilities.” According to the provision and the hypothetical posed, deported parents would have a right of access to institutions and services in order to help care for and protect their children.

c. United Nations Charter and The Universal Declaration on Human Rights


80 The only remaining countries who have not yet ratified the Convention on the Rights of the Child are “the United States and Somalia. The United States did ratify a later agreement, known as an Optional Protocol to the convention, aimed at preventing the recruitment and use of child soldiers.” Furthermore, President Obama was quoted as saying, “It is embarrassing to find ourselves in the company of Somalia, a lawless land.” Jeffrey Gettleman, Editorial, Children Carry Guns for a U.S. Ally, Somalia, N.Y. TIMES, June 13, 2010 at A1, available at http://www.nytimes.com/2010/06/14/world/africa/14somalia.html (last visited Oct. 20, 2010); Roper, 543 U.S. at 576 (noting that the Convention on the Rights of the Child is one that “every country in the world has ratified save the United States and Somalia”).

81 Id. at Art. 18 §2.

82 Amnesty International USA, “Children’s Rights,” http://www.amnestyusa.org/children/crn_faq.html last visited (Jan. 28, 2011) (stating, while there is opposition to the idea that the U.S. should adopt the Convention because some government officials believe it is at odds with the freedom parents should have in choosing how to raise their children, “since 1990, five resolutions have also been introduced in Congress which support U.S. ratification of the Convention”).
The human rights provisions included in the *Charter of the United Nations*,83 protect “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”84 In particular, Article 56 obligates all member states as responsible for the mission of the United Nations.85

The *Universal Declaration of Human Rights* is useful in understanding the need to protect minors separated from their parents upon their families’ deportation.86 The Declaration works to ensure that human rights are "protected by the rule of law,"87 and states, “all human beings are born free and equal in dignity and rights.”88 The Declaration threatens “rebellion against tyranny and oppression” if human rights are not protected.89 In many cases, “in the eyes of the U.S. government and courts most international covenants and treaties recognizing universal human rights are simply restatements of existing U.S. law and established constitutional guarantees.”90 The second provision of Article 25 states, “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”91 This declaration furthers the notion that

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85 Id. at Art. 56.
87 Id. at Art. 1.
88 Id. at Preamble.
89 Id. at Art. 1.
children worldwide are a vulnerable group and deserve special protections and rights, many of
which can be safeguarded by the proposed federal sub agency.

d. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{92} is a multi-lateral
treaty that is part of the International Bill of Human Rights,\textsuperscript{93} and includes “express reservations
preserving existing American conceptions”\textsuperscript{94} of the rights of free speech,\textsuperscript{95} right to life,\textsuperscript{96}
prohibition against cruel or degrading treatment and punishment,\textsuperscript{97} discrimination,\textsuperscript{98} and
punishment against minors.\textsuperscript{99} The ICCPR is seen as an “important tool for protecting individual
rights vis-à-vis the government.”\textsuperscript{100} While the U.S. is a party to the ICCPR,\textsuperscript{101} in 1992 the
Senate gave “its Advice and Consent” to the treaty.\textsuperscript{102} The document was ratified with several
reservations, understandings and declarations, limiting the domestic effect of Articles 1–27,\textsuperscript{103} as
the U.S. declared these provisions non self-executing.\textsuperscript{104}

\textsuperscript{92} Christopher L. Blakesley, Edwin B. Firmage, Richard F. Scott, & Sharon A. Williams, \textit{supra} note 34.
\textsuperscript{93} See United Nations Human Rights: Office of the High Commissioner for Human Rights, International Law,
http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf (last visited Nov. 6, 2010); Roach \textit{v.}
Quarterman, 2007 U.S. App. LEXIS 4224, at 8–10* (5th Cir. Tex. 2007) (holding that the ICCPR is not U.S. law
because it is not self-executing and Congress has not incorporated it into domestic law).
J. Comp. L. 533, 549 (2010).
\textsuperscript{95} U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138
Congressional Record S4781-01 (daily ed., April 2, 1992) at I(1).
\textsuperscript{96} \textit{Id.} at I(2).
\textsuperscript{97} \textit{Id.} at I(3).
\textsuperscript{98} \textit{Id.} at I(1).
\textsuperscript{99} \textit{Id.} at I(5).
\textsuperscript{100} Angela M. Banks, \textit{Comprehensive Immigration Reform Symposium: Problems, Possibilities and Pragmatic
\textsuperscript{101} Centre for Civil and Political Rights, Status of ratification, http://www.ccpcentre.org/en/status-of-ratification
(last visited Nov. 3, 2010).
\textsuperscript{102} Christopher L. Blakesley, Edwin B. Firmage, Richard F. Scott, & Sharon A. Williams, \textit{The International Legal
System: Cases and Materials} 646 (5th ed. 2001) (the U.S. government ensured that when Ratifying the Covenant
they would “minimize international scrutiny into its domestic policies” as a means of maintaining internal
sovereignty).
\textsuperscript{103} \textit{Id.} at 647.
\textsuperscript{104} International Justice Project, United States of America’s Reservations to the ICCPR – Juveniles.
http://www.
internationaljusticenproject.org/juvICCPR.cfm (last visited Nov. 2, 2010).
Articles 23 and 24 detail rights of children and families that must be upheld by signatories to the treaty. Specifically, the relevant provisions claim “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State,”105 and that “states Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”106 While Alyssa, Paul, and many other American children may not have divorced parents, in many ways these provisions are analogous, as these children face a form of family dissolution and its long-lasting effects.

Additionally, the Covenant ensures “every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State”107 and that “every child has the right to acquire a nationality.”108 One may understand these provisions to insinuate equal treatment for all minors and that children also have the right to maintain their nationality, as Alyssa and Paul have every right to continue to live in the U.S. and have their rights respected by the government.

III. United States Citizen Minors with Deported Guardians

a. Sub Agency Creation and Implementation

The creation of a sub agency titled United States Citizen Minors with Deported Guardians (USCMDG) within the U.S. Department of Homeland Security (DHS) would

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106 Id. at Art. 23(4).
107 Id. at Art. 24(1).
108 Id. at Art. 24(3).
ameliorate the complex problems associated with caring for the children of deported individuals.

DHS\textsuperscript{109} is one of five federal executive agencies that deals with immigration matters,\textsuperscript{110} and includes USCIS,\textsuperscript{111} Immigration and Customs Enforcement (ICE),\textsuperscript{112} and Customs and Border Protection.\textsuperscript{113}

In accord with the hypothetical posed, this Note suggests the creation of a commission within DHS. “Administrative agencies are created by the federal Constitution, the U.S. Congress, state legislatures, and local lawmaking bodies to manage crises, redress serious social problems, or oversee complex matters of governmental concern beyond the expertise of legislators.”\textsuperscript{114} Despite the text of Article 1, § 1 of the Constitution stating, “legislative Powers herein granted shall be vested in a Congress of the United States,”\textsuperscript{115} the “necessary-and-proper” clause provides Congress the power to make “all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers … in any Department or

\begin{thebibliography}{115}
\bibitem{110} Stephen H. Legomsky & Cristina M. Rodriguez, Immigration and Refugee Law and Policy 5 (5th ed. 2009) (describing the five federal agencies that are designed to deal with immigration matters, including the Department of Homeland Security, the Department of State, the Department of Labor, the Department of Justice and the Department of Health and Human Services).
\bibitem{111} U.S. Citizenship and Immigration Services, supra note 30.
\bibitem{112} Immigration and Customs Enforcement is the largest investigative agency of the DHS. Formed in 2003, as a result of the September 11\textsuperscript{th} terrorist attacks, it is designed to “protect national security, public safety and the integrity of the U.S. borders through the criminal and civil enforcement of federal laws governing border control, customs, trade and immigration.” United States Government, About U.S. Immigration and Customs Enforcement (ICE), http://www.ice.gov/about/index.htm (last visited Oct. 13, 2010).
\bibitem{115} U.S. Const. art I, §1.
\end{thebibliography}
Officer thereof.” As an administrative agency enacted by the legislature, this commission will fall under the direction of the executive branch and the U.S. President.  

DHS includes USCIS and ICE, both of which can be used to focus the purposes of USCMDG. USCIS administers immigration services and benefits. It is proposed that USCMDG have essentially the same goals as USCIS, but expand the mission to assist the families, in particular the children involved to have a smooth adjustment after deportation, if the child ultimately stays in America. While this would be a federal agency, the employees would be closely coordinated with state and local government agencies in order to carry out their functions.

The most efficient way to create this sub agency is for child and immigrant rights groups to persuade DHS officials to recognize the need for this sub agency and seek funding from Congress. This necessary advancement in the fundamental rights of minors would be especially beneficial in extreme situations where the child’s physical health or emotional well-being would be adversely affected if they left the U.S. with their biological family.

b. **Sub Agency Structure & Functions**

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118 “The events of September 11, 2001 led eventually to a radical restructuring of the myriad federal government agencies whose missions relate to national security. The Homeland Security Act of 2002 (HAS) brought almost all of those agencies under a single new umbrella, the Department of Homeland Security (DHS). Some 22 federal agencies, 185,000 government employees, and countless specific functions were transferred.” Stephen H. Legomsky & Cristina M. Rodriguez, Immigration and Refugee Law and Policy 2-3 (5th ed. 2009).
119 U.S. Citizenship and Immigration Services, supra note 30.
The proposed agency would have a structure similar to ICE.\textsuperscript{122} The initiative will be led by an Executive Secretariat, appointed by DHS. Additionally, lower level officials will deal with specific concerns relating to the U.S. citizen minor, in the fields of social work, psychology, education, legal affairs and other matters as needed. To reiterate, the children in these situations are lawfully in the U.S. and both as American citizens and minors, they deserve to have their rights protected by their government.

There are four main functions that the sub agency will carry out. First, USCMDG will maintain consistent family contact and promote parental involvement in the child’s life. Second, with the help of social workers, the sub agency will facilitate strong social development and adaptability for the emotional health of the child. Third, the sub agency will work to support a positive psychological state for the child. Lastly, agency staff will ultimately further family reunification when possible, with the assistance of legal personnel. However, in addition to these tasks, the sub agency will provide additional services as needed, at the discretion of the DHS staff. For instance, the social workers and foster care workers will receive additional training as needed to more effectively deal with the issues associated with children being separated from deported family members. Furthermore, the sub agency will assist the children in their adjustment from foster care to becoming highly functioning adults, gaining education, skills, and a career. The ability to expand the functions of the sub agency, will best serve the children as their needs change and immigration trends and regulation are altered over time.

c. \textit{Criteria for Sub Agency Involvement}

In order to most wisely utilize federal resources and tax payer money, this sub agency as proposed will not be used across the board in all deportation settings where an American citizen

\textsuperscript{122} Immigration and Customs Enforcement, ICE Leadership, http://www.ice.gov/about/leadership/index.htm (last visited Oct. 13, 2010).
minor remains in the U.S. Specific situations would trigger the involvement of this agency. Criteria includes the following: (1) The person affected is a U.S. citizen; (2) minor under age 18; (3) where either both parents or the sole parent has been deported; (4) The parents have willingly placed the minor in foster care, as opposed to leaving the child with relatives; and (5) the familial country of origin is particularly distinguishable in terms of its cultural, religious, and/or societal makeup, or currently has hostile relations with the U.S. government.

**IV. Potential Complications Associated with USCMDG’s Formation and Practice**

This proposal has complications; however, it is the most feasible means of addressing a problem that if not solved in the near future, will soon become unmanageable with the increase in illegal immigration in the U.S. Studies have shown that “deportation of a parent is a risk for a large number of children.” The potential contrary arguments to this proposal can be easily repudiated by balancing the costs and benefits of the problem with the results of leaving it unaddressed. The counter arguments will be primarily based on the way the agency is created and funded, what situations will trigger its action and justifying its purposes.

First, one may argue that the creation of a sub agency to assist the children in these situations would be too costly, and tax payers would object. Opponents may question whether this situation occurs enough to warrant the creation of a new federal sub agency – requiring compensated employees, office space, supplies and legal resources for these children. Despite the current economic downturn, these children deserve advocacy as American citizens. As previously discussed, it is difficult to determine just how many American children and families are directly affected by deportation, but even if the number is relatively small in actuality, these minors, as American citizens and as children, deserve to be protected and adequately

123 Id.
124 Elisa Foley, supra note 38.
assisted. Moreover, the agency would only act on a case-by-case basis when specific requirements have been met. This argument is particularly irrelevant in light of the fact that these offices would not be needed all around the nation, but instead only in areas where immigration is a particular problem and there are high levels of deportation. Because these federal resources would only be applicable when certain criterion is met, action by the sub agency is situation specific, minimizing the expense to tax payers. Once the sub agency is established, it is recommended that additional funding is sought through non-profit groups, both domestically and abroad that support children’s rights and immigration reform.

Secondly, skeptics may suggest this practice would open the floodgates and condone illegal immigration. However, having an advocate for the child’s rights as an American citizen after life-altering parental deportation proceedings is more important than the possibility of encouraging immigration into the U.S. On a different, but related note, petitioning for a parent to come to the U.S. is not a quick or simple process, as previously discussed. At this point in time, altering or eliminating the family petitioning process would be a drastic step, but it may be something that needs to be reexamined in the future.

Lastly, assuming the parent who has been deported is not unfit, child advocates may inquire as to why these families should be separated at all. While the parent may be perfectly capable of raising the child in the U.S. if they legally could remain here, they cannot. In many situations, the parent’s country of origin would diminish the child’s quality of life and in some cases, place the child in extreme harm. These extreme factors will trigger the action and involvement of the new sub agency. Again, the families that will be assisted by the agency are those where the parents have willingly left their child in the U.S. post-deportation.

V. Long-Term Societal and Legal Implications of USCMDG on Child Advocacy,

Family Law and Immigration Law

There are both positive and negative long-term effects that the creation of a sub agency to deal exclusively with U.S. citizen children affected by deportation will have. The agency, including its benefits to American citizens and the costs it will inevitably impose, has implications that are worthy of discussion, both in the fields of family law and immigration law.

Alyssa fits into each of the five factors to trigger action by USCMDG. Alyssa and Paul will benefit from USCMDG’s services. They will have access to psychological resources and legal assistance as needed until they reach age 18, to help them handle foster care, familial separation, and to become well-adjusted adults. Most importantly, they will have an open line of communication with their biological parents, which is crucial to their ongoing well-being.

The sub agency this Note proposes will protect the rights of American children. While children as a whole are a vulnerable faction of society, children whose parents have been deported are vulnerable in additional ways. The proposed agency’s stated purpose of keeping the family members in contact and ultimately unifying the family unit when possible furthers the purposes of family law by maintaining the structure of the family unit in society. The agency’s philosophy expands minor’s rights, benefiting child advocacy.

VI. Conclusion

There is a necessity to satisfy and merge the goals of child and family advocacy with immigration law. Historically, these two fields have continued to conflict in their clashing policies and procedures which have the potential to cause familial destruction.126 There is no

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indication that immigration into the U.S. will slow at any point in the near future, and as a result, the U.S. citizen minors most affected by immigration law must be protected now more than ever.

The creation of the proposed federal sub agency will create consistency on a national level in the manner in which U.S. citizen minors remaining in the states after their parents have been deported are handled by the courts. USCMDG will ensure that the rights of the child as an American citizen will be preserved during the traumatic post-deportation period.