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# Disabled By Solitude: The Convention On The Rights Of Persons With Disabilities And Its Impact On The Use Of Supermax Solitary Confinement

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# Disabled by Solitude: The Convention on the Rights of Persons with Disabilities and Its Impact on the Use of Supermax Solitary Confinement

KATHRYN D. DEMARCO\*

I.	INTRODUCTION .....	524
II.	The CRPD .....	529
	A. <i>The CRPD and State-Imposed Disabilities.</i> .....	530
	B. <i>Disablement as a Legal Concept</i> .....	531
III.	SUPERMAX SOLITARY CONFINEMENT .....	535
	A. <i>History of Supermax Solitary Confinement</i> .....	535
	B. <i>Current Description of Solitary Confinement in U.S. Supermax Prisons</i> ...	536
IV.	THE MENTAL EFFECTS OF SENSORY DEPRIVATION FROM SOLITARY CONFINEMENT CONSTITUTE DISABLEMENT UNDER THE CRPD .....	541
	A. <i>Mental Effects</i> .....	541
	B. <i>The Effects of Solitary Confinement Meet the Article 1 Disability Definition</i> .....	544
	1. "LONG-TERM" .....	544
	2. "FULL AND EFFECTIVE PARTICIPATION" .....	545
	3. UNIFORMITY OF RESULT AND FREQUENCY OF "LONG-TERM" PSYCHIATRIC CONSEQUENCES .....	547
	a. pre-existing mental state .....	547
	b. the amount of time spent in supermax solitary .....	548
V.	ARTICLE 15 AS ANOTHER AVENUE FOR A DISABLEMENT CLAIM .....	549
	A. <i>Supermax Confinement as Torture or Cruel and Inhuman Treatment</i> .....	549
	B. <i>Disablement and Article 15</i> .....	551
VI.	U.S. RATIFICATION AND IMPLEMENTATION OF THE CRPD .....	552
	A. <i>The CPRD's Provisions for Implementation and Enforcement</i> .....	552
	B. <i>The Impact on U.S. Law</i> .....	554
	1. THE IMPACT OF "CLEAN" RATIFICATION OF THE CRPD .....	554
	2. THE IMPACT OF CONDITIONS TO THE SENATE'S CONSENT TO RATIFICATION .....	555
	a. RUDs relating to implementation and enforcement .....	556
	b. RUDs limiting the substantive scope of the CRPD .....	557
VII.	CONCLUSION .....	564

*It's an awful thing, solitary. It crushes your spirit and weakens your resistance more effectively than any other form of mistreatment.*

—John McCain<sup>1</sup>

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1. Atul Gawande, *Hellhole: The United States Holds Tens of Thousands of Inmates in Long-*

## I. INTRODUCTION

As the first human rights treaty of the twenty-first century, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) aims to protect the “world’s largest minority”—some 650 million people in the world living with a disability.<sup>2</sup> It is the most recent and “the most extensive recognition of the human rights of persons with disabilities.”<sup>3</sup> The United Nations General Assembly approved the text of the CRPD on December 13, 2006, in order “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>4</sup> On March 30, 2007, the CRPD opened for signatures, and eighty-two countries signed the convention with forty-four signing the Optional Protocol—the largest number of signatories on an opening day in the history of the United Nations.<sup>5</sup> On May 3, 2008, thirty days after the twentieth ratification, the CRPD became legally binding on all state parties.<sup>6</sup> Today, the CRPD has 149 signatures and 103 ratifications.<sup>7</sup> The Optional Protocol for the CRPD has 90 signatures and 62 ratifications.<sup>8</sup> As a result, this convention will have far-reaching implications for those with disabilities around the world and for any nation whose domestic policies violate the precepts of the CRPD.<sup>9</sup>

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*term Solitary Confinement. Is this Torture?*, THE NEW YORKER, Mar. 30, 2009, [http://www.newyorker.com/reporting/2009/03/30/090330fa\\_fact\\_gawande](http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande).

2. See Secretariat for the Convention on the Rights of Persons with Disabilities, *Fact Sheet on Persons with Disabilities*, U.N. ENABLE, <http://www.un.org/disabilities/default.asp?id=18> (last visited Aug. 16, 2011); *World Report on Disability*, WORLD HEALTH ORGANIZATION (2011), [http://whqlibdoc.who.int/publications/2011/9789240685215\\_eng.pdf](http://whqlibdoc.who.int/publications/2011/9789240685215_eng.pdf) (stating that there are actually more than one billion people living with a disability) [hereinafter *World Report on Disability*]. The *World Health Survey* estimates that 785 to 975 million people over the age of fifteen have disabilities, and the *Global Burden of Disease* estimates that about 190 million individuals suffer from a “severe” disability such as severe depression or blindness. *Id.* at 44. See also Arlene S. Kanter, *The Promise and Challenge of the United Nations Convention on the Rights of Persons with Disabilities*, 34 SYRACUSE J. INT’L L. & COM. 287, 306 (2007); Anna Lawson, *The United Nations Convention on the Rights of Persons with Disabilities: New Era or False Dawn?*, 34 SYRACUSE J. INT’L L. & COM. 563, 563 (2007).

3. *World Report on Disability*, *supra* note 2, at 9 (stating that the CRPD “applies human rights to disability, thus making general human rights specific to persons with disabilities”).

4. United Nations Convention on the Rights of Persons with Disabilities, art. 1, Dec. 13, 2007, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/106 [hereinafter CRPD].

5. Secretariat for the Convention on the Rights of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities and Optional Protocol*, U.N. ENABLE, <http://www.un.org/esa/socdev/enable/conventioninfo.htm> (last visited Aug. 10, 2011).

6. Press Release, Department of Public Information, With 20 Ratifications, Landmark Disability Treaty Set to Enter into Force on 3 May, U.N. Press Release HR/4941 (Apr. 3, 2008), available at <http://www.un.org/News/Press/docs/2008/hr4941.doc.htm>.

7. U.N. ENABLE, <http://www.un.org/disabilities/> (last visited Aug. 16, 2011).

8. *Id.*

9. See *id.*

On July 24, 2009, President Obama signed the CRPD, referring to it as a “historic piece of civil rights legislation” that furthers “our global commitment to fundamental human rights for persons with disabilities.”<sup>10</sup> While President Obama has not yet submitted the CRPD to the Senate, a requirement for future ratification,<sup>11</sup> the potential implications of this document for domestic policy cannot be ignored. Specifically, this piece will analyze whether the use of supermax solitary confinement is consistent with the CRPD.<sup>12</sup>

Supermax solitary confinement prison facilities are designed for mass and indefinite solitary confinement.<sup>13</sup> They deprive the prisoner of virtually all forms of human interaction and sensory stimulation. Unlike traditional solitary confinement where inmates are placed briefly into cells as a form of punishment, supermax solitary facilities keep inmates in confinement for years on end and use solitary confinement as a “prison management tool.”<sup>14</sup> In other words, supermax solitary confinement is a form of long-term confinement as opposed to a brief punishment for a disciplinary infraction.

While supermax solitary confinement units vary in their details, they share certain common features. The cells in supermax solitary units are basically the equivalent of a small “concrete exercise pen”<sup>15</sup> in which prisoners must live for months and possibly years. Deprivation of sensory experience, human interaction, and intellectual stimulation are hallmarks of supermax confinement. In many instances, the cells are designed without color and are furnished with only a stainless steel sink, a toilet, and a concrete bed and writing desk.<sup>16</sup> Inmates are denied access to a clock, television, radio, computer, telephone, and books (except for

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10. *Remarks by the President on Signing of the U.N. Convention on the Rights of Persons with Disabilities Proclamation*, WHITEHOUSE (July 24, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-rights-persons-with-disabilities-proclamation-signing>.

11. U.S. CONST. art. I, § 2, cl. 2.

12. This article uses the more general term of *supermax prison* when referring to solitary confinement. Different prison systems use different terms to refer to such facilities such as “control unit,” “security housing units,” or “communications management units.” Ken Strutin, *Solitary Confinement*, LLRX (Aug. 10, 2010), <http://www.llrx.com/features/solitaryconfinement.htm>.

13. *Supermax Prisons: An Overview*, HUMAN RIGHTS WATCH, <http://www.hrw.org/legacy/reports/2000/supermax/Sprmx002.htm> (last visited Aug. 16, 2011); see also Gawande, *supra* note 1.

14. See Sharon Shalev, *A Sourcebook on Solitary Confinement*, MANNHEIM CENTER FOR CRIMINOLOGY & LONDON SCHOOL OF ECONOMICS 31 (Oct. 2008), [www.solitaryconfinement.org/sourcebook](http://www.solitaryconfinement.org/sourcebook).

15. Laura Sullivan, *In U.S. Prisons, Thousands Spend Years in Isolation*, NPR (July 26, 2006), <http://www.npr.org/templates/story/story.php?storyId=5582144>; see also Terry A. Kupers, *What to Do with the Survivors? Coping with the Long-Term Effects of Isolated Confinement*, 35 CRIM. JUST. & BEHAV. 1005 (2008), <http://cjb.sagepub.com/content/35/8/1005.full.pdf+tml>.

16. Tracy Hresko, Article, *In the Cellars of the Hollow Men: Use of Solitary Confinement in*

a religious text).<sup>17</sup> They are subjected to “almost complete idleness” for indefinite periods of time.<sup>18</sup> When there is contact with other people, it is usually brief, routine, and superficial, such as being escorted to the showers by a guard.<sup>19</sup>

Confinement in a supermax facility typically has profound, long-lasting, and adverse effects on the majority of individuals. One description of life at the Pelican Bay State Prison is as follows: “One inmate stands in the middle of his cell, hollering at no one in particular. Another bangs his head against the door. Many of the inmates are naked, some exposing themselves.”<sup>20</sup> The monotony and sensory deprivation of everyday life become overwhelming. “There is simply nothing to do. Sit in your bathroom alone with none of your intimate possessions and try to imagine years of it, week after week. Slowly it tears you down, mentally and physically.”<sup>21</sup> Tommy Silverstein, who was in solitary confinement for over twenty-five years, described solitary confinement as a “slow constant peeling of the skin, stripping of the flesh.”<sup>22</sup>

The criteria for the use of supermax confinement differ by facility, and the length of such confinement is left to the discretion of prison officials.<sup>23</sup> Supporters of supermax confinement in the United States typically offer several justifications for its use. Often supermax facilities claim to house the “worst of the worst”<sup>24</sup>—prisoners who are extremely dangerous to others and utterly incorrigible—though this is quite debatable.<sup>25</sup> Supermax confinement is sometimes used as a way of protecting

*U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT’L L. REV. 1, 10 (2006).

17. Jones ‘El v. Berge, 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001); Christine Rebman, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 579 (1999).

18. Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. CONFINEMENT 124, 126 (2003), <http://cad.sagepub.com/content/49/1/124.full.pdf+html> [hereinafter *Mental Health Issues*].

19. U.N. Secretary-General, *Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Note by the Secretary-General*, U.N. DOC. A/63/175 (July 28, 2008) [hereinafter U.N. Secretary-General] (stating that “[t]he reduction in stimuli is not only quantitative but also qualitative”).

20. Laura Sullivan, *At Pelican Bay Prison, a Life in Solitary*, NPR (July 26, 2006), <http://www.npr.org/templates/story/story.php?storyId=5584254>.

21. Shalev, *supra* note 14, at 19.

22. Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 116 (2008).

23. Maria A. Luise, *Solitary Confinement: Legal and Psychological Consideration*, 15 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 301, 301 (1989); Gawande, *supra* note 1.

24. Kupers, *supra* note 15, at 1011.

25. *Mental Health Issues*, *supra* note 18, at 129 (stating that there is “no evidence that the rise of supermax prisons was driven by the threat of some new breed of criminal or prisoner”); Colin Dayan, *Barbarous Confinement*, N.Y. TIMES, July 17, 2011, <http://www.nytimes.com/2011/07/18/opinion/18dayan.html> (stating that the decision to place an inmate in solitary is “haphazard and

certain prisoners from attacks by others,<sup>26</sup> and as a form of punishment for disciplinary infractions—nonviolent as well as violent.<sup>27</sup> Prison officials also place inmates in solitary merely because the inmates are “perceived as troublemakers or simply disliked by correctional officers.”<sup>28</sup> Inmates have also been placed in supermax confinement in order to suppress activity that prison officials deem “dissident”—a category that can include helping other inmates with habeas petitions or trying to bring suit against the prison administration.<sup>29</sup> Finally, inmates may be confined to supermax confinement for purely administrative reasons—*e.g.*, prison overcrowding or a lack of more suitable space when they are ill.<sup>30</sup> In general, the criteria behind supermax solitary’s use varies from facility to facility, and the term of confinement is entirely dependent on the discretion of prison officials.<sup>31</sup>

Today the use of supermax solitary confinement in the U.S. prison system is on the rise. Conservative estimates report that there are at least 25,000 inmates in supermax solitary confinement in the United States.<sup>32</sup> Nicholas Katzenbach, the former Attorney General of the United States, noted that “the growth rate in the number of prisoners housed in segregation far outpaced the growth rate of the overall prison population.”<sup>33</sup> The increase of supermax prisons and solitary confinement has been called “perhaps the most troubling” human rights trend in the United States corrections system.<sup>34</sup> The Commission on Safety and Abuse in America’s Prisons stated that after ten days in solitary confinement, there are “practically no benefits” to such confinement, while the “harm

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arbitrary” and that while prison officials claim that those imprisoned in the Pelican Bay State Prison are “the worst of the worst . . . often it is the most vulnerable, especially the mentally ill, not the most violent, who end up in indefinite isolation”).

26. See Sullivan, *supra* note 20.

27. Shalev, *supra* note 14, at 25; *Mental Health Issues*, *supra* note 18, at 126–27.

28. Dayan, *supra* note 25.

29. Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT’L J. OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 622, 626–28 (2008), <http://ijo.sagepub.com/content/52/6/622.full.pdf+tml>.

30. Craig Haney, *A Culture of Harm: Taming the Dynamics of Cruelty in Supermax Prisons*, 35 CRIM. JUST. & BEHAV. 956, 962, 964–65 (2008), [www.sagepub.com/bartolstudy/articles/Haney.pdf](http://www.sagepub.com/bartolstudy/articles/Haney.pdf) [A Culture of Harm]. See also Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 493–94 (1977); Dayan, *supra* note 25 (“[I]solation, which can last for decades, is often not explicitly disciplinary, and therefore not subject to court oversight. Their treatment is simply a matter of administrative convenience.”).

31. Luise, *supra* note 23, at 301.

32. Sullivan, *supra* note 20.

33. COMM’N ON SAFETY AND ABUSE IN AMERICA’S PRISONS, VERA INSTITUTE OF JUSTICE, CONFRONTING CONFINEMENT 53 (2006), available at [http://www.prisoncommission.org/pdfs/confronting\\_confinement.pdf](http://www.prisoncommission.org/pdfs/confronting_confinement.pdf).

34. *Mental Health Issues*, *supra* note 18, at 125.

is clear.”<sup>35</sup>

Equally important, there are alternatives to the use of supermax facilities. For example, in the 1980’s, Great Britain prison officials began to reduce isolation and to offer inmates access to work and educational opportunities within the prison.<sup>36</sup> The officials also began to allow inmates more free time for exercise and phone calls.<sup>37</sup> This change caused “impressive” results, and now the use of solitary confinement in Great Britain is negligible.<sup>38</sup>

This article argues that the use of supermax facilities is inconsistent with the CRPD. Confining an individual to a supermax facility in essence creates a mental disability. While the major concern of the CRPD is to protect “the rights and development of people with disabilities,”<sup>39</sup> it cannot be consistent with the CRPD for the government to make someone disabled. Accordingly, the use of supermax facilities violates the CRPD.<sup>40</sup>

Because the disability inflicted by supermax facilities is inconsistent with the CRPD, what effect will ratification of the convention have? This article addresses a major policy question heretofore not analyzed in the already significant body of commentary on the CRPD.<sup>41</sup> Specifically, with what reservations, understandings, and declarations might the Senate approve the treaty? The United States has an established pattern of ratification of human rights treaties, the ratification of which is typically accompanied by a standard package of reservations, understandings, and declarations.<sup>42</sup> This package is designed to modify the

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35. Gawande, *supra* note 1.

36. *Id.* (analyzing violence levels in state prisons following the opening of new supermaxes in Arizona, Illinois, and Minnesota. Levels of inmate-on-inmate violence remained the same with inmate-on-staff violence fluctuated at random. No steady decrease in violence was found).

37. *Id.*

38. *Id.*

39. Mark Malloch, Deputy U.N. Sec. Gen., Secretary General’s Message on the Adoption of the Convention on the Rights of Persons with Disabilities (Dec. 13, 2006), *available at* <http://www.un.org/apps/sg/sgstats.asp?nid=2362>.

40. While this article is limited to an analysis of supermax solitary confinement, this does not necessarily mean that lesser forms of solitary confinement are consistent with the CRPD. Also beyond the scope of this article is an analysis of the obligations the CRPD places on states with respect to prisoners who have a non-state-imposed disability.

41. See, e.g., Aaron A. Dhir, *Human Rights Treaty Drafting Through the Lens of Mental Disability: The Proposed International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*, 41 *STAN. J. INT’L L.* 181 (2005); Kanter, *supra* note 2; Lawson, *supra* note 2; Tina Minkowitz, *The United Nations Convention on the Rights of Persons with Disabilities and the Right to Be Free from Nonconsensual Psychiatric Interventions*, 34 *SYRACUSE J. INT’L L. & COM.* 405 (2007); Michael L. Perlin, “A Change Is Gonna Come”: *The Implications of the United Nations Convention on the Rights of Persons with Disabilities for the Domestic Practice of Constitutional Mental Disability Law*, 29 *N. ILL. U. L. REV.* 483 (2009).

42. See UNITED STATES SENATE FOREIGN RELATIONS COMMITTEE REPORT: INTERNATIONAL

substantive commitments the United States takes on, bring them into conformity with existing domestic U.S. law, and ensure that U.S. courts lack jurisdiction to enforce the treaty.

Were the Senate to take up the question of ratifying the CRPD, it would likely give serious consideration to exempting supermax facilities from its scope. This article will analyze how it might seek to do so, arguing that it may be extraordinarily difficult to formulate a reservation or understanding that is both politically acceptable and successful in exempting supermax facilities from international scrutiny under the CRPD.

Part II of this article discusses the background of the CRPD and the concept of disablement. Part III presents the history and current use of solitary confinement in the United States. Part IV discusses the medical and psychological effects of supermax solitary confinement and the implications of those effects in reference to the CRPD. Following that, Part V explains an additional avenue of relief for inmates under Article 15 of the CRPD. Lastly, Part VI analyzes possible reservations, understandings, and other procedural mechanisms that the United States might employ in order to limit the effect of a possible ratification of the CRPD.

## II. THE CRPD

The CRPD aims to protect the civil, political, economic, social, and cultural rights of disabled persons. The rights protected by the CRPD include the right to equality before the law without discrimination,<sup>43</sup> the right to physical and mental integrity,<sup>44</sup> freedom of movement<sup>45</sup> and work,<sup>46</sup> and the right to an adequate standard of living.<sup>47</sup> Article 1 of CRPD defines those who are disabled as those who have “long-term physical, mental, intellectual or sensory impairments.”<sup>48</sup> The Secretariat for the CRPD stated that a disability “should be seen as the result of the interaction between a person and his/her environment” and “not something that resides in the individual as the result of some impairment.”<sup>49</sup>

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COVENANT ON CIVIL AND POLITICAL RIGHTS, S. Exec. Doc. No. 102-123, Cong., 2d Sess. 6-12 (1992), reprinted in 31 I.L.M. 645 (1992) [hereinafter US ICCPR Conditions].

43. CRPD, *supra* note 4, art. 5.

44. *Id.* art. 17.

45. *Id.* art. 18.

46. *Id.* art. 27.

47. *Id.* art. 28.

48. *Id.* art. 1; see also *World Report on Disability*, *supra* note 2, at 21 (defining a disability as a “complex multidimensional experience [that] poses several challenges for measurement. Approaches to measuring disability vary across countries and influence the results.”).

49. See Secretariat for the Convention on the Rights of Persons with Disabilities, *Focus of the Convention*, U.N. ENABLE, <http://www.un.org/disabilities/default.asp?id=216> (last visited Aug. 16, 2011) [hereinafter *Focus of the Convention*].



The Secretariat for the CRPD has also made it clear that the CRPD definition of a disabled person is not exhaustive and does not “exclude broader categories of persons . . . with short-term disabilities or persons who had disabilities in the past.”<sup>50</sup> In other words, the CRPD does not appear to impose a temporal limitation on disabilities based on the broad language and interpretations of Article 1. For example, one who suffers from a mental disability that is either permanent *or* temporary would be covered by the CRPD.

It is also important to note that both physical and mental impairments are recognized under Article 1 of the CRPD. The Secretariat for the CRPD acknowledged on his official website, U.N. Enable, that the Article 1 definition is not an exhaustive definition for individuals who might be able to claim relief under the CRPD.<sup>51</sup> Therefore, the mental effects produced by supermax solitary would not be excluded under Article 1 of the CRPD.

#### A. *The CRPD and State-Imposed Disabilities*

As noted, the primary aim of the CRPD is to ensure the full equality and integration into society of people who have disabilities.<sup>52</sup> But there is an equally fundamental right under the CRPD—specifically, the right not to be disabled by government action. Support for this proposition is found in the text and drafting history of the treaty.

Article 4(d) of the CRPD requires states to “refrain from engaging in any act or practice that is inconsistent with the present Convention . . . .”<sup>53</sup> It cannot be consistent with the CRPD for a state to impose a disability on someone. Consider what an alternate interpretation would mean: A state party could deliberately disable an individual, and then would be obligated to take a variety of measures designed to ensure that the disability the state imposed has as little limiting or restrictive effect on that person as possible. To put it another way, by this reading, a state party would be free to take an action, but would then be obligated to undo its effects as much as possible. Any such reading of the CRPD would be inconsistent with the fundamental requirement of international law that a treaty be “interpreted in good faith . . . in light of its object and purpose.”<sup>54</sup> In fact, any such reading would be “manifestly absurd” or “unreasonable.”<sup>55</sup>

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50. *Id.*

51. *Id.*

52. *Id.*

53. CRPD, *supra* note 4, art. 4.

54. Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

55. *Id.* art. 32(b).

The preparatory materials to the CRPD state that “[d]isability often arises from war and inhumane treatment” and that steps must be taken to protect “those who have become disabled as a result of inhumane treatment as well as to promote prevention.”<sup>56</sup> Consistent with this admonition, the Secretary-General spoke on the day of the adoption of the CRPD of the “need to enable every person to contribute to the best of their abilities and potential.”<sup>57</sup> A state that imposes a disability on an individual is plainly acting contrary to that need.<sup>58</sup> The *World Report on Disability*, meant to facilitate the implementation of the CRPD, also highlights the importance of preventing health conditions that cause disabilities such as nutrition and preventable diseases<sup>59</sup> and the increased risk of disability associated with poverty.<sup>60</sup> The report goes on to mention the “huge effect” environment can have on both the prevalence and extent of a person’s disability.<sup>61</sup> For example, environmental changes such as armed conflict and natural disasters can disable individuals.<sup>62</sup>

### B. *Disablement as a Legal Concept*

The term “disablement” here refers to state action, intentionally undertaken, that predictably results in the imposition of a disability on the majority of the population subjected to the state action.<sup>63</sup> It is not necessary to show that state officials are motivated by a desire that those

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56. Secretariat for the Convention on the Rights of Persons with Disabilities, *Human Rights and Persons with Disabilities*, U.N. ENABLE (2007), <http://www.un.org/esa/socdev/enable/rights/humanrights.htm>; see also U.N. Secretary-General, *Progress in Equalization of Opportunities by, for and with Persons with Disabilities*, (June 27, 2003), [http://www.un.org/esa/socdev/enable/rights/a\\_ac265\\_2003\\_3e.htm](http://www.un.org/esa/socdev/enable/rights/a_ac265_2003_3e.htm) (stating that “war and conflict, as well as violence in society, are recognized causes of disablement [and] progress in implementing the programme of action would contribute to a reduction of one of the significant causes of disability in populations”).

57. Malloch, *supra* note 39.

58. Article 15 of the CRPD states that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” CRPD, *supra* note 4, art. 15. This provision is analyzed in Part V *infra*.

59. *World Report on Disability*, *supra* note 2, at 8.

60. *Id.* at 10.

61. *Id.* at 37.

62. *Id.*

63. Some scholars have used the term “disablement” in a broader though related sense, as the social, political, legal, and economic factors by which people who have disabilities are mistreated. Factors such as a lack of medical care and nutrition in prison constitute a form of such disablement. See Marta Russell & Jean Stewart, *Disablement, Prison & Historical Segregation*, 53 MONTHLY REV. 3 (2001). Beth Ribet analyzes disablement in the context of prison rape, where a disability is created through external factors and suffering. Beth Ribet, *Naming Prison Rape as Disablement: A Critical Analysis of the Prison Litigation Reform Act, the Americans with Disabilities Act, and the Imperatives of Survivor-Oriented Advocacy*, 17 VA. J. SOC. POL’Y & L. 281, 285 (2010) (referring to disablement as “the process by which some disabilities . . . are produced by violence, inequality, and subordination” in the context of U.S. prisons); see also *World Report on Disability*, *supra* note 2, at 169 (stating that “[e]nvironments—physical, social, and attitudinal—can either disable people with impairments or foster their participation and

subjected to the policy become disabled, but it may be easiest to set out the legal elements of disablement in the context of state action that is so motivated—deliberate physical maiming as punishment.

In 2010, a Saudi Arabian judge asked several hospitals whether they would sever a man's spinal cord as punishment for paralyzing another man during a fight.<sup>64</sup> There is no sign the punishment was ever actually imposed, but it is worth analyzing whether Saudi Arabia would have violated its obligations under the CRPD had the severing been carried out.<sup>65</sup> Additionally, an example of disablement occurred in Iran in 2008, when Iranian authorities amputated the hand of a young man as punishment for stealing.<sup>66</sup> Like Saudi Arabia, Iran is a party to the CRPD.<sup>67</sup>

These examples of governmental action inflicting permanent disabilities would certainly qualify as a violation of the CRPD. "Disablement" has four basic elements, all of which are present here. First, both of these actions were official government actions. In both the Iran and Saudi Arabia examples, a judge imposed a criminal sentence. However, the scope of the CRPD may not necessarily be limited to state action. For instance, the CRPD guarantees protection of disabled people from "all forms of exploitation, violence and abuse,"<sup>68</sup> an obligation which may entail state action to protect people with disabilities from private abuse. But whatever its scope may be, it certainly includes all official state action.

Second, the result of this action is a permanent disability under Article 1 of the CRPD. In the Iran example, the victim would be permanently deprived of the use of his or her hand. In the Saudi Arabia example, were the spine-severing carried out, the victim would permanently

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inclusion"). The *World Report* also enumerates types of "disabling barriers" such as negative attitudes and inadequate policies and standards. *Id.* at 262.

64. *Saudi Hospitals Are Asked to Maim Man as Punishment*, N.Y. TIMES, Aug. 19, 2010, [www.nytimes.com/2010/08/20/world/middleeast/20saudi.html](http://www.nytimes.com/2010/08/20/world/middleeast/20saudi.html); see also *Saudi Arabia: Authorities Must Not Deliberately Paralyze Man as Punishment*, AMNESTY INT'L, Aug. 20, 2010, [www.amnestyusa.org/news/press-releases/saudi-arabia-authorities-must-not-deliberately-paralyze-man-as-punishment](http://www.amnestyusa.org/news/press-releases/saudi-arabia-authorities-must-not-deliberately-paralyze-man-as-punishment).

65. Saudi Arabia ratified both the CRPD and the Optional Protocol in June 2008. See Secretariat for the Convention on the Rights of Persons with Disabilities, *Convention and Optional Protocol Signatures and Ratifications*, U.N. ENABLE, <http://www.un.org/disabilities/countries.asp?navid=12&pid=166> (last visited Aug. 16, 2011) [hereinafter *Signatures and Ratifications*].

66. *Iran Cuts off Man's Hand for Stealing*, GUARDIAN, Oct. 24, 2010, <http://www.guardian.co.uk/world/2010/oct/24/iran-thief-hand-cut-off>; see also *Iranian Sentenced to Blinding for Acid Attack Pardoned*, BBC NEWS, July 31, 2011, <http://www.bbc.co.uk/news/world-middle-east-14356886> (noting Iranian court's sentencing of a man to blinding for having blinded a woman in an acid attack).

67. Iran ratified the CRPD in 2009. See *Signatures and Ratifications*, *supra* note 65.

68. CRPD, *supra* note 4, art. 16(2).

lose the ability to walk. Article 1 of the CRPD defines “[p]ersons with disabilities” as those who have “long-term physical, mental, intellectual or sensory impairments . . . [that] may hinder their full and effective participation in society on an equal basis with others.”<sup>69</sup> The severing of a spinal cord and the chopping off of a hand undoubtedly meet the Article 1 definition of “long-term,” given that these are permanent disabilities for which there is no hope of recovery. It should be emphasized, though, that Article 1 imposes no permanency requirement on a disability, but rather the requirement of “long-term.”<sup>70</sup> The second part of Article 1 is also satisfied in these examples. The severing of a spinal cord or hand creates a disability that prevents one’s full and effective participation in society on an equal basis with others. These actions do so by depriving someone of the use of his hand or his ability to walk.<sup>71</sup>

Third, in both instances, there is intent to impose a disability. “Intent” for this purpose means intentionally undertaking an action that the state knows or should know will result in disablement. There is nothing unusual in international law about such an understanding of intent. For example, under Article 30(2) of the Rome Statute of the International Criminal Court, an individual has “intent” to cause a consequence when he or she “means to engage in . . . conduct” and “is aware that . . . [the consequence] will occur in the ordinary course of events.”<sup>72</sup> Under Article 1 of the Convention Against Torture, moreover, “consent or acquiescence” is sufficient to show that the torture was intentionally inflicted.<sup>73</sup> In the cases of Saudi Arabia and Iran, government authorities took a specific action, which they knew would permanently disable. Thus the disablement would be intentional.

One might argue that there is a lack of intent to inflict a disability on these individuals, as the true reason for purposeful maiming is to uphold religious law. The disability that results is simply a side-product of that true intention. However, this argument confounds the subjective motive of the governmental officials with that of an objective analysis of an overall intent to disable. From an objective standpoint, the requisite intent is present because officials were fully aware of the consequences of deliberately chopping off an individual’s hand. There is an intent to

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69. *Id.* art. 1.

70. *Id.* Indeed, the Secretariat of the CRPD has suggested that the CRPD can be construed as to cover those with “short-term disabilities or persons who had disabilities in the past.” See *Focus of the Convention*, *supra* note 49.

71. CRPD, *supra* note 4, art. 4.

72. Rome Statute of the International Criminal Court, art. 30(2), July 17, 1998, A/CONF.183/9.

73. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), Dec. 10, 1984, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984) [hereinafter CAT].

chop a person's hand off, and the resulting physical disability is the objectively foreseeable consequence of that intent. Any subjective religious or other purpose is irrelevant. In other words, the element of intent can be the knowledge that such an action will logically cause the disability and can exist in conjunction with other motives such as maintaining security.

One additional qualification to the definition of intent is needed. What is *not* covered by an intent standard is strict liability or negligence. Many government actions, legitimate in themselves, might occasionally and unpredictably result in an individual becoming disabled. A police officer using reasonable force to save someone's life might accidentally shoot someone and cause him to be paralyzed. At that point the obligations of the CRPD would become relevant, but the state's action in causing the paralysis would not constitute a violation. Where a state action that is intentionally undertaken predictably causes a disability in the majority of cases, however, it is nonsensical to say that the imposition of the disability was not intended.<sup>74</sup>

Fourth, these two examples present conduct that produces a disability in *all* cases. In other words, there is no chance that an individual will *not* be disabled once his spinal cord is severed or her hand is chopped off. There is, however, no reason why the concept of disablement should

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74. One might ask whether a state's use of armed force violates the CRPD, especially given that it predictably causes disability on the part of many individuals, civilian and soldier, enemy and national. The answer is no: The CRPD is not the Kellogg-Briand Pact. See Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, art. 1, 46 Stat. 2343, TS No. 796, 94 LNTS 57. International law traditionally distinguishes between *jus ad bellum* (the right to engage in war) and *jus in bello* (the law governing the conduct of war). With regard to the former, just as a state party to a treaty that bans capital punishment is not absolutely barred from the use of armed force even though doing so will predictably result in many deaths, so, too, is it reasonable to read the CRPD as having nothing to say about a state's resort to armed force. Similarly, it is clear that whatever application the International Covenant on Civil and Political Rights (ICCPR) may have in time of war, it does not govern a state's decision to resort to armed force—a matter governed by the U.N. Charter. See U.N. Charter, arts. 2(4), 51. Confining the CRPD to actions other than the decision to use armed force has no impact on its applicability to all other actions, including the treatment of prisoners, veterans, or the population at large.

With regard to the international law governing the conduct of war, Article 3 of the Geneva Convention bars "mutilation" of civilians, prisoners of war, and the wounded, but not, of course, soldiers taking part in combat. Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S.135. See also Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000); Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1 (2004). There is controversy over whether international human rights law has any application here, or whether armed conflict is governed solely by international humanitarian law. The CRPD is part of human rights law, and there is no reason to think that the question of its applicability to how war is conducted is any different from that of, say, the ICCPR. It is not necessary for the argument in this article to resolve this larger question. If human rights law applies in some way to the conduct of war, then so would the CRPD; if it does not, then the CRPD would not.

be limited to actions that have one hundred percent efficacy in producing a disability. If a state action results in a disability for a particular individual, it is irrelevant that the imposition of that action on other individuals might not have produced a disability. The affected individual is still disabled. The question of how often the action results in disability can be relevant to intent, as noted, but less than perfect efficacy overall is no defense in an individual case.

In short, physical maiming of the sort that Iran committed and a Saudi judge considered is a clear violation of the CRPD, and so is the use of supermax confinement. First, like the decision to maim, the decision to submit an inmate to supermax confinement is obviously state action.<sup>75</sup> Second, as will be shown in Part IV.B., solitary confinement produces an Article 1 disability because the psychiatric effects of prolonged supermax can be long-term and of a devastating nature.<sup>76</sup> Third, the production of a disability is intentional. Once again, the motive—observance of religious law, a desire to punish or control—is irrelevant. What matters is that a prisoner does not happen into supermax confinement; rather, a prison administrator intentionally authorizes placing the individual into solitary confinement for punishment or for other purposes. Fourth, the disability occurs in a majority of cases. While the devastating effects of solitary confinement do not manifest themselves one hundred percent of the time, as they do in the context of purposeful maiming, intentionally subjecting an inmate to long-term solitary confinement will more often than not result in severe and long-term psychological impairments.<sup>77</sup>

### III. SUPERMAX SOLITARY CONFINEMENT

#### A. *History of Supermax Solitary Confinement*

The rise of supermax prison facilities owes much to prison overcrowding. From 1975 to 2000, the rate of incarceration in the United States quintupled.<sup>78</sup> The size of many state prison systems doubled.<sup>79</sup> Prisoner administrators could no longer manage the large number of inmates or the “inevitable tensions and conflicts that festered behind the

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75. The analysis here assumes that the prison is run by the government. Where a prison is run by a private contractor, the article assumes that the state would still be responsible, but an analysis of this issue is beyond the scope of the article.

76. See Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 J.L. & POL'Y 325 (2006), [law.wustl.edu/journal/22/p325grassian.pdf](http://law.wustl.edu/journal/22/p325grassian.pdf).

77. See generally *id.*

78. *Mental Health Issues*, *supra* note 18, at 127–28 (citing C. Haney & P. Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-five Years After the Stanford Prison Experiment*, 53 AM. PSYCHOLOGIST 709 (1998)).

79. *Id.* at 128.

walls.”<sup>80</sup> Supermax was the solution. In 1983, the first supermax prison facility in the United States opened in Marion, Illinois, in reaction to inmates killing two of the Marion prison guards.<sup>81</sup> Today, most supermax facilities are modeled after the “Marion Model.”<sup>82</sup> In this model of incarceration, solitary confinement is used as a disciplinary measure as opposed to a source of rehabilitation.<sup>83</sup> This “super-maximum security approach” soon spread to other parts of the United States with the Pelican Bay State Prison, which opened in 1989, followed by the ADX Florence supermax-style prison in Colorado in 1994, the federal government’s main supermax facility.<sup>84</sup> By 1997, there were fifty-seven supermax prisons in thirty-four states, and by 1998, approximately 20,000 prisoners were held in these facilities.<sup>85</sup> By 2000, over sixty supermax institutions were open in the United States,<sup>86</sup> and in 2004, forty-four states had at least one supermax facility.<sup>87</sup>

#### B. *Current Description of Solitary Confinement in U.S. Supermax Prisons*

The cells in supermax prisons reflect the purpose of these facilities: “to monitor, to control, to isolate.”<sup>88</sup>

Reflect for a moment on what a small space that is not much larger than a king-sized bed looks, smells, and feels like when someone has lived in it for 23 hours a day, day after day, for years on end. Property is strewn around, stored in whatever makeshift way possible, clothes and bedding soiled from recent use sit in one or another corner or on the floor, the residue of recent meals (that are eaten within a few feet of an open toilet) here and there, on the floor, bunk, or elsewhere in

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80. *Id.*

81. Patrick J. Kiger, *History of Solitary Confinement*, NATIONAL GEOGRAPHIC, <http://channel.nationalgeographic.com/channel/solitary-confinement-history> (last visited Aug. 16, 2011).

82. Haney & Lynch, *supra* note 30, at 495 (stating that “after the notorious federal penitentiary at Marion where the new policy seems to have originated, a number of prison systems (including the Federal Bureau of Prisons) have either begun or completed construction on specialized prisons devoted entirely to long-term punitive segregation and solitary confinement-like conditions and routines”) (citations omitted).

83. Rebman, *supra* note 17, at 574–75.

84. Laura Sullivan, *Timeline: Solitary Confinement in U.S. Prisons*, NPR (July 26, 2006), <http://www.npr.org/templates/story/story.php?storyId=5579901> (stating that while there are many state-run supermax facilities in states such as Oregon, Mississippi, Indiana, Virginia, and Ohio, ADX Florence was the “federal government’s first and only Supermax facility”); *see also* Shalev, *supra* note 14, at 2 (stating that at least forty-four States now operate at least one supermax prison).

85. Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 443 (2006).

86. Gawande, *supra* note 1.

87. Arrigo & Bullock, *supra* note 29, at 624.

88. Sullivan, *supra* note 20.

the cell.<sup>89</sup>

[The cells] are structured to deprive prisoners of most of the things that all but the most callous commentators would concede are basic necessities of life—minimal freedom of movement, the opportunity to touch another human being in friendship or with affection, the ability to engage in meaningful or productive physical or mental activity, and so on.<sup>90</sup>

With virtually around the clock surveillance and a total lack of human contact and interaction, the effects of supermax solitary confinement are truly experiences of “stark sterility and unremitting monotony.”<sup>91</sup> Although the exact conditions of solitary confinement differ by prison, author Leonard Orland gives a basic description of the current physical conditions of supermax solitary confinement:

I was placed in a 4 x 8 foot steel box with no windows, a bare light bulb, a small peephole (which only the guards could control and which was kept closed most of the time), a sink (occupied by three cockroaches), a toilet, and one steel shelf on which, if the guards so desired, a mattress could be placed for sleeping. It was very much like being forced into a very small stalled elevator.<sup>92</sup>

Generally, the physical layout of supermax facilities is designed to divide and isolate; prisoners in supermax facilities are divided into small and manageable groups of individuals in cell-blocks and then placed in their own individual cells.<sup>93</sup> Each facility has four cell-blocks that are called “pods,” each of which has its own shower and recreation areas.<sup>94</sup>

The individual units where inmates are confined are called “secure housing units” (SHUs).<sup>95</sup> These units are usually about eight feet by six feet in size, which means that these cells are equal to the size of a bathroom.<sup>96</sup> As in Orland’s description, there is generally a stainless steel sink and toilet, as well as some type of desk and bed.<sup>97</sup> The walls of the cell are bare and white with no windows.<sup>98</sup> Usually the only light is a

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89. *A Culture of Harm*, *supra* note 30, at 968.

90. *Id.* at 967.

91. *Madrid v. Gomez*, 889 F. Supp. 1146, 1230 (N.D. Cal. 1995).

92. LEONARD ORLAND, *PRISONS: HOUSES OF DARKNESS* 72–74 (1975); *see also* Bryan B. Walton, *The Eighth Amendment and Psychological Implications of Solitary Confinement*, 21 *LAW & PSYCHOL. REV.* 271, 272–73 (1997); Gawande, *supra* note 1 (stating that the average cell is fifty feet long and five feet wide—similar to a “dog kennel”).

93. *Cold Storage: Super-Maximum Security Confinement in Indiana*, HUMAN RIGHTS WATCH (Oct. 1997), <http://www.hrw.org/legacy/reports/1997/usind/> [hereinafter *Cold Storage*].

94. *Id.*

95. Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 *AM. U. INT’L L. REV.* 71, 74 (2005).

96. Hresko, *supra* note 16, at 10.

97. *Id.*

98. *Id.*



bare light bulb, which hangs from the ceiling and remains on twenty-four hours a day.<sup>99</sup> Inmates are unable to control the brightness of their cells and are unable to tell what time of day it is.<sup>100</sup> Prisoners who try to shield the light can be subject to other disciplinary measures.<sup>101</sup> The doors of the SHUs are different from the doors used in cells in other parts of the prison.<sup>102</sup> They are “made of solid steel, interrupted only by a small approximately eye-level clear window and a waist-level food slot.”<sup>103</sup> These doors are made of a heavy-gauge metal, which block all light, in order to prevent inmates from throwing objects at guards and other inmates.<sup>104</sup> Moreover, the door is usually outfitted with strips on each side so as to muffle any possible conversations between inmates in adjacent cells.<sup>105</sup> These doors “effectively cut inmates off from the world outside the cell, muffling sound and severely restricting visual stimulus.”<sup>106</sup> The doors also have the effect of cutting off ventilation in the units, so that the air becomes “heavy and dank.”<sup>107</sup>

There is usually no recreational equipment, and so prisoners generally just pace back and forth. The “the image created is hauntingly similar to that of a caged feline pacing in the zoo.”<sup>108</sup> Indeed one inmate in supermax solitary confinement began to think of himself as an animal, stating:

Look at me. They have reduced me to an animal. I can't take care of myself, I smell, my hair is matted together, I eat all of my meals just a few feet away from the toilet in my cell. I am living like an animal. I am afraid I am becoming one.<sup>109</sup>

The physical exercise facilities are so limited that they are often referred to as “dog runs.”<sup>110</sup> Furthermore, when an inmate leaves his cell, he must usually undergo a “visual strip search” in front of the control tower officers.<sup>111</sup> When the prisoners are escorted from their cells to the exercise cage, they are usually placed in restraints and are sometimes

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99. *Id.*

100. Arrigo & Bullock, *supra* note 29, at 625.

101. *Wilkinson v. Austin*, 545 U.S. 209, 214–15 (2005).

102. *Cold Storage*, *supra* note 93.

103. *Id.*

104. *Madrid v. Gomez*, 889 F. Supp. 1146, 1228 (N.D. Cal. 1995).

105. Jeffrey Kluger, *Are Prisons Driving Prisoners Mad?*, TIME, Jan. 26, 2007, <http://www.time.com/time/magazine/article/0,9171,1582304,00.html>.

106. *Cold Storage*, *supra* note 93.

107. *A Culture of Harm*, *supra* note 30, at 968.

108. *Madrid*, 889 F. Supp. at 1229.

109. *A Culture of Harm*, *supra* note 30, at 968–69; *see also* Dayan, *supra* note 25 (“If they only touch you when you’re at the end of a chain, then they can’t see you as anything but a dog. Now I can’t see my face in the mirror. I’ve lost my skin. I can’t feel my mind.”).

110. *Mental Health Issues*, *supra* note 18, at 126.

111. Rebman, *supra* note 17, at 581–82.

also attached to a leash that is held by the escorting officer.<sup>112</sup> These protocols have the effect of discouraging many inmates from taking advantage of the recreation time, as leaving the cell is actually more humiliating than remaining in the cell.<sup>113</sup>

In some instances, the food in solitary is a tasteless block called nutra-loaf, which contains “just enough nutrition for survival.”<sup>114</sup> Inmates consume all meals within their cells, which deprives the prisoners of an invaluable socializing opportunity with other inmates. Thus even mealtime has become another opportunity for sensory deprivation. Inmates in solitary confinement are also forbidden to have a variety of personal objects and educational materials.<sup>115</sup> However, in the federal supermax facility, ADX-Florence, educational and religious programs are broadcast through the TV channels of the prison.<sup>116</sup>

In general, once a prisoner is placed in a SHU, there is very minimal human contact, and the prisoner could go years without actually seeing another human being.<sup>117</sup> Overall, it is difficult to pinpoint the average length most prisoners are kept in solitary confinement because so much of the statistics depend on the particular supermax facility as well as the type of prisoner.<sup>118</sup> However, once placed in solitary confinement, the prisoner is confined to the SHU for about twenty-two or twenty-three hours a day. The remaining hour or two are for either a brief computer-controlled shower or recreation time.<sup>119</sup>

Throughout solitary confinement, the inmates are not allowed to talk to other inmates by yelling from cell to cell.<sup>120</sup> Interaction with prison guards is also severely limited, as prison officials are able to give

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112. *Mental Health Issues*, *supra* note 18, at 126.

113. Rebman, *supra* note 17, at 582 (stating that “to some, time spent outside of the cell is considered more degrading and torturous than remaining in the solitary confinement cells”).

114. Gawande, *supra* note 1.

115. Rebman, *supra* note 17, at 579; *Solitary*, THE NEW HUMANIST, Jan. 2011, <http://newhumanist.org.uk/2479/solitary> (stating that “the personal belongings that prisoners may keep in their cell are extremely limited in number and type”). In the federal supermax facility in Florence, Colorado, an inmate’s request for a copy of two books written by Barack Obama was turned down because giving the inmate such literature would be “potentially detrimental to national security.” *Id.*

116. *Supermax Prisons and the Psychological Effects of Isolation*, HUMAN RIGHTS WATCH (June 9, 2008), [http://www.hrw.org/en/node/62183/section/4#\\_ftn58](http://www.hrw.org/en/node/62183/section/4#_ftn58).

117. Nan D. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT’L L.J. 139, 159 (1995).

118. See Alysia, *Results of the “Solitary Confinement Bill” Bring Moral Victory, New Allies*, MAINE CIV. LIBERTIES UNION (Apr. 8, 2010, 2:28 PM), <http://www.mclu.org/node/551> (stating that the average length of supermax solitary confinement for “high risk prisoners” is about 205 days).

119. Hresko, *supra* note 16, at 8.

120. *Id.*

all instructions through loud speakers.<sup>121</sup> The only form of habitual human contact that a prisoner in solitary has is when his meal is pushed through a slot in the door.<sup>122</sup> The heightened security and technology essentially mean that inmates “may go for months or even years without any meaningful social or physical contact.”<sup>123</sup>

For example, many supermax facilities now employ computerized locking and tracking systems, which allow guards to observe an inmate’s movement without any human interaction.<sup>124</sup> The inmates are usually watched by camera and speak through intercoms instead of through direct contact with guards.<sup>125</sup> Also, some newer facilities now use videoconferencing equipment for visits so that there is never any direct human interaction.<sup>126</sup> Even more disturbing, some supermax facilities use “tele-medicine” and “tele-psychiatry,” which are procedures that allow physicians to “examine” the inmates through the use of television screens located miles away.<sup>127</sup> Sadly, “tele-medicine” seems like a better option than the alternative of “cell front therapy,” where inmates are required to shout their medical concerns to a physician on the other side of the door, allowing other inmates to hear.<sup>128</sup> If inmates have a visitor, they are only able to interact with the visitor through a small video screen that is located across the room and has poor sound quality.<sup>129</sup> During the visit, the inmate must remain handcuffed, shackled, and belly chained.<sup>130</sup> To make matters worse, in some facilities, only about ten percent of inmates receive visitors at all.<sup>131</sup>

The fusion of the old practice of solitary confinement and the more modern and sophisticated technology is what really sets these supermax facilities apart from usual solitary confinement and makes supermax solitary an “extraordinary and extreme form of imprisonment unique in the modern history of corrections.”<sup>132</sup>

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121. *Id.*

122. *Id.*

123. Miller, *supra* note 117, at 156.

124. *Mental Health Issues*, *supra* note 18, at 126.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 143.

129. Jones ‘El v. Berge, 164 F. Supp. 2d 1096, 1101 (W.D. Wis. 2001) (stating that the audio quality is so poor that “some mentally ill inmates believe that the images on the video screens are manipulated and refuse visitors”).

130. *Id.*

131. *Id.*

132. *Mental Health Issues*, *supra* note 18, at 127.

IV. THE MENTAL EFFECTS OF SENSORY DEPRIVATION FROM  
SOLITARY CONFINEMENT CONSTITUTE DISABLEMENT  
UNDER THE CRPD

A. *Mental Effects*

The mental effects caused by prolonged solitary confinement are well documented and widely recognized in extensive historical evidence, clinical research, and empirical data. Solitary confinement has “serious psychological, psychiatric, and sometimes physiological effects on many prison inmates,” ranging from insomnia to hallucinations to outright insanity.<sup>133</sup>

The devastating mental effects of solitary confinement were already recognized early in the nineteenth century.<sup>134</sup> The Cherry Hill prison was built in Philadelphia in 1829, representing an approach to imprisonment that aimed to emphasize isolation and self-reflection over whipping and other corporal punishments. Each prisoner was kept entirely isolated, with “absolute silence” imposed on them all.<sup>135</sup> In 1842, after visiting Cherry Hill, Charles Dickens characterized its system as one of “rigid, strict, and hopeless solitary confinement.”<sup>136</sup> Though he viewed the prison authorities as well-intentioned, he asserted that “no man has the right to inflict upon his fellow creature” the “dreadful punishment” of prolonged solitary confinement.<sup>137</sup> Alexis de Tocqueville’s views on penology were considerably stricter than Dickens’. He believed that prisoners should be kept from communicating with each other to avoid “mutual corruption”<sup>138</sup> and viewed flogging as an appropriate means of discipline.<sup>139</sup> Even so, he was appalled by the approach taken in the Auburn prison in New York when it opened a new wing in 1821. Speaking of the prisoners there, he wrote:

In order to reform them, they had been submitted to complete isolation; but this absolute solitude, if nothing interrupts it, is beyond the strength of man; it destroys the criminal without intermission and

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133. Lobel, *supra* note 22, at 117.

134. Grassian, *supra* note 76, at 341.

135. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 220 (3d ed. 2005).

136. CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 111 (Patricia Ingham ed. 2001).

137. *Id.* at 111, 113 (stating that any prisoner at Cherry Hill was “a man buried alive; to be dug out in the slow round of years; and in the mean time dead to everything but torturing anxieties and horrible despair”). See also FRIEDMAN, *supra* note 135, at 220.

138. GUSTAVE DE BEAUMONT & ALEXIS DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION TO FRANCE 44 (Francis Lieber trans. 1964). For accounts of his visits to American prisons and his views on penology, see HUGH BROGAN, ALEXIS DE TOCQUEVILLE: A LIFE 154–56, 166–67, 189–92 (2006); LEO DAMROSCH, TOCQUEVILLE’S DISCOVERY OF AMERICA 36–40 (2010); FRIEDMAN, *supra* note 135, at 220–21.

139. See DAMROSCH, *supra* note 138, at 39.

without pity; it does not reform, it kills.<sup>140</sup>

Sadly, when a former warden of a modern supermax facility wrote in 2004 that “[a]fter long-term confinement and the loss of hope for offenders controlled under [supermax] conditions, mental deterioration is almost assured,”<sup>141</sup> he said nothing that had not been recognized for well over a century and a half. There is now a large body of literature documenting the physical and mental effects of supermax solitary confinement. Overall, the mental effects of solitary confinement, such as post-traumatic stress disorder (PTSD) are similar to the effects seen in torture and trauma victims.<sup>142</sup> And they are long-lasting. Prisoners of war during the Korean war, who were held in conditions similar to those in supermax solitary confinement, displayed “psychosomatic ailments, suspicion, confusion, and depression,” and were “detached from social interaction” for as long as forty years after being released.<sup>143</sup>

The mental effects of solitary confinement are so common that psychiatrists now associate a specific psychiatric syndrome known as Reduced Environmental Stimulation (RES) Syndrome or “isolation sickness” with prolonged solitary confinement.<sup>144</sup> The most common symptoms associated with this syndrome include hyperresponsivity to external stimuli, perceptual distortions, illusions and hallucinations, panic attacks, difficulties in thinking, concentration, and memory, “intrusive obsessional thoughts” or “emergence of primitive aggressive ruminations,” overt paranoia, and problems with impulse control.<sup>145</sup> These side effects comprise what Dr. Stuart Grassian, a Boston psychiatrist and former member of the Harvard Medical School faculty, has called an “acute organic brain syndrome” or “delirium.”<sup>146</sup> This syndrome also results in electroencephalogram (EEG) abnormalities in the brain.<sup>147</sup> More specifically, EEG studies show “diffuse slowing of brain waves” in most prisoners after only a week in solitary confinement.<sup>148</sup>

This overall EEG decline is connected to “a reduction in stimulation seeking behavior.”<sup>149</sup> Individuals in supermax solitary become withdrawn and develop a “shut-in” or reclusive personality.<sup>150</sup> Their

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140. BEAUMONT & TOCQUEVILLE, *supra* note 138, at 41.

141. *Culture of Harm*, *supra* note 30, at 957 (citing JAMES H. BRUTON, *THE BIG HOUSE: LIFE INSIDE A SUPERMAX SECURITY PRISON* 38 (2004)).

142. *Mental Health Issues*, *supra* note 18, at 132.

143. Grassian, *supra* note 76, at 383.

144. *Mental Health Issues*, *supra* note 18, at 137.

145. Grassian, *supra* note 76, at 336–37, 372.

146. *Id.* at 337.

147. *Id.* at 338.

148. Gawande, *supra* note 1.

149. Shalev, *supra* note 14, at 20.

150. *Id.* at 18.

day-to-day mental functioning becomes impaired. There is a “drop in sensory input,” which in turn produces a “drop in mental alertness.”<sup>151</sup> Concentrating becomes difficult, as prisoners suffer from a decline in motivation.<sup>152</sup> This in turn can cause difficulty in using the speech and motor systems coupled with a “disinclination to learn” and decline in physical activity.<sup>153</sup>

In 1993, in preparation for a class-action lawsuit challenging the use of solitary confinement at the Pelican Bay State Prison, Grassian conducted an in-depth study of forty-nine inmates in that prison.<sup>154</sup> Of those forty-nine inmates, at least seventeen were characterized as “actively psychotic and/or acutely suicidal” and urgently in need of hospital treatment as a result of their confinement.<sup>155</sup> Twenty-three others exhibited “serious psychopathological reactions to solitary confinement,” leading Grassian to declare that the sensory deprivation that results from solitary confinement is “toxic to brain functioning.”<sup>156</sup> In another study, Grassian studied over two hundred prisoners in solitary confinement and found that about a third suffered from acute psychosis with hallucinations.<sup>157</sup> Grassian also found that the inmates in supermax solitary were hypersensitive to stimuli and suffering from distortions of perception.<sup>158</sup> In some cases inmates developed a “full-blown psychosis and functional disability” while in supermax solitary.<sup>159</sup>

Dr. Craig Haney, a professor of psychology at the University of California, Santa Cruz, has also researched the effects of solitary confinement.<sup>160</sup> His study of one hundred prisoners in the Pelican Bay Security Housing Unit reported that ninety-one percent of the prisoners suffered from anxiety and nervousness; eighty percent suffered from headaches, lethargy, and trouble sleeping; and seventy percent were concerned about having an “impending breakdown.”<sup>161</sup> The prisoners also suffered physical effects such as dizziness and heart palpitations.<sup>162</sup>

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151. *Id.* at 20.

152. *Id.*

153. *Id.*

154. Grassian, *supra* note 76, at 349. The case was *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995). In *Madrid*, inmates brought suit challenging the use of solitary confinement at the Pelican Bay facility. The court ruled that the supermax confinement did not constitute an Eighth Amendment violation. *See Id.*

155. Grassian, *supra* note 76, at 349.

156. *Id.*

157. Gawande, *supra* note 1.

158. Arrigo & Bullock, *supra* note 29, at 628.

159. Kupers, *supra* note 15, at 1006.

160. Craig Haney, *Hiding from the Death Penalty*, THE HUFFINGTON POST (July 26, 2010, 6:04 PM), <http://www.huffingtonpost.com/craig-haney>.

161. Shalev, *supra* note 14, at 11.

162. *Id.*

Haney identified several “social pathologies” that develop in prisoners placed in supermax confinement.<sup>163</sup> For example, because prisoners are unable to organize their lives around a purpose or goal, they begin to suffer from apathy, lethargy, and despair.<sup>164</sup> They lose the ability to concentrate and complete even the most routine of tasks.<sup>165</sup> They lose a sense of self and become “literally at risk of losing their grasp on who they are, of how and whether they are connected to a larger social world.”<sup>166</sup> These social pathologies of supermax confinement can “significantly interfere” with post-confinement adjustment upon release.<sup>167</sup>

When analyzing the plethora of mental and physical effects caused by solitary confinement, one must be cognizant of the fact that the side effects are probably worse than we know. In many cases researchers have found that inmates have a tendency to minimize their reaction to solitary confinement and downplay any mental health problems.<sup>168</sup> This was a concern present in both the Haney and Grassian studies.<sup>169</sup>

### B. *The Effects of Solitary Confinement Meet the Article 1 Disability Definition*

#### 1. “LONG-TERM”

Article 1 of the CRPD defines people with disabilities as “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>170</sup> As previously stated, the vast majority of studies analyzing the mental effects of supermax confinement of more than sixty days show long-lasting and negative mental effects.<sup>171</sup> Such effects include not only “persistent symptoms of post traumatic stress . . . but also lasting personality changes—especially including a continuing pattern of intolerance of social interaction.”<sup>172</sup> Examples of personality changes include an inability to tolerate even the most basic social interaction as well as vivid flashbacks and a sense of hopelessness.<sup>173</sup> Many studies also show

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163. *Mental Health Issues*, *supra* note 18, at 137.

164. *Id.* at 139.

165. *Id.*

166. *Id.*

167. *Id.* at 144.

168. Shalev, *supra* note 14, at 12.

169. *Id.*

170. CRPD, *supra* note 3, art. 1. The *World Report on Disability*, which is meant to “facilitate” the implementation of the CRPD, defines disability as “complex, dynamic [and] multidimensional.” *World Report on Disability*, *supra* note 2, at 3.

171. Lobel, *supra* note 22, at 118.

172. Grassian, *supra* note 76, at 353.

173. *Id.*

serious and long-term effects such as chronic isolation syndrome.<sup>174</sup> Such prolonged mental effects undoubtedly meet the CRPD definition of “long-term.” Moreover, that some of these effects might recede in varying degrees in some individuals after release from solitary confinement does not diminish the fact that solitary confinement still imposes a significant chance that the inmate will indeed “suffer permanent harm as a result of such confinement.”<sup>175</sup>

## 2. “FULL AND EFFECTIVE PARTICIPATION”

The long-term and sometimes permanent effects caused by solitary confinement create an inability for the inmate to participate in society upon release, thereby hindering his or her “full and effective participation in society,” as stated in Article 1 of the CRPD. A preliminary question concerns the meaning of “participation in society.” Plainly, the term “society” as used in the CRPD includes prison. While a major concern of the use of solitary confinement relates to its impact on prisoners’ ability to function effectively after release from prison, the CRPD is also concerned with the prisoners’ ability to function effectively *in* prison. Article 14 makes it clear that the CRPD does protect persons in prison.<sup>176</sup> Of course, “full and effective participation in society” is contextual; prisoners, for example, do not have the same freedom of movement as those not in detention. Consequently, “full and effective participation” is implicated not only by impediments to functioning upon release from prison, but also by impediments to functioning effectively as a prisoner upon release from supermax confinement to the general prison facilities.

While in solitary confinement, all parts of the prisoners’ daily life are controlled in the solitary unit.<sup>177</sup> As a result, inmates effectively lose any ability to control their behavior or to set limits for themselves.<sup>178</sup> Moreover, prisoners in supermax solitary begin to “lose the ability to initiate behavior of any kind . . . because they have been stripped of any opportunity to do so for such prolonged periods of time.”<sup>179</sup>

Human beings rely on social interaction with other people in order

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174. Smith, *supra* note 85, at 495.

175. Grassian, *supra* note 76, at 332.

176. Article 14(2) provides:

States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation. CRPD, *supra* note 4, art. 14.

177. *Mental Health Issues*, *supra* note 18, at 139.

178. *Id.*

179. *Id.*; see also Arrigo & Bullock, *supra* note 29, at 628.



to test their understanding of their surroundings.<sup>180</sup> Without this opportunity, inmates in supermax confinement begin to blur the distinction between fantasy and reality.<sup>181</sup> The inmates also become “unnaturally sensitive, and vulnerable to the influence of those who control the environment around them.”<sup>182</sup> Inmates then begin to act out in anger as a result of developing intense frustration and rage while in solitary.<sup>183</sup> “[I]rrational anger” and being “consumed with revenge fantasies”<sup>184</sup> are characteristic of maladaptive strategies that inmates use to cope and survive in supermax solitary. Suicide attempts and self-mutilation are also tragic effects that occur with more frequency in solitary confinement.<sup>185</sup> These effects are devastating for those prisoners who might one day be integrated back into the general prison population.

As expected, these psychiatric effects hinder one’s “full and effective participation within society” upon release, whether in the context of the general prison environment or the community at large. Grassian has stated that prolonged solitary confinement creates “a handicap . . . which severely impairs the inmate’s capacity to reintegrate into the broader community upon release from imprisonment”<sup>186</sup> and leaves the “individual socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction.”<sup>187</sup> It is a sad paradox that after yearning for human interaction for so long, individuals released from supermax solitary become unable to tolerate social interaction upon release.<sup>188</sup>

Prisoners become unable to “manage” their conduct when they are released into the world.<sup>189</sup> They are more likely to have clinical depression and long-term impulse-control disorder.<sup>190</sup> Because so much of our personality and identity is socially constructed, the loss of all social contact leads to “a disconnection of experience from meaning” and creates a risk of prisoners “losing their grasp on who they are.”<sup>191</sup> It is hard to imagine a set of side effects more problematic for these inmates who one day will be expected to survive and function in the world outside supermax facilities.

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180. *Id.* at 627.

181. *Id.*

182. *Id.*

183. *Id.* at 628.

184. Gawande, *supra* note 1.

185. *Id.*; *see also* Kupers, *supra* note 15, at 1009 (stating that about half of the successful suicides in prison occur in the six to eight percent of those inmates in solitary confinement).

186. Grassian, *supra* note 76, at 333.

187. *Id.* at 353.

188. Arrigo & Bullock, *supra* note 29, at 627.

189. *Id.* at 628.

190. *Id.*

191. *Mental Health Issues*, *supra* note 18, at 139.

3. UNIFORMITY OF RESULT AND FREQUENCY OF “LONG-TERM”  
PSYCHIATRIC CONSEQUENCES

The consistency with which supermax solitary has devastating mental effects is clear; however, one possible issue with utilizing the framework of the CRPD for a disablement claim is that fewer than one hundred percent of those placed in supermax solitary confinement actually suffer from an Article 1 mental disability as a result.

Variability in mental effects has proved to be legally significant in U.S. law. In 1995, while reviewing the conditions of California’s first supermax prison, a California federal court ruled that even though solitary confinement may “hover on the edge of what is humanly tolerable for those with normal resilience,” there could be no valid objection to its use because such confinement failed to make *every* inmate go insane.<sup>192</sup> More specifically, the routine use of solitary confinement did not pose “a sufficiently high risk to *all* inmates of incurring a serious mental illness.”<sup>193</sup> It is possible that variability in the frequency of mental disabilities might be an obstacle for disablement claims, as this lack of inevitable disability differentiates solitary confinement from physical maiming. Overall, the frequency with which disabilities develop from solitary confinement depends on many factors such as one’s pre-existing mental state and the amount of time one spends in solitary.

a. pre-existing mental state

In his 2006 study, Grassian stated that there “is great variability among individuals in regard to their capacity to tolerate a given condition of sensory restriction.”<sup>194</sup> He noted that generally, those with a “mature, healthy personality” and average intelligence usually demonstrate fewer psychiatric consequences due to solitary confinement.<sup>195</sup> Human Rights Watch stated that “[h]ow destructive [solitary confinement is] depends on each inmate’s prior psychological strengths and weaknesses.”<sup>196</sup> The organization went on to say that:

Although not everyone will manifest negative psychological effects to the same degree, and it is difficult to specify the point in time at which the destructive consequences will manifest themselves, few [long-term supermax inmates] escape unscathed . . . . The psychological consequences of living in these units for long periods of time are predictably destructive, and the potential for these psychic stressors

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192. *Madrid v. Gomez*, 889 F. Supp. 1146, 1280 (N.D. Cal. 1995).

193. *Id.* at 1267.

194. Grassian, *supra* note 76, at 347.

195. *Id.* at 348.

196. *Cold Storage*, *supra* note 93.

to precipitate various forms of psychopathology is clear-cut.<sup>197</sup>

A wide range of psychiatric reactions are possible, as some people suffer all symptoms of RES syndrome, some suffer only a few, and some suffer none at all.<sup>198</sup> However, in another study performed by both Grassian and Dr. Nancy Friedman, results showed that even some prisoners with no previous psychotic tendencies became “grossly psychotic.”<sup>199</sup>

b. the amount of time spent in supermax solitary

The amount of time one spends in solitary confinement has some impact on the frequency with which permanently disabling mental effects occur. In this article, “long-term” solitary confinement is the focus of my discussion, but what exactly constitutes “long-term” solitary confinement can be nebulous. How long does one’s placement in solitary have to be before negative side effects become disabling in the “long-term” under the CRPD? Many studies analyzing the mental effects of supermax confinement state that more than sixty days in solitary will create long-lasting and negative mental effects.<sup>200</sup> Other studies have said ten days.<sup>201</sup> Dr. Kaufman has studied the effects of solitary confinement in consideration of the amount of time spent in the cell.<sup>202</sup> He found that after only a few hours in solitary confinement, the prisoner’s brain waves “shift[ed] toward a pattern characteristic of stupor and delirium.”<sup>203</sup> Studies at Montreal McGill University show that with intense sensory deprivation (elimination of sounds, sight, and tactile stimulation), the subject can experience hallucinations within as little as forty-eight hours.<sup>204</sup> The American Correctional Association, on the other hand, has designated thirty days as the time when detrimental mental effects usually appear and when a prisoner must be psychologically evaluated.<sup>205</sup>

While there is some variation in the precise amount of time before these effects occur, it is clear that those prisoners placed in solitary confinement are less likely to be rehabilitated and are much more likely to become violent rather than less so.<sup>206</sup> What is also clear is that despite some variability stemming from individual characteristics or other con-

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197. *Id.*

198. Smith, *supra* note 85, at 493.

199. Walton, *supra* note 92, at 279.

200. Lobel, *supra* note 22, at 118.

201. *Mental Health Issues*, *supra* note 18, at 132.

202. Edward Kaufman, *The Violation of Psychiatric Standards of Care in Prisons*, 137 AM. J. PSYCHIATRY 566, 666, 569 (1980).

203. Kluger, *supra* note 105.

204. *Id.*

205. Walton, *supra* note 92, at 282.

206. Kiger, *supra* note 81.

textual factors, there is “remarkable consistency” in finding negative mental health effects after supermax solitary.<sup>207</sup> To ignore the consistent data and studies on supermax solitary confinement would be ethically and politically irresponsible.

In sum, the mental effects of supermax confinement produce a disability within the meaning of the CRPD. Supermax solitary confinement socially incapacitates inmates while in prison and produces prolonged or permanent psychiatric disabilities including impairments, which “may seriously reduce the inmate’s capacity to reintegrate into the broader community upon release from prison.”<sup>208</sup>

## V. ARTICLE 15 AS ANOTHER AVENUE FOR A DISABLEMENT CLAIM

### A. *Supermax Confinement as Torture or Cruel and Inhuman Treatment*

Article 15 is another possible basis for claiming a violation of the CRPD. Article 15 states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or sci-

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207. Shalev, *supra* note 14, at 10. All studies of inmates who have been detained more than ten days involuntarily show negative physical and mental health effects. *Id.* at 21; *see also Mental Health Issues, supra* note 18, at 132 (stating that “there is not a single published study of solitary or supermax-like confinement in which non-voluntary confinement lasting for longer than 10 days . . . failed to result in negative psychological effects”); Kupers, *supra* note 15, at 1006 (stating that all prisoners held in supermax confinement for longer than three months have “lasting emotional damage” or “full-blown psychosis and functional disability”). Even federal judges continually recognize the detrimental effects of solitary confinement. *See* Jones ‘El v. Berge, 164 F. Supp. 2d 1096 (W.D. Wis. 2001); Ruiz v. Johnson, 37 F. Supp. 2d 855 (S.D. Tex. 1999), *rev’d and remanded for further findings sub. nom.* Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001); Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995). While the consensus is clear, one study by the Colorado Department of Corrections has recently reached a different conclusion, sparking much controversy and dissent. *ACLU and Experts Slam Findings of Doc Report on Solitary Confinement*, ACLU (Nov. 29, 2010), <http://aclu-co.org/news/aclu-and-experts-slam-findings-of-doc-report-on-solitary-confinement>. The study, entitled “One Year Longitudinal Study of the Psychological Effects of Administrative Segregation,” concluded that supermax solitary confinement does not cause the health of mentally ill prisoners to deteriorate. *Id.* The ACLU pointed out that this conclusion contradicts “considerable previous research” and “prevailing expert opinion.” *Id.* Dr. Terry Kupers, an expert on the mental effects of prison confinement, stated, “[T]he methodology of the study is so deeply flawed that I would consider the conclusions almost entirely erroneous.” *Id.* He also pointed out that the researchers “did not even spend time talking to the subjects about their experience in supermax” and “minimize[d] the emotional pain and suffering because they judge[d] the prisoners to have been already damaged before they arrived at supermax.” *Id.* Dr. Kupers then went on to say that the report only included prisoners who volunteered and who were able to read and write, thus excluding two groups of inmates who would be most severely impacted by supermax solitary—“those who refuse to participate in social interaction and those unable to pass time by reading and writing.” *Id.*

208. Grassian, *supra* note 76, at 354.

entific experimentation.”<sup>209</sup> It is important to note that an Article 15 claim would be entirely separate from an Article 4 claim under the CRPD. An Article 4 claim in no way depends on an assertion that solitary confinement constitutes torture or cruel or inhuman punishment. Article 15 provides an additional, independent basis for evaluating supermax confinement.

Given its dehumanizing and extreme impact on an individual’s mental health, supermax confinement would seem to present a textbook case of torture. The Convention Against Torture is quite relevant to the interpretation of Article 15 of the CRPD. The United States is a party to the Convention Against Torture.<sup>210</sup> When the United States ratified that treaty, it specifically added an understanding defining torture.<sup>211</sup> As shown below, supermax confinement would seem to qualify as torture under this definition.

Even if it were not torture, however, supermax confinement would still be inconsistent with Article 15.<sup>212</sup> Generally, when one of the elements of the definition of torture is not present, certain acts and treatment such as solitary confinement will amount to “cruel, inhuman or degrading treatment or punishment.”<sup>213</sup> Manfred Nowak, the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, stated that prolonged isolation could constitute cruel and inhuman treatment and “in certain instances” even torture.<sup>214</sup> This conclusion finds support in several sources. The United Nations Human Rights Committee (HRC) has stated that the phrase “cruel, inhuman or degrading” in Article 7 of the International Covenant on Civil and Political Rights “should be interpreted so as to extend to the widest possible protection against abuses” in order to protect an individual from the deprivation of the use of “any of his natural senses, such as sight or hearing or of his awareness of place and the passing of time.”<sup>215</sup> This broad interpretation could also apply to supermax solitary confinement, given that many cells lack windows and are padded to make them

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209. CRPD, *supra* note 4, art 15.

210. U.N. Secretary General, Treaty Collections: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Sept. 5, 2011), [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en) [hereinafter CAT Treaty Collections].

211. *Id.*

212. Vasiliades, *supra* note 95, at 96.

213. Office of the High Commissioner for Human Rights, *Expert Meeting on Freedom from Torture, Cruel, Inhuman or Degrading Treatment or Punishment and Persons with Disabilities: Guide to Discussion for Participants*, (Dec. 11, 2007).

214. U.N. Secretary-General, *supra* note 19.

215. Shalev, *supra* note 14, at 4.

soundproof.<sup>216</sup> The HRC has also pointed out that solitary confinement for a prolonged amount of time and not under exceptional circumstances may constitute torture and cruel, inhuman or degrading treatment or punishment.<sup>217</sup> The European Court of Human Rights, moreover, has ruled, “[I]nhumane treatment covers at least such treatment as that which deliberately causes severe suffering, mental or physical . . . or treatment that drives [one] to act against his own will or conscience.”<sup>218</sup>

### B. *Disablement and Article 15*

There is a second way in which supermax confinement could violate Article 15. Unlike the first type of violation,<sup>219</sup> this violation would depend on both Article 15 and Article 4. Torture or cruel and inhuman treatment has long-lasting effects that produce a disability. Thus, supermax solitary confinement would amount to torture or cruel and inhuman treatment under Article 15 of the CRPD, and its effects during and after release from such confinement would amount to disablement under Articles 1 and 4.

The concept of disablement through torture is not new in the world of international human rights. One need only look to the language and purpose of the World Programme of Action Concerning Disabled Persons (World Programme), which recognizes such a concept, stating that:

With the emergence of “victimology” as a branch of criminology, the true extent of injuries inflicted upon the victims of crime, causing permanent or temporary disablement, is only now becoming generally known. Victims of torture who have been disabled physically or mentally, not by accident of birth or normal activity, but by the deliberate infliction of injury, form another group of disabled persons.<sup>220</sup>

This is highly significant and informs the concept of disablement in the CRPD. This language recognizes that torture can produce a disability and even designates those disabled by torture as a separate, legally distinct group of people. Such language gives credence to a possible disablement claim under Article 15 of the CRPD in that Article 15 can be viewed as a continuation of the World Programme’s prohibition of disablement through torture. In other words, the text of Article 15, especially when read in conjunction with the World Programme, can be read as implicitly saying that people in general (those with *and* without disa-

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216. Hresko, *supra* note 16, at 10; Kluger, *supra* note 105.

217. Shalev, *supra* note 14, at 33 (citations omitted).

218. Soering v. United Kingdom, 11 Eur. Ct. H.R. 439, 489 (1989).

219. *See supra* Part IV.

220. *See* Secretariat for the Convention on the Rights of Persons with Disabilities, *World Programme of Action Concerning Disabled Persons*, U.N. ENABLE, <http://www.un.org/disabilities/default.asp?id=23> (last visited Aug. 16, 2011).

bilities) have an explicit right to not only be free from torture and “inhuman” treatment, but also to be free from disablement though the use of torture or “inhuman” treatment.

## VI. U.S. RATIFICATION AND IMPLEMENTATION OF THE CRPD

If the Obama Administration or some future administration submits the CRPD to the Senate for its advice and consent, ratification of the treaty will make it the “supreme Law of the Land” under the Supremacy Clause of the Constitution.<sup>221</sup> This Part discusses two key questions relating to the impact of ratification. First, what do the CRPD and U.S. law provide with regard to implementation and enforcement? Second, how might the terms on which the Senate gives its consent to ratification affect the implementation and enforcement of the treaty?

### A. *The CRPD’s Provisions for Implementation and Enforcement*

Article 32 of the CRPD requires states to take “appropriate and effective” steps to implement the CRPD through international cooperation.<sup>222</sup> More importantly, the CRPD obligates states to take a variety of domestic steps to ensure implementation. Parties to the CRPD must adopt “appropriate” legislation and take “other measures” in order to implement the legislation.<sup>223</sup> The state party must implement the Article 4 measures to the “maximum of its available resources.”<sup>224</sup> Under Article 4(1)(c), state parties must consider the “protection and promotions of the human rights of persons with disabilities in all policies and programmes.”<sup>225</sup> Article 4(1)(d) also imposes a broad obligation on state parties to “refrain from engaging in any act or practice that is inconsistent with the present Convention.”<sup>226</sup> In light of its effects on individuals, the CRPD will require state parties to enact legislation against the use of supermax confinement. To the extent that a state continues to use it, prison officials will have to collect statistical information and conduct research to show compliance with the purpose and policies of the CRPD. This might include psychological evaluations of prisoners and in-depth tracking of the frequency and extent of solitary confinement use.<sup>227</sup>

A variety of national and international enforcement mechanisms

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221. U.S. CONST. art. VI, cl. 2.

222. CRPD, *supra* note 4, art. 32, art. 40(1).

223. *Id.* art. 4(1)(a).

224. *Id.* art. 4(2).

225. *Id.* art. 4(1)(c).

226. *Id.* art. 4(1)(d).

227. Given the effects of supermax solitary confinement, however, it is almost certain that such monitoring would show that the use of supermax confinement is inconsistent with the CRPD, so ultimately compliance would entail ceasing to use it.

could also be employed once the CRPD is ratified. Article 34 of the CRPD provides for a Committee on the Rights of Persons with Disabilities.<sup>228</sup> Parties to the CRPD are required to submit reports to the Committee every four years concerning the implementation of the goals of the convention.<sup>229</sup> While the Committee has no binding power over state parties, the very process of international examination of U.S. policy could place some pressure on the United States to change practices that are inconsistent with the CRPD.

Domestically, Article 33(2) of the CRPD requires state parties to establish independent mechanisms and organizations that will “promote, protect and monitor the implementation of the present Convention.”<sup>230</sup> In particular, states must identify an office within the government that will be responsible for issues relating to the implementation of the CRPD.<sup>231</sup> By requiring not only international but also domestic monitoring, the CRPD has created a second and important layer of enforcement. This requirement has been used before in the 2006 Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), which required that national officials visit detention facilities.<sup>232</sup> These national reporting requirements are significant, as the “struggle for human rights will be won or lost at the national level.”<sup>233</sup>

One final implementation mechanism is unlikely to be available in the case of the United States: the individual petition procedure under the Optional Protocol to the CRPD. Under the Optional Protocol, individuals can present complaints to the Committee, and the Committee has the authority to conduct inquiries into the alleged violations of the CRPD.<sup>234</sup> The United States, however, has not signed the Optional Protocol<sup>235</sup> and seems unlikely to submit itself to any type of individual complaint mechanism.

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228. CRPD, *supra* note 4, art. 34.

229. *Id.* art. 35(2).

230. *Id.* art. 33(2).

231. *Id.* art. 33(1).

232. Gauthier De Beco, *Article 33(2) of the U.N. Convention on the Rights of Persons with Disabilities: Another Role for National Human Rights Institutions?*, 29 NETH. Q. OF HUM. RTS. 84, 87 (2011).

233. *Id.* at 87 (citing Jack Donnelly, *Post-Cold War Reflections on the Study of International Human Rights*, 8 ETHICS & INT'L AFF., 97, 117 (1994)).

234. CRPD, *supra* note 4, Annex II, arts. 1–7.

235. *Signatures and Ratifications*, *supra* note 65.



## B. *The Impact on U.S. Law*

### 1. THE IMPACT OF "CLEAN" RATIFICATION OF THE CRPD

If the Senate were simply to ratify the CRPD with no conditions, the treaty might well have a profound impact on the use of supermax confinement. Under Article VI of the Constitution, a ratified treaty is the supreme law of the land.<sup>236</sup> This would make the CRPD superior to all state law and earlier federal statutes.<sup>237</sup> Individuals confined in supermax facilities could therefore seek relief in court under the CRPD, so long as the CRPD were self-executing under U.S. law.<sup>238</sup> As the Supreme Court noted in *Medellín v. Texas*,<sup>239</sup> self-executing treaties "automatically have effect as domestic law," whereas non-self-executing treaties, though they "constitute international law commitments—do not by themselves function as binding federal law."<sup>240</sup>

Under the Restatement, a treaty is "non-self-executing" only if (1) the treaty itself manifests such an intention, (2) the Senate makes it non-self-executing as a condition of ratification, (3) or the constitution requires implementing legislation. Nothing in the United States Constitution would require implementing legislation.<sup>241</sup> As to the first requirement, there does not appear to be any intention in the CRPD to require that it be non-self-executing. On the contrary, Article 4(1)(b) requires states to "take *all* appropriate measures" to bring domestic law into conformity; these measures include legislation, but are not limited to it. One might argue that *Medellín* requires a conclusion that the CRPD is non-self-executing. *Medellín* emphasized the word "undertakes" as a way of showing an intent by state parties that a treaty be non-self-executing.<sup>242</sup> The Court treated the use of that word as indicating something more like a promise to take action, rather than an acceptance of a presently binding obligation. The word "undertake" or some variation appears in the CRPD thirteen times.<sup>243</sup> The context of *Medellín* was, however, quite different. In *Medellín*, there was an underlying concern that finding self-execution in the case before it would deprive the United States of its flexibility in the U.N. Security Council concerning the enforcement of

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236. U.S. CONST. art. VI, cl. 2.

237. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. e (1987)

238. Restatement § 111 ("Courts in the United States are bound to give effect to . . . international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law.")

239. 552 U.S. 491 (2008).

240. *Id.* at 504.

241. Restatement § 111.

242. *Medellín*, 552 U.S. at 492.

243. CRPD, *supra* note 4, preamble, art. 4, art. 8, art. 23, art. 29, art. 31, art. 32.

orders by the International Court of Justice.<sup>244</sup> No such circumstance would be present in a challenge to supermax facilities.

A better approach focuses on the comment in the Restatement that “[s]ome provisions of an international agreement may be self-executing and others non-self-executing.”<sup>245</sup> The issue of self-execution should not be determined for the treaty as a whole, but on a case-by-case basis. Some provisions clearly would require implementing legislation or perhaps executive action. Any obligation that could be enforced by traditional injunctive relief, on the other hand, would seem appropriate for self-executing status. The treaty concerns individual rights and obligates state parties to ensure that persons who are disabled have access to justice.<sup>246</sup> An injunction against the use of supermax facilities would be entirely within a court’s traditional competence.<sup>247</sup>

As the Restatement notes, however, the Senate does have the power to attach a condition to ratification providing that the treaty should be non-self-executing. Whether the Senate would do so in the case of the CRPD is of great significance because, as shown, without such a condition there would be a very strong basis for a court to enjoin the use of supermax facilities as a violation of the CRPD. Even with such a condition, the treaty would still have some significance in U.S. courts. Courts would consider the CRPD in construing federal and state regulations and statutes and in interpreting the Constitution.<sup>248</sup> Still, the question of the conditions that the Senate might attach to ratification (including regarding self-execution) is an important one and is discussed in the next section.

## 2. THE IMPACT OF CONDITIONS TO THE SENATE’S CONSENT TO RATIFICATION

The United States has never given a human rights treaty a “clean” ratification—that is, one devoid of qualifying reservations, understand-

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244. *Medellín*, 552 U.S. at 492.

245. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (1987).

246. CRPD, *supra* note 4, art. 13.

247. *Cf. Brown v. Plata*, 131 S. Ct. 1910 (2011) (upholding federal court order to end overcrowding in California prisons).

248. *See Roper v. Simmons*, 543 U.S. 551, 554, 578 (2005) (acknowledging the “overwhelming weight” of international law and of the Convention on the Rights of the Child (CRC) when striking down the juvenile death penalty, despite the United States not having ratified the CRC); *see also Atkins v. Virginia*, 536 U.S. 304 (2002); *State v. Romano*, 155 P.3d 1102, 1114 n.14 (Haw. 2007) (relying partially on the United Nations Convention for the Suppression of the Traffic in Person and the Exploitation of the Prostitution of Others); *In re Peggy*, 767 N.E.2d 29, 38 (Mass. 2002) (stating that while the CRC is not binding on U.S. courts, the ruling of the court was “completely in accord with principles expressed therein”).

ings, and declarations (RUDs). It is unlikely that any ratification of the CRPD will depart from this pattern. Accordingly, it is important to consider what kinds of RUDs the Senate might adopt in any future ratification of the CRPD and what impact they would have on the United States' use of supermax facilities.

The Senate's use of RUDs will likely fall into two categories: those that affect implementation and enforcement of the CRPD and those that affect the substantive obligations the United States takes on in ratifying the CRPD. As an examination of the likely RUDs makes clear, the conditions the Senate adopts will have a significant impact on domestic implementation and enforcement, but are unlikely to prevent ratification of the CRPD from having important effects on the use of supermax facilities.

a. RUDs relating to implementation and enforcement

Past U.S. practice indicates that the Senate will likely adopt two RUDs that will affect domestic implementation and enforcement. The first is a provision declaring that the entire treaty is non-self-executing. The United States adopted such a declaration in connection with the International Covenant on Civil and Political Rights,<sup>249</sup> the International Covenant on the Elimination of Racial Discrimination,<sup>250</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>251</sup> Such a declaration would deprive federal and state courts of the power to enforce the treaty. Critics have decried the practice and suggested ways to lessen its impact,<sup>252</sup> but inclusion of such a provision appears highly likely if the CRPD is to win ratification.

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249. See US ICCPR conditions, *supra* note 42; U.N. Secretary-General, Treaty Collections: International Covenant on Civil and Political Rights (Aug. 21, 2011), [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&lang=en) (stating that the "the United States declares that the provisions of articles 1 through 27 of the Covenant are not self-executing").

250. U.N. Secretary-General, Treaty Collections: International Convention on the Elimination of All Forms of Racial Discrimination (Oct. 21, 1994), [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-2&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-2&chapter=4&lang=en#EndDec) (stating that "the United States declares that the provisions of the Convention are not self-executing").

251. CAT Treaty Collections, *supra* note 210 (stating that "the United States declares that the provisions of articles 1 through 16 of the Convention are not self-executing").

252. *E.g.*, David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999); see also Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998). Even Harold Koh, the current legal advisor at the Department of State, has criticized the United States' pattern of RUDs, stating, "To proceed with such a qualified, 'swiss cheese' ratification in which the legal exceptions would overshadow the core act of ratification would be politically unwise, legally questionable, and practically unnecessary to protect American national interests." Harold Hongju Koh, *Why America Should Ratify the Women's Rights Treaty (CEDAW)*, 34 CASE W. RES. J. INT'L L. 263, 271 (2002).

Ratification even with a non-self-execution declaration would have some impact. Courts are bound to take even a non-self-executing treaty into account in interpreting domestic law. Ratification would formally commit the United States to the basic aims of the CRPD, making clear, for example, that the United States could not reject international criticism of how it handles disability issues as an intrusion on its sovereignty. And it would give a rallying point for domestic advocates for people with disabilities.

A second likely condition concerning implementation and enforcement would be an understanding concerning federalism. In ratifying the International Covenant on Civil and Political Rights (ICCPR), the United States stated that it understood

that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.<sup>253</sup>

The U.S. government also submitted a similar understanding when it ratified the Convention Against Torture.<sup>254</sup> These federalism understandings have come under severe criticism.<sup>255</sup> While their meaning is not entirely clear, these reservations are plainly intended to create some kind of division of responsibilities between the federal government and the states in implementing the treaty. It seems likely that a similar proviso will be included in any ratification of the CRPD. With the exception of a few federally run supermax prisons such as the ADX Florence and the USP Marion facility, most other supermax facilities are state-run.<sup>256</sup> Such an understanding could complicate application of the CRPD to state supermax facilities.

#### b. RUDs limiting the substantive scope of the CRPD

Typically, when the United States has ratified human rights treaties, it has made use of reservations and understandings to bring the United States' treaty obligations into conformity with existing domestic law. This approach undercuts much of the domestic benefits of ratification,

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253. US ICCPR Conditions, *supra* note 42.

254. CAT Treaty Collections, *supra* note 210.

255. See Carlos Manuel Vázquez, Breard, Printz, and the Treaty Power, 70 U. COLO. L. REV. 1317, 1353–57 (1999). But see Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 442–43, 425 n.96 (2003).

256. Arrigo & Bullock, *supra* note 29, at 624.

but it seems likely that the Senate will utilize such conditions in the case of the CRPD. The difference between this kind of RUD and those that relate to implementation and enforcement is important. The latter have no impact on U.S. obligations on the international plane. For example, even if a treaty is non-self-executing, the United States remains obligated as a matter of international law to implement its provisions. In contrast, substantive adjustments to the obligations of the treaty do affect the extent of U.S. obligations on the international plane.

Past examples of the practice of limiting the treaty obligations the United States takes on are numerous. Some of them are quite specific. For example, when the United States ratified the ICCPR, it reserved the right to apply the death penalty to those who were juveniles at the time they committed a crime.<sup>257</sup> At the time, U.S. law permitted such executions,<sup>258</sup> but Article 6 of the ICCPR forbade them.<sup>259</sup> As noted earlier, when the United States ratified the Convention Against Torture, it limited the definition of Torture under Article 1 by adopting an “understanding” that no act inflicting severe mental pain could constitute torture unless the mental suffering was “specifically intended to inflict severe physical or mental pain”; the pain was “prolonged”; and the mental harm resulted from certain specified conditions, including the “administration . . . [of] procedures calculated to disrupt profoundly the senses or personality.”<sup>260</sup> According to the Department of Justice, this understanding was so that “mental torture would rise to a severity seen in the context of physical torture.”<sup>261</sup>

Other RUDs have been framed more broadly. One example relates to Article 16 of the Convention Against Torture, which prohibits “cruel, inhuman or degrading treatment or punishment.”<sup>262</sup> When the United States ratified the Convention Against Torture, it adopted a reservation that it would be bound by Article 16 “only insofar as the term ‘cruel, inhuman or degrading treatment or punishment’ means the cruel and unusual punishment prohibited” by the Constitution.<sup>263</sup>

As to the RUDs that the Senate might consider in relation to the

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257. See US ICCPR Conditions, *supra* note 42; see also David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183 (1993).

258. See *Stanford v. Kentucky*, 492 U.S. 361 (1989), *overruled by Roper v. Simmons*, 543 U.S. 551 (2005).

259. International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

260. CAT Treaty Collections, *supra* note 210.

261. Memorandum from Jay C. Bybee, Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto Gonzales, Counsel to the President 18 (Aug. 1, 2002).

262. CAT Treaty Collections, *supra* note 210.

263. *Id.*

CRPD, the most obvious candidate concerns Article 15 of the treaty. The United States might well adopt a declaration concerning the meaning of torture and a reservation regarding cruel, inhuman or degrading treatment or punishment along the lines of the RUDs adopted in connection with the Convention Against Torture. Presumably the intention would be to limit the U.S. obligations under the CRPD to those of current domestic law. If successful, adoption of such RUDs could preclude the Committee from criticizing the United States' use of supermax facilities as a violation of the CRPD.

In gauging whether these RUDs would have their intended effect, two considerations are paramount. First, what substantive impact would they have on the United States' obligations regarding torture and cruel, inhuman or degrading treatment or punishment? Second, would they be valid under international law? With regard to the first point, there is a potential tension between the two RUDs. The declaration on mental suffering as torture would not, by its terms, seem to rule out application of the CRPD to supermax facilities. The reservation regarding cruel and unusual punishment would.

Article 15 of the CRPD does not define torture, but the definition in Article 1(1) of the Convention Against Torture might well give guidance. That Article defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person."<sup>264</sup> As previously stated, the U.S. declaration on torture would preclude mental suffering from constituting torture unless the harm was prolonged and rose to the severity of physical pain. This requirement would be satisfied in the case of supermax facilities because loneliness can actually manifest itself as severe physical pain, making solitary confinement a form of "no-touch torture"<sup>265</sup> and causing the mental effects of solitary confinement to fit under the United States' tailored definition of torture.

The U.S. declaration on torture also added requirements that the suffering be intentionally inflicted—the declaration refers to suffering "specifically intended" to inflict severe mental pain, as the result of procedures "calculated" to "profoundly disrupt" the senses or personality.<sup>266</sup> Certainly supermax facilities meet the latter criterion: the whole point is to disrupt the senses. If such a declaration is read, though, to require that officials be driven by evil motives—that is, if they must want to inflict pain and to destroy personality—then it could present a

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264. CAT, *supra* note 73, art. 1.

265. Kluger, *supra* note 105.

266. CAT Treaty Collections, *supra* note 211.

serious obstacle.<sup>267</sup> However, such an extreme reading of the declaration should be avoided.<sup>268</sup>

A U.S. reservation on the meaning of cruel, inhuman or degrading treatment or punishment under Article 15 of the CRPD would likely limit it to whatever constitutes cruel or unusual punishment under the Constitution. This reservation could well be a problem for application of Article 15 to supermax facilities, because as noted earlier, courts have so far rejected challenges to prolonged solitary confinement under the Eighth Amendment.<sup>269</sup> Paradoxically, this could mean that the use of supermax facilities could constitute torture under Article 15, but not cruel, inhuman or degrading treatment under Article 15. How U.S. courts or the Committee might resolve this paradox remains to be seen.

The second question one might raise about the reservations to Article 15 is whether they are valid under international law. Article 46 of the CRPD provides that “[r]eservations incompatible with the object and purpose of the present Convention shall not be permitted.”<sup>270</sup> Given the fundamental nature of the ban on torture under international law—it constitutes a peremptory norm<sup>271</sup>—one might wonder how any qualification to or limitation on a treaty provision banning torture could be compatible with its object and purpose. While this question is important—and could have relevance to the potential RUDs discussed below—there is no definitive mechanism for resolving disputes over the validity of reservations. The likely declaration that the treaty is non-self-executing means that U.S. courts would not have the occasion to rule on this question, and while the Committee could express views on the subject, the United States would almost certainly consider such comments to be non-binding. In any event, for the reasons given in the next section, the validity or invalidity of any Article 15 RUD will have little impact on the application of the CRPD to supermax facilities.

Potential RUDs for other parts of the treaty will likely pose more difficult problems for the Senate. Already there is some political sparring over highly controversial issues. For example, U.S. officials have stated in reference to the term “reproductive health” in the CRPD<sup>272</sup> that

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267. Michael L. Perlin & Henry A. Dlugacz, “It’s Doom Alone That Counts”: *Can International Human Rights Law Be an Effective Source of Rights in Correctional Conditions Litigation?*, 27 BEHAV. SCI. & L. 675, 693 (2009).

268. Vienna Convention, *supra* note 54, art. 31(1).

269. *See supra* Part IV.B.3.

270. CRPD, *supra* note 4, art. 46.

271. Restatement § 702 cmt. n (1987).

272. Jeanne E. Head, *U.N. General Assembly Approves Disability Convention; Clear Understanding That the Term “Sexual and Reproductive Health” Does Not Include a Right to Abortion Reaffirmed*, NAT’L RIGHT TO LIFE (Dec. 13, 2006) <http://www.nrlc.org/UN/DisabilityConventionApproved.html>.

“the phrase . . . does not include abortion, and its use in that Article does not create any abortion rights, and cannot be interpreted to constitute support, endorsement, or promotion of abortion.”<sup>273</sup>

Some of the likely RUDs would have only indirect or limited effect on the question of supermax facilities. For example, one might predict that the Senate will seek to limit the CRPD definition of “disability.” Some conservative groups opposed to ratification of the CRPD have already criticized its definition of disability on the ground that it “invites abuse by persons or groups who do not suffer from a recognized medical disability yet seek resources and protection under the authority of the convention.”<sup>274</sup> Rather than accept paragraph (e) of the preamble to the CRPD, which states that disability is an “evolving” concept, the Senate might prefer to tie the definition to that under the Americans with Disabilities Act (ADA).<sup>275</sup> One such reservation could be framed as follows: “The United States considers itself bound by the convention only insofar as the term “disability” is understood in the ADA” (or federal law generally). Under the ADA, a disabled person is one who has “a physical or mental impairment that substantially limits one or more . . . major life activities” and “has a record of such an impairment” or has been “regarded as having such an impairment.”<sup>276</sup> While any limitation on the definition of disability under the CRPD seems unnecessary, simply using the ADA definition of disability in connection with the CRPD would be unlikely to pose any barrier to the conclusion that the use of supermax facilities is inconsistent with the treaty. It is entirely predictable that the Senate will consider attaching a condition to ratification that aims to exempt supermax confinement from coverage by the convention. What is debatable, however, is whether any such RUD would be both effective and feasible.

What RUDs might be sufficient to remove supermax facilities from scrutiny under the CRPD? While it might be far more desirable to ratify the treaty without seeking to blunt its domestic impact, ratification of the treaty without any RUDs is not a realistic prospect. Therefore, it makes sense to ask what those RUDs might be in relation to the issue of disablement through long-term solitary confinement.

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273. *Id.*

274. STEVEN GROVES, THE HERITAGE FOUND., RATIFICATION OF THE DISABILITIES CONVENTION WOULD ERODE AMERICAN SOVEREIGNTY 10 (2010), available at [http://www.heritage.org/research/reports/2010/04/ratification-of-the-disabilities-convention-would-erode-american-sovereignty#\\_ftn32](http://www.heritage.org/research/reports/2010/04/ratification-of-the-disabilities-convention-would-erode-american-sovereignty#_ftn32).

275. CRPD, *supra* note 4, preamble.

276. Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12102(1) (2006). The ADA then provides further clarification by defining “major life activities” as “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, [and] standing . . . .” *Id.* § 12102(2).



The most obvious place for the Senate to start is Article 4. As noted earlier, Article 4 provides that States must “refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention.”<sup>277</sup> As this article has argued, prolonged solitary confinement is inconsistent with Article 4. What kind of RUD might be formulated that would exempt it from scrutiny under Article 4?

The first point to note here is that exempting supermax facilities from claims under Article 15 (as discussed earlier) would not, by itself, exempt them from scrutiny under Article 4. The claim that prolonged solitary confinement causes disablement in violation of the treaty in no way rests on the distinct assertion that such confinement amounts to torture or cruel, inhuman or degrading treatment. Article 4(d) states that state members must “refrain from engaging in *any* act or practice that is inconsistent with the present Convention.”<sup>278</sup> The Article 4 argument would simply not be affected by any conclusion that solitary confinement is not torture or cruel, inhuman or degrading treatment.

Accordingly, a separate RUD would be needed to address Article 4. And this may prove to be a daunting task, for formulating such a RUD in a way that is politically acceptable *and* legally effective may well prove difficult or impossible. Explicitly limiting the scope of Article 4 as it relates to prolonged solitary confinement would be politically unpalatable. It is unclear how the U.S. Government would be able to craft a reservation that would address the implicit violation of disablement without conceding that there is in fact a link between solitary confinement and long-term mental disabilities. Stating, for example, that “nothing in Article 4 will limit the use of solitary confinement” could easily be taken as an admission that solitary confinement does in fact disable people and would be inconsistent with the treaty in the absence of the reservation.

A second strategy would be to adopt a treaty-wide reservation or understanding, stating, for example, that “nothing in this treaty bears on the practice of long-term solitary confinement.” This kind of reservation might be more politically palatable, as it could be read to imply not that solitary confinement is disablement but is exempted, but that the CRPD as a whole simply has nothing to say one way or the other as to solitary confinement. The problem with this approach, however, is that it would sweep too broadly, utterly exempting solitary confinement even from Article 15 scrutiny. The United States would be announcing that even if solitary confinement amounts to torture, whether as defined internation-

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277. CRPD, *supra* note 4, art. 4.

278. *Id.* (emphasis added).

ally or as narrowed by a RUD, it would still be acceptable. That is a very different kind of approach from the likely reservation to Article 15 as discussed earlier, which claims to accede to the ban on all forms of torture, though leaving the definition to domestic rather than international law. Nor would it help to modify the reservation to something like the following: "Nothing in this treaty bears on the practice of long-term solitary confinement, except insofar as it may constitute torture under Article 15." This qualification would solve the problem of inadvertently claiming a right to practice torture, but once again at the cost of appearing to concede that prolonged solitary confinement can be torture.

Another conceivable reservation might be one providing that "nothing in this treaty bears on the administration of prisons." A reservation of this sort would almost certainly be too broad to be acceptable politically. Federal law itself protects disabled prisoners.<sup>279</sup> Simply to exempt prisoners from the protection of the CRPD is therefore not a realistic option.

The Senate might, however, consider more limited versions of such a RUD. For example, it might state, "Nothing in this treaty restricts the right of prison administrators to impose on persons under lawful detention conditions of detention that are valid under federal or state law or the U.S. Constitution." This reservation, if valid under Article 46, might achieve the Senate's aims, but once again, at the cost of seeming to exempt the United States even from Article 15 obligations.

Alternatively, the Senate might adopt a declaration that "in the case of persons under lawful detention, the treaty shall be interpreted to provide no more rights than are protected under federal or state law or the U.S. Constitution." This would make the full range of U.S. obligations under the CRPD exactly the same as those under domestic law when it comes to prisoners. In turn, that would give one group of people—prisoners—explicit second-class status under the CRPD, at least in the absence of a general RUD declaring that for all those subject to U.S. jurisdiction, the obligations of the United States under the CRPD are limited to those under U.S. law. Because prisoners are not a politically popular or powerful group, a reservation or declaration of this sort might conceivably be politically possible.

The most extreme reservation would be generally to limit the scope of Article 4 to that of the domestic law of the United States. A reservation of this sort would avoid any drawing of attention to the practice of solitary confinement and the question of whether it violates human rights. But if there were any textbook case for the invalidity of a reserva-

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279. 42 U.S.C. §§ 12131, 12132; *see, e.g.*, *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998).

tion as “incompatible with the object and purpose” of a treaty,<sup>280</sup> it would be just this. What is the point of ratifying a treaty if its entire substantive content is effectively cancelled in favor of domestic law in the course of ratification—which is what such a reservation would accomplish in practice? Obviously, a reservation that essentially replaced the content of the treaty with current or future domestic law would entirely negate the purpose of the treaty. A reservation of this sort might well be invalid under international law, and more importantly, under the CRPD itself. As previously mentioned, Article 46 of the CRPD states, “Reservations incompatible with the object and purpose of the present Convention shall not be permitted.”<sup>281</sup> The importance of this observation is not that the reservation would be struck down by a court or international body, but that the Senate would be unlikely to adopt it in the first place.<sup>282</sup>

In short, crafting a reservation or understanding that would effectively remove prolonged solitary confinement from international scrutiny under the CRPD may well prove politically and legally impossible. One possibility is that the Senate, upon drawing such a conclusion, would reject the treaty in its entirety. Doing so would be unfortunate, and it would effectively amount to a concession that prolonged solitary confinement is inconsistent with a major human rights treaty. Alternatively, the Senate might proceed with ratification, accepting as a price of the benefits of ratification the strong possibility that U.S. practice in supermax facilities would now be subject to a new level of international scrutiny. Which path the Senate takes remains to be seen.

## VII. CONCLUSION

Supermax solitary confinement runs counter to international human rights law, undercutting its fundamental aim of “preserving the right to human dignity.”<sup>283</sup> The international community has developed a broad understanding and appreciation of the mental effects produced by solitary confinement, and the United States should follow suit.

Even weighted down with qualifying conditions, U.S. ratification of the CRPD has the potential to vindicate the rights of prisoners in

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280. CRPD, *supra* note 4, art. 46.

281. *Id.*

282. Adopting such a reservation would put the United States in the company of states that ratified the Convention on the Elimination of All Forms of Discrimination Against Women, but took a general reservation to Article 2 (requiring states to take appropriate measures to implement the Convention) that made compliance subject to Sharia law. See Belinda Clark, *The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women*, 85 AM. J. INT'L L. 281, 299–300 (1991).

283. Miller, *supra* note 117, at 167.

supermax solitary confinement. Even reduced largely to a moral statement rather than a legal instrument, the CRPD might help guide the United States in drafting legislation and forming policy. It could provide the groundwork for the gradual limitation and elimination of supermax solitary confinement. Indeed, even as the treaty awaits ratification, it has some force, given that we have signed it. The Secretariat for the CRPD has stated:

[B]y signing the Convention or Optional Protocol, States or regional integration organizations indicate their intention to take steps to be bound by the treaty at a later date. Signing also creates an obligation, in the period between signing and ratification or consent to be bound, to refrain from acts that would defeat the object and purpose of the treaty.<sup>284</sup>

The time to begin bringing U.S. practice into conformity with the CRPD is now.

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284. See Secretariat for the Convention on the Rights of Persons with Disabilities, *Becoming a Party to the Convention and the Optional Protocol*, U.N. ENABLE, <http://www.un.org/disabilities/default.asp?id=231> (last visited Aug. 10, 2011). See also Vienna Convention, *supra* note 54, art. 18.