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Providing Accommodations for Prisoners in South Africa's Correctional Centres: A Constitutional Contradiction?

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PROVIDING ACCOMMODATIONS FOR PRISONERS IN SOUTH AFRICA'S CORRECTIONAL CENTRES: A CONSTITUTIONAL CONTRADICTION?

The plight of prisoners with physical disabilities in South Africa was brought to the attention of the world after the 2013 arrest of Oscar Leonard Carl Pistorius. The former Olympic athlete was charged with the February 14, 2013 murder of his girlfriend Reeva Steenkamp, a model and law graduate.¹ Pistorius never denied shooting Steenkamp, and the case turned on whether he intended to shoot her or whether he shot into the locked bathroom believing an intruder had broken into his home.² The trial of this fallen national icon was followed by tens of millions of people around the world³ and, to the shock of many,⁴ Pistorius was later convicted of the lesser crime of culpable homicide.⁵

During Pistorius' original sentencing, his disability⁶ was cited as a relevant sentencing consideration,⁷ and defense advocate Barry Roux argued Pistorius' health and safety would be put at risk in an overcrowded South African prison.⁸ Roux contended that without significant assistance,

1. Stu Woolman & Courtenay Sprague, *Nowhere to Run, Nowhere to Hide: The Absence of Public Policy on Intimate Partner Violence Abrogates the Rights to Health Care and Bodily Integrity Under the South African Constitution*, 22 *CARDOZO J.L. & GENDER* 29, 52 (2015).

2. Sarah Lyall & Alan Cowell, *A Trial Concludes, but for South Africans, the Debate May Be Just Starting*, *N.Y. TIMES* (Sept. 12, 2014), <http://www.nytimes.com/2014/09/13/world/africa/oscar-pistorius-verdict-guilty-of-culpable-homicide.html>.

3. Jason Burke, *Oscar Pistorius: case that obsessed a nation and captured its reflection*, *THE GUARDIAN* (June 12, 2016), <http://www.theguardian.com/world/2016/jun/13/oscar-pistorius-case-south-africa-athlete-prison-murder-girlfriend-reeva-steenkamp>.

4. *Id.*

5. *S. Afr. v. Pistorius* 2014 (42) SA 3280. The crime of culpable homicide involves "killing someone but without direct intent either through recklessness or negligence." *What is culpable homicide*, *The Telegraph* (Sept. 11, 2014), <http://www.telegraph.co.uk/news/worldnews/oscar-pistorius/11091036/What-is-culpable-homicide.html>.

6. Pistorius was "Born with no fibulas - the smaller of the two lower leg bones" and his legs were amputated below the knee when he was 11 months old." Tom Geoghegan, *The Making and Unmaking of Oscar Pistorius*, *BBC* (Nov. 3, 2016), <http://www.bbc.com/news/magazine-26628573>. He uses prosthetics to assist him in walking. *Id.*

7. As articulated in *State. v. Zinn*, sentencing considerations are guided by "the triad consisting of the crime, the offender and the interests of society." *State. v. Selebi* 2010 ZAGPJHC 58 (S. Afr.) (citing *State. v. Zinn* 1969 (2) SA 537 (A) at 540 G (S. Afr.)). When imposing a sentence, the judge must consider "all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender." *Dodo v. State* 2001 (1) SACR 594 at 35.

8. Almari Wessels, *If Oscar goes to jail*, *YOU MAGAZINE* (Sept. 11, 2014), <http://you.co.za/news/oscar-pistorius/if-oscar-goes-to-jail/>.

Pistorius would be left defenseless against other prisoners,⁹ and would be exposed to contagious illnesses, such as tuberculosis.¹⁰ A probation officer supported Roux's concern in her pre-sentencing report stating, "[correctional] centres were, in her view, inadequately equipped to cater to the needs of the accused."¹¹ Prosecutor Gerhard Nel presented the testimony of Acting National Commissioner of Correctional Services Zach Modise who stated that during his tenure, he had "seen a lot of improvement and a lot of progress in the Correctional Department."¹² Modise further stated he had visited "correctional facilities in other countries and felt that the Correctional Services Department in this country was comparatively among the best."¹³

On October 21, 2014, after much discussion of Pistorius' disability and the constitutional protections afforded to him,¹⁴ the Honorable Thokozile Masipa of the Gauteng Division of the High Court of South Africa imposed on Pistorius a five-year sentence, with a minimum of ten months to be served in a correctional facility.¹⁵ Pistorius served less than one year of his sentence¹⁶ in a private cell in the medical wing of Pretoria's Kgosi Mampuru II prison¹⁷ before being released under house arrest on October 19, 2015.¹⁸

Public outcry regarding special treatment afforded to Pistorius, which some believed was due to his status and disability,¹⁹ was heard across the country.²⁰ In December 2015, Pistorius' conviction was

9. *Id.*

10. Rose Troup Buchanan, *Oscar Pistorius: The brutal prison life that awaits disgraced athlete*, THE INDEPENDENT (Oct. 21, 2014), <http://www.independent.co.uk/news/world/africa/oscar-pistorius-what-conditions-will-the-paralympian-face-in-kgosi-mampuru-ii-prison-9808191.html>.

11. *State v. Pistorius*, 2014 (924) SA 4-5 (Oct. 21, 2014).

12. *Id.* at 7.

13. *Id.*

14. *Id.* at 10-11.

15. *Id.* at 20.

16. A non-violent offender sentenced after 2004 becomes eligible for parole or alternative sentencing arrangements after serving one-sixth of his or her prison term in jail. DEP'T OF CORR. SERVICES, PLACEMENT ON PAROLE AND CORRECTIONAL SUPERVISION: HOW THE PROCESS AFFECTS THE OFFENDER, 14 (S. Afr. 2012), http://www.dcs.gov.za/docs/landing/Parole_public_pamphlet_2012_Eng.pdf. In this case, 10 months represented one-sixth of Pistorius' five-year sentence. Brent Swails & Don Melvin, *Parole board to recommend Oscar Pistorius be released in August*, CNN (June 8, 2015), <http://www.cnn.com/2015/06/08/africa/south-africa-oscar-pistorius-release-recommendation>.

17. *Oscar Pistorius given five years for Reeva Steenkamp death*, BBC (Oct. 21, 2014), <http://www.bbc.co.uk/news/world-africa-29700457>.

18. Simon Allison & Claire Phipps, *Oscar Pistorius released a day early to finish sentence under house arrest*, THE GUARDIAN (Oct. 19, 2015), <http://www.theguardian.com/world/2015/oct/19/pistorius-release-sentence-house-arrest-uncle>.

19. *Incarcerating people with disabilities: What the law says*, CAPETALK (July 6, 2016), <http://www.capetalk.co.za/articles/14816/incarcerating-people-with-disabilities-what-the-law-says>.

20. Laura Smith-Spark & Faith Karimi, *Oscar Pistorius awaits sentence for Steenkamp killing*, CNN (Oct. 13, 2014), <http://www.cnn.com/2014/10/13/world/africa/south-africa-pistorius-sentencing/>.

replaced by the Supreme Court of Appeal with a conviction for murder.²¹ His counsel filed an appeal to the South African Constitutional Court,²² the highest court in South Africa.²³ On March 2, 2016, the Constitutional Court dismissed Pistorius' appeal²⁴ and he was later sentenced to serve six years for Steenkamp's murder.²⁵ This sentence is far less than the fifteen years sought by the National Prosecuting Authority,²⁶ which subsequently filed an appeal.²⁷ At the time of writing, Pistorius has been transferred to the newly renovated Atteridgeville Correctional Centre²⁸ and his future outside of the Centre's walls remains uncertain, as the appeal remains pending.²⁹

Members of the public continue to be angered by what they see as preferential treatment afforded to Pistorius and call for maximum sentencing. This anger highlights an inherent contradiction inside modern South Africa, a country that considers itself a "rainbow nation" that embraces and supports the similarities and differences of all people.³⁰ This ideology of inclusion—symbolized by a rainbow—has been part of the South African vocabulary since the 1990s.³¹ In spite of this language of

21. *Director of Public Prosecutions, Gauteng v. Pistorius*, (96/2015) [2015] ZASCA 204 (3 Dec. 2015) (Setting aside Pistorius' conviction for Culpable Homicide as the trial court had improperly applied the principles of *dulus eventualis* because he did not need to intend to kill Reeva Steenkamp, but instead must only have intended to cause harm to whomever was behind the bathroom door).

22. Claire Phipps, *Oscar Pistorius granted bail and will take murder appeal to the constitutional court as it happened*, THE GUARDIAN (Dec. 8, 2015), <http://www.theguardian.com/world/live/2015/dec/08/oscar-pistorius-bail-hearing-returned-to-jail-live>.

23. *Courts in South Africa*, DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, <http://www.justice.gov.za/about/sa-courts.html> (last visited April 22, 2017).

24. Genevieve Quintal, *Oscar's appeal lacked prospect of success*, NEWS24 (Mar. 3, 2016), <http://za.b2.mk/news/?newsid=Eib>. The Constitutional Court issued a one-page order stating, "It has been concluded that the application should be dismissed for lack of prospects of success." *Id.*

25. *State v. Pistorius*, (CC113/2013) [2016] ZAGPPHC 724 (6 July 2016).

26. *Oscar Pistorius: Appeal over 'shockingly lenient' sentence*, BBC (July 21, 2016), <http://www.bbc.com/news/world-africa-36855498>.

27. Bulelwa Makeke, *Media Statement: NPA Decision to Appeal Sentence of Oscar Pistorius*, SOUTH AFRICAN NATIONAL PROSECUTING AUTHORITY, July 21, 2016, <https://www.npa.gov.za/sites/default/files/media-releases/2016%20July%2021%20-%20NPA%20Decision%20to%20Appeal%20Sentence%20of%20Oscar%20Pistorius.pdf>.

28. *Correctional Services on transfer of Oscar Pistorius to Atteridgeville Correctional Centre*, DEPARTMENT OF CORRECTIONAL SERVICES (Nov. 14, 2016), <http://www.gov.za/speeches/offender-pistorius-14-nov-2016-0000>.

29. Teboho Letshaba, *Pistorius sentence saga continues*, SABC (Dec. 3, 2016), <http://www.sabc.co.za/news/a/6d78f6804f3175d7b162b7d0098f4b9c/Pistoriusundefinedsentenceundefinedsagaundefinedcontinues-20160312>.

30. See generally Nwamilorho Joseph Tshawane, *Rainbow Nation: A Critical Analysis of the Notions of Community In Thanking of Desmond Tutu* (November 2009) http://uir.unisa.ac.za/bitstream/handle/10500/3761/thesis_tshawane_n.pdf.

31. The term "rainbow nation" is thought to have originated in a speech given by Archbishop Desmond Tutu in Tromsø, Norway on December 5, 1991. Abdulkader Tayob, *Managing Cultural Diversity in Democratic South Africa: Is there a Surplus Value to the National Project?* in RELIGION AND POLITICS IN SOUTH AFRICA 79, 85 (Abdulkader Tayob & Wolfram Weisse eds., 1990). In this speech, Tutu stated, "the rainbow is the sign of prosperity. We want peace, prosperity and justice and can have it when all the people of God, the rainbow people of God, work together." *Id.* The term was

inclusion, however, the government has yet to find a way to protect the rights of all citizens, particularly those with disabilities.³² In this Note, the treatment of physically disabled prisoners in South African correctional centres will be explored and compared with the policies and practices in other countries. The Note begins with a brief overview of South African history and the creation of the Constitution of the Republic of South Africa. The Note then examines the official policies of the Department of Correctional Services before looking to how these policies have been implemented. The policies protecting prisoners with disabilities in the United States, England and Wales will be considered, before finally looking toward possible policy changes for improved protection of physically disabled prisoners in South Africa.

CONSTITUTIONAL PROMISES

The Preamble of the Constitution of the Republic of South Africa begins with “[w]e, the people of South Africa...[b]elieve that South Africa belongs to all who live in it, united in our diversity...[and] [l]ay the foundations for a democratic and open society in which...every citizen is equally protected by law.”³³ A country with a population of 51,770,560,³⁴ located at the southernmost tip of the African continent, the modern Republic of South Africa was formed after its democratic election in

solidified into the national consciousness by President Nelson Mandela in his 1994 inaugural address to the nation as President. Here Mandela stated his hopes to shape the new nation and reminded citizens that “[w]e have triumphed in the effort to implant hope in the breasts of the millions of our people. We enter into a covenant that we shall build the society in which all South Africans, both black and white, will be able to walk tall, without any fear in their hearts, assured of their inalienable right to human dignity - a rainbow nation at peace with itself and the world.” NELSON MANDELA, IN HIS OWN WORDS, 69 (2004). The inclusion of the diverse backgrounds of South African citizens is symbolically captured in the national flag, which is made up of six colors, and the national anthem—Nkosi Sikelel’ iAfrika and Call of South Africa—made up of stanzas in five of the most widely spoken of South Africa’s eleven official languages. *National Anthem*, GOVERNMENT OF SOUTH AFRICA, <http://www.gov.za/about-sa/national-symbols/national-anthem>.

32. The scope of this Note includes a discussion on physical disability defined in the Correctional Services Act as “a physical...condition which prevents a prisoner from operating in an environment developed for people without such an impairment, and includes deafness; dumbness; paraplegia; quadriplegia...blindness or extreme impairment of vision.” Lukas Muntingh, PRISONS IN A DEMOCRATIC SOUTH AFRICA – A GUIDE TO THE RIGHTS OF PRISONERS AS DESCRIBED IN THE CORRECTIONAL SERVICES ACT AND REGULATIONS 45-46 (2006), <http://cspri.org.za/publications/research-reports/Prisons%20in%20a%20Democratic%20South%20Africa%20%20a%20Guide%20to%20the%20Rights%20of%20Prisoners%20as%20Described%20in%20the%20Correctional%20Services%20Act%20and%20Regulations.pdf>.

33. S. AFR. CONST., 1996.

34. PALI LEHOHLA, CENSUS 2011 METHODOLOGY AND HIGHLIGHTS OF KEY RESULTS 9 (2012), http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Methodology_and_Highlights_of_key_results.pdf.

1994.³⁵ The South African Constitution, like the Constitution of the United States and other countries who fought for independence, was written with the intention of keeping the injustices suffered under the country's former oppressors from resurfacing in the new country. Specifically, the drafters of the South African Constitution sought to rectify the injustices suffered by citizens under the system of Grand Apartheid, a "wholly unique system of racially biased laws that limit[ed] the personal freedom of all South African blacks and prohibit[ed] them from any significant political voice in their Government - a Government that control[ed] nearly every facet of their existence."³⁶ Under Grand Apartheid and the concurrent policy of Petty Apartheid, South African Blacks and Coloureds—including many who would later serve in the new government—were denied access to an impartial criminal justice system and sentenced to long periods of time in prison,³⁷ suffering inhumane treatment.³⁸

The drafters of the South African Constitution sought to balance major ethnic divisions³⁹ and ultimately hoped to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights," as well as "[l]ay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law."⁴⁰ One way it did this was through a recognition of the injustices previously suffered by South African prisoners, and a specific guarantee of additional constitutional rights for prisoners in Section 25 of the 1993 Interim

35. *History*, SOUTH AFRICAN GOVERNMENT, http://www.gov.za/about-SA/history#decade_freedom.

36. Robert S. McNamara, *Before It's Too Late in South Africa*, N.Y. TIMES. (Aug. 14, 1985), <http://www.nytimes.com/1985/08/14/opinion/before-it-s-too-late-in-south-africa.html>.

37. See generally NELSON MANDELA, *LONG WALK TO FREEDOM: THE AUTOBIOGRAPHY OF NELSON MANDELA* (1995); RAYMOND SUTTNER, *INSIDE APARTHEID'S PRISON: NOTES AND LETTERS OF STRUGGLE* (2001); TIM JENKINS, *INSIDE OUT: ESCAPE FROM PRETORIA PRISON* (2005); INDRES NAIDOO, *ISLAND IN CHAINS: TEN YEARS ON ROBBER ISLAND* (2000); RUTH FIRST, *117 DAYS: AN ACCOUNT OF CONFINEMENT AND INTERROGATION UNDER SOUTH AFRICAN 90-DAY DETENTION LAW* (2009).

38. The horrific treatment of prisoners in Apartheid era prisons has become a symbol for the importance of protecting the rights of prisoners worldwide. In recognition of this, the United Nations' updated Standard Minimum Rules for the Treatment of Prisoners has come to be called the "Nelson Mandela Rules." G.A. Res. 70/175, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), U.N. Doc. A/RES/70/175 (Dec. 17, 2015). These updated rules provide member states with additional guidance and standards in the general areas of "respect for prisoners inherent dignity...medical and health services...disciplinary measures and sanctions...investigations of death and torture in custody...protection of vulnerable groups...access to legal representation...complaints and independent inspection...[and] training of staff." *UN Nelson Mandela Rules (revised SMR)*, PENAL REFORM INTERNATIONAL, (last visited April 2017). <https://www.penalreform.org/priorities/prison-conditions/standard-minimum-rules/>.

39. Stephen Ellman, *The New South African Constitution and Ethnic Division*, 26 COLUM. HUM. RTS. L. REV. 5, 11 (1994).

40. S. AFR. CONST., 1996.

Constitution.⁴¹ These guarantees were later carried over in to Section 35 of the 1996 South African Constitution.⁴² Part of the South African Bill of Rights, Section 35 guarantees those who have been detained the right “to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.”⁴³ However, the precise meaning of “conditions consistent with human dignity” is something this young country—ripe with ideology and the desire to move beyond the horrors of the past—had yet to define.

THE OFFICIAL STANCE ON THE TREATMENT OF DISABLED PRISONERS

The guidelines for ensuring the humane treatment of both sentenced prisoners and individuals awaiting trial and sentencing were established two years after the promulgation of Section 35 of the Constitution, in the Correction Services Act of 1998.⁴⁴ Though these guidelines have attempted to meticulously define conditions for the general prison population, such as children,⁴⁵ women,⁴⁶ and those with mental disabilities,⁴⁷ there are few specific references regarding what accommodations are deemed necessary for one class of inmates: those with physical disabilities.⁴⁸ As there are no specific provisions related to

41. S. AFR. (INTERIM) CONST., 1993.

42. *Id.*

43. S. AFR. CONST., 1996 §15.

44. Correctional Services Act 111 of 1998, (S. Afr.), http://www.saflii.org/za/legis/num_act/csa1998234.pdf. Though the Correctional Services Act was passed by Parliament in 1998, it was not fully promulgated until October 2004. *Id.*

45. Children in prison are afforded a number of enumerated rights. See Muntingh, *supra* note 32, at 44. These rights include detaining children separately from adults at all times, (including when prisoners are transported), and providing accommodation that is appropriate to their age, including access to social work services, religious care, recreational programmes and psychological services. *Id.*

46. Two special accommodations for women included in the Act require that “male and female prisoners must be detained separately...from one another at all times.” *Id.* at 43. Women who come to prison with young children are allowed to remain with their children until the child turns five years old. *Id.* During this time, the Department of Correctional Services must “accommodate such women and children in mother-and-child units that are more suitable for this purpose than general prisoner accommodation.” *Id.*

47. The Act prohibits prisoners who are found to be insane from being “detained in prisons and arrangements shall be made to remove them to mental institutions as soon as possible.” *Id.* at 117. During their stay in prison, prisoners with a mental illness are to be under “special supervision by a medical officer” and given psychiatric treatment. *Id.* Further, the Department of Correctional Services is instructed to work with various outside agencies to “ensure if necessary the continuation of psychiatric treatment after release and the provision of social-psychiatric after-care...” *Id.*

48. The existence of defined and specified protections under the law for women, children, and the mentally disabled without a corresponding provision for physically disabled prisoners is significant as South Africa has gone out of its way to notify the world of its intentions to ensure humane treatment of prisoners with physical disabilities. South Africa was one of the first twenty nations to sign the United Nations Convention of the Rights of Persons with Disabilities on March 30, 2007. U.S. INT’L COUNCIL ON DISABILITIES, CONSOLIDATED DISABILITY FINDINGS FROM THE 2010 U.S. STATE

the treatment of prisoners with physical disabilities, “[i]t therefore has to be assumed that the accommodation and other amenities for disabled prisoners has to meet the same standards as for prisoners who do not have these disabilities, as set out in the Act.”⁴⁹

In its 2005 White Paper on Corrections in South Africa, the Department of Correctional Services acknowledged it must find better ways to care for the inmates in its 243 correctional centres,⁵⁰ including better meeting the “needs of special categories of offenders,” a category which includes the physically disabled.⁵¹ This means correctional institutions are to be “designed to cater for the needs of disabled offenders and should be consistent with the national policy framework on persons with disabilities.”⁵² The White Paper continues by stating that any policies implemented by the Department of Correctional Services must “reflect both the equality of rights of disabled offenders and the particular needs that disabled offenders have. The provision of appropriate facilities must not be limited to the physical accommodation needs, but must include the provision of appropriate facilities for the enhancement of rehabilitation amongst these offenders.”⁵³

To handle the various needs of prisoners, the Department of Correctional Services is required to take “steps as are necessary to ensure the safe custody of every prisoner and to maintain security and good order in every prison.”⁵⁴ For prisoners with physical disabilities, their needs are determined through an internal medical assessment upon a person’s arrival to the correctional centre. Department policy dictates that within “the first six hours of admission” the needs and risks of a disabled prisoner are to be assessed.⁵⁵ After the assessment, a prisoner is not automatically granted an accommodation if found to have a disability.⁵⁶ Prisoners must first provide the authorities with “all necessary information” related to their disability.

DEPARTMENT COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: AFRICA (2011), http://www.usicd.org/doc/Africa_Disability_References1.pdf. This international human rights treaty was promulgated to protect the rights and dignity of persons with disabilities and ensure equal protection for these persons under the law. Convention on the Rights of Persons with Disabilities, U.N. Doc. A/61/611 (Dec. 6, 2016), South Africa is one of only 23 African countries to both sign and ratify this treaty. *Convention on the Rights of Persons with Disabilities*, United Nations, *Treaty Series*, vol. 2515, p. 3 <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-15.en.pdf>

49. Muntingh, *supra* note 32, at 46.

50. DEP’T OF CORR. SERVICES, ANNUAL REPORT 2015/2016 FINANCIAL YEAR, 29 (S. Afr.), <http://www.dcs.gov.za/docs/2016%20doc/DCS%20Annual%20Report%202015-16.pdf>.

51. DEP’T OF CORR. SERVICES, WHITE PAPER ON CORRECTIONS IN SOUTH AFRICA, EXECUTIVE SUMMARY ¶ 9 (Feb. 9, 2005) (S. Afr.).

52. *Id.* at ¶ 11.5.1.

53. *Id.*

54. Correctional Services Act 111 of 1998 (S. Afr.).

55. *Correctional Services outlines policy on inmates with disabilities*, SANNEWS (2014), <http://www.sanews.gov.za/south-africa/correctional-services-outlines-policy-inmates-disabilities>.

56. *Id.*

⁵⁷ Then, using this information, the correctional centre must find the accommodation is “necessary” because of the severe “vulnerability caused by the disability.”⁵⁸

Though this policy may appear to be neutral, it can cause extreme hardship for a disabled prisoner. Not only does it force a prisoner who is disabled to discuss a possibly sensitive topic in a situation with extreme power differences, it also assumes prisoners are both able to articulate their disabilities and are aware that they must share their disability at that time. This policy can prove to be especially hard on prisoners with little to no previous experience with the penal system as few prisoners have access to legal assistance of the quality given to Pistorius.⁵⁹ In fact, it is entirely possible that a prisoner with a physical disability would be afraid to speak up and would then be denied any sort of accommodation. Further, it assumes that this screening actually occurs as mandated. According to the Judicial Inspectorate of Correctional Service’s 2015- 2016 annual report, these assessments are not taking place.⁶⁰

Once a disability is proven, the policy of the Department of Correctional Services allows for certain accommodations to be made for extremely physically disabled prisoners, such as daytime use of a wheelchair.⁶¹ The Department of Correctional Services’ policy requires prisoners who use “assistive devices (such as wheelchairs)” to keep the devices, when not in use, in “the hospital section” of the correctional centre in order to allow access to this device to all offenders with disabilities.⁶² Due to financial constraints, there are not enough devices to meet the needs of the inmates, and the sharing of assistive devices can cause extreme hardship for prisoners. Prisoners are often left without the ability to be mobile when another inmate is using the assistive device and are forced to adapt to life without necessary accommodations. This could mean having to wear diapers because of an inability to access a bathroom or, as stated by a former Department of Correctional Services employee, a

57. *Id.*

58. *Id.*

59. Many believe that because of Pistorius’ notoriety and access to “strong legal representation he will, in all likelihood, be treated well and be provided adequate conditions in terms of his disability.” Greg Nicolson, *Oscar’s 6-year sentence: Speaking volumes on SA*, DAILY MAVERICK (July 7, 2016), <https://www.dailymaverick.co.za/article/2016-07-07-oscar-6-year-sentence-speaking-volumes-on-sa/#.WHgVLLYrLdQ>. They hope that because “[h]e is high-profile news...through this probable privilege he will raise awareness for other inmates who are disabled and not given the same treatment or best standard of care...” *Id.*

60. JUDICIAL INSPECTORATE OF CORR. SERVICE, 2015-2016 ANNUAL REPORT 54, <http://judicialinsp.dcs.gov.za/Annualreports/JICS%20Annual%20Report%20%202015-2016%20as%20at%20at%20October%202016%20v%2012.pdf> [hereinafter “Inspectorate Annual Report”].

61. *Id.*

62. *Id.*

“prisoner who had no legs...walked around on his hands.”⁶³ With or without access to vital accommodations, physically disabled prisoners are forced to “[i]n some way or another...get along.”⁶⁴

JUDICIAL INSPECTORATE OF PRISONS OF SOUTH AFRICA

To ensure the Department of Correctional Services fulfills its mandate of creating “a just, peaceful and safe society by the detention of all prisoners in safe custody whilst ensuring their human dignity” and promoting the “social responsibility and human development of prisoners,”⁶⁵ the Correctional Services Act created the independent office of the Judicial Inspectorate.⁶⁶ This office is tasked with facilitating “the inspection of prisons in order that the Inspecting Judge may report on the treatment of prisoners in prisons and on conditions and any corrupt or dishonest practices in prisons.”⁶⁷ The head of the Inspectorate is known as the Inspecting Judge and is a current or retired High Court Judge appointed by the President.⁶⁸ The Inspecting Judge must then appoint Independent Prison Visitors who are charged with dealing with “complaints by prisoners by regular visits; interviewing prisoners in private; recording complaints in official diary and monitoring the manner in which they have been dealt with; and discussing complaints with the Head of the Prison...”⁶⁹ If a prisoner is denied an accommodation or is

not satisfied with the response to his or her complaint or request may convey the reasons for his or her dissatisfaction to the Head of Prison, who must refer the matter to the Area Manager. If the prisoner is still not satisfied after the Area Manager has responded to the complaint or request, he or she may refer the matter to the IPV [Independent Prison Visitors].⁷⁰

Concerns exist regarding whether the Independent Prison Visitors have been adequately trained to possess a “sufficient understanding of the context and systemic issues pertaining to prison reform for them to be able

63. *No special treatment for disabled inmates*, NEWS24 (Feb. 20, 2013), <http://www.news24.com/SouthAfrica/News/No-special-treatment-for-disabled-inmates-20130220>.

64. *Id.*

65. Saras Jagwanth, *A Review of the Judicial Inspectorate of the Prisons of South Africa*, 9 LAW, DEMOCRACY & DEV, 45, 47 (2005).

66. Correctional Services Act 111 of 1998 § 85 (S. Afr.)

67. *Id.*

68. *Id.* at § 86.

69. *Id.* at § 93.

70. Jagwanth, *supra* note 65, at 50.

to intervene and report effectively.”⁷¹ Additionally, some have stated that “IPVs rely on their relationship with the prison authorities for an effective discharge of their mandate...[so] prisoners perceive the IPVs' relationship with prison authorities as lacking independence.”⁷² This can serve to chill communications between prisoners and the Independent Prison Visitors.

Complaints not solved through the Independent Prison Visitors' process are then handled by the Legal Services Unit of the Inspectorate.⁷³ This unit has the authority to investigate claims and issue a “ruling” on the complaint by finding either for the prisoner or the Centre.⁷⁴ These rulings, however, are not final or binding on the Correctional Centre,⁷⁵ though they are generally complied with.⁷⁶ It takes about three months for a complaint to be heard by the Legal Services Unit.⁷⁷ In many cases, this length of time can cause prisoners to give up on the process, as the harm will have already been suffered.⁷⁸

There are serious questions regarding the legitimacy of the complaint process and whether the Inspectorate is truly an independent check on the Department of Correctional Services. All of the expenses for the Inspectorate are paid for by the Department of Correctional Services⁷⁹ and “[t]he Inspectorate had very little influence and opportunity to determine its own financial and human resourcing needs, as the budget of the JICS is administered via DCS.”⁸⁰ Additionally, “[t]he JICS is in an incessant battle with DCS for resources such as staff, IT systems, infrastructure and it places an onerous burden on the Inspectorate's ability to fulfill its duties.”⁸¹ This places the Inspectorate in a particularly difficult situation as too many “rulings” in favor of prisoners may cause the Department to limit funding. Additionally, “[u]nless efforts are made to ensure administrative separation, there is the danger that an independent body is perceived as merely a directorate of the parent department both by the department itself and staff in the office and by the user public.”⁸²

SHEDDING LIGHT ON SOUTH AFRICA'S DISABLED PRISONERS

71. *Id.* at 53.

72. *Id.*

73. *Id.*

74. *Id.* at 53-54.

75. Pippa Hudson, Interview with Umesh Raga, *Incarcerating people with disabilities: what the law says*, CAPETALK (July 6, 2016), <http://www.capetalk.co.za/articles/14816/incarcerating-people-with-disabilities-what-the-law-says>.

76. Jagwanth, *supra* note 65, at 54.

77. *Id.* at 55.

78. *Id.*

79. Correctional Services Act 111 of 1998, § 91. (S. Afr.)

80. Inspectorate Annual Report, *supra* note 60, at 32.

81. *Id.* at 82.

82. *Id.* at 60.

There are over two million persons with disabilities in South Africa.⁸³ How these individuals have been treated in prison, however, has not been largely documented and there is no official record of exactly how many of the country's 161,984 prisoners⁸⁴ are categorized as disabled, or consider themselves to be physically disabled. Wits Justice Project, a non-profit human rights organization associated with the University of Witwatersrand in Johannesburg, South Africa, has sought to "raise public awareness on extensive and systemic problems in the criminal justice system."⁸⁵ This has included exploration into the treatment of prisoners with physical disabilities, including the ongoing story of Ronnie Fakude, sometimes called "Prisoner A."⁸⁶ Fakude's story serves as an example of how current policies regarding the accommodations for prisoners with disabilities are applied. Fakude is a level four paraplegic man in his 50s.⁸⁷ His physical disability occurred after he was "shot in [his] spinal cord, which was cut in the middle during a hijacking in the driveway of [his] house three years before [his] arrest."⁸⁸ This disability requires him to have use of a wheelchair or, if he has to use crutches, to "pull [his] legs and throw them to the front."⁸⁹ He also has no control over his bowels or bladder and has to use adult diapers.⁹⁰ Fakude spent over 28 months in a correctional centre awaiting trial on fraud charges before he was released on bail.⁹¹

Fakude was just one of many in the overcrowded South African correctional centres and during his time there, he was held in an "overcrowded prison cell designed for 32 men but housing 88."⁹² Prisoners with communicable diseases are kept in the general prison population, including "eight or 10 people with TB in [Fakude's] cell and four or five we know are HIV-positive. A guy with multi-drug resistant

83. U.S. CENSUS BUREAU, PROFILE OF PERSONS WITH DISABILITIES IN SOUTH AFRICA, 66 (2011), <http://beta2.statssa.gov.za/publications/Report-03-01-59/Report-03-01-592011.pdf>.

84. See DEPT. OF CORRECTIONAL SERVS. ANNUAL REPORT, *supra* note 50, at 30.

85. WITS JUSTICE PROJECT, ABOUT, <http://www.witsjusticeproject.co.za/pages/about-us> (last visited April 22, 2017).

86. Carolyn Raphaely, *Help for South Africa's Prisoner A*, THE GUARDIAN (Mar. 8, 2013), <https://www.theguardian.com/world/2013/mar/08/south-africa-disability-prison>.

87. Carolyn Raphaely, *Oscar Pistorius' case highlights plight of South Africa's disabled prisoners*, THE GUARDIAN (Feb. 22, 2013), <https://www.theguardian.com/world/2013/feb/22/paraplegic-remand-south-africa>.

88. LIAT BEN-MOSHE, CHRIS CHAPMAN & ALLISON C. CAREY, *DISABILITY INCARCERATED: IMPRISONMENT AND DISABILITY IN THE UNITED STATES AND CANADA*, 277 (2014).

89. *Id.*

90. Raphaely, *Oscar Pistorius' case highlights plight of South Africa's disabled prisoners*, *supra* note 87.

91. Carolyn Raphaely, *Inequality before the Law: Oscar Pistorius v. Ronnie Fakude*, DAILY MAVERICK (Apr. 28, 2014), http://www.dailymaverick.co.za/article/2014-04-28-inequality-before-the-law-oscar-pistorius-vs.-ronnie-fakude/#.Vj_kdoS4ndQ.

92. *Id.*

TB sleeps on top of me. I feel vulnerable all the time.... I'd rather die than be here."⁹³ Because of his disability, he was later transferred to a hospital section,⁹⁴ but not before he first contracted tuberculosis.⁹⁵

Overcrowding and limited funding caused Fakude's disability to become a divisive issue inside the correctional centre.⁹⁶ Some in the prison's administration recognized Fakude's disability. He was given two accommodations: access to crutches and his own cot.⁹⁷ Others, including Thamsanqa Nelane, the head of Grootvlei Medium A Correctional Centre, attempted to avoid making any special accommodations for Fakude.⁹⁸ Fakude claimed his disability should be considered as a reason for his release on bail.⁹⁹ A hearing was held where the Centre's doctor testified, "she'd seen Fakude walking in the prison corridors."¹⁰⁰ After a doctor testifying on behalf of Fakude diagnosed him as a paraplegic, the judge appointed a third party doctor to examine Fakude.¹⁰¹ This doctor conducted a physical examination and MRI before determining Fakude had "no function of his lower limbs, his paraplegia was permanent and the soles of his feet were soft with no signs of recent weight bearing."¹⁰² Despite the testimony of the appointed doctor and an MRI, Nelane continued to deny Fakude's disability, stating "various professionals...all confirmed that Fakude is not paraplegic as he alleged, can still stand and walk with both feet, but need walking grudges [sic]...."¹⁰³

Inside the Centre, court ordered accommodations were also denied. Fakude had been assigned a special diet by a previous correctional centre doctor.¹⁰⁴ However, when asked to accommodate this special diet, the prison administration told Mr. Fakude "Jy sal nie rys in die tronk eet nie; jy is nie 'n blanke of 'n celebrity." [You will not eat rice in jail; you are not white or a celebrity.]"¹⁰⁵ A court order required Fakude to be "kept

93. BEN-MOSHE, CHAPMAN, & CAREY, *supra* note 88, at 277.

94. Fakude explains the conditions of the sleeping situation at the prison as "Twelve people sleep in two bunks pushed together, that's six on the top and six on the bottom. I have my own bed on the bottom, which is a privilege. Luckily, I don't have to share because of my medical status." *Id.*

95. Carolyn Raphaely, *Denying paraplegic bail is 'torture,'* MAIL & GUARDIAN (Apr. 19, 2013), <http://mg.co.za/article/2013-04-19-00-denying-paraplegic-bail-is-torture>.

96. Carolyn Raphaely, *How justice system treats ordinary disabled prisoners,* THE STAR (Apr. 29, 2014), <https://witsjusticeproject.files.wordpress.com/2014/04/ronnie-the-star.pdf>.

97. *Id.* Before his transfer to Grootvlei Correctional Centre, Fakude "was in Johannesburg prison, where the doctor prescribed a wheelchair for me. The doctor here says I must get a wheelchair from an outside hospital but hasn't referred me." BEN-MOSHE, CHAPMAN, & CAREY, *supra* note 88, at 277.

98. Raphaely, *Inequality before the Law,* *supra* note 91.

99. Raphaely, *Denying paraplegic bail is 'torture,'* *supra* note 95.

100. Raphaely, *Inequality before the Law,* *supra* note 91.

101. *Id.*

102. Raphaely, *Denying paraplegic is 'torture,'* *supra* note 95.

103. Raphaely, *How Justice System Treats Ordinary Disabled Prisoners,* *supra* note 96.

104. *Id.*

105. *Id.*

in the hospital section and...cared for properly. He must be helped to use the toilet and helped to bath as well.”¹⁰⁶ The Centre, however, believed he should “go back to the cells.... He's been there before and he survived” and did not “see anything to make him not continue [sic]...” in the general population.¹⁰⁷ Additionally, the Centre continued to deny Fakude’s special medical accommodations.¹⁰⁸

The attention surrounding Fakude’s case brought about outrage and awareness in the international community regarding the treatment of disabled prisoners.¹⁰⁹ To better handle prisoners on remand and awaiting trial, the Department of Correctional Services created a pilot project allowing prisoners awaiting trial and sentencing to be released on bail on the condition that they agree to be electronically monitored.¹¹⁰ Mr. Fakude was the first prisoner on remand to be electronically monitored.¹¹¹

Although the international attention has helped to effectuate positive change for Fakude, the publicity has arguably done little to protect or advance the interests of disabled prisoners as a class in South Africa. It still remains difficult to implement policies created to protect disabled prisoners when infrastructure and funding is limited. If Fakude, a prisoner who needs continuous access to adult diapers and crutches, can be found to not have a disability, then it is likely others with less severe or less obvious disabilities are being overlooked and denied access to basic necessary services.

GENERAL ANTI-DISCRIMINATION LAWS IN SOUTH AFRICA

The Republic of South Africa has long looked to the policies of other countries, such as the United States, to help shape its legislative policies. Anti-discrimination laws related to historically vulnerable classes of people are no exception.¹¹² To date, legislation has been promulgated to

106. *Id.*

107. Raphaely, *Inequality before the law*, *supra* note 91.

108. “I have to wash my pressure wounds and sores twice a day. I can't even get swabs or bandages. The last time I asked for Savlon, I was told to wash my wounds with salt water. I'm in constant pain. Sleep is the only escape. I've only seen a doctor here once, in September last year, and he prescribed medical shoes for me. I'm still waiting.” GUN VIOLENCE, DISABILITY AND RECOVERY, SPOTLIGHT: RONNIE FAKUDE (SOUTH AFRICA) 220-23 (C. Buchanan ed., 2014).

109. Since Mr. Fakude’s story was first published in February 2013 by The Guardian in the United Kingdom, his access to medical and legal support increased tremendously. *Id.* at 203.

110. Raphaely, *Inequality before the law*, *supra* note 91; The Department of Correctional Services had previously used this electronic monitoring system for prisoners serving life terms in prison. *Id.* This program, which previously contained less than 150 people, is currently being increased to at least 1,000 offenders. *Id.*

111. *Id.*

112. See MC Marumoagae, *Disability Discrimination and the Right of Disabled Persons to Access the Labour Market*, 15 POTCHEFSTROOM ELECTRONIC LAW JOURNAL/POTCHEFSTROOMSE ELEKTRONIESE REGSBLAD 345-46 (2012).

prevent discrimination based upon race, ethnicity, religion, and sex in the context of employment¹¹³ and in society as a whole.¹¹⁴

STATUTORY PROTECTIONS FOR THE DISABLED IN THE UNITED STATES

In the United States, the protection of disabled persons is largely controlled through the combination of Section 504 of the Rehabilitation Act of 1973 (Section 504)¹¹⁵ and the Americans with Disabilities Act of 1990 (ADA).¹¹⁶ Section 504 provides civil rights protections for person

113. See Employment Equity Act 55 of 1998 (S. Afr.). This Act establishes the Commission for Employment Equity, a government body somewhat similar to the Equal Opportunity Commission in the United States. The Commission for Employment Equity is charged with advising the Minister of Labour on best practices related to compliance with the Employment Equity Act. COMMISSION FOR EMPLOYMENT EQUITY REPORT 2016-2017, DEPARTMENT OF LABOUR OF THE REPUBLIC OF SOUTH AFRICA 1, <http://www.labour.gov.za/DOL/documents/annual-reports/Commission%20for%20Employment%20Equity%20Report/2016-2017/downloads/documents/annual-reports/employment-equity/2016-2017/17th%20CEE%20Annual%20Report.pdf>

114. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.). Though the Promotion of Equality and Prevention of Unfair Discrimination Act contains provisions related to the discrimination of persons with disabilities, it has not been applied to persons in jail. *c.f.* The Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly in December 2006. Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S.3. This represents an expansion on the ideals contained in the Promotion of Equality and Prevention of Unfair Discrimination Act regarding persons with disabilities. This Convention was both signed and ratified by South Africa; it was also signed by the United States and was never ratified. UNITED STATES INTERNATIONAL COUNCIL ON DISABILITIES, *Consolidated Disability Findings from the 2010 U.S. State Department Country Reports on Human Rights Practices: Africa* (2010), http://www.usicd.org/doc/Africa_Disability_References1.pdf.

115. 29 U.S.C. § 794(a) (“No otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any [Federal] Executive agency....”) What “receiving federal financial assistance” means has been the subject of much litigation in federal court. See *Nolley v. County of Erie*, 776 F. Supp. 715, 742-43 (W.D.N.Y. 1991) (finding a jail receiving money in exchange for housing federal prisoners was not considered receiving federal financial assistance but instead was simply receiving money in exchange for providing the federal government a service), *rev’d*, 798 F. Supp. 123 (W.D.N.Y. 1992) (reversed only as to the awarding of punitive damages). See also *Jarno v. Lewis*, 256 F. Supp. 2d 499, 504 & n.3 (E.D. Va. 2003) (holding that because the federal government only hired the INS to operate a jail and the INS was not provided any funds beyond its payment for the operation of that jail, the INS was not a government actor). Though Jarno was not suing under Section 504, the court clearly stated that it had interpreted the term “federal financial assistance” in the same way as it would have under Section 504 because the Rehabilitation Act was modeled after the law under which he was suing. *Id.* Section 504 is the exclusive remedy for prisoners in a federal prison and non-citizen detainees in a federal detention center as the ADA cannot be used to sue the federal government. See *Cellular Phone Taskforce v. FCC*, 217 F.3d 72, 73 (2d Cir. 2000) (noting that the ADA does not apply to the federal government).

116. 42 U.S.C. § 12101 (2008). The ADA underwent significant amendments in 2008 with the passage of the ADA Amendments Act of 2008. *Id.* These amendments were made largely in reaction to judicial construction of what is considered a disability. The ADA Amendments Act states, “Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973.” ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(3), (7), 122 Stat. 3554 (2008). The Amendments clarified previous judicial interpretations of the term “substantially limits” as

with disabilities by prohibiting “discrimination on the basis of disability by the federal government, federal contractors, and by recipients of federal financial assistance.”¹¹⁷ Programs must be made available for persons with disabilities at any organization that receives federal funds, including businesses.¹¹⁸ As Section 504 only applies in situations where federal funds are either directly or indirectly received,¹¹⁹ there was a gap in protection at the exclusively state and local level for over a decade.

In 1990, the ADA was passed to fill this gap and end all discrimination against persons with disabilities by both public and private entities.¹²⁰ Title II of the ADA expands protections for prisoners by applying all 504 requirements to actions taken by state and local governments.¹²¹ Title II of the ADA provides “[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”¹²² Courts have analyzed claims the same way whether brought under Section 504 or Title II of the ADA.¹²³

Prisoners may now seek protection under the ADA and Section 504. However, these and many other legislative protections were not originally constructed as affording protection to prisoners. Historically, inmates in the United States have been granted few rights or protections.¹²⁴ Beginning in 1944, courts’ stances began to change, affording inmates many rights available to non-incarcerated citizens.¹²⁵ However, courts

requiring a “greater degree of limitation than was intended by Congress.” *Id.* The updates to these Amendments have provided disabled prisoners with an increased likelihood of success in suing prisons for violations.

117. Deborah Leuchovius, *ADA Q&A...The Rehabilitation Act and the ADA Connection*, *Pacer Center Action Information Sheets* (2003), <http://www.pacer.org/parent/php/PHP-c51f.pdf> (last visited Apr. 7, 2017).

118. *Id.*

119. 29 U.S.C. § 769.

120. Americans with Disabilities Act, 42 U.S.C. § 12101(b)(1) (2008) (specifying one of the goals of the ADA as providing “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities”). The ADA additionally prohibits discrimination against people who are associated with a disabled person. *See* 28 C.F.R. § 35.130(g) (2008); *Niece v. Fitzner*, 922 F. Supp. 1208, 1216 (E.D. Mich. 1995) (recognizing a possible ADA violation after prison officials refused to make accommodations to allow a prisoner the ability to communicate with his deaf fiancée).

121. *See* Leuchovius, *supra* note 117, at 1-2.

122. 42 U.S.C. § 12132 (2008).

123. *See, e.g., Frame v. City of Arlington*, 657 F.3d 215, 223-224 (5th Cir. 2011) (“Although we focus primarily on Title II, our analysis is informed by the Rehabilitation Act, and our holding applies to both statutes.”).

124. *See, e.g., Ruffin v. Commonwealth*, 21 Gratt. 790, 62 Va. 790 (1871) (“He has, as a consequence of his crime not only forfeited his liberty, but his personal rights, except those which the law in its humanity accords to him. He is for the time being the slave of the state.”)

125. *See Coffin v. Reichard*, 143 F.2d 443 (6th Cir. 1944) (an inmate is entitled to “all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.”).

were not fully open for inmates to receive relief until 1964, when inmates were given the ability to sue the government for deprivations of their constitutional rights.¹²⁶ Beginning with *Saunders v. Horn*, courts began applying protections afforded by the ADA and Section 504 to the rights of inmates in state prisons.¹²⁷ Notably, these have included placing an affirmative duty on prisons to evaluate the accommodations of prisoners who were obviously disabled,¹²⁸ providing disabled prisoners access to recreation,¹²⁹ providing adequate meals and showers,¹³⁰ allowing possible exclusion from work release programs due to disability,¹³¹ and providing adequate time to consume meals.¹³² The Supreme Court also began to define the boundaries of the ADA as applied to prisoners. In *Pennsylvania Dep't of Corrections v. Yeskey*, the Court found the ADA “unmistakably includes State prisons and prisoners within its coverage.”¹³³ Additionally, the Court in *Barnes v. Gorman* clarified that punitive damages could not be awarded in suits brought under Section 504 or the ADA.¹³⁴

STATUTORY REQUIREMENTS UNDER THE ADA AND SECTION 504

To sue under either the ADA or Section 504, a prisoner must meet several statutory elements. First, the individual must show he or she has a disability.¹³⁵ A “disability” under the ADA is defined as “a physical or mental impairment that substantially limits one or more major life activities of such individual...a record of such an impairment...or being regarded as having such an impairment.”¹³⁶ Three different categories of disabilities qualify for protection. The first category includes a person who has a mental or physical impairment that substantially limits one or more

126. See *Cooper v. Pate*, 378 U.S. 546 (1964) (finding for the first time that a state inmate has standing to sue in federal court to address civil rights violations).

127. See *Saunders v. Horn*, 960 F. Supp. 893 (E.D. Pa. 1997).

128. See *Piercv. D.C.*, No. 13-CV-0134, 2015 WL 7574750, at *3 (D.D.C. Nov. 25, 2015).

129. See *Norfleet v. Walker*, 684 F.3d 688, 690 (7th Cir. 2012).

130. See *Phipps v. Sheriff of Cook County*, 681 F. Supp. 2d 899, 916 (N.D. Ill. 2009).

131. See *Jaros v. Illinois Dep't of Corr.*, 684 F.3d 667 (7th Cir. 2012).

132. See *Rainey v. County of Delaware*, No. 00-548, 2000 WL 1056456, at *2 (E.D. Pa. Aug. 1, 2000).

133. See *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209-10 (1998). In *Yeskey*, an inmate had a history of hypertension. *Id.* at 208. Because of this, he was denied access to a motivational boot-camp program; completion of this six-month program gave an inmate the opportunity to receive parole earlier than someone who did not complete the program. *Id.* The Supreme Court found the ADA did apply to prisons and that the Pennsylvania Department of Corrections could not discriminate against inmates on the basis of a disability. *Id.*

134. See *Barnes v. Gorman*, 536 U.S. 181, 189 (2002).

135. 42 U.S.C. §§ 12102(1)(A)–(C) (2009).

136. *Id.*

major life activities.¹³⁷ These include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”¹³⁸ Courts have found other activities, such as eating¹³⁹ and reproduction,¹⁴⁰ to be major life activities.¹⁴¹ The second category includes individuals who have a “record of a mental or physical impairment that substantially limits a major life activity.”¹⁴² An example of a person with such a disability is someone with a history of heart disease.¹⁴³ The third category includes people who are “regarded as having a mental or physical impairment that substantially limits a major life activity.”¹⁴⁴ An example of a person who falls into this category is someone who has one seizure, causing a prison official to refuse to give the person a job “based upon the mistaken belief that the job will trigger seizures.”¹⁴⁵

After a prisoner shows the existence of a disability, the individual must then show he or she is a “qualified individual with a disability.”¹⁴⁶ The Act defines a “qualified individual with a disability” as any person with a disability who “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”¹⁴⁷ Showing a prisoner qualifies for a specific service or activity is a fact-intensive investigation and some services and activities are easier for an individual to qualify for than others. For example, as all prisoners qualify for food service, “an inmate with uncontrolled diabetes who needs a

137. *Inmate Rights Under The ADA: A Brief Overview*, DISABILITY RIGHTS NETWORK OF PENNSYLVANIA (2009), <https://www.drnpa.org/File/publications/inmate-rights-under-the-ada---a-brief-overview.pdf>.

138. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 3, 122 Stat. 3553, 3555.

139. See *Scott v. Garcia*, 370 F. Supp. 2d 1056, 1074 (S.D. Cal. 2005) (holding that eating is a major life activity).

140. See *Bragdon v. Abbott*, 524 U.S. 624, 637-42 (1998) (refusing to find HIV infection is always a disability but finding an HIV-positive woman had a disability because her disease substantially limited her reproductive ability).

141. See *Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 642 (2d Cir. 1998) (determining whether a particular activity is a “major life activity” turns on whether the “activity is a significant one within the contemplation of the ADA, rather than whether that activity is important to a particular plaintiff.”).

142. *Inmate Rights Under The ADA: A Brief Overview*, DISABILITY RIGHTS NETWORK OF PENNSYLVANIA, <https://www.disabilityrightspa.org/wp-content/uploads/2014/04/0109-Inmate-Rights-Under-the-ADA.pdf>.

143. *Id.*

144. *Id.* at 2.

145. *Id.*

146. 42 U.S.C. § 12131(2) (2009).

147. *Id.*

special diet would be ‘qualified’ to receive it.”¹⁴⁸ Other services may require a prerequisite for qualification. For example, “if a prison requires a high school diploma or GED for admittance to college level courses, an inmate who is deaf and seeks an interpreter for such courses will only be eligible if he has a diploma or GED.”¹⁴⁹

If a prisoner is able to show he or she meets the criteria as a qualified individual, the prison generally must make reasonable accommodations. Such accommodations include “certain physical accessibility requirements to accommodate persons with mobility or other physical impairments” as well as “reasonable modifications to rules, policies, or practices that enable persons with disabilities to participate in programs, services, and activities of the facilities.”¹⁵⁰

However, showing an individual is qualified may not be sufficient to require an accommodation. The prison may declare the disabled prisoner poses a “direct threat to the health and safety of others.”¹⁵¹ A direct threat is defined as “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services.”¹⁵² This determination is made by prison officials who must look at “the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.”¹⁵³ If these standards are met, then the prison may be able to deny the accommodation.¹⁵⁴

PROCEDURE FOR CONTESTING THE DENIAL OF AN ACCOMMODATION

If a prisoner is denied a reasonable accommodation he or she believes is necessary, there are set procedures to dispute this decision. A prisoner who is entitled to but denied an allowed accommodation has an opportunity to file an administrative complaint.¹⁵⁵ The Prison Litigation

148. See *Inmate Rights Under The ADA*, *supra* note 137 at 1.

149. *Id.*

150. *Id.* at 2-3.

151. 42 U.S.C.A. §12182(B)(3) (2009). See e.g. *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) (holding that even if an individual is “otherwise qualified” for an activity, the accommodation may be denied if there is a significant risk to others.).

152. 42 U.S.C.A. §12182(B)(3) (2009).

153. 28 C.F.R. § 35.139 (2010). See also *Arline*, at 286-289 (“Such an inquiry is essential if § 504 is to achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks.”)

154. 28 C.F.R. § 35.139 (2010).

155. 28 CFR § 35.170. (1996). This complaint must be filed within 180 days of the alleged discrimination. *Id.* This complaint should “(1) state with specificity the inmate's disability; (2) the

Reform Act requires “all inmates [to] exhaust available administrative remedies before filing a federal lawsuit under any federal law, including the ADA.”¹⁵⁶ The importance of following the administrative process is reinforced by the sanction placed on prisoners who fail to exhaust their administrative remedies: a “failure to use the grievance procedure (and the accommodation procedure if the issue involves accommodation) available to...inmates will result in the dismissal of the lawsuit.”¹⁵⁷

Continued opportunity to request a disability accommodation is essential to the protection of disabled prisoners in the United States as “there are acknowledged gaps in the information regarding the number of inmates with disabilities and the types of services provided to those who are recognized within institutional populations as having disabilities.”¹⁵⁸ In fact, many prisons in the United States “lack comprehensive and accessible data on the health status of their inmates.”¹⁵⁹ Because the informational infrastructure is still not prominently available in many state prisons, the burden continues to fall on disabled inmates to contest the denial of accommodations.

nature of the alleged violation of the ADA; and (3) if the grievance involves a failure to provide a reasonable accommodation, the specific accommodation he or she seeks.” *Inmate Rights Under the ADA*, *supra* note 137, at 5.

156. The Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a); *See also Porter v. Nussle*, 534 U.S. 516, 532 (2002) (holding the PLRA to require a prisoner to exhaust all administrative remedies before filing for relief under the ADA); *Burgess v. Garvin*, No. 01- Civ. 10994, 2003 U.S. Dist. LEXIS 14419 (S.D.N.Y. Aug. 18, 2003) at *9, *reconsideration granted on other grounds by* 2004 U.S. Dist. LEXIS 4122 (S.D.N.Y., Mar. 16, 2004) (“The plain language of [the PLRA] requires the prisoner to exhaust such administrative remedies as are available. It is not limited to administrative redress within the prison system in which the prisoner is being held, or to administrative remedies provided by any particular sovereign.”)

157. *Inmate Rights Under The ADA*, *supra* note 137 at 5.

158. Jessie L. Krienert, Martha L. Henderson & Donna V. Vandiver, *Inmates with Physical Disabilities: Establishing a Knowledge Base*, 1 S.W. JOURNAL OF CRIM. JUST. 13, 17 (2003).

159. Laura M. Marushack & Allen J. Beck, *Medical Problems of Inmates*, U.S. DEPARTMENT OF JUSTICE, 2 (1997) <http://www.bjs.gov/content/pub/pdf/mpi97.pdf>. Maruschak & Beck’s 1997 study involved a random sampling of inmates in various state prisoners in the United States. *Id.* These inmates were asked general background questions in addition to a variety of questions regarding their medical background during a one-hour interview. *Id.* The survey concluded that 5.7 percent of state inmates had a hearing impairment, 8.3 percent reported vision impairment and 11.9 percent reported a physical impairment. *Id.* Krienert, Henderson and Vandiver’s study, conducted in 2003, tested these numbers and different state’s policies regarding data collection on inmates. *See Krienert & Henderson*, *supra* note 158, at 18. Of the 38 states to respond, only fifty percent reported they collected information on the numbers of inmates who had physical disabilities. *Id.* Accommodations for disabled prisoners were also tallied. *Id.* at 19. The number of accommodations for the number of inmates who were determined to be disabled was extremely low. *Id.* Based upon this data, Krienert, Henderson, and Vandiver questioned whether many state departments of corrections were “in full compliance with the mandates issued within the confines of the Americans with Disabilities Act.” *Id.* at 21. Because of this, “some departments of corrections are likely to find themselves at a disadvantage when confronted by inmate lawsuits claiming violations of the Americans With Disabilities Act.” *Id.*

A LOOK AT THE POLICIES OF ENGLAND AND WALES

In England and Wales,¹⁶⁰ the Equality Act of 2010¹⁶¹ governs the treatment of between 4,500 and 16,000 prisoners with physical disabilities.¹⁶² Under this act, prison authorities are “required to make reasonable accommodations to meet the needs of disabled persons and their visitors.”¹⁶³ Inmates with disabilities are informed of their rights through a handbook given prior to entry into the penal system.¹⁶⁴ In this handbook, prisoners are informed of services and personal assistance available to them.¹⁶⁵ An example of personal assistance is the service of a special officer assigned to each prison, known as a Disability Liaison Officer.¹⁶⁶ These officers are charged with looking into “the needs people have and mak[ing] a record of these...making sure that people with disabilities can take part in prison activities.”¹⁶⁷

Courts play a much smaller role than in the United States.¹⁶⁸ Instead, the system relies on “independent administrative protection” provided by “the Prisons Inspectorate, the Prisons and Probation Ombudsman, and the system of Independent Monitoring Boards.”¹⁶⁹ If a prisoner feels a reasonable accommodation has not been made, he or she must exhaust “various tiers of prisons’ internal complaint procedure.”¹⁷⁰

160. For a discussion of the policies of Scotland and Northern Ireland, *see generally Justice Disability Steering Group*, SCOTTISH PRISON SERVICE INVOLVEMENT EVENT-HMP BARLINNIE, (Oct. 9, 2009) http://www.capability-scotland.org.uk/media/96996/barlinnie_report_9.10.09_final.pdf; *Human Rights Guidance for the Northern Ireland Prison Service Conditions of Imprisonment*, ATTORNEY GENERAL FOR NORTHERN IRELAND (March 21, 2014), https://www.attorneygeneralni.gov.uk/sites/ag/files/human_rights_guidance_for_the_northern_ireland_prison_service_on_conditions_of_imprisonment.pdf. *C.f.* Aileen McColgan, *National protection beyond the two EU Anti-discrimination Directives: The grounds of religion and belief, disability, age and sexual orientation beyond employment*, EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR JUSTICE, (September 2013) http://ec.europa.eu/justice/discrimination/files/final_beyond_employment_en.pdf (containing an overview of various protections afforded prisoners with disabilities in various member countries of the European Union).

161. *See* Equality Act 2010, c. 15, Part 2, § 6 (U.K.).

162. SUSAN EASTON & CHRISTINE PIPER, SENTENCING AND PUNISHMENT: THE QUEST FOR JUSTICE 325 (3d ed. 2012). *See also* Denise Smith, *Disability in the United Kingdom 2016*, PAPWORTH TRUST 46 (2016), <http://www.papworthtrust.org.uk/sites/default/files/Disability%20Facts%20and%20Figures%202016.pdf>.

163. SUSAN EASTON, PRISONERS’ RIGHTS: PRINCIPLES AND PRACTICE 191 (2011).

164. *Id.*

165. *Id.*

166. *Information Book for Prisoners with a Disability*, OFFENDER HEALTH AND PRISON REFORM TRUST 11 (2009), <http://www.prisonreformtrust.org.uk/portals/0/documents/disability%20pib.pdf>.

167. *Id.*

168. Anne Owers, *Prison Inspection and the Protection of Prisoners’ Rights*, 30 PACE L. REV 1535 (2010).

169. *Id.* at 1536-37.

170. *Id.* at 1537.

After this has been done, the Prisons and Probation Ombudsman “investigates the complaint and makes a finding.”¹⁷¹ Though these findings are not enforceable, the prison implements these findings “in the great majority of cases.”¹⁷² Inspections of the prisons are conducted by Her Majesty’s Inspectorate for Prisons for England and Wales, an “independent inspectorate which reports on conditions for and treatment for those in prison...”¹⁷³ However, they do not deal with “individual complaints or...investigate individual cases.”¹⁷⁴ Finally, the Independent Monitoring Boards are civilian groups charged with monitoring a particular prison.¹⁷⁵ These boards have the statutory right to enter the prison and receive complaints made by individual prisoners.¹⁷⁶

REASONABLE ACCOMMODATIONS IN SOUTH AFRICA

In addition to the suggestions below, the construction of the ADA, Section 504, and the Equality Act of 2010 provides the South African Parliament and Department of Correctional Services with guidance for possible changes to current policies to better support the needs of prisoners with disabilities.

I. Update the Procedures for Granting Accommodations

The first possible change is to create clearer policies and procedures for when the Department of Correctional Services should allow accommodations and what those accommodations should look like. By streamlining the process and procedures for accommodations, it would remove the subjectivity of decision-making that is currently occurring, and prison officials would be prevented from denying accommodations for arbitrary reasons. These procedures should incorporate evidence that can be documented and reevaluated by others should the accommodation be contested by the inmate. Some objective evidence of a disability could come from an evaluation of the medical history of every inmate; alternatively, evaluations could just cover people in marginal cases with a borderline disability. By requiring this outside evaluation, self-interested

171. *Id.*

172. *Id.*

173. *About HMI Prisons*, HM INSPECTORATE OF PRISONS (Feb. 14, 2014), <https://www.justiceinspectors.gov.uk/hmiprison/about-hmi-prison/>.

174. Owers, note 168, at 1537-38.

175. *Id.* at 1537.

176. Prison Act, 1952 s.6 (3) (U.K.), <http://www.legislation.gov.uk/ukpga/Geo6and1Eliz2/15-16/52/section/6> (“boards of visitors and shall among other things require members to pay frequent visits to the prison and hear any complaints which may be made by the prisoners and report to the Secretary of State any matter which they consider it expedient to report... ”)

parties—such as the warden or prison doctor in Fakude’s case—would not be able to selectively choose when a disability should be accommodated. Further, it would keep the court from having to evaluate the credibility of each party providing testimony on the disability.

Another possibility is to automatically allow a reasonable accommodation to any inmate that a social service agency has determined to be disabled. This could include, for example, an individual who had received a disability grant through the South African Social Security Agency.¹⁷⁷ If the inmate has ever filed an application for such a grant and the application was denied, an inquiry into the reasons for the denial should be undertaken. If the reason for the denial was based solely on earnings, assets or age, then the individual should automatically receive a physical examination by a non-prison doctor.

Next, information regarding the availability of disability accommodations needs to be made clearer to inmates. This could be done, like in England and Wales, by providing inmates with a handbook regarding their rights to accommodations. For many prisoners, incarceration is their first encounter with the penal system, and they are therefore not always aware they need to speak up during the intake process. Providing them with a handbook containing this type of information would prevent those not obviously disabled from being denied accommodations simply because they did not speak up at the right time. Additionally, knowing they have the ability to later ask for an accommodation could allow people who are uncertain if their disability will need accommodation in prison the opportunity to experience prison life, providing them with a better idea of whether an accommodation is necessary. The information in the handbook should be coupled with the opportunity to speak with someone regarding it as well as time to ask any questions the prisoner may have. This is a role that could easily be filled by the Inspectorate or its appointees.

Inmates who are denied disability accommodations should be given an automatic right to an independent and expedited appeal process. While the appeal is pending, the inmate should be granted as much of the accommodation as possible. This should be done for two reasons. First, it would provide an incentive to the prison administrators to move the appeals process forward if they believe the accommodation is truly unnecessary. Second, it would prevent inmates who were unjustly denied accommodations from being further injured while the appeals process is pending.

177. For more information on Disability Grants in South Africa, see *Disability Grants*, SOUTH AFRICAN SOCIAL SECURITY AGENCY, <http://www.sassa.gov.za/index.php/social-grants/disability-grant>.

Finally, any appeals process should be able to produce a binding decision, unlike the current system of the Inspectorate's non-binding findings. These binding findings would help legitimize the process.

II. Increase Access to Alternative Sentences

South Africa's recent exploration of alternative sentencing options provides this overly crowded system with means to reduce the number of inmates who daily reside in their prisons.¹⁷⁸ Allowing prisoners with disabilities to take advantage of new programs, such as those utilized by the Department of Correctional Services for prisoners serving life sentences,¹⁷⁹ would allow these prisoners to receive the care they need without additional cost to the correctional institutions. If prisoners with disabilities are able to show that people outside of the prison are willing and able to care for them, then he or she should be released subject to the electronic monitoring system. By requiring individuals to check in with local officials, such as a parole officer or an officer from Community Corrections,¹⁸⁰ or be subject to house arrest, the correctional centre would be able to keep tabs on the prisoner while allowing the prisoner access to the care he or she needs. Although this would not be as feasible for individuals from extremely rural areas who are not able to access Community Corrections, it would at least provide many disabled prisoners with an opportunity to receive accommodation outside of prison, thus freeing up funds to be used for disabled prisoners who remain in the correctional centres.¹⁸¹

178. Electronic monitoring systems are currently being utilized around the world as a means of providing alternative sentencing to prisoners. Countries such as Canada, Taiwan, Singapore, Australia, Netherlands, Germany, Belgium, Portugal, Italy, Argentina, Israel, England, France, Switzerland, and Scotland have all adopted such programs. Harry R. Dammer & Jay S. Albanese, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* 202 (2d ed. 2011).

179. *New prisoner monitoring system nothing to worry about: Ndebele*, SABCNEWS (Nov. 12, 2013), <http://www.sabc.co.za/news/a/0217898041cd23588a06cb5393638296/New-prisoner-monitoring-system-nothing-to-worry-about:-Ndebele-20131112>.

180. Community Corrections provides "two alternatives to incarceration, namely correctional supervision and parole..." *Community Corrections*, DEPARTMENT OF CORRECTIONAL SERVICES-REPUBLIC OF SOUTH AFRICA, <http://www.dcs.gov.za/Services/CommunityCorrections.aspx>. Community Corrections imposes restrictions, including but not limited to "[r]estriction to changing place of residence/employer without prior approval of Head of Community Corrections, [r]eporting at the Community Corrections Office at set intervals...[and] Home confinement - this refers to that portion of the day/night when the parolee is not working and is compelled to be at home..." *Id.* A prerequisite for release to Community Corrections includes enrollment in the Release Preparation Programme. *Id.* This program teaches prisoners basic knowledge and skills including "dealing with the stigma attached to imprisonment; crisis management; family planning; financial planning; street law..." *Id.*

181. Currently, the cost of providing care for a prisoner in South Africa is around R10,000 per month. *New prisoner monitoring systems nothing to worry about: Ndebele*, SABCNEWS, <http://www.sabc.co.za/news/a/0217898041cd23588a06cb5393638296/New-prisoner-monitoring->

III. Provide Options for Separate Accommodations

At a minimum, instead of forcing disabled prisoners to live in mixed cells, the Department of Corrections should give disabled prisoners the option to live with other disabled prisoners in one cellblock and provide basic accommodations to that cell block. If funds are not available to renovate all of the prison, renovations to that part of the prison would allow disabled prisoners access to proper care and would free up existing resources for other prisoners. South Africa has taken positive steps in this regard through the May 2016 renovation of Atteridgeville Correctional Centre in Pretoria.¹⁸² This facility has been renovated “for people with special needs,” including being revamped to include facilities with bath tubs.¹⁸³ This renovation will provide valuable services to prisoners with disabilities who are part of the Gauteng province’s 36,230 prisoners.¹⁸⁴ Renovations of this type should continue starting with other regions with large inmate populations, including KwaZulu-Natal¹⁸⁵ and Western Cape.¹⁸⁶

Finally, more attention needs to be given to the care and treatment of inmates with disabilities related to communicable diseases, such as HIV/AIDS and Tuberculosis (also known as TB). Currently, many inmates with untreated communicable diseases are housed in the same cells as disabled prisoners and the general population.¹⁸⁷ As many people with physical disabilities have compromised immune systems, the current housing arrangement only serves to create a heavier burden on prison staff, as these infectious diseases will only continue to spread.

In a 2014 study of 968 inmates, approximately 34 (3.5%) were found to have undiagnosed Tuberculosis.¹⁸⁸ This statistic is not entirely

system-nothing-to-worry-about:-Ndebele-20131112. By releasing the prisoner on electronic monitoring, the cost for the Department of Corrections would be around R500. *Id.*

182. *Correctional Services on transfer of Oscar Pistorius to Atteridgeville Correctional Centre*, DEPARTMENT OF CORRECTIONAL SERVICES (Nov. 14, 2016), <http://www.gov.za/speeches/offender-pistorius-14-nov-2016-0000>.

183. Agence France-Presse, *Oscar Pistorius transfers to jail adapted for disabled prisoners*, THE GUARDIAN (Nov. 14, 2016) <https://www.theguardian.com/world/2016/nov/14/oscar-pistorius-transfers-to-jail-adapted-for-disabled-prisoners>.

184. DEPARTMENT OF CORRECTIONAL SERVICES, ANNUAL REPORT 2015/2016 FINANCIAL YEAR 30 (2016) <http://www.dcs.gov.za/docs/2016%20doc/DCS%20Annual%20Report%202015-16.pdf>.

185. The 2016 total inmate count for KwaZulu-Natal was 29,253. *Id.*

186. The 2016 total inmate count for Western Cape was 29,872. *Id.*

187. Ina Skosana, *Prisoners’ health rights routinely violated In SA’s Jails*, MAIL & GUARDIAN (Apr. 23, 2015), <http://mg.co.za/article/2015-04-23-prisoners-health-rights-routinely-violated-in-sas-jails>.

188. Tellinghe, Fielding, Malden, Hanifa, Churchyard, Grant & Charalambous, *High Tuberculosis Prevalence in a South African Prison: The Need for Routine Tuberculosis Screening*, PLOS ONE. 2014 Jan. 30; 9(1):e87262, doi: 10.1371/journal.pone.0087262.

surprising considering around 80% of South Africa's population is infected with Tuberculosis.¹⁸⁹ As the current system neither tests individuals for Tuberculosis nor separates physically disabled prisoners from those diagnosed with Tuberculosis, it is extremely common for physically disabled prisoners to contract Tuberculosis in jail.¹⁹⁰ For example, Mr. Fakude, the paraplegic discussed above, contracted Tuberculosis while in jail awaiting trial.¹⁹¹

Prisons can serve as an "ideal environment for TB control."¹⁹² This is because entry into prison presents a unique opportunity for medical professionals to identify infected persons and treat them in a controlled environment.¹⁹³ To increase the chance of detecting persons infected with Tuberculosis as soon as they enter into the prison system, medical check-in procedures should be updated to look into whether an inmate is currently undergoing treatment for Tuberculosis or if anyone in their family has received treatment for Tuberculosis.¹⁹⁴ The Tuberculosis Coalition for Technical Assistance and International Committee of the Red Cross has created example forms for prisons to use to update their intake policies and better screen incoming prisoners.¹⁹⁵ If a person is diagnosed with active Tuberculosis, prison officials should be able to have inmates opt in to a system that allows the information to be shared with social service organizations outside of the prison to provide diagnosis and possible treatment for members of the inmate's family. This would allow the government the opportunity to assist people outside of the prison system, enabling them to receive treatment for a disease that they otherwise would have not known they had, and to helping to stop the transmission of this infection in society.¹⁹⁶ For people with active Tuberculosis or other communicable diseases, management of the disease using medication should be undertaken in a controlled environment away from other disabled prisoners, as well as away from the general prison population. Creation of any such a program, however, would need to be

189. Fidele K. Mukinda & Hassan Mohamed, *A systematic review of the epidemiology of and programmatic response to tuberculosis in inmates and the correctional services in South Africa* 3, EVIDENCE TO INFORM SOUTH AFRICAN TB POLICIES: EVISAT PROJECT (2014).

190. See Skosana, *supra* note 187.

191. See Raphaely, *supra* note 91. Now, he has extremely compromised lung function and is even more prone to contracting other diseases. *Id.*

192. Masoud Dara, Malgosia Grzemska, Michael E. Kimerling, Hernan Reyes & Andrey Zagorskiy, *Guidelines for Control of Tuberculosis in Prisons*, TUBERCULOSIS COALITION FOR TECHNICAL ASSISTANCE AND INTERNATIONAL COMMITTEE OF THE RED CROSS 32 (2009), http://pdf.usaid.gov/pdf_docs/Pnadp462.pdf.

193. *Id.* at 36.

194. *Id.*

195. *Id.* at 130.

196. *Id.* at 119-20.

carefully constructed to ensure compliance with South Africa's anti-discrimination laws.¹⁹⁷

CONCLUSION

South Africa has manifested its intention to provide for all its citizens through the wording of its Constitution, disabilities acts, and anti-discrimination laws. Putting these ideas into practice for prisoners with disabilities, however, has proven difficult for the Republic as it is faced with systemic corruption, poverty, and overcrowded correctional centres. By looking to how other countries have constructed their protections for prisoners with disabilities, the Republic can begin to implement policies to better protect the rights of all of its citizens and set positive precedent for the rest of the continent.

*Megan Gabbard Bruyns**

197. This is a practice that had previously been implemented in the United States related to prisoners with HIV/AIDS. The decision of whether to separate persons with communicable diseases — most notably HIV/AIDS — is left up to the states. See Toshio Meronek, *The Invisible Punishment of Prisoners with Disabilities*, THE NATION (July 23, 2013), <http://www.thenation.com/article/invisible-punishment-prisoners-disabilities/>. The last two states—Alabama and South Carolina—ended their segregation policies in 2012. Alabama required inmates who tested HIV positive to "wear white armbands identifying them as 'infected,' [and] live in a dorm where they [could not] participate in substance abuse, work-release, or other programs." *Id.* Because of these policies, "prisoners with HIV ended up serving longer sentences in prison under far harsher and more degrading conditions and with far fewer opportunities for rehabilitation in comparison to their HIV-negative peers." Margaret Winter, *Stigmatized No Longer: The End of HIV Segregation in Alabama Prisons*, JURIST- SIDEBAR (Oct. 9, 2013), <http://jurist.org/sidebar/2013/10/margaret-winter-hiv-segregation.php>. In *Henderson v. Thomas*, 891 F. Supp. 2d 1296 (M.D. Ala. 2012), a federal judge "held that Alabama's policy of categorical exclusions of prisoners with HIV from prison programs, services and activities violates the ADA, that the ADA requires Alabama to give individual consideration to each and every prisoner with HIV in all classification decisions which is consistent with its treatment of HIV-negative prisoners, that relegating prisoners with HIV to segregated housing violates the ADA's integration mandate, and that stigmatizing and 'outing' prisoners with HIV by such means as requiring them to wear white armbands violates the statute's anti-discrimination mandate." Meronek, *supra*. In light of the *Henderson* decision, South Carolina decided to end its practice of segregating all HIV-positive inmates into maximum-security facilities. *Id.*

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