

23 HOURS IN 23 THE BOX



**Solitary Confinement in New Jersey
Immigration Detention**



**New Jersey Advocates for Immigrant Detainees
June 2015**

ABOUT THE NEW JERSEY ADVOCATES FOR IMMIGRANT DETAINEES

New Jersey Advocates for Immigrant Detainees is an alliance of civic and religious organizations (individual participation is also welcome). Its goals include bringing attention to the plight of immigrant detainees in New Jersey jails, working to improve the conditions in those institutions, and advocating for the reduction and elimination of the use of detention of immigrants.

Coalition Members include American Friends Service Committee (AFSC) Immigrant Rights Program; Casa de Esperanza; Casa Freehold; the Episcopal Immigration Network; First Friends of NJ & NY; the Latin American Legal Defense and Education Fund, Lutheran Office of Governmental Ministry in NJ; Middlesex County Coalition for Immigrant Rights; NJ Forum for Human Rights; Pax Christi NJ; People's Organization for Progress- Bergen County Branch; the Reformed Church of Highland Park; Sisters of St. Joseph of Chestnut Hill ESL; and the Unitarian Universalist Congregation at Montclair.

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Andrew Lyubarsky and Juan Caballero are J.D. Candidates at New York University School of Law and are the primary authors of this report. They conducted this work as student advocates in the Law School's Immigrant Rights Clinic.

About the NYU School of Law Immigrant Rights Clinic

The Immigrant Rights Clinic is a leading institution in both local and national struggles for immigrant rights. Students engage in direct legal representation of immigrants and community organizations as well as in immigrant rights campaigns at the local, state, and national level. Students have direct responsibility for all aspects of their cases and projects and the opportunity to build their understanding of legal practice in the field of immigrant rights law and organizing.

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Foreword

I still remember the first time I heard someone make reference to solitary confinement. "I'll send you to the 'box'!" said the correctional officer on Rikers Island, New York City's largest jail. Although his words were not meant for me, the purpose of using those words were. This would be the first of many times that I would be threatened with solitary.

My context for learning about solitary confinement was through my serving 6½ years in the New York State (NYS) prison system. Long before the United Nations' Special Rapporteur on Torture, Juan E. Méndez stated, "Segregation, isolation, separation, cellular, lockdown, Supermax, the hole, Secure Housing Unit... whatever the name, solitary confinement should be banned by States as a punishment or extortion technique," I witnessed dozens of men being thrown into solitary for all too often minor infractions.

When I was released from NYS Corrections custody in 2010, I strived tirelessly to reintegrate into my community, completing a graduate degree in social work and working to help others like me with their rehabilitation and reentry. I thought I would never be that close to the inhumanity of solitary again. I was wrong. On the morning of May 8, 2014, I awoke in my home with my wife and two daughters, and by nightfall I was in Hudson County Correctional Facility, an ICE-contracted jail that houses men and women who are being detained pending immigration removal proceedings. Due to a tremendous advocacy effort, I was released from immigration detention on October 10th, 2014. However, what I witnessed during those five months was extremely disturbing.

While immigration proceedings are not criminal proceedings, the people who are held in immigration detention are subjected to jail rules and regulations that expose them to conditions that can severely damage a person psychologically, physically, and mentally. Within the walls of the institution, the use of intimidation as a tool to instill fear and control over people being detained is the norm. Correctional officers treat the control of showers, use of phones, participating in recreational time, and access to the law library to challenge one's immigration proceedings, as privileges that can be revoked at a whim in order to control people's behavior.

Disciplinary penalties such as solitary confinement negatively impact an individual's immigration proceedings because so many forms of immigration relief are discretionary. Therefore, one avoids these disciplinary measures at all costs by complying with some of the most miniscule demands of correctional staff.

For example, during my stay in immigration detention at Hudson, there was an officer who made a concerted effort to enforce the “no no-sleeves” rule. What this meant and required was for this officer to personally tell every person who had removed the sleeves from his or her t-shirt, to replace the t-shirt with one that had the “appropriate” sleeves. Many people complied to avoid further confrontation, however, there were people who refused to comply and were placed in solitary for such denial. The arbitrary use of solitary for non-violent offenses such as these was all-too-common.

Furthermore, solitary confinement does nothing to address the underlying issues that lead to unrest and frustration. At Hudson, the lack of consistent access to adequate programs within the facility for people in immigration detention, non-contact family visits, expensive phone calling system, inadequate medical and mental health services, and lack of outside recreational time, all contribute to creating a climate and environment that causes people to vent frustrations in non-constructive ways.

The current immigration policies we have in the U.S. are not reflective of the values that we hold and share as country—they threaten and contradict these values. Since the expansion of mandatory detention in 1996 and the maintenance of a daily bed quota, we have been entangling millions of people into a net of despair, anguish and distress. The violence of the immigration system results in the separation of countless men, women and children from their families through detainment, and in too many cases, life-long separation through deportation.

Solitary confinement should not be used in immigration detention. Undoubtedly, we need to hold people accountable for their actions, but punishing someone by isolation is neither humane nor effective. For this reason, I believe this report is timely and relevant to the larger national conversations around solitary confinement and immigration reform, as well as to the current debate about restricting the use of solitary confinement in New Jersey. I believe that the need for such dialogue on all levels, in various institutions, across a diverse spectrum of race, class and social status, is needed to bring us back to the shared values that we have as Americans.

- Khalil Alvaro Cumberbatch

Khalil Alvaro Cumberbatch graduated from CUNY Lehman College’s MSW program in May 2014 where he was awarded the Urban Justice Award. Khalil currently serves as Policy Associate for the Legal Action Center in New York City, where he advocates for sound policies regarding the criminal justice system. Originally from Guyana, he was a detainee at Hudson County Correctional Facility from May 2014 to October 2014.

Introduction

While solitary confinement is a practice widely used in both civil detention and criminal incarceration, current practices by state and federal facilities have received significant criticism for over reliance on solitary confinement and excessive disciplinary sanctions.¹

The State of New Jersey has a long history of using solitary confinement in its state prisons as a system of control and intimidation. In 1975, after the Civil Rights Movement, the Vietnam War and the prisoners' rights movement, Trenton State Prison (now New Jersey State Prison) established an administrative isolation unit for politically dissident prisoners.² Management Control Units (MCUs), which were characterized by “no-touch isolation” and severe restrictions on visits and telephone contact with family members, recreation, as well as the denial of work, education, law library access, and collective religious practice—imposed nearly complete sensory deprivation on those subjected to it.³ Individuals who had not broken institutional rules were isolated because they belonged to radical political groups, particularly Afro-American nationalist organizations.⁴ Some people were subject to this treatment for years; Ojore Lutalo, a member of one such group, was held in isolation for 16 years.⁵

The American Friends Service Committee and other New Jersey civil society groups have actively monitored the use of isolated confinement in the state for decades, and fought to secure dignity for many of those subjected to prolonged isolated confinement. The present report continues this tradition of advocacy by focusing exclusively on immigration detainees in civil detention. Though the deprivations immigrant detainees subject to solitary confinement in New Jersey

¹ See *Buried Alive: Solitary Confinement in the US Detention System*, Physicians for Human Rights (2013); *Invisible in Isolation: The Use of Segregation and Solitary Confinement*, Physicians for Human Rights, Heartland Alliance's National Immigration Justice Center (2012). See also Human Rights Coalition, <http://hrcoalition.org/node/238> (last visited Oct. 10, 2014); New York Campaign for Alternatives to Isolated Confinement, <http://nycaic.org/> (last visited Oct. 10, 2014).

² Bonnie Kerness, *The Hidden History of Solitary Confinement in New Jersey's Control Units*, SOLITARY WATCH (Mar. 13, 2013), <http://solitarywatch.com/2013/03/13/the-hidden-history-of-solitary-confinement-in-new-jerseys-control-units>.

³ *Id.*

⁴ Bonnie Kerness, American Friends Service Committee, *Testimonies of Torture in New Jersey Prisons: Evidence of Human Rights Violations*, 2-3 (Feb. 2015), https://www.afsc.org/sites/afsc.civicaactions.net/files/documents/TORTURE_IN_NEW_JERSEY_PRISONS_0.pdf.

⁵ *Id.* at 6-7.

county institutions may not be as prolonged, they are a particularly vulnerable population which suffers lasting psychological damage from isolation.

Though such conditions are extremely troubling in the case of confined individuals generally, these problems are of special concern in the context of immigrant detainees. Although immigration detention has always been characterized as non-punitive, and the rhetoric from the Obama Administration has emphasized a reform of the civil immigration detention system, this report finds that immigrant detainees are subject to an unnecessarily harsh system that applies the drastic punishment of solitary confinement too often and for too long. Because immigrants are held in penal facilities they are subjected to the same heavy-handed tactics as criminal inmates, and minor incidents which could easily be handled with non-punitive conflict resolution techniques or, if needed, less restrictive sanctions, immediately trigger solitary confinement. Detainees are confined, often for prolonged periods of time, even when no threat exists to the safety or the functioning of the facilities. Moreover, the current system raises serious due process concerns regarding the policies and practices of disciplinary systems and non-compliance with state regulations in several important respects.

Our focus on disciplinary systems and sanctions proceeds from an increased clinical consensus about the severe effects of prolonged solitary confinement on an individual's psychological and physical well-being. Studies have cataloged a series of unique psychiatric symptoms commonly associated with solitary confinement.⁶ Taken together, these symptoms rise to the level of a formal psychiatric diagnosis of trauma referred to as "prison psychosis."⁷ These harmful effects can be compounded by pre-existing mental health problems that the detainee may have experienced prior to his or her solitary confinement.⁸ Since many individuals in immigration detention are likely to have been the victims of life traumas, such as human trafficking, domestic violence, torture, and persecution, solitary confinement poses a unique threat to this population.⁹

⁶ These symptoms include perceptual distortions, illusions, and hallucinations; panic attacks; difficulties with thinking, illusions, and hallucinations; intrusive obsessional thoughts, overt paranoia; and problems with impulse control. Physicians for Human Rights, *See Buried Alive*, *supra* note 1, at 31.

⁷ *Id.*

⁸ *Id.* at 32.

⁹ *See* Physicians for Human Rights and The Bellevue/NYU Program for Survivors of Torture, *From Persecution to Prison: The Health Consequences of Detention for Asylum Seekers*, 56-57 (2003), available at <http://www.survivorsoftorture.org/files/pdf/perstoprison2003.pdf>. Among the surveyed population of detained asylum seekers, researchers found clinically significant symptoms of anxiety in 77%; depression in 86%; and PTSD in 50%; Forty-four percent had symptoms of all three disorders.

Objectives

The report has three aims. First, the report seeks to shed light on a population that is often overlooked in public debates over solitary confinement. Many immigrant detainees have been convicted of no crime, or have been detained as a result of minor offenses dating back years for which some served no time in prison. Immigrants in detention include asylum seekers, lawful permanent residents and the spouses and parents of US citizens. Many have lived in the United States and in New York's and New Jersey's communities for decades, some with lawful status, and are separated for months from their families while awaiting their immigration proceedings. In addition to the suffering and hardship that they endure in the dehumanizing environment of a penal facility, they are subject to harsh disciplinary repercussions over minor infractions, without regard to their status as civil detainees.

Second, in light of the introduction of the **Isolated Confinement Restriction Act** [NJ S 2588] by Senator Raymond J. Lesniak (D-Union) and Senator Peter Barnes III (D-Middlesex), this report seeks to provide detailed information about the practical application of solitary confinement inside New Jersey's county correctional facilities, providing legislators, advocates, and the general public with information which has up to now not been available. As the report notes on various occasions, the passage of a bill like S 2588 could wholly or partially remedy many of the most grievous flaws in the current system for all those confined in New Jersey's correctional facilities—immigrants and non-immigrants alike.

The passage of a bill like NJ S 2588 would mark a dramatic and humane improvement over the current disciplinary system. The bill would end the utilization of solitary confinement as a general disciplinary measure, permitting its use only where “there is reasonable cause to believe that the inmate would create a substantial risk of immediate serious harm to himself or another” and “a less restrictive intervention would be insufficient to reduce this risk.”¹⁰ Within this restriction, it would impose a categorical limit of 15 consecutive days in solitary confinement, with a maximum of 20 days out of any 60 day period, and categorically bar the use of solitary for vulnerable populations, including individuals under 21 or over 55, those with a mental illness, developmental disability or serious medical condition which cannot be treated in solitary.¹¹ The bill requires the Department of Corrections to develop less restrictive alternatives

¹⁰ S 2588, 216th Leg. (N.J. 2014) [hereinafter NJ S 2588].

¹¹ *Id.*

which would provide for facility discipline without resorting to the extreme measure of solitary confinement.

This report's conclusion, that solitary confinement is used excessively and inappropriately against immigrant detainees, further shows the need for such a bill. Solitary confinement is used as an all-purpose disciplinary measure responding to a wide range of conduct by immigrant detainees, much of which is non-violent, instead of a last resort to be imposed only when no less restrictive alternative could guarantee the safety of detainees and correctional staff. Disciplinary officials regularly breach the 15-day time limit imposed by current regulations by charging a detainee with two or three offenses for a single act. Specifically, corrections officers routinely add the catch-all "conduct which disrupts or interferes with the safety and orderly running of the facility" to all charges involving fighting or abusive language. There is no indication that any weight is given to their status as civil immigration detainees awaiting their administrative proceedings.

Third, considering the fact that S 2588's legislative process may take more than one NJ legislative session, the report aims to provide an overview of how solitary confinement is practiced in the immigration detention setting. These practices suggest a trend of non-compliance with New Jersey regulations and no oversight of whether detainees' due process rights in disciplinary proceedings are being respected. As such, this report provides the state and counties in New Jersey, as well as the Department of Corrections with a number of administrative steps they should undertake to ensure that the facilities are in rigorous compliance with New Jersey law.

Methodology

Scope

The investigators looked at the use of solitary confinement in immigration detention in three facilities in New Jersey, the Essex County Correctional Facility (ECCF), Hudson County Correctional Facility (“Hudson”) and Bergen County Jail (“Bergen”). These are all county facilities which incarcerate both immigration detainees and criminal inmates. All three facilities incarcerate immigrants pursuant to an Intergovernmental Service Agreement (IGSA) with the Department of Homeland Security (DHS) under which each facility is paid a per-diem rate for each immigrant detained under the direction and supervision of ICE. Pursuant to these contracts, Hudson houses between 400 and 450 ICE detainees at any given time¹² and Bergen has a maximum capacity of 194 immigrant detainees.¹³ Essex County’s IGSA allows it to subcontract with a neighboring facility, Delaney Hall which is privately operated. The capacity at both the ECCF and Delaney Hall is 1,250.

Delaney Hall and the Elizabeth Detention Center, another privately run NJ facility that incarcerates immigrants on behalf of ICE were not a part of this study. As private facilities, they are not subject to public records requests.

The New Jersey Advocates for Immigrant Detainees (“NJAID”), in collaboration with and the NYU Immigrant Rights Clinic, successfully gathered data from both the Bergen County Jail (“Bergen”) and Hudson County Correctional Facility (“Hudson”) from November 2013 through November 2014. We also collected detainee testimonies for several years and collected reports related to solitary confinement of detainees with the intent of studying these facilities’ policies and practices regarding solitary confinement of immigrant detainees.

Data Sources

This report relies heavily on information acquired from the Bergen and Hudson County Departments of Corrections pursuant to New Jersey’s Open Public Records Act (OPRA), and relied on their good faith cooperation. Both counties provided incident and investigation reports, disciplinary hearing and adjudication

¹² Lindsay Curcio et al., *Expose & Close: Hudson County Jail*, November 2012, available at <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/expose-hudsonnov12.pdf>.

¹³ Monsy Alvarado, *More Detainees to be Housed in Bergen Lockup*, North Jersey (May 4, 2013), available at <http://www.northjersey.com/news/more-immigrant-detainees-to-be-housed-in-bergen-lockup-1.160978?page=all>

forms, separation orders, use of force reports and medical evaluation forms for disciplinary incidents occurring in 2013 and 2014. Bergen County provided information on 83 separate disciplinary incidents, whereas Hudson County provided information on 25 incidents.¹⁴

To the best of our knowledge, the public record custodians and Department of Corrections officials of Bergen and Hudson counties complied fully with their responsibilities under New Jersey's Open Public Records Act.

Obstruction by Essex County

While record custodians in Bergen and Hudson furnished the investigators with the records requested within the time allowed by law, the records custodian from Essex County refused to do so.

In direct violation of Open Public Records Act (OPRA), Essex County refused to provide the investigators with the requested information or issue a reason why such documents should not be released. County authorities responded to the investigators' request for records that the county is required to keep on each individual use of solitary confinement by sending only the blank forms used in the facility whenever a disciplinary incident occurs and a hearing is necessary.

The NYU Immigrant Rights Clinic on behalf of NJAID filed a complaint against Essex County with the State of New Jersey Government Records Council. After months of stonewalling, Essex County provided documents in late June 2015, making it impossible to include their information in this report.

The NYU Immigrant Rights Clinic and NJAID have collected and examined data regarding immigration detention in Essex County using OPRA requests for two previous reports, one issued in 2010 and the other in 2012. Both reports found conditions at the Essex County Correctional Facility lacking. The second report found violations of both ICE's standards and NJ DOC regulations. It concluded that "the conditions for immigrant detainees in Essex County, NJ falls far short of any measurable standard."¹⁵ Furthermore, it specifically referred to abuses related to the use of solitary confinement at the ECCF.

¹⁴ This disparity does not imply that Bergen County uses solitary confinement more than Hudson County. Upon further inquiry, Hudson County officials represented that their Department of Corrections only retains information until the discharge date of an ICE detainee, after which the information is archived. It appears that Bergen County either does not archive its documents in the same way or had easier access to the information, as it was able to provide information for both current and discharged ICE detainees.

¹⁵ Semuteh Freeman & Lauren Major, N.Y.U. Immigrant Rights Clinic, *Immigration Incarceration: The Expansion and Failed Reform of Immigration Detention in Essex County, NJ* at 35 (Mar. 2012), available at <https://www.afsc.org/sites/afsc.civicactions.net/files/documents/ImmigrationIncarceration2012.pdf>.

Among the data and testimony collected was the story of Charbel Chehoud. Mr. Chehoud is a Lebanese immigrant who was detained in the ECCF beginning in October 2010. “From the end of December until his deportation on February 22, 2012, he was held in solitary confinement.” Chehoud was represented by an attorney, who filed complaints on his behalf with ICE. Chehoud also received significant community support, including from members of the local Jersey City police department. Despite this, it was only through his deportation that he was released from solitary “just days after officials from DHS came to the ECCF to investigate the complaints his lawyer had filed.”¹⁶

Chehoud’s was not the only story of immigrants being held in solitary confinement in the ECCF that the investigators collected—other individuals interviewed also came forward and stated that they had been held in solitary confinement for 23.5 hours a day while at ECCF.¹⁷ Lawyers and advocates report that there have been no significant improvements in conditions in Essex County since the publication of NJAID’s last report. These troubling stories were, in part, the genesis of this latest report focusing solely on the use of solitary confinement in immigration detention.

Classification of Data

Once all of the reports were received and processed, they were classified into one of the following categories according to the type of offense involved.

1. **Fighting** – Any alleged offense involving physical force between detainees, including minor physical altercations such as pushing.
2. **Disruptive Inmate** – Any alleged offense which does not involve actual or threatened physical force, but where corrections officers determine that the individual’s behavior is disruptive to the functioning of the facility.

Such offenses include instances of alleged abusive language towards officers, refusal to follow orders, disruptive shouting, or other non-violent behavior towards other detainees or officers. No violent acts or threats of violence were classified under this section.

3. **Threatening an Officer** – Any alleged violence or threats of violence towards corrections officers.

¹⁶ *Id.* at 16.

¹⁷ *Id.* at 20.

4. **Possession (Non-Weapon)** – Any offense involving the alleged possession of a contraband item which was not categorized by the facility as a weapon. This included homemade alcohol and prohibited literature.
5. **Possession (Weapon)** – Any offense involving the alleged possession of an item which was categorized by the facility as a weapon. It should be noted that the facilities had an extremely broad definition of “weapon”, which included sharpened plastic spoons, arms of pairs of eyeglasses, and toothbrushes.
6. **Damaging Property** – Any alleged offense involving the damage or destruction of facility property.
7. **Stealing** – Any alleged offense involving the improper taking of the property of another detainee.
8. **Sexual Harassment** – Any alleged offense involving intimidating, threatening or harassing another detainee by means of sexual innuendo or threats.

Once the types of cases were categorized, several variables of interest were identified:

- Average length of sentence, as well as maximum and minimum sentences imposed;
- Percentage of guilty verdicts among total number of disciplinary cases presented;
- Percent of guilty versus not guilty pleas after a detainee is accused of an offense;
- Average number of days spent in pre-hearing detention.

It should be noted that the record provided presents a heavily slanted narrative of these situations. The records we examined were all from the perspective of the charging and investigating officers, not from the person’s charged. The information is presented and construed in such a way as to create the factual predicate for a finding of guilt and a sentence of solitary confinement for each individual. Despite the voices of the individuals in these reports being unavailable, the reports do provide a valuable glimpse into the way that the disciplinary process works within these facilities.

Legal Framework Governing the Solitary Confinement of Immigrant Detainees in New Jersey

The solitary confinement regime, which governs the practice of immigration detention is a patchwork composed of three components—New Jersey state law, which generally govern discipline in the state’s correctional facilities, ICE-issued “Performance Based National Detention Standards” (PBNDS), which provide a floor of minimum standards for solitary confinement below which states cannot fall, and a 2013 Segregation Directive, which intended to provide additional layers of ICE review of solitary confinement placements. However, as with the PBNDS, the standards in the Segregation Directive are not legally enforceable and there is no penalty for facilities or individual corrections officers who do not abide by them.¹⁸

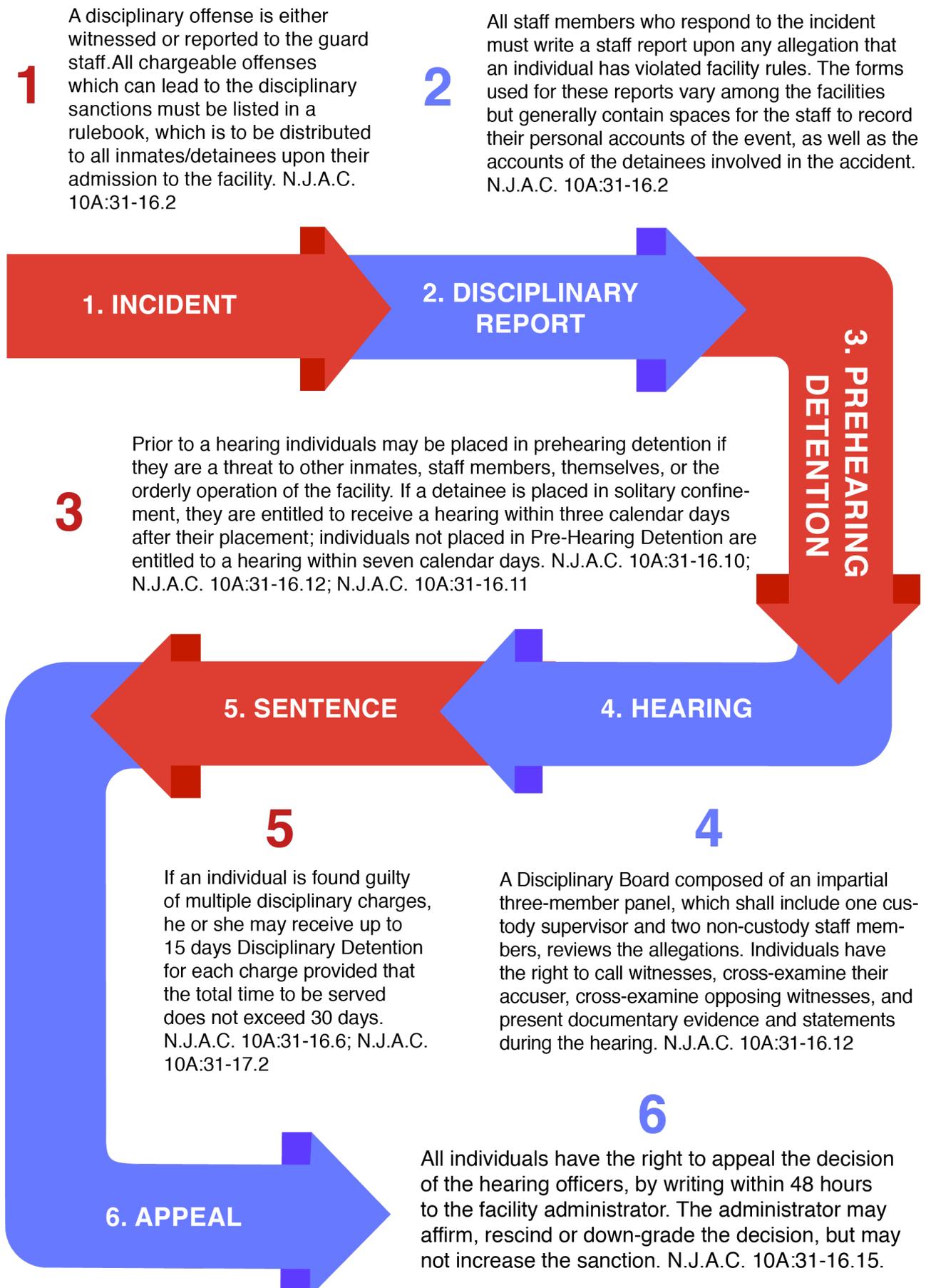
New Jersey Laws

While ICE detainees are held in New Jersey county jails, under the authority of the federal government, as they are held in New Jersey county facilities pursuant to intergovernmental service agreements, they are subject to the same New Jersey state regulations which apply to prisoners in those institutions.

The application of solitary confinement in New Jersey is governed by New Jersey Administrative Code (N.J.A.C.) 10a:31-16–17. Below is a chart describing the procedures that govern the response to a typical disciplinary incident and the relevant sections of the N.J.A.C. that apply:

¹⁸ Ruben Loyo and Carolyn Corrado, N.Y.U. Immigrants Rights Clinic *Locked Up but Not Forgotten: Opening Access to Family & Community in the Immigration Detention System* at 28, (April 2010) available at http://www.law.nyu.edu/sites/default/files/upload_documents/Locked%20Up%20but%20Not%20Forgotten.pdf

Figure 1: Procedures Governing the Use of Solitary Confinement under New Jersey Law



Under the N.J.A.C., detainees in solitary confinement retain their rights to correspondence but are not permitted to receive visits or telephone calls; legal visits and telephone calls may be permitted, but only by special authorization of the facility administrator. N.J.A.C. 10A:31–17.7.

ICE's 2013 Segregation Directive

In the face of civil society pressure, John Sandweg, then Acting Director of the U.S. Immigration and Customs Enforcement, issued a new segregation directive in 2013, mandating several layers of ICE oversight of certain solitary confinement placements. As the directive references all of the existing versions of the National Detention Standards which exist (the 2000, 2008, and 2011 versions), its requirements should be read to apply to all facilities that house ICE detainees.

“ICE shall ensure the safety, health, and welfare of detainees in segregated housing in its immigration detention facilities... Placement of detainees in segregated housing is a serious step that requires careful consideration of alternatives. Placement in segregation should occur only when necessary and in compliance with applicable detention standards. In particular, placement in administrative segregation due to a special vulnerability should be used only as a last resort and when no other viable housing options exist.”¹⁹

Detainees with Special Vulnerabilities

ICE's 2013 Segregation Directive imposed special requirements for detainees placed in disciplinary segregation who fall into specific “special vulnerabilities” categories.²⁰

These include detainees placed in **disciplinary segregation** for any reason with:

- i. Mental illness;
- ii. Serious medical illness;
- iii. Physical disability²¹

The ICE Field Office Director must be notified **within 72 hours** of any detainee falling into the above categories being placed into segregation. The Field Office

¹⁹ John Sandweg, Acting Director, U.S. Immigration and Customs Enforcement, 11065.1: Review of the Use of Segregation for ICE Detainees at 1, (Sept. 4, 2013), *available at* http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf, [hereinafter ICE Segregation Directive].

²⁰*Id.* at 5-7].

²¹ *Id.* at 6.

Director must send the case to the Custody Management Division (CMD) at ICE National Headquarters to permit expedited review, and inform the detainee's attorney.²²

ICE's Health Service Corps (IHSC) is to evaluate the appropriateness of placement for any detainees with medical/mental illness, or who are suicide risks or on hunger strike. If the IHSC determines that segregation has deteriorated the detainee's health and an appropriate alternative is available, the detainee must be removed from segregation. It must also monitor the detainee's placement at least once every 14 days.²³

Other Detainees (General Reporting Requirements)

In addition to the requirements described above, the 2013 Segregation Directive imposes additional communication and documentation requirements on the use of segregation at ICE facilities. In addition to the expedited review provided for members of vulnerable populations listed above, the other major innovation of the Directive is an additional role for the ICE Field Office in reviewing "extended" solitary confinement sanctions.

Under the new rules, facility administrators must notify the Field Office Director (FOD) in writing whenever a detainee has been held continuously in solitary confinement for 14 days, 30 days, and at every 30-day interval thereafter, or has been held in segregation for 14 days out of any 21-day period.²⁴ The FOD is then to independently review the placement to ensure that the sanction the disciplinary panel instituted was properly tailored to the severity of the offense and that the individual is receiving all of the services that he or she is entitled to. The FOD is instructed to conduct an individualized assessment of each case and consider whether return of the detainee to the general population or less restrictive alternatives to solitary confinement would be appropriate.²⁵

Moreover, all FOD reviews of those held for 14 days out of any 21-day period must now be sent to the national Custody Management Division for review.²⁶ For such cases, the FOD must report the date of the placement, the reason of the

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 4.

²⁵ *Id.* at 5.

²⁶ *Id.* at 7-8.

placement, the date of the FOD completed their review, and any additional information the FOD believes is noteworthy.²⁷

Performance Based National Detention Standards

Thus, the three New Jersey facilities studied in this report are subject to three different standards, pursuant to diverse contractual arrangements with ICE; Bergen County is bound by the 2000 National Detention Standards (2000 NDS), Hudson County by the 2008 Performance Based National Detention Standards (2008 PBNDS) and Essex County by the 2011 Performance Based National Detention Standards (2011 PBNDS).²⁸ In February 2012, ICE made a commitment to implement the 2011 PBNDS in all detention facilities stating, “ICE has begun implementing PBNDS 2011 across its detention facilities, with priority initially given to facilities housing the largest populations of ICE detainees.”²⁹ It is unclear why over three years later, the 2011 PBNDS have not been implemented in Hudson County or Bergen County.

Upon reviewing the disciplinary policies of the three institutions in question, it became apparent that references to the relevant NDS/PBNDS were non-existent, and that the policies were fundamentally guided by New Jersey law. As such, for the sake of brevity, this report will not restate the minimum standards that ICE requires for all facilities, except to state that the New Jersey regulations delineated above are largely consistent with these requirements.

There appears to be one exception to this general statement—New Jersey regulations on visitation directly contradict the requirements of all of the NDS/PBNDS. The NDS/PBNDS all state that detainees should ordinarily retain normal visitation principles, unless they are being punished for committing an offense related to visitation or other individualized findings of a security risk are found.³⁰ In New Jersey, visits and telephone privileges are suspended for those in solitary confinement, and legal visits and calls are subject to prior approval by the facility director. N.J.A.C. 10A:31–17.7.

²⁷ *Id.* at 8.

²⁸ This information is based on representations made by county correctional facility officers.

²⁹ U.S. Immigration and Customs Enforcement, *ICE Detention Standards*, (Feb. 24, 2012) , <http://www.ice.gov/factsheets/facilities-pbnbs> (last accessed May 27, 2015).

³⁰ 2011 PBNDS at 190; 2008 PBNDS, Special Management Units at 6; 2000 NDS, Special Management Unit (Disciplinary Segregation) at 6.

NJ S.2588 – A Proposal For Change

As other states and jurisdictions across the country act to limit solitary confinement for vulnerable populations, the New Jersey State legislature is considering the Isolated Confinement Restriction Act (“NJ S.2588”), which would restrict the use of solitary confinement in state and county correctional facilities. While New York City has moved to eliminate solitary confinement for individuals under 21 years of age³¹ and Colorado has prohibited the use of the punishment for individuals with serious mental illnesses,³² NJ Senate Bill 2588 proposes comprehensive reforms that would place New Jersey at the forefront of the reform movement. As of the publication date of this report, the bill is pending consideration by the Senate Law and Public Safety Committee, after a hearing on February 12, 2015.³³

The following table compares the current disciplinary regime in place in New Jersey with that proposed in NJ S 2588.

³¹ Michael Winerip & Michael Schwartz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES (Jan. 12, 2015), available at <http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html>.

³² Michael Muskal, *Colorado bans solitary confinement for seriously mentally ill*, L.A. TIMES (Jun. 8, 2014), available at <http://www.latimes.com/nation/nationnow/la-na-nn-colorado-mentally-ill-isolation-20140606-story.html>.

³³ At this hearing, some legislators requested additional information about how solitary confinement is used in practice from the DOC. This report seeks to contribute to the information available to these public officials, as there is no public data published by the Department of Corrections on solitary confinement use. Transcript of the hearing available at <http://www.njleg.state.nj.us/legislativepub/pubhear/slp02122015.pdf>

Table 1: Comparison of Current New Jersey Law and S.2588

	Current NJ Law	Proposed NJ S.2588
Permissible Reasons for Solitary Confinement	Can be imposed for any major offense prohibited by the facility as a means of punishment, whether or not the detainee is dangerous or a less restrictive alternative could preserve safety of others.	Can only be imposed where (1) there is reasonable cause to believe that the inmate would create a substantial risk of immediate serious harm to himself or another AND (2) a less restrictive intervention would be insufficient to reduce this risk.
Maximum Length of Solitary Confinement	Maximum of 15 consecutive days for a single offense, or 30 days if multiple offenses are charged. 15 day limit routinely circumvented by charging several offenses for a single act.	Maximum of 15 consecutive days, or 20 days out of a 60 day period, regardless of number of offenses charged.
Protection of Vulnerable Populations	No explicit protection of mentally ill/ developmentally disabled, young or elderly detainees from solitary confinement. Pre-solitary confinement mental health screening consists of a single check box.	Solitary confinement is explicitly prohibited for (1) persons who have a mental illness or a developmental disability; (2) individuals over 55 or under 21 years of age; (3) individuals with a serious medical condition which cannot be treated in solitary confinement; (4) pregnant women.
Review Processes	No automatic review process of solitary confinement placement by facility administrators. Appeal right formally exists, but rarely exercised and never granted.	Pre-placement medical and mental health screening; mandatory reviews after 72 hours and every 15 days thereafter, to protect vulnerable individuals and ensure that maximum length of solitary confinement not exceeded, daily clinical reviews;
Less Restrictive Alternatives	“On the Spot” corrections and loss of privileges possible for minor offenses. However, much non-violent conduct is classified as “major”.	Department of Corrections mandated to develop less restrictive alternatives to decrease use of solitary confinement, including separation from other inmates; transfer to other correctional facilities; and any non-isolated confinement sanction authorized by Department regulations.

International Human Rights Standards and Obligations

The United States is a party to a number of international treaties which protect the liberty and human dignity of all individuals. These include the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).³⁴ New Jersey correctional institutions' current disciplinary system, which imposes up to thirty days of solitary confinement as punishment on even civil immigration detainees violates Article 7³⁵ and 10³⁶ of the ICCPR and Article 1 of the CAT.³⁷

The latest interpretation of whether solitary confinement constitutes “cruel, inhuman, or degrading treatment or punishment”, which violate the ICCPR and the CAT is provided by the current Special Rapporteurs on Torture and Other Cruel, Inhuman and Degrading Treatment, Juan Mendez, who published a detailed Interim Report focusing entirely on the subject of solitary confinement in 2011.³⁸

Special Rapporteur Mendez reached three primary conclusions regarding the use of solitary confinement:

- Depending on the specific reason for its application, conditions, length, effects and other circumstances, solitary confinement can amount to a breach of article 7 of the International Covenant on Civil and Political Rights, and to an act defined in article 1 [torture] or article 16 [cruel,

³⁴ Mike Corradini, Kristine Huskey & Christy Fujio, *Buried Alive: Solitary Confinement in the US Detention System*, PHYSICIANS FOR HUMAN RIGHTS (Apr. 2013), at 27.

³⁵ “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

³⁶ “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

³⁷ “For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.”

³⁸ Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 66th Sess., UN Doc. A/66/268 (August 5, 2011) [hereinafter Mendez Report].

inhuman or degrading treatment or punishment] of the Convention against Torture,³⁹

- Where the physical conditions and the prison regime of solitary confinement fail to respect the inherent dignity of the human person and cause severe mental and physical pain or suffering, it amounts to cruel, inhuman or degrading treatment or punishment;⁴⁰
- Any period of solitary confinement imposed on juveniles or individuals with mental disabilities or prolonged solitary confinement which exceeds fifteen days can amount to cruel, inhuman or degrading treatment or torture.⁴¹

Based on these conclusions, Special Rapporteur Mendez issued a variety of recommendations focused primarily on post-conviction, criminal incarceration, a number of which are relevant to the issue of solitary confinement in immigration detention. These include:

- States should take necessary steps to put an end to the practice of solitary confinement in pretrial detention.⁴²
- Prolonged solitary confinement [over 15 days] should be subject to an absolute prohibition.⁴³
- States should prohibit the imposition of solitary confinement as punishment, including as a disciplinary measure, and should develop and implement alternative disciplinary sanctions to avoid the use of solitary confinement.⁴⁴
- States should abolish the use of solitary confinement for juveniles and persons with mental disabilities.⁴⁵

³⁹ *Id.* at ¶ 80.

⁴⁰ *Id.* at ¶ 81.

⁴¹ *Id.*

⁴² Immigration detention is essentially one large pretrial detention system, as most detainees are awaiting civil immigration hearings.

⁴³ *Id.* at ¶ 88.

⁴⁴ *Id.* at ¶ 84.

⁴⁵ *Id.* at ¶ 86.

- Solitary confinement should be used only in very exceptional circumstances, as a last resort, for as short a time as possible, where less restrictive measures would not accomplish the intended disciplinary goal.⁴⁶
- A documented system of regular review of the justification for the imposition of solitary confinement should be in place. The review should be conducted in good faith and carried out by an independent body. Any change in the factors that justified the imposition of solitary confinement should immediately trigger a review of the detained person's solitary confinement. All review processes must be documented, and all internal administrative findings must be subject to external appeal through judicial processes.⁴⁷
- There should be a documented system of monitoring and review of the detainee's physical and mental condition by qualified medical personnel on a daily basis while the person remains in solitary confinement. Such personnel should be trained in psychological assessment or have the support of specialists. They should be independent of the prison administration and accountable to outside authorities. Any deterioration of the inmate's mental or physical condition should trigger a presumption that the conditions of confinement are excessive and activate an immediate review.⁴⁸

The following table compares the solitary confinement system as governed by current New Jersey Law, the changes proposed by S 2588, and Special Rapporteur Mendez's recommendations under the Convention against Torture and International Covenant on Civil and Political Rights.

⁴⁶ *Id.* at ¶ 89, 91.

⁴⁷ *Id.* at ¶ 95.

⁴⁸ *Id.* at ¶ 100.

Table 2: Comparison of Current New Jersey Law and S. 2588 to International Norms

Convention against Torture/International Covenant on Civil and Political Rights	Current New Jersey Law	S 2588
<p>When Solitary Confinement can be Used:</p> <p>Should never be used as punishment or discipline.</p>	<p style="text-align: center;">X</p> <p>Solitary can be imposed for any major offense prohibited by the facility as a means of punishment, whether or not the detainee is dangerous or a less restrictive alternative could preserve safety of others.</p>	<p style="text-align: center;">✓</p> <p>Can only be imposed where (1) there is reasonable cause to believe that the inmate would create a substantial risk of immediate serious harm to himself or another AND (2) a less restrictive intervention would be insufficient to reduce this risk.</p>
<p>Protection of Vulnerable Populations:</p> <p>Solitary should not be used on juveniles or the mentally ill.</p>	<p style="text-align: center;">X</p> <p>No explicit protection of mentally ill/ developmentally disabled, young or elderly detainees from solitary confinement. Pre-solitary confinement mental health screening consists of a single check box.</p>	<p style="text-align: center;">✓</p> <p>Solitary confinement is explicitly prohibited for (1) persons who have a mental illness or a developmental disability; (2) individuals over 55 or under 21 years of age; (3) individuals with a serious medical condition which cannot be treated in solitary confinement; (4) pregnant women.</p>
<p>Maximum Length of Solitary Confinement:</p> <p>There should be an absolute ban on solitary confinement lasting more than 15 days.</p>	<p style="text-align: center;">X</p> <p>Maximum of 15 consecutive days for a single offense, or 30 days if multiple offenses are charged. 15 day limit routinely circumvented by charging several offenses for a single act.</p>	<p style="text-align: center;">✓</p> <p>Maximum of 15 consecutive days, or 20 days out of a 60 day period, regardless of number of offenses charged.</p>
<p>Review Processes:</p> <p>There should be a regular system of review of solitary confinement placements by an independent body.</p>	<p style="text-align: center;">X</p> <p>No automatic review process of solitary confinement placement by facility administrators. Appeal right formally exists, but rarely exercised and never granted.</p>	<p style="text-align: center;">X</p> <p>Pre-placement medical and mental health screening; mandatory reviews after 72 hours and every 15 days thereafter, to protect vulnerable individuals and ensure that maximum length of solitary confinement not exceeded. However, review process is internal to and not independent of Corrections.</p>

Findings

Based on the data collected, five specific areas of concern were identified. These include:

- The overuse and inappropriate use of solitary confinement;
- Delays in hearings following placement in prehearing segregation;
- Excessive length and stacking of solitary confinement sentences;
- Violations of individual due process;
- Insufficient ICE oversight and unenforceability of ICE standards and directives.

1. Overuse and Inappropriate Use of Solitary Confinement

Solitary confinement should be a last resort, not the first and only option to maintain order among immigrant detainees who are held in penal facilities. Disciplinary problems inevitably arise; when people who have been taken away from their families and communities are deprived of their liberty and held in close quarters, disputes and arguments are to be expected. However, not any infraction should lead to the harsh decision to place an individual in solitary confinement. Instead, correctional facilities can deploy conflict resolution techniques to decrease tensions, proactively provide educational, vocational or social programs that would promote cooperation among detainees, or implement a tiered disciplinary system, with less restrictive alternatives available for minor or first-time breaches.

UN Special Rapporteur Mendez recommends that “solitary confinement should be used only in very exceptional circumstances, as a last resort, for as short a time as possible.”⁴⁹ The county jails discussed in this report have systematically failed to adopt this recommendation. From the data collected, it is clear that there is a pattern and practice of over-reliance on solitary confinement in Bergen and Hudson County immigration detention. Anecdotal evidence points to the over-reliance on solitary confinement at the Essex County Correctional Facility as well. This is most pronounced in the cases highlighted below, where corrections officers used this extreme tool to address minor incidents of misbehavior.

An analysis of the data and detainee testimonies from Bergen and Hudson County demonstrates that these facilities are applying solitary confinement not just when it is necessary to maintain the security of the facility or punish particularly egregious acts, but as an all-purpose punishment to be imposed for

⁴⁹ Mendez Report, *supra* note 37, at ¶ 89.

any infraction of disciplinary codes. This leads to the systematic overuse of solitary confinement in situations where less restrictive alternatives could reasonably resolve the situation.

Chart 1. Total Distribution of Offenses by Category

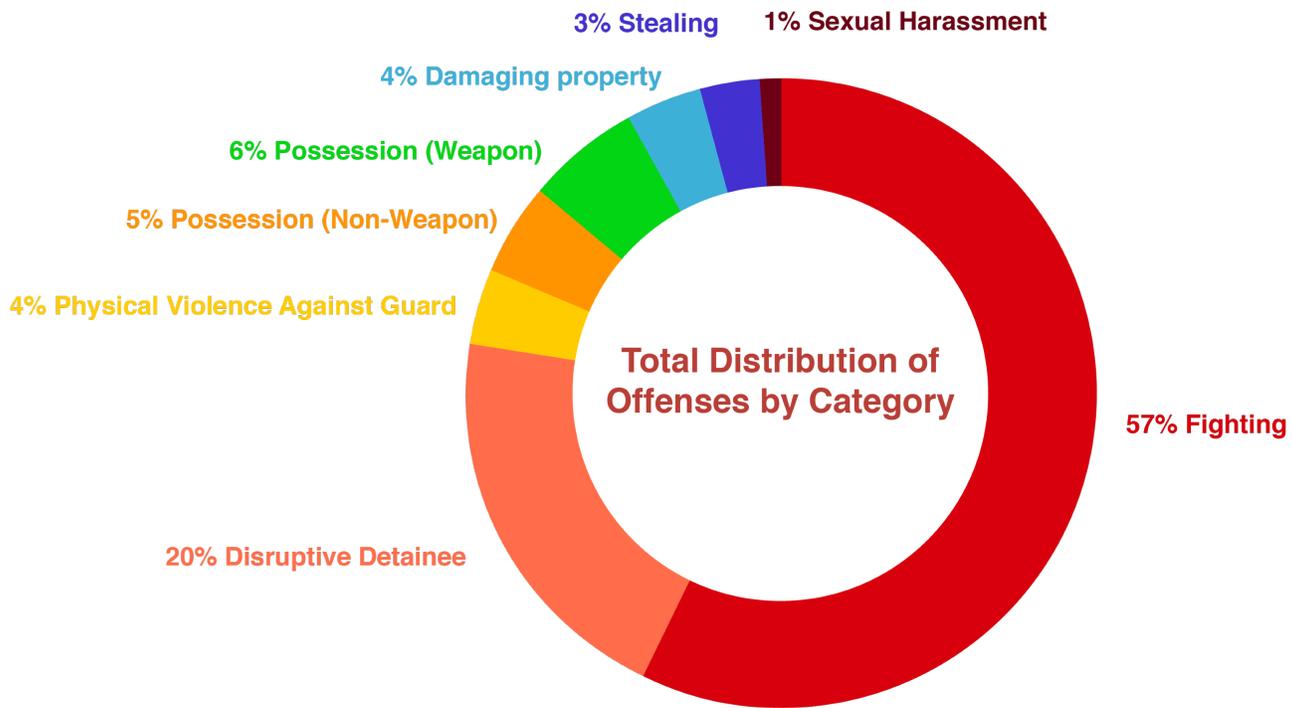


Chart 2. Distribution of Offenses by Category: Hudson County Correctional Facility

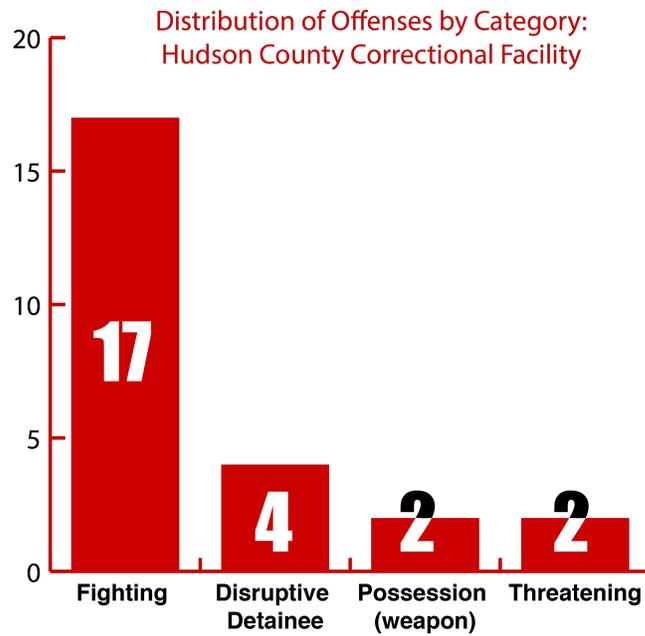
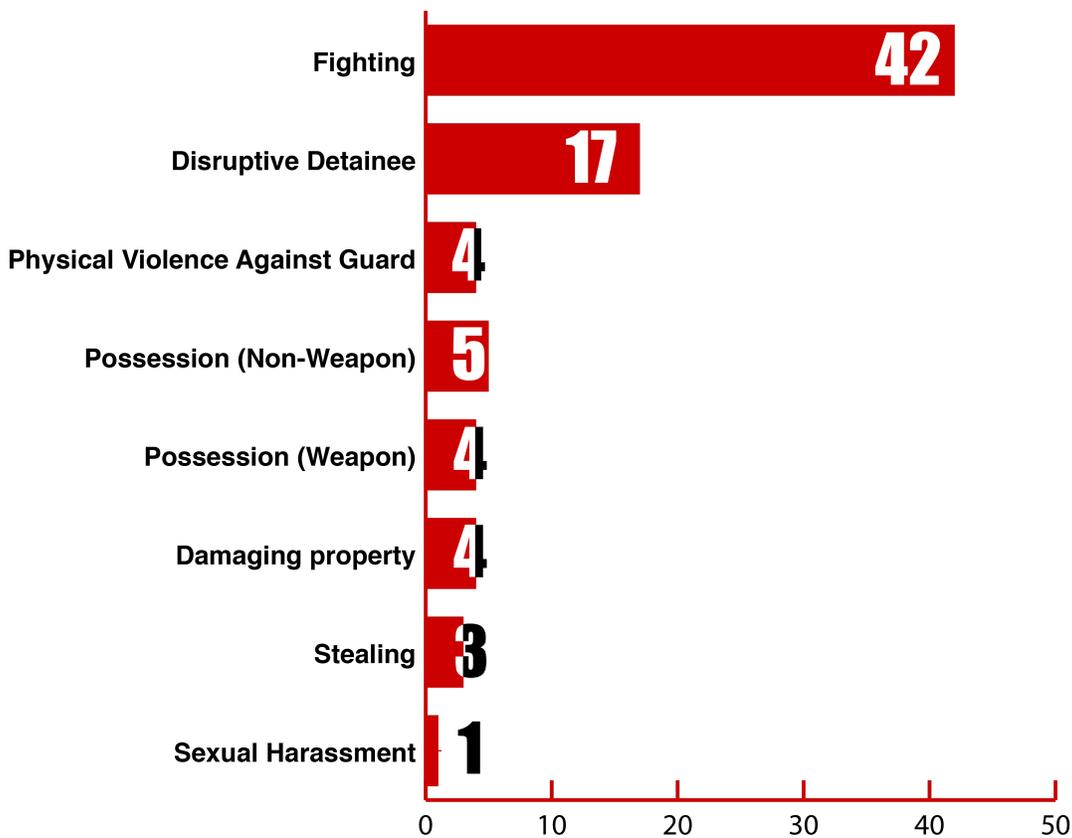


Chart 3. Distribution of Offenses by Category: Bergen County Jail

Distribution of Offenses by Category:
Bergen County Jail



Mental Health Concerns

The severe adverse effects of solitary confinement on individual's mental health have been well documented since the early nineteenth century when the United States pioneered a penitentiary system that resembled our modern solitary confinement facilities.⁵⁰ By 1890, the adverse psychiatric effects of placing individuals in solitary confinement as a means of incarceration was recognized by the U.S. Supreme Court:

*A considerable number of the prisoners fell, after even a short confinement [in solitary confinement], into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.*⁵¹

In its report on immigration detention, the Inter-American Commission on Human Rights (IACHR) was particularly concerned about the use of solitary confinement (both administrative and disciplinary segregation) on detainees with mental illness. The IACHR states that it “received numerous pieces of alarming testimony from immigrant detainees with mental illnesses, whose conditions deteriorated with the time spent in segregation”, and recommended that “mentally ill detainees should be housed in a therapeutic space or released to receive proper treatment.”⁵²

The adverse effects of solitary confinement discussed above are the result of individuals' inability to maintain an adequate state of alertness and attention to the environment when they are deprived of sufficient environmental and social stimulations.⁵³ The deprivation of environmental stimulation, even for a brief period of time, causes individuals to descend into a state of mental inactivity, where alertness, attention and concentration all become impaired, and eventually the individual loses their capability of processing external stimuli.⁵⁴ For this reason, many individuals who have experienced solitary confinement become

⁵⁰ Stuart Graissan, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 328 (2006).

⁵¹ *In re Medley*, 134 U.S. 160, 166 (1890).

⁵² Inter-American Commission on Human Rights, Report on Immigration in the United States: Detention and Due Process, Doc. 78/10, ¶ 340 (December 30, 2010).

⁵³ Graissan, *supra* note 49, at 330.

⁵⁴ *Id.* at 330.

“hyper-responsive” to external stimuli such as sudden noises or flashing lights.⁵⁵ These hypersensitivities can be “subjectively painful” and occur as the result of changes in brain physiology.⁵⁶ It is common for individuals experiencing such hypersensitivities to avoid further stimulation and will often withdraw progressively into themselves.⁵⁷

This is not to suggest that solitary confinement affects everyone in the same manner, but rather to highlight general effects that it may have on individuals who experience it. While some individuals with greater ability to modulate their emotional expression and with stronger cognitive functioning, may be less affected, all individuals will experience some difficulties with thinking and concentration, obsessional thinking, agitation, irritability, and difficulty tolerating external stimuli as a result of their time in solitary confinement.⁵⁸

In the facility reports that we analyzed, a few cases indicated improper use of solitary confinement on vulnerable populations that would be most severely affected by solitary confinement. One particularly disturbing case demonstrates the facility’s punitive treatment of mental illness, imposing solitary confinement on exactly the class of individual for whom it is likely to be the most traumatic.

A detainee was given seven days in solitary confinement for being disruptive while washing his cup and allegedly “throwing water in a provocative fashion” at another detainee.

The investigator’s report suggested that the detainee became extremely agitated when he was interviewed, spoke of several other detainees with whom he had problems, and spoke about people not flushing the toilet and not being courteous. He also denied throwing water, and said that he only pretended to throw water at the other detainee.

These indications of mental health “issues” notwithstanding, the investigator recommended the maximum sanctions (15 days in solitary confinement) for him “due to the fact that he feels that he did nothing wrong and does not recognize that his actions were quite clearly aggressive and disruptive to the secure and orderly functioning of the housing unit.”

⁵⁵ *Id.* at 331.

⁵⁶ *Id.* at 337

⁵⁷ *Id.* at 331.

⁵⁸ *Id.* at 332.

Several months later, the same detainee was given fifteen days in solitary confinement because he was making a lot of noise in the morning and had an extremely foul odor (refused to take showers). He was also reported as a problem because he would constantly “pick up his grey bin and flush the toilet”.

While mental illness is not mentioned anywhere on these disciplinary reports, and the detainee supposedly went through some kind of basic health screening before entering solitary confinement, the detainee’s level of agitation, lack of hygiene and erratic though non-aggressive behavior strongly suggests that some form of additional screening should have been implemented before being placed in solitary confinement. It is unlikely that the corrections officer who penned this report was qualified to comment on the likelihood of mental illness, yet the records do not reflect any referral for psychological screening. Instead of attempting to address any underlying issues that motivated this detainee’s behavior which may also prevent further instances, he was twice placed in solitary confinement, which would likely increase the severity of any mental or emotional issues. In effect, the institution used solitary confinement to deal with unusual behavior that posed no threat to the staff or other detainees.

Indeed, it appears that even using the language of punishment and more or less “restrictive interventions” would be inappropriate for such an individual; instead of being isolated in lockup, he requires mental health services and support. In this detainee’s case, it does not appear that the hearing record considered his mental health at all in sentencing him to a total of 22 days in solitary confinement. In an interview with a former detainee at the Hudson County Correctional Facility, the lack of quality mental health services was identified as a key factor in the overuse of solitary confinement. He stated that the entire facility had only one mental health provider. Anyone meeting with her would do so in an open room, very visible to other detainees, increasing an already present sense of stigma.⁵⁹

The documents do not demonstrate that the facilities are engaging in a comprehensive review of mental health concerns before placing an individual in solitary confinement. The Bergen County facility, where the above detainee was confined, did not provide us with any documents pertaining to mental health screening. Hudson County provided only a form consisting of two check boxes, which require a medical professional to check “cleared” or “not cleared” for pre-hearing detention based on a “medical determination” and a “mental health determination.” In all disciplinary incidents that we examined, the detainee was cleared for such detention.

⁵⁹ Authors’ interview with Khalil Alvaro Cumberbatch, former detainee at Hudson County Correctional Facility.

The passage of a bill like S 2588 would clearly prohibit the use of punitive solitary confinement in such a case, whether or not the detainee was found to have a mental illness. Under any reasonable interpretation, the detainee’s behavior did not “create a substantial risk of immediate serious harm to himself or another,” the standard that S 2588, if passed, would impose.

“Disruptive Inmate” Cases

In Bergen County, 43.2% of the cases where solitary confinement was imposed—including the above-mentioned case potentially involving mental health concerns—did not involve violence or a threat of violence against either detainees or guards. Most of these cases involved detainees violating a prohibition on “disruptive conduct”, “using obscene language” or “refusing an order”—broad and flexible categories that can be made to fit a wide variety of behavior.

A second category of detainees subject to solitary confinement under these categories include those who refuse an order or curse at guards. Two such case studies included:

- Detainee posted unauthorized items: prayer sheet and religious card, writing, drawings, pictures of bullets and several female model cutouts on his cell wall and refused to take them down when instructed by the staff. He was charged with refusing an order and disruptive conduct and given 7 days in solitary confinement.
- Detainee was being escorted from recreation back to the cell unit, and demanded to get a shaving razor immediately. After a guard told him that he would have to wait to receive a razor until recreation was over for all detainees, he yelled “go **** yourself” and refused the officer’s order to lock in to his cell. No indication was made that he made any threats of violence towards the officer, but he was given 10 days in solitary confinement for using foul language and refusing the order.

The above incidents were not characterized as involving violence or the threat of violence. There was no showing that the individual was a repeat offender. Nor was there any indication that less restrictive alternatives—such as a simple counseling or mediation session and a warning, would have been insufficient to resolve the conflict.

The relevant choice should not be between solitary confinement and no punishment at all. While an ideal less-restrictive solution in the civil detention framework would preference conflict resolution over punishment, punitive

measures such as restriction of privileges or transfer to less desirable but non-isolated housing would be permissible.

If adopted, NJ S 2588 would bring New Jersey facilities into compliance with international standards by limiting the use of solitary confinement to situations where, “there is reasonable cause to believe that the inmate would create a substantial risk of immediate serious harm to himself or another, and a less restrictive intervention would be insufficient to reduce this risk.”⁶⁰ This is an important shift from the current New Jersey regime, which allows for use of solitary confinement as a purely punitive measure. By allowing the use of solitary confinement for situations where corrections officers can use the charge of a detainees posing a risk to the “orderly” running of the facility, solitary confinement can and will be used as a response to minor behavior.

Under the framework which would be imposed under S 2588, however, there would be no “reasonable cause to believe that [these detainees] would create a substantial risk of immediate serious harm to [themselves] or another”, and therefore no showing that “a less restrictive intervention would be insufficient to reduce this risk.”

“Fighting” Cases

A majority of cases in both Bergen (51.9%) and Hudson (68.0%) involved fighting, loosely defined as any kind of physical altercation between detainees. While certain types of such cases may meet S 2588’s stringent standard requiring both a substantial risk of immediate serious harm and the unavailability of a less restrictive intervention, many of these cases could be resolved with a number of measures, such as instituting mediation and conflict-resolution procedures or loss of privileges short of solitary confinement.

Importantly, none of the cases in which solitary confinement was imposed featured a finding that the safety of the facility could not be maintained if the detainees were simply separated from one another into different housing units.

Khalil Alvaro Cumberbatch, a former detainee at Hudson County Correctional Facility, believes that fighting in the detention context is largely produced by the stress and tension experienced by individuals who do not understand the immigration process and their case status. He believes that the tension could be reduced by holding legal clinics to help detainees follow their cases, support groups to talk about how the process is affecting detainees and their families,

⁶⁰ NJ S 2588, at 3.

and other more positive learning programs which would foster cooperative behavior.⁶¹

A number of cases from the Bergen County facility suggest that in the case of fights involving several detainees, bystanders or innocent parties are also given solitary confinement sentences as a form of collective punishment.

- Detainee received a verbal reprimand (and one day in pre-hearing detention) for not listening to an order to get on his bunk while a fight between other inmates broke out. He “refused three orders” and “walked around” and had to be “physically put on his bunk”. There is no indication that he participated in the fight or did anything else wrong, but he was handcuffed and put in pre-hearing solitary confinement. As appears to be protocol, the officer requested that the committee give him the maximum sanction of 30 days; 15 days for refusing an order and 15 days for disrupting the facility.
- A fight broke out in the dorm between multiple detainees, with detainees arguing and throwing chairs at one another. Two Spanish-speaking detainees failed to get back on their bunk when ordered to do so, and had chairs in their hands. They stated that because they didn't understand the language, they didn't know what the other detainees were arguing about and only took chairs in their hands to defend themselves. They also claimed that they didn't believe the officer was yelling at them since it seemed like the officer was yelling at the whole unit and thus didn't mean to disobey any orders.

The investigating officer found that these detainees were credible and didn't really understand what was occurring because of the language barrier. Nonetheless, the disciplinary panel sentenced them both to 20 days in solitary confinement, the same sentence that it gave all of the principal participants in the fighting.

- Detainee affirmatively came to a corrections officer and told him that he had been hit by another detainee, and showed him that there was redness in his face. He said that he didn't fight back. The other detainee, when questioned, said that he did hit him, but that this detainee had pushed him first.

⁶¹ Authors' interview with Khalil Alvaro Cumberbatch, former detainee at Hudson County Correctional Facility.

Even though the investigating officer believed that the detainee was telling the truth and deserved time served only, he was given a sentence of 7 days in solitary confinement (4 of which were spent without a hearing).

Other Cases

Other infractions for which inmates were inappropriately threatened with or sentenced to solitary confinement included possession of homemade alcohol and tattooing of other detainees.

2. Delays in Hearings Following Placement in Prehearing Segregation

In this context of over-reliance on solitary confinement, guards often respond to incidents by immediately placing an individual in solitary confinement while they await a hearing by a disciplinary committee. During this prehearing segregation, individuals are placed in the same solitary confinement conditions they will experience if found guilty. According to the New Jersey Administrative code, facilities may place individuals in this prehearing segregation for limited periods of time, while they await a hearing to determine their guilt.⁶² Such practices by the facilities are problematic, especially when coupled with the fact that hearings are often delayed.

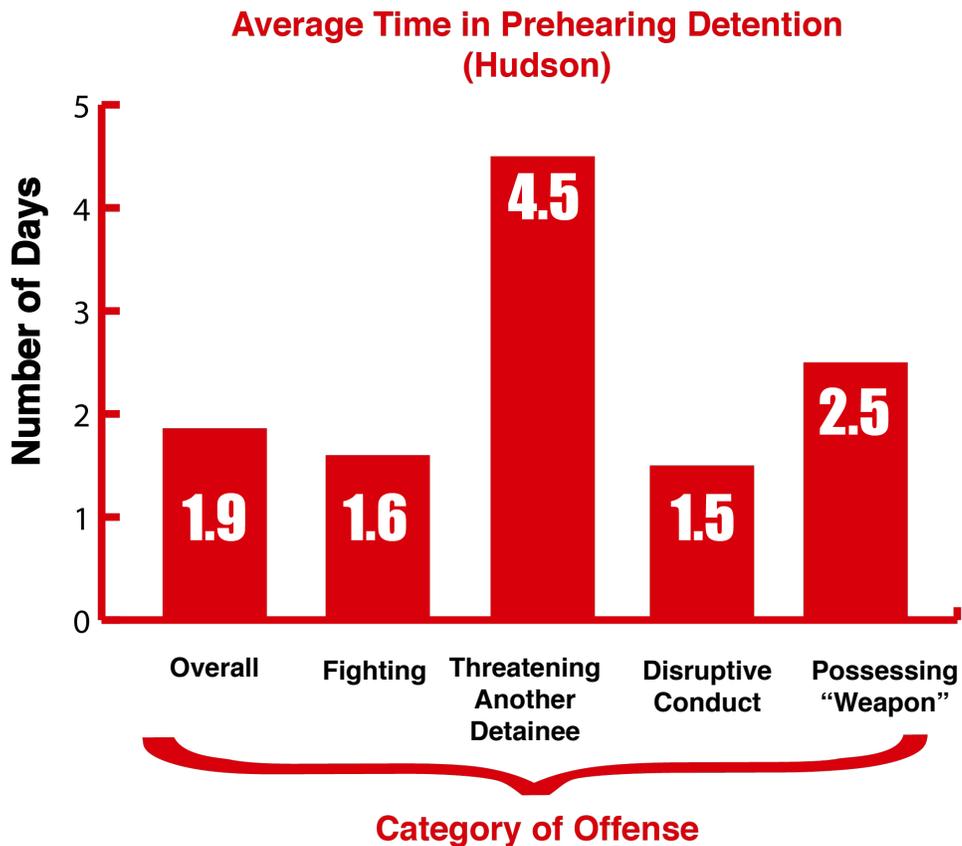
The average amount of time spent in prehearing segregation varies significantly within and across the two institutions. The records provided by Hudson indicate that the average time spent in prehearing segregation was 1.86 days. This average, however, does not convey the variation in the prehearing segregation across the different types of offenses. Since the charges of “fighting” make up 68% of the reported cases at Hudson, the average time spent in prehearing detention for these offenses (1.6 days) significantly influences the total average time spent in prehearing detention for the facility. This average is more or less consistent with the average time spent in prehearing segregation for the other two major categories of cases, charges relating “disruptive inmate” and “possessing a weapon”.

The reported cases from Hudson included a few outliers for the average days spent in prehearing detention. In two reported cases of “threatening another detainee”, records indicate that individuals were placed in prehearing segregation for 4 and 5

⁶² N.J.A.C. 10A:31–16.10; N.J.A.C. 10A:31–16.12; N.J.A.C. 10A:31–16.11

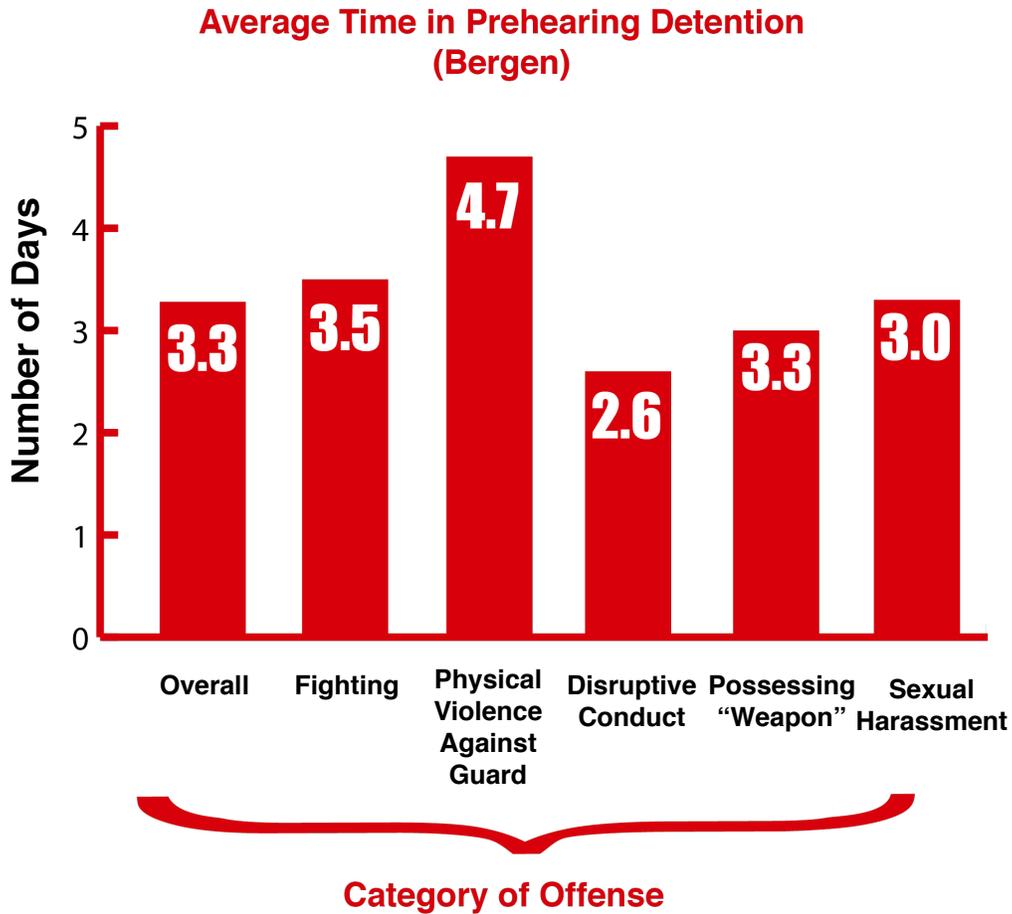
days. These two cases involve vague and disputed threats with little evidence suggesting any sort of investigation into the incidents by the facilities' staff.

Chart 4. Average Time in Prehearing Detention (Hudson)



In Bergen, this average time spent in prehearing segregation was 3.28 days. Much like the reported incidents from Hudson, "fighting" made up a majority of these cases (51.9%). The Bergen reports indicated general consistency in average time spent in prehearing segregation across the classes of offenses.

Chart 5. Average Time in Prehearing Detention (Bergen)



The records from Bergen County contain some serious cases where individuals were placed in prehearing segregation for excessive periods. Within the fighting cases, there were 13 cases where individuals were placed in prehearing detention for 4 or more days. The record indicates that, depending on the circumstances surrounding the fight, Bergen used three different sentences for individuals placed in segregation for fighting; 7 days, 10 days, and 15 days, with some detainees receiving more time because they were also found guilty of another offense, such as disruptive conduct. In one instance, a detainee was placed in prehearing segregation for 9 days; despite alleging that he was assaulted, this individual was found guilty and was sentenced to the 9 days he had already served in prehearing detention (“time served”). In one particularly egregious case, an individual was placed in prehearing detention for 12 days following charges of damaging property; he too was found guilty of the charge and sentenced to the time he had already served in prehearing detention.

Chart 6. Longest Time in Prehearing Detention (Bergen)

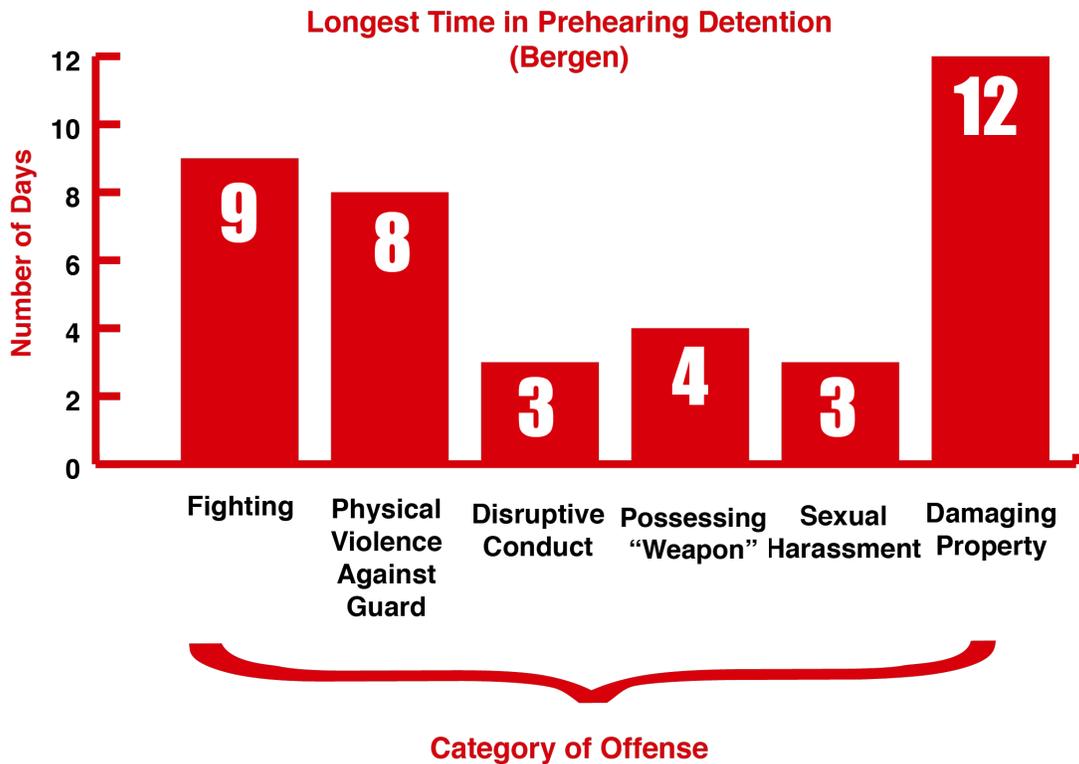
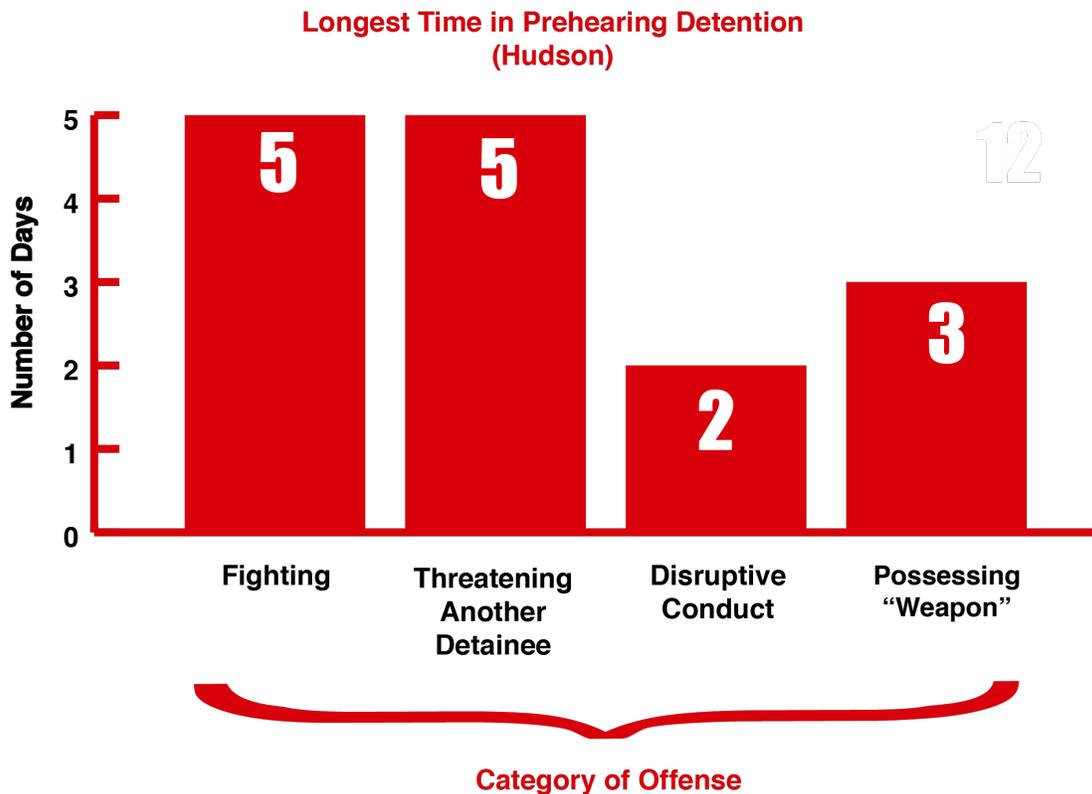


Chart 7. Longest Time in Prehearing Detention (Hudson)



3. Excessive Length and Stacking of Solitary Confinement Sentences

In addition to the overuse of solitary confinement for infractions, which could be resolved through less restrictive disciplinary or supportive measures, it is clear that the length of the sentences applied is unduly harsh and violates international human rights standards. According to the UN Special Rapporteur report, prolonged solitary confinement, defined as any period of solitary confinement which exceeds fifteen days, should be subject to an absolute prohibition in all correctional contexts.⁶³

While the New Jersey state administrative code limits solitary confinement for a single offense to a maximum of fifteen days,⁶⁴ the facilities' disciplinary panels regularly sentence detainees to twenty, twenty-five, or even thirty days of solitary confinement. They are able to do so because the law permits individuals found guilty of multiple charges to be sentenced to up to thirty days.⁶⁵ Presumably, this provision is intended to cover individuals found guilty of separate discrete acts, all of which violate the facility's disciplinary policies.

Both the Hudson and Bergen County facilities engage in a troubling practice of adding a charge of "conduct which disrupts or interferes with the security or orderly running of the correctional facility" (coded as infraction 306) to all violations which cause normal detainee movement in the facility to be delayed or disrupted, or cause an officer to abandon his assigned duties in order to restrain the individual. For example, an individual who got into a shoving match with another detainee would likely be charged with two offenses for that single act—fighting and disruptive conduct.

Our investigation shows that this practice is widespread in both facilities. 12% of solitary confinement sentences in Bergen County and 19% in Hudson County exceeded 15 days. ***Every single one of these was due to the artificial addition of the disruptive conduct charge to what otherwise was a single, discrete incident.***

By presenting at least two charges against detainees stemming from a single incident, both facilities are able to circumvent the fifteen-day restriction that the regulations impose, and sentence detainees to prolonged periods of solitary confinement at their sole discretion.

⁶³ Mendez Report, *supra* note 33, at ¶ 88.

⁶⁴ N.J.A.C. 10A:31-17.2.

⁶⁵ *Id.*

The facility practice of adding an all-purpose charge to virtually every disciplinary proceeding circumvents the limits currently imposed by law, and leads to harsh and inhumane outcomes. The inclusion of this category—much like disorderly conduct charges in criminal law—is best read as a savings clause which covers disruptive activity which does not neatly match any other category but is nonetheless viewed as deserving of punishment, not as a supplementary charge which entitles disciplinary officials to prolong solitary confinement.

Chart 8. Hudson County Correctional Facility Average Sentence Length

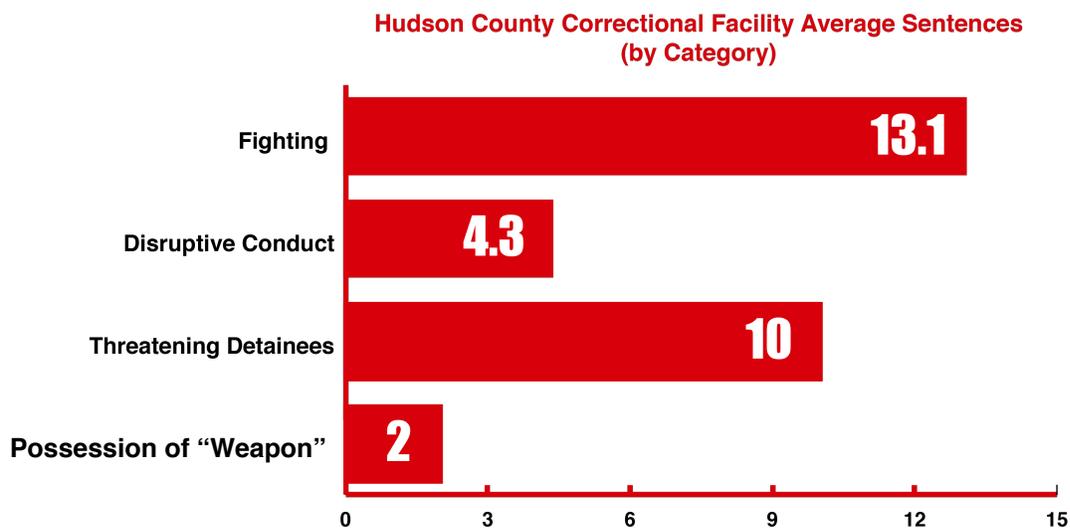
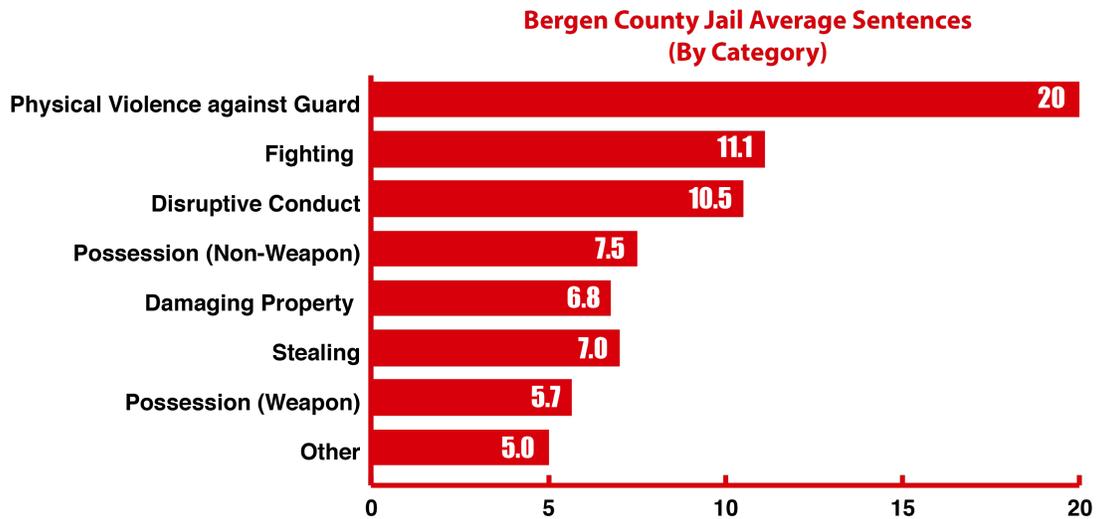


Chart 9. Bergen County Jail Average Sentence Length



Beyond this practice of artificially extending the legally permissible length of solitary confinement, it is clear that the facilities are issuing inappropriately lengthy sentences overall. In Bergen County, detainees found guilty of “disruptive inmate” violations not involving the use or threatened use of physical violence have been sentenced to an average of almost 11 days in confinement—the same length as those found guilty of fighting. In Hudson County, average sentences for “fighting”—a category which the facility interprets to include even minor physical altercations—run almost 13 days, with certain individuals receiving 20, 25, or 30 day sentences.

S 2588 would eliminate this practice immediately by placing an absolute limit of fifteen consecutive days on the use of solitary confinement. However, facilities’ current practices are illegal under the current legislative regime as well, and should be limited.

4. Due Process Violations

In addition to the concerns regarding solitary confinement generally, there are several due process concerns raised by the detention centers’ overreliance on solitary confinement. Individuals in immigration detention must prepare for their immigration hearings while in detention and, for this reason, are especially reliant on their lawyers, families and the law library; when placed in solitary confinement, detainees cannot access either of these vital resources.

In an attempt to address the vulnerability of this population, several procedural steps have been enacted to protect individuals from being placed unnecessarily in solitary confinement. ICE standards require detainees be allowed to put on their own case and allows them to call witnesses in their own defense. Despite this basic procedural safeguard, none of the records from either Bergen or Hudson include a detainee requesting a witness for their hearing; this is a strange phenomenon since most detainees charged with violating a facility rule allege that they are not guilty of the crimes for which they are accused. In Bergen County, the only facility for which there is information regarding pleadings, 77.8% of the detainees allege that they are not guilty of one or more of the offenses for which they are charged. Nevertheless, the written records indicate that these detainees have repeatedly and consistently turned down the opportunity to call their own witnesses.

While in the absence of extensive detainee testimony it is difficult to make conclusive findings about the adequacy of the hearing process, the available data overwhelmingly suggests a system which is tilted towards the correctional authorities. In Bergen County, 87.5% of detainees were found guilty of at least one of the charges of which they were accused, including 100% of those charged with some act under the “disruptive inmate” classification. In Hudson County, only 1 of the 25 detainees whose disciplinary charges were processed was found not guilty—a 96% rate of guilty verdicts. At the very least, such lopsided statistics—coupled with detainees’ supposed failure to request witnesses at their hearing—raise powerful inferences regarding the desultory nature of the due process offered detainees to contest their disciplinary charges.

Chart 10. Percentage of Guilty/Not Guilty Verdicts (Hudson County)

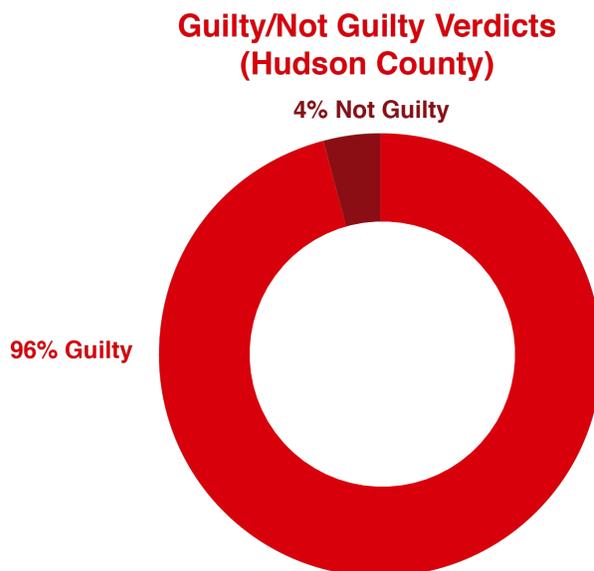
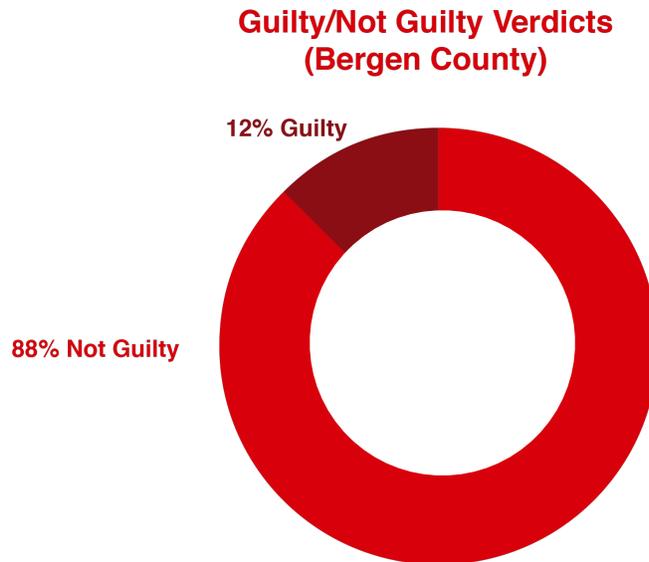


Chart 11. Guilty/Not Guilty Verdicts (Bergen County)



Each disciplinary report from both Hudson and Bergen require that the filing staff member indicate whether or not the detainee received notice of their right to appeal and these forms almost universally indicate that detainees do receive notice. Despite these procedural notifications, none of the cases reviewed indicated any sort of appeal of the verdict. This occurred even in cases where detainees vociferously advocated their own innocence prior to and during their hearings. This complete lack of appeals suggests that this right of the detainees is not being enforced properly either by failure to properly inform the detainees or by actively discouraging appeals of the hearing decisions.

In addition to calling their own witnesses, charged detainees are allowed to request that a representative be present at their disciplinary hearing. A far cry from legal counsel, these representatives are drawn from the detention center staff, a population likely to be biased against the detainee they are being asked to represent.

5. Insufficient ICE Oversight and Unenforceability of ICE Standards and Directives

Essex, Hudson and Bergen are also subject to ICE standards, which put in place certain reporting and auditing requirements. Though, as noted above, neither the PBNDS nor the standards in the Segregation Directive are legally enforceable. One requirement is that segregation placements are reviewed after the first 15

days by a representative of the ICE Field Office to guarantee that the original segregation justifications still remain valid. In practice, many of these Disciplinary Segregation Reviews (provided only by Hudson) operate as rubber stamps by concluding that the reasons for initial placement remained valid. In no instance did a Disciplinary Segregation Review form indicate that the continued segregation of the detainee was no longer necessary.

At the date that this report was published, it was unclear whether the facilities were reporting information about ICE detainees in solitary confinement to the ICE Field Office systematically, and whether the Field Offices were in turn reviewing it and reporting it to ICE's Custody Management Division, as required by ICE's 2013 Segregation Directive. A Freedom of Information Act (FOIA) request to ICE found no information regarding either Hudson or Bergen County's reports regarding members of vulnerable populations in solitary confinement; only information for Essex County was available. For Essex, the documents showed that the New Jersey Field Office was not in full compliance with the Directive and was required to submit a corrective plan. It is important to note that the New York Field Office is responsible for oversight at Hudson and Bergen, while the New Jersey Field Office is responsible for oversight at Essex.

While ICE oversight is not likely to significantly alter the practical realities of solitary confinement for most detainees, it is a requirement of these facilities' contractual obligations with ICE and an additional layer of due process which is being ignored.

Conclusion and Recommendations

Solitary confinement is an extreme and excessive form of punishment that has several well-documented adverse effects on the individuals placed in isolation. While this practice is troubling in any context, it is especially troubling in a civil detention context, such as immigration detention, where immigrants are expected to live apart from their families while prepare their legal cases and claims. A review of the current practices and procedures imposed on facilities using solitary confinement demonstrate that they do not appropriately regulate the use of solitary. Loopholes in the state regulations allow detention staff to regularly breach regulations such as the 15 day time limit by charging a detainee with multiple offenses for a single act.

Given the severity of this form of punishment, solitary confinement should be a tool of last resort and these facilities should work to develop less restrictive alternatives in order to guarantee the safety of detainees and correctional staff. The State of New Jersey, three New Jersey counties and the Department of Homeland Security have a responsibility to treat vulnerable populations, which they have been charged with housing, with the respect and dignity to which all individuals are entitled. Currently, they are failing in this responsibility.

Based on the findings above, NJAID and the NYU Immigrant Rights Clinic issue the following recommendations to the New Jersey Department of Corrections facility administrators, state legislators, Congress and the Department of Homeland Security:

1. Strengthen New Jersey Law Governing Solitary Confinement

Solitary confinement in immigration detention poses a significant threat to an especially vulnerable population and its use should be monitored closely. From the records reviewed for this report, it appears that the facilities regularly double charge or overcharge detainees for minor offenses. This overreliance on such a damaging system should be curtailed by imposing stricter limits on the practice than currently exist.

This goal would be best achieved by imposing new legislative standards. Currently, the New Jersey Senate is considering NJ S 2588, a bill that would mark a dramatic step in curtailing the abuses prevalent in the current system and bring the state's practices in line with international norms.

Specifically, passage of S2588 would:

- Impose a rigorous legal standard tied exclusively to safety concerns and mandating the use of less restrictive alternatives, thus significantly reducing the frequency and duration of solitary confinement and severely limiting its use as a first resort disciplinary sanctions. Solitary confinement would still be available in emergencies.
- Eliminate incentives for institutions to charge detainees with multiple disciplinary offenses, by limiting the presumptive maximum sentence to 15 consecutive days, without regard to the number of charges a detainee is found guilty of.
- Require meaningful medical and mental health screening and clinical reviews of people facing imposition and continuation of solitary confinement.
- Protect vulnerable populations by preventing the use of solitary confinement for the youngest and oldest detainees, as well as for those with mental health or serious medical issues.
- Improve the validity and reliability of hearing investigations and procedures that could result in the imposition of solitary confinement as an administrative sanction.
- Mandate that Department of Corrections research and implement less restrictive alternatives to solitary confinement.
- Promote transparency and accountability by requiring the Department of Corrections to publish quarterly reports regarding the use of solitary confinement for each facility.

For these reasons, we recommend the passage of this bill or any similar bill as a first step in the process of reforming this abusive system. Currently, NJ S 2588 does not contain any requirement of **civilian review boards**, which would promote accountability and transparency in the use of solitary confinement. We recommend the inclusion of more robust oversight mechanisms in this bill and any future reform bills considered.

2. Establish Effective Mental Health Screening Procedures

Some of the incidents discussed above involved detainees who exhibited symptoms of either mental illness or a cognitive disability. While some incident reports reviewed reflected medical screenings that required health providers to

indicate whether or not such conditions existed prior to placing an individual in prehearing detention, information provided consisted only of a single check-box and none of the records reviewed found any of the individuals placed in solitary to have exhibited an signs or symptoms of any mental illness.

This practice could and should be remedied under the current legal system, regulations, without the need for additional legislation. Facilities should implement comprehensive mental and medical screenings of individuals placed into solitary confinement by a licensed psychiatrist, psychologist or other mental health professional, as would be required by N.J. S 2588.

Given the adverse effects that solitary confinement has on individuals, qualified mental health personnel, who are independent from and accountable to an outside authority must regularly review the medical and mental health condition of detainees in solitary confinement. These regular checkups should begin when someone is placed in solitary confinement and continue during the duration of their stay. Health and security professionals violating these principles must be subject to review and sanction by the appropriate ethics board governing their conduct.

The assessment should include not only whether the individual has a diagnosed disability, but also whether he or she is likely to suffer negative mental health effects as a result of this sanction as well as any potential mitigating factors, which might explain their allegedly wrongful conduct. Given the traumatic experiences that many in immigration detention have experienced, the threshold for being placed in solitary confinement should be high enough to guarantee that severe adverse consequences will not occur from someone's placement in solitary confinement. Even if an individual is ultimately "cleared" for solitary confinement, such a report should go in to the disciplinary record and be considered by the disciplinary authorities as a potential ground in reducing, modifying, or commuting the sentence.

3. Guarantee Due Process and Promote Facility Accountability Under the Current Law

While the current law provides certain due process safeguards for detainees accused of disciplinary charges, the findings above strongly suggest that they are not being followed strictly by the facilities. The overwhelmingly high rates of findings of guilt, the complete lack of appeals, the failure to call witnesses and the cursory reviews by ICE which always result in the affirmation of the initial sentence all suggest that true due process is being denied.

Another case in point is the misuse of charge 306, “conduct which disrupts or interferes with the security or orderly running of the correctional facility.” By systematically “double-charging” detainees with this offense, the facilities have been skirting the current law’s requirement that an individual can only receive a maximum of 15 days in solitary confinement for a single disciplinary charge.

Given the track record of non-compliance with state law, the facilities should not be left to regulate themselves, and should be subject to more independent and civilian oversight. In this vein, we recommend that:

- Facilities should only use charge 306 if it pertains to an allegation which is not covered by any other disciplinary charge, and not as an automatic “sentence-enhancer.” This is both a matter of complying with New Jersey state law and international human rights standards prohibiting solitary confinement for over 15 days.
- The State Department of Corrections should play a more robust role in monitoring both the conditions of confinement and the due process afforded detainees by engaging in unscheduled site inspections and audits of disciplinary hearing documents to ensure compliance with existing standards.
- The Corrections Ombudsman’s office should offer services to all those detained in county facilities. At present, while the Ombudsman’s office exists for state inmates, county inmates sentenced to less than a year in prison and immigration detainees are denied the office’s services.⁶⁶ In addition to expanding access to the Ombudsman’s services, a dedicated staff person should be appointed to deal exclusively with the concerns stemming from county facilities, and could serve as a liaison with a civilian review mechanism.
- A civilian review board, which could respond to detainee and inmate complaints about their due process rights, sentence lengths, or conditions in solitary confinement should be formed. This board should have the power to conduct site visits and examine all documents relating to the imposition of solitary confinement, as well as make recommendations to corrections officials regarding excessive or inappropriate disciplinary measures. This would promote transparency and the participation of a

⁶⁶ See State of New Jersey, Office of the Corrections Ombudsman, Frequently Asked Questions, <http://www.state.nj.us/correctionsombudsman/faqs/> (visited Apr. 30, 2015) (“Any person, over the age of 18 years, who is convicted under the laws of the State of New Jersey and sentenced to a correctional facility for more than 364 days is a “state-sentenced” inmate and considered to be among the individuals who may properly seek help from the Corrections Ombudsman.”).

wide range of civil society stakeholders, including mental health, medical, legal, and corrections experts, as well as clergy.

- An agency which is independent of the NJ DOC, such as the NJ Attorney General's Division on Civil Rights, should be given authority to investigate complaints of the abusive use of solitary confinement. It should not be left solely up to, what is in effect, the jailer to investigate reports of problems at the jailhouse.

4. End Mass Immigration Detention

While this report is narrowly focused on a particularly extreme form of disciplinary sanction faced by certain immigration detainees, it should be noted that these individuals, who are not being held because they have committed any crime, should not be held in detention in the first place. Immigrants should have the right to prepare their case with their families and in the communities, without passing through the ordeal of months (or sometimes years) of traumatic detention.

There are many reasons why the average daily number of people in immigration detention has ballooned from 6,785 people in 1995 to over 34,000 in 2013.⁶⁷ In 1996, Congress imposed mandatory detention, removing the right of many immigrants, even those with minor criminal convictions, to request bond. In subsequent years, it has passed a bed quota requiring the Department of Homeland Security to maintain at least 34,000 available beds at all times, creating incentives for continued detention of individuals who do not pose a threat to their communities and who are not a flight risk.

As such, the New Jersey Advocates for Immigrant Detainees believes that mass immigration detention is unjustified by public safety concerns and inhumane. We support much more affordable alternative-to-detention programs⁶⁸ such as community-based case management. We call on Congress to repeal the bed quota, modify the mandatory detention law to permit every immigrant to have his

⁶⁷ Migration and Refugee Services/Joint Conference of Catholic Bishops & Center for Migration Studies, *Unlocking Human Dignity: A Plan to Transform the U.S. Immigrant Detention System*, at 7 (2015), available at <http://www.usccb.org/about/migration-and-refugee-services/upload/unlocking-human-dignity.pdf>.

⁶⁸ While the price of keeping an individual in detention is estimated to be approximately \$158 per night in FY 2013, the average daily cost of applying an alternative-to-detention program is only \$10.55 per person. *Id.* at 29. Though statistics are not available, the cost of maintaining someone in solitary confinement is likely higher than keeping them in general population.

or her bond equities considered by an immigration judge, and end the mass immigration detention system as we know it.⁶⁹

5. Stop Incarcerating Immigrant Detainees in County Jails

While the immigration detention system continues in its current form, we believe that, notwithstanding the above recommendations, immigrant detainees should not be held in county jails and **solitary confinement should never be used against immigrant detainees in civil detention.** A humane civil detention system should not subject detainees to prison rules and harsh disciplinary regimes by virtue of being held in a penal facility out of convenience for the local ICE Field Offices or for the purpose of generating revenue for local counties. It should not lock them up for 23 hours a day for any reason.

⁶⁹ This demand has now been made by, among others, the Editorial Board of the New York Times. See Op-Ed, *End Immigration Detention*, N.Y. TIMES (May 15, 2015), available at <http://www.nytimes.com/2015/05/15/opinion/end-immigration-detention.html>.