



ISOLATED IN ESSEX

PUNISHING IMMIGRANTS THROUGH
SOLITARY CONFINEMENT

————— JUNE 2016 —————

A report of the New Jersey Advocates for Immigrant Detainees, the American Friends Service Committee, and the New York University School of Law Immigrant Rights Clinic

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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 our state's jails, working to improve the conditions in those institutions, and advocating for the reduction and elimination of the use of detention for immigrants.

Coalition members include American Friends Service Committee (AFSC) Immigrant Rights Program in Newark, Casa de Esperanza, the Episcopal Immigration Network, Lutheran Office of Governmental Ministry in NJ, NJ Association on Correction, NJ Forum for Human Rights, Pax Christi NJ, Middlesex County Coalition for Immigrant Rights, People's Organization for Progress- Bergen County Branch, the Reformed Church of Highland Park, Sisters of St. Joseph of Chestnut Hill ESL, Unitarian Universalist Congregation at Montclair, and First Friends of New Jersey and New York.

ABOUT THE AMERICAN FRIENDS SERVICE COMMITTEE

The American Friends Service Committee (AFSC) is a Quaker organization that promotes lasting peace with justice, as a practical expression of faith in action. Drawing on continuing spiritual insights and working with people of many backgrounds, AFSC nurtures the seeds of change and respect for human life that transform social relations and systems.

The AFSC Immigrant Rights Program in Newark integrates legal services, advocacy, and organizing, providing legal representation in challenging immigration cases and ensuring that immigrant voices in New Jersey and beyond are heard in policy debates.

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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Executive Summary

Immigration detention is intended to ensure the appearance of immigrants at removal proceedings and is meant to be civil and non-punitive, yet immigrant detainees are held in penal facilities and subjected to the same conditions as individuals accused or convicted of crimes, including solitary confinement. The troublesome use of solitary confinement in state and federal penal institutions and its severe mental health consequences are often the focus of national discourse, but the specific impact of solitary confinement on immigrant detainee populations has received less attention. In 2015, the New Jersey Advocates for Immigrant Detainees (NJAID) and the New York University School of Law Immigrant Rights Clinic (IRC) published a report describing the use of solitary confinement as a disciplinary measure in two of the three New Jersey county jails that house immigrant detainees. This report completes the picture by presenting an analysis of previously unavailable data regarding the use of disciplinary solitary confinement (“disciplinary segregation”) against immigrant detainees in Essex County Correctional Facility (Essex), the third and largest immigration detention facility in New Jersey.

Essex produced 446 incident reports for the period covering 2013, 2014, and 2015. An analysis of these reports reveals that the use of solitary confinement in Essex is excessive and disproportionate, implemented in an arbitrary fashion, and lacking in adequate due process and transparency. Essex routinely “stacks” charges, meaning it charges a detainee with multiple offenses for a single incident, thus circumventing New Jersey’s 15-day limit on a solitary confinement sentence for a single charge, intended to be for clearly separate discrete acts. Furthermore, detainees regularly face solitary confinement during pre-hearing detention before there has been any finding of guilt. The data also demonstrates that many of the incidents leading to solitary confinement in Essex are related to frustration over the jail’s conditions. The conditions in a detention center are inherently stressful for detainees and staff alike, and the data shows that allowing officers the authority to mete out solitary confinement as a disciplinary measure in that context results in excessive and arbitrary punishments.

FINDINGS

1. The imposition of solitary confinement in Essex is excessive and disproportionate.

Out of the incidents charged that resulted in punishment, 96% led to solitary confinement and only 4% were deemed to merit a less punitive response, such as restricting commissary access. Furthermore, 42.1% of the incidents resulting in a punishment of solitary confinement were for nonviolent conduct. The high rate of imposition of solitary confinement demonstrates that it is being used as an all-purpose punishment, rather than as a last resort. Qualitative data also shows that the solitary sentences imposed are often disproportionate to the conduct of the detainee. For example, one detainee received 12 days in solitary for damaging a recently issued identification wristband, while another detainee received a sentence of 15 days in solitary confinement for refusing to close his food port after he found worms in his food.

2. Essex employs solitary confinement in an arbitrary fashion.

The enormous discretion placed in the hands of jail staff leads to arbitrary results in the imposition solitary confinement. Officers have the discretion to upgrade “minor” infractions to “major,” thus authorizing the use of solitary as a punishment, and also have the ability to “stack” additional charges to result in sentences exceeding 15 days. Detainees engaged in the exact same conduct – and charged with identical violations – often receive drastically different lengths of time in solitary confinement.

3. The disciplinary process for imposing solitary confinement in Essex lacks transparency and due process.

Even though New Jersey law and the Essex ICE Detainee Handbook mandate certain procedures that must be followed when punishing a detainee for an infraction, the appeals records we reviewed demonstrate that in practice, detainees are often deprived of basic due process. For example, despite the explicit provision that guarantees detainees’ right to call witnesses, several detainees complained that they were never given the opportunity to call witnesses at their disciplinary hearings. Moreover, Essex overuses pre-hearing detention, subjecting individuals to solitary confinement before they are found guilty of any violation. New Jersey law allows for an individual to be placed in pre-hearing detention, which in effect is the same as solitary confinement, if the individual poses a threat to himself, others, or the facility. However, the Essex data reveals that that a staggering 95% of cases involved pre-hearing detention, ranging from hours to fifteen days. Over 23% of these incidents ultimately resulted in dismissal of the charges or not guilty findings. In fact, Essex places individuals in pre-hearing detention for offenses that do not suggest the detainee poses any risk. Pre-hearing detention is overused and misused, casting doubt on whether detainees are given a fair process in these pre-hearing detention determinations.

RECOMMENDATIONS

1. The use of solitary confinement as a disciplinary measure should be abolished. In the interim, solitary confinement must be significantly reformed and used only as a tool of last resort.
2. Detention facilities should improve their conditions and implement effective procedures to address detainee concerns by expanding the role for the Office of the Corrections Ombudsman and creating a civilian review board.
3. Pre-hearing detention should be abolished or, in the interim, used only in a less restrictive setting and where necessary to protect the detainee or others from harm.
4. Stacking charges for a single incident and upgrading conduct from “minor” to “major” should be entirely prohibited.
5. The proposed solitary confinement restriction bill S.51 in New Jersey should be adopted as an important step in the right direction.
6. End mass immigration detention.

Methodology

This report closely examines the use of solitary confinement as a form of punishment of immigrant detainees in Essex County Correctional Facility (“Essex”) through information gathered from solitary confinement incident reports from 2013, 2014, and 2015. These incident reports were obtained through New Jersey’s Open Public Records Act (OPRA) subsequent to two rounds of requests.

New York University School of Law (NYU) Immigrant Rights Clinic initially sought information from Essex about disciplinary incidents leading to solitary confinement in preparation for a report published in June 2015, titled “23 Hours in the Box,” which investigated the use of solitary confinement in New Jersey jails that have contracts with Immigration and Customs Enforcement (“ICE”) to detain immigrants.

Essex uses the term “segregation” to describe its practice of solitary confinement. Segregation in Essex falls into two categories: “disciplinary segregation” and “administrative segregation.” Disciplinary segregation refers to solitary confinement of ICE detainees who Essex considers (1) a “serious disruption in the general population” of ICE detainees, (2) “require secure physical confinement,” and/or (3) “have received a disciplinary sanction from the Institutional Disciplinary Panel.”¹ Administrative segregation refers to solitary confinement of ICE detainees who “[a]re pending investigation and/or hearings for disciplinary violations; [n]eed medical observation; [a]re pending transfer or release within 24 hours; [a]re a security risk; and/or, [n]eed protective custody.”² We sought records relating to disciplinary segregation and pre-hearing detention for disciplinary violations.

In 2014, both Bergen County Jail and Hudson County Correctional Facility, two other N.J. detention centers we requested records from, complied with the OPRA request within the time allowed by law and provided records that the authors analyzed to produce the “23 Hours in the Box” report. Essex, however, refused to produce the records within the time they were required to do so, without providing a reason. 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 which Essex finally provided the documents in June 2015. These documents covered solitary confinement incidents in Essex in 2013 and 2014. Because of Essex’s late compliance with the OPRA request, the authors were unable to include Essex in the “23 Hours in the Box” report.

The authors of this report subsequently filed another OPRA request to obtain Essex’s solitary records for 2015, which Essex then produced with minimal delay on April 13, 2016.

For the period covering 2013, 2014, and 2015, we received 446 incident reports of disciplinary segregation. These incident reports included information about the charges made against an immigrant detainee; a description of the incident by the reporting correctional officer and any response by the detainee; the imposition and length of prehearing detention, if any; the outcome of the hearing (specified in 95% of the 446 incidents), including the imposition and length of solitary confinement ordered, if any; the justification by which a particular length of sentence was reached where solitary confinement was imposed, including the stacking of multiple charges; and the filing of any appeal and outcome (specified in only 12% of the cases where an appeal was requested).

To assess the type of circumstances in which solitary confinement was or was not imposed, the incidents were grouped into the following categories based on the type of offense involved:

PHYSICAL ALTERCATIONS

Any alleged offense involving physical contact, which ranges from fights between detainees to a detainee bumping another detainee with a food tray.

VERBAL DISPUTES BETWEEN DETAINEES

Any alleged offense where there was a dispute between detainees, but involved no physical contact.

HOSTILITY OR USING PROFANITY TOWARD OFFICERS

Any alleged offense where a detainee spoke out against an officer, which ranges from threats to harm the officer in response to perceived unfair treatment to using profanity toward an officer without any threatening language.

VIOLATING ADMINISTRATIVE FACILITY RULES

Any alleged offense where the detainee violated a facility rule. These violations include being in unauthorized areas, tampering with facility property, possession of unauthorized items, etc.

NON-COMPLIANCE OR ENCOURAGING NON-COMPLIANCE WITH OFFICER ORDER

Any alleged offense where the detainee is charged with disrupting the facility, not obeying officer orders, or encouraging others to riot, such as by not arranging their beds in the way the officer requested.

HUNGER STRIKE

Any alleged offense where the detainee is on “hunger strike” for not eating a meal or allegedly encouraging others to not eat a meal.

In determining the nature of the offense, the authors relied on the staff account of the incident, although there were several instances where the detainee's account differed. Examples of those differences are noted where applicable in the qualitative descriptions of the incidents in this report.

These incidents were further analyzed to observe the imposition of solitary confinement in relation to other variables of interest including: dismissals and not guilty findings, the use of pre-hearing detention, the practice of stacking charges, sentence length by category of offense, and percentage of nonviolent conduct according to characterization by parties involved.

I.

Solitary Confinement: An Overview

Over the years, numerous civic organizations, elected leaders, and human rights groups have expressed concern about the disturbing practice of solitary confinement as punishment in our country's prisons and jails.³ This practice affects confined individuals, including pretrial detainees, people convicted of crimes, civil detainees, and immigrant detainees. While the use of solitary confinement in state and federal penal institutions is often the focus of discussion, the specific impact of solitary confinement on immigrant detainee populations has received less attention.

In 2015, New Jersey Advocates for Immigrant Detainees (including American Friends Service Committee) and NYU Immigrant Rights Clinic published a report highlighting the use of disciplinary solitary confinement against immigrant detainees in two of the three New Jersey county jails that currently contract with federal officials to detain immigrants, Bergen County Jail and Hudson County Correctional Facility. That report was among the first to highlight the use of solitary confinement for individuals in civil detention in ICE custody. The current report completes the picture by presenting an analysis of previously unavailable data regarding the use of disciplinary solitary confinement against the immigrant detainee population at Essex County Correctional Facility (Essex), the jail with the largest immigration contract in New Jersey. Even though immigration detention is purportedly intended to ensure the appearance of immigrants at removal proceedings and is characterized as non-punitive, immigrant detainees are held in penal facilities and subjected to the same conditions as individuals accused or convicted of crimes, including solitary confinement. Our review of disciplinary segregation records from Essex reveals that the use of solitary in Essex is excessive and disproportionate, implemented in an arbitrary fashion, and lacking in adequate due process and transparency. The Essex data underscores the need to abolish solitary confinement in the long term and implement meaningful reforms to reduce the harms of the practice in the short term.

To provide the necessary context for this analysis, this part of the report opens with a general analysis of solitary confinement, its impact, and the rules that currently govern the practice, while parts II and III discuss the specific findings in Essex County Correctional Facility.

A. WHAT IS SOLITARY CONFINEMENT?

Solitary confinement is the practice of isolating an incarcerated person in a separate cell as a form of punishment and/or control. In Essex, jail officials refer to solitary confinement as “disciplinary segregation” or “administrative segregation.” Disciplinary segregation is used to punish detainees who have been disruptive or have violated a facility rule and received a disciplinary sentence from the facility’s Institutional Disciplinary Panel. Administrative segregation is used to separate individuals from the general detainee population for a variety of reasons, including pre-hearing detention (detainees who are in solitary pending investigation or hearings for disciplinary violations), protective custody (detainees the facility deems are at risk of harm), detainees under medical observation, detainees pending transfer or release within 24 hours, or detainees who present a security risk.

Regardless of the label, individuals held in solitary confinement at Essex are locked in a small cell for 23 hours a day. They receive their meals through a thin slot in the sealed door. They are prohibited from phone calls or visits from family members or other loved ones. They are prevented from basic social interaction with people in the jail. Days and often weeks may pass in this state of heightened isolation.

DETAINEE ACCOUNT

The first night is terrible. It’s like going to a different world. When they put you in only with four filthy walls to look at and a small window facing another wall, you’re begging for someone to just walk past, it is very depressing. The toilet is never cleaned and there are feces on the walls. You’re supposed to get a mattress for the bed but sometimes the officers don’t come with one until the middle of the night. If someone else is held in solitary on your wing, all you hear is them calling out, Officer, Officer, and often no one comes.

I was in for over a week. The first couple of days were before my solitary hearing. They put me in a cell where the stench was so strong I couldn’t breathe and my asthma flared up. I asked them to move me but they said they couldn’t because it was the weekend. When Monday came they moved me a few cells down.

I got my hearing and my sentence and had to count down the days in that cell. They took me out for one hour, three days a week – Monday, Wednesday, and Friday – to shower. I could also use that same hour to walk up and down a hallway in another cage –that’s what they called recreation – but usually I didn’t have any time left. The weekend I was inside the whole time.

The worst thing about being there was the hunger. The food in solitary is worse than the food generally, and it was served through a slot at around 6 a.m., 11 a.m., and 5 p.m.. After 5 p.m., you have nothing to eat, and you can’t use your commissary to help you get through the night. I never want to go back.

But so much depends on the officer who reports you for breaking a rule, whether you did or didn't. Some officers are good. Others get it wrong, but no one is willing to call out their friends, so some people get punished for nothing. Other times things happen. People are frustrated, they get upset, they say the wrong thing to the officer and that's it. You're locked in a hole. No one is watching Essex to make sure they treat people right. Being there, in the hole, I don't recommend that to anyone, even my worst enemy.

— “JOHN,” FORMER ESSEX COUNTY CORRECTIONAL FACILITY DETAINEE,
SENTENCED TO SOLITARY CONFINEMENT FOR DAMAGING JAIL PROPERTY.

The process of placing an individual in solitary confinement for disciplinary reasons in Essex starts with an incident report. The incident report consists of two parts, a critical data sheet and an incident summary report. The critical data sheet contains a series of check boxes for the types of parties involved (e.g., ICE detainees, inmates, custody staff, etc.), whether restraints or force were used, and the nature of the incident (e.g., minor discipline, major discipline, etc.). The incident report summary is a written description by the reporting officer that includes what happened in the incident, who was involved, and where and when the incident took place. After a detainee is charged with a major discipline violation (or has a minor discipline violation that is upgraded), a hearing date is set, and the individual may be held in prehearing detention—also in solitary confinement—while awaiting the hearing. The hearing takes place before a hearing officer or a disciplinary board composed of a three-member panel that includes one custody supervisor and two non-custody facility staff members. The hearing officer or panel determines whether and how long the individual must be placed in solitary confinement.

B. WHAT IS THE IMPACT OF SOLITARY CONFINEMENT?

A growing body of research indicates that solitary confinement has serious mental health effects, even when used for relatively short periods of time. Experts have found that solitary confinement leads to a combination of symptoms referred to as “prison psychosis,” which includes hypersensitivity to external stimuli, hallucinations, panic attacks, paranoia, cognitive difficulties, and problems with impulse control.⁴ According to one report, “[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social, and physical pathologies.”⁵ Suicide and self-harm, such as banging one’s head on the wall, are also more common in solitary confinement than in general prison populations.⁶ The mental health dangers associated with solitary may be exacerbated among immigrant detainee populations, many of whom have prior trauma from having survived persecution or torture in their country of origin.

The main justification for the use of solitary confinement by its proponents is its role in promoting the safety of penal institutions; however, experts have found alternatives are more effective. A report by the Vera Institute of Justice recently addressed the “common misconception” that solitary confinement is a necessary response to prison violence.⁷ It describes the efforts made in several states to reduce the use of solitary confinement without compromising prison safety. In Colorado, for example, recent reforms have decreased the use of solitary confinement by 85%, and prisoner-on-staff assaults are the lowest they have been since 2006.⁸ The Vera Institute report also cited two studies contrasting “control-oriented” prisons, which utilize formal sanctions like solitary, with other models, such as “responsibility-based” prisons that provide self-governance opportunities or “consensual” models that incorporate formal sanctions and responsibility-based characteristics. These studies found that prisons with responsibility-based or consensual models “experienced lower levels of minor and serious disorders than prisons that were more control oriented.”⁹

Finally, mounting evidence also demonstrates that the use of solitary confinement may also have an adverse impact on the communities to which individuals placed in solitary confinement return. The Vera Institute report collected studies measuring recidivism rates for individuals who are placed in solitary confinement in criminal incarceration.¹⁰ It concluded that “recidivism rates for incarcerated people who have been held in segregated housing ... is significantly higher than for those who have not spent time in segregated housing while in prison.”¹¹ The destabilizing impact of solitary confinement thus may negatively affect public safety overall, policy concerns that have been recognized through litigation and legislative efforts to end or reform solitary in various states across the United States.¹²

C. WHAT RULES GOVERN THE USE OF SOLITARY CONFINEMENT?

FEDERAL STANDARDS

Federal standards and state laws currently provide some limitations on the use of solitary confinement, although further reforms are vital. For immigrants, the use of solitary confinement is guided by the ICE Performance Based National Detention Standards (PBNDS) and the ICE Segregation Directive (both of which are currently non-enforceable), as described in further detail in our previous report, “23 Hours in the Box.”¹³ The PBNDS provide guidance for the disciplinary systems at facilities housing ICE detainees. It indicates that facilities should have “graduated severity scales of prohibited acts and disciplinary consequences” and describes the types of sanctions that can be imposed for different offense categories.¹⁴ It also lays out the procedures that facilities should follow when imposing disciplinary sanctions, including guidelines for incident reports, investigations, and hearings.¹⁵ The 2013 Segregation Directive imposes certain reporting requirements on detention facilities that use segregation, with stricter reporting requirements applying to incidents involving “vulnerable populations,” including detainees with mental illness, serious medical illness, or physical disabilities.¹⁶

STATE AND LOCAL FACILITY STANDARDS

In addition, states may have their own rules governing the use of solitary confinement. In New Jersey, the disciplinary process and the application of solitary confinement is governed by the New Jersey Administrative Code (N.J.A.C.) §§ 10A:31-16 – 17. These sections specify the procedures that must be followed when imposing disciplinary sanctions, including solitary. The current N.J. laws mandate that:

- Sanctions be written in a rulebook distributed to all detainees¹⁷
- Staff members prepare a disciplinary report for any violation of a facility rule¹⁸
- Pre-hearing detention only be used when detainees are a threat to themselves, others, or the orderly operation of the facility¹⁹
- A hearing be conducted within three days of placement in pre-hearing detention²⁰
- Hearings be presided over by an impartial three-member panel, which must include one custody supervisor and two non-custody staff members²¹
- Individuals have the opportunity to call witnesses, cross-examine their accuser, cross-examine opposing witnesses, and present documentary evidence and statements during the hearing²²
- Individuals have the right to appeal the decision of the hearing officers by writing within 48 hours to the facility administrator, who may affirm, rescind, or downgrade the sanction (but may not increase it).²³

Current New Jersey law allows correctional officers to have wide discretion in determining how allegations of misconduct are characterized and thus what punishments are considered. Following N.J.A.C. § 10A:31-16.5-16.6, the Essex ICE Detainee Handbook divides “prohibited acts” into “minor violations” and “major violations” and contains a list of violations for each category. The Handbook provides officers with different levels of authority to mete out punishments depending on whether the violation at issue is considered minor or major. For minor violations, correctional officers may issue “on-the-spot” sanctions, including verbal reprimands; loss of recreation privileges for a period of no more than five days; up to four hours confinement to tier, room, or cell; loss of radio or television privileges for a period of no more than five days; and/or confiscation. For major violations, correctional officers may order solitary confinement through a hearing process, or less punitive sanctions, including loss of privileges (such as commissary) up to 30 days; forfeiture/confiscation; restitution; and any of the sanctions listed for the minor infractions.

The Handbook also indicates that the officer must report minor violations to the shift supervisor and the shift supervisor can approve the on-the-spot sanction, in which case it would be imposed, or the shift supervisor “may also dismiss the minor rule violation or upgrade the minor violation to a major violation.” The Handbook does not provide guidance on what factors a shift supervisor should consider when determining whether to upgrade a minor violation.

INTERNATIONAL STANDARDS

Finally, international law standards also apply. The United States is party to international treaties which prohibit torture and other cruel, inhuman, or degrading treatment or punishment.²⁴ Juan Mendez, the United Nations Special Rapporteur on Torture, investigated the use of solitary confinement around the world and condemned its use, especially prolonged solitary confinement or any period of solitary confinement imposed on juveniles or individuals with mental disabilities, as cruel, inhuman, and degrading treatment and even torture.²⁵

In his 2011 Interim Report, Mendez urged member States to prohibit the use of prolonged solitary confinement, anything in excess of 15 days, at which point he found “severe mental pain and suffering beyond any reasonable retribution for criminal behavior.”²⁶

The Inter-American Commission on Human Rights has specifically condemned the use of solitary confinement in U.S. immigration detention, stating “[T]he Inter-American Commission is deeply troubled by the use of confinement in the case of vulnerable immigration detainees, including members of the LGBT community, religious minorities and mentally challenged detainees. The use of confinement to protect a threatened population amounts to a punitive measure. Equally troubling is the extent to which this measure is used as a disciplinary tool.”²⁷

POTENTIAL DEVELOPMENTS

Notably, there is a sizable gap between the current laws in New Jersey and many other states, and the standards described in international law. Melissa Hooper, Director of the Pillar Project at Human Rights First, said that in the United States, “our entire philosophy about how we use solitary completely contradicts international norms and the perspective of international law on how it should be used. It should be a least restrictive measure.”²⁸

To address this gap, the New Jersey State legislature is currently considering the Isolated Confinement Restriction Act (NJ S.51), which proposes remedies for some of the most egregious flaws in the current system of solitary confinement usage in New Jersey. The Isolated Confinement Restriction Act was first introduced in 2014 by Senator Raymond J. Lesniak (D-Union) and Senator Peter Barnes III (D-Middlesex), and was re-introduced in January 2016 by Senators Lesniak and Barnes for consideration.

Specifically, NJ S.51 would allow solitary confinement to be imposed 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.”²⁹ For such uses, the bill would require an absolute limit of 15 consecutive days in solitary confinement, with a maximum of 20 days out of any 60 day period.³⁰ NJ S.51 also would strictly ban the use of solitary confinement for certain vulnerable populations, which includes someone who is:³¹

- 21 years of age or younger
- 65 years of age or older

- has a disability based on a mental illness, a history of psychiatric hospitalization, or has recently exhibited conduct indicating the need for further observation
- has developmental disabilities
- has serious medical conditions that cannot be effectively treated in solitary confinement
- is pregnant, in the postpartum period, or has recently suffered from a miscarriage or terminated a pregnancy
- has significant visual or auditory impairment, or
- is perceived to be lesbian, gay, bisexual, transgender, or intersex.

Recent amendments to the bill note federal reforms adopted by President Obama reducing solitary confinement use in federal correctional facilities through various measures because of the “devastating and lasting psychological consequences of solitary confinement on persons detained in correctional facilities.”³²

NJ S.51 would bring New Jersey law more in line with international standards for the use of solitary confinement, and is a necessary measure of reform to protect against an egregious violation of rights until solitary confinement is abolished.

II.

Examining the Use of Solitary Confinement of Immigrant Detainees in Essex County Correctional Facility: Incidents, Charges, and Outcomes

As noted above in our Methodology section, our Open Public Records Access request sought records documenting charges and placements of immigrants in solitary confinement for disciplinary purposes in Essex in 2013, 2014, and 2015. This request produced 446 incident reports regarding the use of “disciplinary segregation.” Each incident is a case in which a detainee was charged with an offense that was then adjudicated to result in solitary confinement or other punishment in a minority of instances. This part of the report presents a snapshot of these 446 incidents by the use of pre-hearing detention as immigrant detainees await their disciplinary hearing, rate of findings of guilt (which we will refer to as “convictions” in this report), convictions by category, sentence, and appeals. Notably, part III of the report takes a deeper look at the nature of the incidents and outcomes, and our findings regarding patterns of disproportionality, arbitrariness, and unfairness in the practice of solitary confinement as a tool for punishment in Essex.

A. PRE-HEARING DETENTION: SOLITARY CONFINEMENT PRIOR TO ANY ADJUDICATION OF GUILT

Once an individual is charged with committing an offense, the individual may be placed in pre-hearing detention as he or she awaits a disciplinary hearing if the correctional officer determines that the individual poses a threat to himself, others, or the facility.³³ Pre-hearing detention at Essex is, in effect, the same as solitary confinement—individuals in pre-hearing detention are placed in an isolated cell for 23 hours a day and prevented from interacting with others in the facility.

Of the 446 disciplinary incident reports received from Essex from 2013-2015, 423—a staggering 95% of cases—involved pre-hearing detention (“PHD”). In only 2% of the cases did the pre-hearing detention last less than 23 or 24 hours. Approximately 16% of those cases of pre-hearing detention involved more than three days of solitary confinement prior to any adjudication of the validity of the

allegations. Ultimately, over 23% of incidents involving pre-hearing detention resulted in not guilty findings or other basis for dismissal of the charges.

95% face pre-hearing detention



The length of pre-hearing detention ranges from hours to up to 15 days prior to an adjudication of the charges. Many people thus face the punishment of solitary confinement before the underlying charges are adjudicated and regardless of whether they are found guilty of those charges.

TABLE 1:

Number of incidents by length of time detainee spends in PHD awaiting a hearing

15 DAYS	1 INCIDENT
6 DAYS	6 INCIDENTS
5 DAYS	11 INCIDENTS
4 DAYS	48 INCIDENTS
3 DAYS	67 INCIDENTS
2 DAYS	119 INCIDENTS
1 DAY	162 INCIDENTS
SAME DAY	9 INCIDENTS

B. HIGH CONVICTION RATES AND A GUARANTEED SENTENCE OF SOLITARY CONFINEMENT

According to the data we received regarding the 446 incidents where solitary confinement was sought as a punishment for alleged conduct by an immigrant detainee, disposition information was available for 425 incidents. Of those 425 incidents, 329 (or 77%) were found guilty of one or more charges, and 316 (or 74.4%) resulted in a sentence of solitary confinement. Thus, nearly three of every four immigrant detainees facing a charge involving solitary confinement received such a sentence. This data also shows that out of the incidents resulting in punishment, 96% led to solitary confinement and only 4% were deemed to merit a less punitive response, such as restricting commissary access.

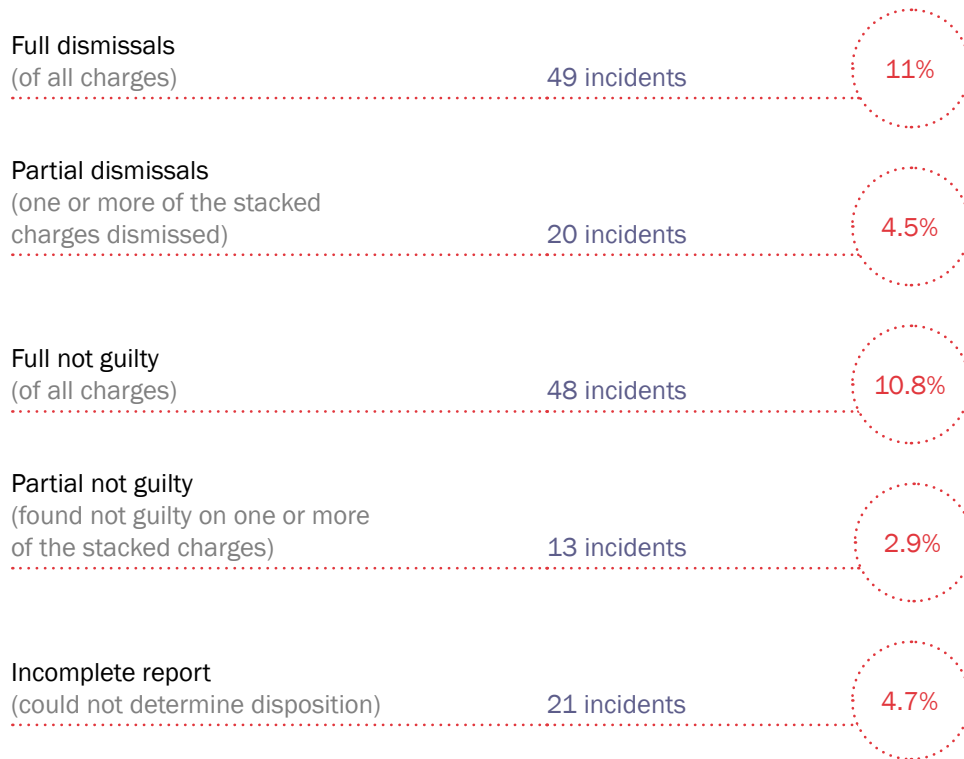
3 out of 4 immigrant detainees facing charges
are found **guilty** and placed in **solitary**



Incidents involving individuals who were not sentenced to solitary confinement were either dismissed, adjudicated as not guilty, or sentenced to punishments other than solitary confinement. Full dismissals and not guilty dispositions occurred in 22% of the cases charged, as noted in Table 2. In 90% of the incidents resulting in full dismissals or not guilty dispositions, immigrant detainees were still subjected to pre-hearing detention.

TABLE 2:

Incidents resulting in dismissals and not guilty findings



C. CONVICTIONS BY CATEGORY

Of the 316 convictions that were obtained by correctional officials through the hearing process, over 40% involved conduct with no findings of physical violence. Of the remaining 60% of cases where an individual was found to have engaged in a physical altercation, the type of underlying conduct ranged from physical fights to one detainee bumping another detainee with his food tray.

As noted in our Methodology section, we grouped incidents by the following categories. The range of offenses leading to solitary confinement varies significantly among and within each category.

TABLE 3:
Offense categories

OFFENSE CATEGORY	NUMBER OF CHARGES	NUMBER OF CONVICTIONS LEADING TO SOLITARY	PERCENT OF CONVICTIONS LEADING TO SOLITARY
Physical altercation	267	185	59%
Verbal dispute between detainees	12	6	2%
Hostility or using profanity toward officer	33	27	9%
Violating administrative facility rule	75	55	17%
Non-compliance/encouraging non-compliance with officer order	48	35	11%
Hunger strike	8	8	3%

Notably, as will be discussed in further detail in part III of the report, across these categories one other characteristic emerged in significant part. While the above categories are based on the officer’s description of the incident, a review of the officer and detainee’s description of the incident demonstrates that 123 incidents, or 39% of all incidents leading to solitary confinement, were related to frustration over jail conditions—whether it be concerns over food, language accessibility, television policies, or desire to speak with federal immigration officials. In some cases, the alleged conduct stemmed from the frustration over confinement itself—detainees “talking back” to guards or fighting with each other over access to television—or were direct expressions of grievance over conditions—detainees demanding to speak with supervisors about problems they were experiencing in the facility.

D. EXCESSIVE AND ARBITRARY LENGTH OF SENTENCES TO SOLITARY CONFINEMENT

Of the 329 incidents that resulted in a finding of guilt, 316 resulted in a sentence of solitary confinement, with only 13 resulting in a lesser sentence (such as restriction on commissary). Thus 96% of sentences involved solitary confinement.

Of the 316 incidents that resulted in a sentence of solitary confinement, the average length of solitary confinement was 10 days, ranging from 1 to 30 with a median of 10 days.

Notably, the length of solitary confinement varies significantly by category of conviction, and does not necessarily correspond to whether allegations of violence were involved. Table 4 lists the lengths of solitary confinement for immigrant detainees by category of offense.

TABLE 4:
Sentence length by offense category

OFFENSE CATEGORY	SENTENCE LENGTH (IN DAYS)			
	AVERAGE	MEDIAN	LOWEST	HIGHEST
Physical altercation	9.4	7	2	30
Verbal dispute between detainees	4.7	5	1	8
Hostility or using profanity towards officer	12.4	10	3	30
Violating administrative facility rule	11.1	10	3	30
Non-compliance/encouraging non-compliance with officer order	12.8	10	3	30
Hunger strike	15	7.5	5	30

A review of the incident reports also demonstrates that the length of solitary confinement is influenced in significant part by the practice of “stacking.” Stacking refers to the practice of charging a detainee with multiple violations for a single offense, thus circumventing New Jersey’s 15-day sentence limit for a single charge, intended to be for clearly separate discrete acts.³⁴ While New Jersey law allows individuals found guilty of multiple charges to be sentenced for up to 30 days, this is meant to be limited to cases where there are clearly separate discrete acts committed.³⁵ However, Essex, as we found in Hudson and Bergen county jails, routinely stacks charges for a single act,

particularly by using the catch-all “conduct which disrupts” charge, and thus skirts the constraints imposed by New Jersey law on solitary sentences.

Approximately one out of every three incident reports involved stacked charges. Of the cases involving stacked charges, a majority, or 61%, involved stacked convictions. The practice of stacking is particularly problematic because well over a third of stacked convictions, or 37%, resulted in the detainee being sentenced to more than 15 days in solitary confinement—the period recognized by many local, federal, and international standards to be the maximum period a person should remain in isolation where isolation is required as a last resort.

III.

Exposing the Injustice of Solitary Confinement Practices in Essex County Correctional Facility: Excessive, Arbitrary, and Unfair

In addition to the statistical picture of the use of solitary confinement described in part II, the data we collected also presents a rich context by which to assess the qualitative nature of this punitive system. As described below, an analysis of the incidents and the treatment of detainees reveals a system that is excessive, arbitrary, and lacks transparency and violates due process.

A. THE IMPOSITION OF SOLITARY CONFINEMENT IS EXCESSIVE AND DISPROPORTIONATE

As noted in part I, the rules and standards governing solitary confinement note that its legitimacy, if any, depends on its proportionality. Essex itself recognizes this principle in theory, recognizing a wide range of alternatives to solitary confinement in response to both major and minor incidents, and stating in its handbook that “[t]he time an ICE Detainee spends in disciplinary detention shall be proportionate to the offense committed.”³⁶

However, the incidents leading to solitary confinement in Essex show that solitary confinement is used disproportionately as a punitive disciplinary measure for all types of conduct, even minor nonviolent conduct. As noted in part II, of the 329 incident reports that lead to convictions, solitary confinement was used as the punishment in 316, or 96% percent, of cases. Of those 316 cases, 42.1% of all convictions were for nonviolent conduct, which oftentimes do not give rise to any perceived or real threat. This all-purpose use of solitary confinement for the whole range of facility violations contradicts even Essex’s own rules, which provides a wide range of alternatives to solitary confinement for these types of offenses. At a minimum, the high rate of the imposition of solitary confinement demonstrates that it is used as a punishment of first resort rather than last resort. As NJ S.51 states, solitary confinement should only be used, if at all, when “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.”³⁷

The excessive and disproportionate nature of the typical sentences imposed in Essex were particularly evident in the incident reports we received from 2013 to 2015, many of which involved an officer's specific choice to upgrade a particular incident from a "minor" to a "major" offense.

In one incident, a detainee was sentenced to 15 days in solitary confinement after refusing to close his food port and demanding to see a sergeant when he found worms in his food. While the violation he was charged with – refusing to obey an order – is generally considered a minor infraction, it was upgraded to major in this case and resulted in the maximum solitary sentence for a single charge (15 days).

DESCRIPTION OF ALLEGED INFRACTION On [REDACTED] as I conducted my initial count and tour of pod, detainee [REDACTED] refused to close his food port. He had his arm hanging out of the port preventing me from closing it. He stated, "I want to see a Sgt." Sgt. [REDACTED] notified.

INMATE/ICE DETAINEE'S STATEMENT: My potatoes had worms in it. I told him ^{director} I was not closing the slot.

Another detainee was sentenced to 12 days in solitary confinement for damaging his recently issued identification wristband. The violation he was charged with, destroying property, is classified by the facility as a minor infraction, but was upgraded to major. The only explanation provided in the incident report for why the charge was upgraded was "charge was upgraded to major due to the nature of the charge; destroying his identification band."

DESCRIPTION OF ALLEGED INFRACTION On [REDACTED] while conducting a routine band check I found that detainee's [REDACTED] has a damaged band. The detainee was issued a new band on the week of [REDACTED]

INMATE/ICE DETAINEE'S STATEMENT: when I put it on they didn't put a part that belongs there so it came off

.....

A detainee who refused his housing assignment after a transfer from another unit and demanded to speak with a sergeant was sentenced to 15 days in solitary confinement. His violation, refusing to accept a housing pod, is classified as a minor infraction and was upgraded to major, allowing the facility to sentence him to the maximum 15-day sentence for a single charge.

DESCRIPTION OF ALLEGED INFRACTION DETAINEE [REDACTED] WAS
TRANSFERRED FROM [REDACTED] WHEN HE ARRIVED
IN UNIT HE REFUSED HIS HOUSING CELL. SGT. [REDACTED]
WAS IMMEDIATELY NOTIFIED

INMATE/ICE DETAINEE'S STATEMENT: I DONT WANT TO GO TO A CELL

.....

One detainee was caught getting a tattoo done by another detainee and was sentenced to 15 days in solitary as a result of stacked charges. Essex charged the detainee with “tattooing or self-mutilation,” generally considered a minor infraction but upgraded to major by the officers in this case, along with a charge for “unauthorized physical contact with any person with an article, item, or material such as anything readily capable of inflicting bodily injury.” The detainee received a sentence of 10 days for the tattooing conviction and 5 days for the additional stacked charge. Because tattooing necessarily involves physical contact with an item, the additional charge seems to serve no purpose other than to inflate the detainee’s sentence.

DESCRIPTION OF ALLEGED INFRACTION ABOVE [REDACTED]
CLAIMED HIMSELF TO BE TATTOOED BY
DETAINEE [REDACTED] AND FINISHED
THE DEVICE AFTER BEING INTERRUPTED BY
TO [REDACTED]

INMATE/ICE DETAINEE'S STATEMENT: I DID IT TO MYSELF,
I TATTOOED MY IDENTIFICATION NUMBER

In another incident involving stacked charges, a detainee was sentenced to 30 days in solitary confinement for allegedly encouraging other detainees to not lock-in. According to the staff account of this incident, the detainee told the officer that he and others would not lock-in until they could speak with the ICE Director. The detainee was sentenced to 15 days in solitary for “engaging in or encouraging a group demonstration” and an additional 15 days for the “disruptive” charge that was tacked on.

FACTS: On the above date at approximately 1236hrs, Officer [REDACTED] who is assigned to [REDACTED], informed me that the detainees housed in his unit were refusing to lock in. I was completely my tours of in [REDACTED] at the time, therefore I was able to immediately respond to the unit. Upon entering the unit, Officer [REDACTED] explained that the detainees refused to lock-in until they spoke directly with the Ice Director.

INMATE/ICE DETAINEE'S STATEMENT: officer [REDACTED] TOLD SGT. [REDACTED] THAT NO ONE WAS GOING TO LOCK IN UNTIL WE SPEAK TO THE DIRECTOR. I WENT IN BUT WHEN SHE LEFT I CAME OUT. I DIDN'T DO ANYTHING WRONG.

A detainee who refused to get out of the shower when ordered and said he would not get out until he was finished because he had a skin disorder was sentenced to 15 days in solitary confinement.

DESCRIPTION OF ALLEGED INFRACTION Detainee refused to come out of the shower, interfering with the count and violating the shower policy of the dorms. No showers on the 10-6 shift.

“Detainee refused to come out of the shower, interfering with the count and violating the shower policy of the dorms No showers on the 10-6 shift.”

One detainee was sentenced to 20 days in solitary confinement because he sat on the floor of his room and did not pack his belongings when asked to for being moved from the infirmary to the dorm. The detainee was ultimately escorted out by wheelchair. For this incident, Essex charged the detainee with the minor infraction “refusing to accept a housing pod assignment,” upgraded it to major, and tacked on a “disruptive” charge. The detainee’s stacked conviction resulted in the 20-day sentence (10 days for each charge).

DESCRIPTION OF ALLEGED INFRACTION The above detainee was medically cleared from the infirmary. A was due to go to Dorm X Bed X. The detainee refused.

“The above detainee was medically cleared from the infirmary [and] was due to go to Dorm X Bed X. The detainee refused.”

One particular “offense” that sheds light on the extent of excessiveness and disproportionality of solitary confinement use in Essex is the practice of “hunger strikes.” The average sentence length for these offenses was 15 days, the most of any other category, including the physical altercations encompassing fighting and assaults.

Some detainees engage in hunger strikers as political protest of detention conditions. Others are accused of hunger striking but are declining to eat for other reasons. In both types of cases, detainees are charged with “enciting[sic] a riot” or “encouraging a group demonstration” for not eating, at times, a single meal. Detainee’s accounts in these incidents include:

INMATE/ICE DETAINEE’S STATEMENT: I WAS TAKING TO CHAMPAIN. I DIDN'T EAT CAUSE I WAS FASTING. I WAS LOOKING OUT WINDOW WHEN HE CAME AND GOT ME.

“I didn’t eat cause I was fasting.”

INMATE/ICE DETAINEE'S STATEMENT: I WAS PLAYING BASKETBALL AND DIDN'T KNOW ANYTHING ABOUT TELLING PEOPLE NOT TO EAT. IN THE ONLY [REDACTED] THERE I DON'T TALK TO ANYONE.

"I was playing basketball and didn't know anything about telling people not to eat... I don't talk to anyone."

INMATE/ICE DETAINEE'S STATEMENT: I WAS NOT INVOLVED - I FAST - SO I DON'T EAT LUNCH. I STAYED IN COMPUTER ROOM. I WAS IN MY CELL HOWEVER I WAS NOT INVOLVED AT ALL.

"I was not involved. I fast so I don't eat lunch. I stayed in computer room. I was in my cell, I was not involved at all."

INMATE/ICE DETAINEE'S STATEMENT: I JUST DIDN'T WANT TO EAT. I DON'T KNOW ANYTHING ABOUT ANYONE ELSE EATING.

"I just didn't want to eat. I didn't know anything about anyone else eating."

INMATE/ICE DETAINEE'S STATEMENT: I WANTED TO BE A WORKER, I WASN'T FEELING WELL, AND DIDN'T WANT TO EAT.

"I wasn't feeling well and didn't want to eat."

INMATE/ ICE DETAINEE'S STATEMENT: I ATE BEFORE why would I encourage
others not to eat. I was supposed to go to court.

"I ate before why would I encourage others not to eat. I was supposed to go to court."

These instances reflect a system of using solitary confinement as a disciplinary measure that does not reflect the nature of the alleged offense, and is oftentimes reactive on the part of officers who are also operating under stressed and oppressive environments. This results in an unacceptable excessive and disproportionate use of solitary confinement that goes far beyond its justifiable use.

B. THE IMPOSITION OF SOLITARY CONFINEMENT IS ARBITRARY

A review of the data from Essex also demonstrates that the implementation of solitary confinement in Essex and the sentences imposed are arbitrary. As noted in part II, even incidents with categories of alleged conduct have wide variations in the sentence imposed. Practices like “upgrading” offenses from “minor” to “major” violations, and “stacking” charges to achieve sentences beyond 15 days, demonstrate the arbitrary results that stem from a system that places enormous discretion in the hands of overburdened correctional officers.

For example, an incident involving four different detainees highlights the arbitrariness of the sentencing process at Essex. According to the staff account of this incident, the detainees were sent to solitary because they indicated that they would not eat breakfast until the facility’s television policy changed. Two of the four detainees were charged with three violations – disruptive conduct, encouraging or engaging in a demonstration, and threatening. The other two detainees were only charged with two violations (they were not charged with threatening). Despite the difference in charges, each of the four detainees received a total of 30 days in solitary confinement for this incident. Essex simply added more days per charge for the detainees that were accused of two violations instead of three. Thus, not only were the detainees subject to an excessive sentence of 30 days for refusing to eat breakfast in protest of the television policy, there was also no consistency, predictability, or fairness in the sanctions for each violation charged.³⁸

DESCRIPTION OF ALLEGED INFRACTION Detainee [REDACTED] encouraged other detainees to refuse breakfast, and do not do as the officer ordered

INMATE/ICE DETAINEE'S STATEMENT: NONE OF WHAT WAS SAID IN REPORTS ARE TRUE. SHE WAS GIVING US ATTITUDE. WE TOLD THE SGT THAT WE WERE PLAYING NOT TO EAT UNTIL THE POLICY CHANGED

SANCTION(S)*: 15-253 - 15-306 30 days

In another incident, a detainee was sentenced to 15 days in solitary confinement for pulling the TV cord out from the back of the TV and damaging it because he was frustrated that he could not watch the news in Spanish. Another detainee who threw a chair at the television and cracked the TV screen received 5 days in solitary confinement and had to pay restitution for the damaged property. These two incidents both involved damaging of facility property (the TV) and yet resulted in drastically different lengths of time in solitary. The failure to use restitution as an alternative to solitary in the first incident also demonstrates that less restrictive alternatives are often not considered and solitary is not treated as a last resort.

DETAINEE 1

DESCRIPTION OF ALLEGED INFRACTION Detainee [REDACTED] pulled the cable wire from the rear television thus breaking the cable and making the television inoperable

INMATE/ICE DETAINEE'S STATEMENT: I WAS WATCHING TV. THEY CHANGED TO TV ON ME. I GOT MAD. THEY DISRESPECTED ME. I PULLED THE PLUG, THEY PUT IT BACK IN. I PULLED THE CABLE.

REPORTS OR TESTIMONY: REPORTS AND TESTIMONY

SANCTION(S)*: 15 DAYS.

DETAINEE 2

DESCRIPTION OF ALLEGED INFRACTION: Inmate [REDACTED] threw a chair at the television and cracked the screen in two places.

"Inmate threw a chair at the television and cracked the screen in two places."

INMATE/ ICE DETAINEE'S STATEMENT: I lost my cell AND GOT UPSET. I DID BUST THE TV SET BY THROWING A CHAIR AT IT.

REPORTS OR TESTIMONY: Reports are testimony.

SANCTION(S)*: Restitution of \$215 5-30p

Unfortunately, even with a less restrictive alternative such as restitution, detainees have reported occasions of unfair implementation. One detainee had his entire commissary taken from him despite the agreed upon restitution requiring only half of the detainee's commissary. The detainee had to wait three months before his belongings were returned to him.

These differences also persist across the same categories of conduct. For example, in two separate incidents involving the same conduct – refusing to clean the detainee's assigned area – the detainees involved were charged with the same violations and yet received very different sentences. In one of these incidents, the detainee was sentenced to 15 days in solitary and in the other the detainee received six days in solitary.

The average sentences for the different categories of offenses also highlight how arbitrary the sentencing process is. As noted in part II, the average sentence for physical altercations was 9.4 days, while the average sentences for several categories of nonviolent incidents were significantly longer. Hunger strike incidents resulted in an average sentence of 15 days, non-compliance with an officer order or encouraging other detainees to not comply with officer orders results in an average sentence of 12.8 days in solitary, and hostility or using profanity towards an officer leads to an average sentence of 12.4 days in solitary.

Part of the disparity is explained by the significant discretion given to correctional officers in Essex. As mentioned in Section III(a) of this report, the Essex data demonstrates that correctional officers regularly stack on the "disruptive conduct" charge to other violations, which artificially inflates sentences and allows Essex to circumvent the 15-day limit codified in the N.J. state administrative code. Officers have unfettered discretion to stack on this additional charge and do so arbitrarily.

Because Essex presumably views most of its specified violations as involving some sort of disruption to the orderly running of the facility, the existence of the “disruptive conduct” violation is best read as a category meant to cover conduct that does not neatly fit into any other category but that the facility deems should be punished. Allowing this charge to be used as an add-on results in evasion of the minimal safeguards that exist to protect detainees from unreasonable punishments.

Similarly, the process by which the facility determines whether an offense is classified as a “major” or “minor” violation is highly arbitrary. As noted above, the Essex Detainee Handbook divides “prohibited acts” into “minor violations” and “major violations.” For minor violations, the Handbook provides a list of authorized on-the-spot sanctions that do not include solitary confinement. However, the Handbook allows shift supervisors to “upgrade” minor violations to major violations, which allows them to use solitary confinement as a sanction. This places a significant degree of discretion in the hands of the jail staff, particularly since the Handbook does not provide guidance regarding the factors the shift supervisor should consider when making this determination. The reports that involved the use of solitary for “upgraded” minor violations often provide no explanation for why the violation was upgraded to major. This option to upgrade allows the facility to impose solitary confinement for conduct like refusing to obey an order, being in an unauthorized area, tattooing, and using obscene language to a staff member. Detainees cannot anticipate whether or not a particular infraction will be upgraded and land them in solitary.

C. THE IMPOSITION OF SOLITARY CONFINEMENT LACKS TRANSPARENCY AND VIOLATES DUE PROCESS

In addition to the disproportionate and arbitrary nature of solitary confinement convictions and sentences, the process by which Essex imposes these oppressive disciplinary measures lacks transparency and violates due process.

Immigrant detainees in Essex are entitled to a fair process for determining sanctions. Some of the structures set in place for achieving this fair process include a mandatory investigation, a disciplinary hearing, and a right to appeal. The Essex Handbook delineates certain protocols for each of these steps in the adjudication process, however, there are no explanations available in the incident reports for what happens during these processes.

For example, the Handbook specifically states, “An ICE Detainee shall be provided an opportunity to call witnesses on his or her behalf, unless doing so would be irrelevant, repetitive or unduly effect the safe, secure or orderly operation of the Essex County Correctional Facility. The reasons for denying the opportunity to call witnesses shall be stated in writing and filed in the record of the ICE Detainee.”³⁹

Despite this explicit provision of the right to call a witness, a detainee in Essex writes in his appeal form⁴⁰ that:

I am requesting to appeal the decision rendered at my disciplinary hearing based on:

I never got a chance to call my witnesses.
The hearing officer made a decision before he
even spoke to us.

Another detainee involved in the same incident wrote in his appeal form:

I am requesting to appeal the decision rendered at my disciplinary hearing based on:

That I told the hearing officer that I would like
to call my witnesses and he said you have none
and it does not matter you all are going to get 30
day for this. Another thing is they have someone
name on my write up say I told every body to follow
his lead but he is no here and I would like to
take him as a witness and I would like to call
me [REDACTED] as witnesses.

The following incident occurred approximately five months ago in Essex: An individual apparently punched Detainee XX and ran out from the dorm. Detainee XX claims that the officer in the unit witnessed the incident, but he still wrote Detainee XX up claiming that he engaged in the altercation. The detainee was handcuffed and taken to the infirmary, and eight hours later around 3 p.m. he was transported to UMDNJ for medical care. Around 7 p.m., he was brought back to ECCF and taken to solitary confinement. Detainee XX claims he was not given an explanation as to why he was sent to solitary confinement even though he has witnesses that saw and explained he was not engaged in a fight. Four days later, a hearing officer saw him. The officer claimed he believed Detainee XX's story and removed the handcuffs and indicated that he will be released later that day.

The fact that detainees could be sentenced to solitary confinement without being heard at their hearing, and without being able to exercise their proscribed right to call witnesses, raises serious concerns about the fairness of these adjudications. Especially in a jail setting in which many of the decisions are made on a credibility judgment of the staff versus detainee accounts, the hearing must allow for the detainee and their witnesses to actually be heard.

Though there were 38 incidents where the detainee affirmatively requested an appeal in the reports, we received only five appeal forms. There is no explanation as to whether the other 33 detainees were provided an appeal, and even if they were, there is no way of verifying whether the appeal was a meaningful one.

The use of pre-hearing detention, another form of solitary confinement as the detainees await their hearing, also lacks transparency and does not provide detainees a fair process of adjudication. As noted in part II, 95% of incident reports involved pre-hearing detention and 98% of those detentions are one day or more. The Essex Handbook states that pre-hearing detention shall be used if and only if the detainee constitutes a threat to other ICE Detainees, staff members, himself or herself or to the orderly operation of the Essex County Correctional Facility.⁴¹ However, the incident reports show that almost all of the detainees, no matter the alleged offense or resulting conviction, were placed in pre-hearing detention.

For example, convictions of possessing unauthorized items often do not involve any threatening behavior at the time of the incident, or risk of threat in the future, since the prohibited item is confiscated at the time of the incident report. However, detainees are routinely placed in pre-hearing detention for these offenses, as well as many other similarly minor nonviolent offenses. There is little logic in placing individuals who are already detained and closely monitored within the jail system into further isolated detention, given its serious effect on people, for even a single day before they are found guilty. All justification disappears when even the alleged offense shows that there is no current or risk of threat from the detainee.

One detainee spent three days in pre-hearing detention when an officer found him in possession of a cellphone and charger. Nothing in the officer's account shows that he had reason to believe or believed that the detainee was a threat, and yet the detainee was placed in pre-hearing detention and ultimately sentenced to 15 days in solitary confinement. Another detainee was similarly placed in pre-hearing detention for three days when the officers found and confiscated pornographic material from him. This detainee was sentenced to four days total in solitary confinement for this offense.

Yet another detainee was placed in pre-hearing detention for five days for being the victim of an "assault," which was a slap in the face. On the pre-hearing detention form, the officer checked the option that the detainee should be placed in pre-hearing detention because he was a "threat to other inmates." The form contained no explanation for why an officer would deem the victim of an assault to be a threat to other inmates.

Not only are the findings of threat questionable, many of the detainees who are placed in pre-hearing detention are subsequently found not guilty of their offenses or have their charges dismissed altogether. Ninety-eight (23.2%) of the cases involving pre-hearing detention did not result in any conviction. Common reasons for dismissals of charges include improper paperwork, minor violations not upgraded to major, lack of evidence or witnesses, and sometimes the reason given is just "due process." Detainees in Essex are routinely placed in solitary confinement for periods of one to six – and on occasion even 15 – days under the guise of pre-hearing detention.

The process by which officers determine which detainees are threats and should be placed into pre-hearing detention lacks transparency, and the instances that show clear misjudgment of potential threat create serious doubt as to whether detainees are given fair process in these determinations.

Recommendations

1. The use of solitary confinement as a disciplinary measure should be abolished. In the interim, solitary confinement must be significantly reformed and used only as a tool of last resort.

Solitary confinement is an extreme and inhumane practice with serious mental health consequences and it is an ineffective means to achieve safer conditions in penal and detention facilities. The conditions in detention centers are inherently stressful and triggering for detainees and staff alike and there will naturally be incidents where people respond with frustration or verbal outbursts. In that context, allowing officers to have the authority to mete out solitary confinement as a sanction results in disproportionate and excessive punishments. Until the use of solitary confinement is abolished, it must be greatly reformed. At a minimum, solitary confinement should not be authorized for violations that are nonviolent or minor fights between detainees (e.g., a verbal altercation with some pushing). Even for more serious conduct, officers should be required to apply less extreme sanctions before they may subject detainees to solitary confinement. Essex already has a list of alternative sanctions to use for even major violations, including loss of privileges or restitution, and yet these alternative sanctions are seldom used. In addition to the listed sanctions, facilities should implement anger management and counseling as more constructive and humane ways of addressing the frustrations individuals experience while confined.

2. Detention facilities should improve their conditions and implement effective procedures to address detainee concerns by expanding the role for the office of the corrections ombudsman and creating a civilian review board.

As this report shows, many of the incidents leading to solitary appear to result from detainees' frustrations with the lack of response from the staff to their legitimate concerns about the facility's conditions. For example, incidents were sparked by detainees voicing concerns about having found insects in the facility food, not receiving adequate hot water to cook the commissary food, having legal mail thrown out, or not having the opportunity to watch television in their native tongue. A report published by NJAID in 2012 describes the substandard conditions in which detainees are held at Essex.⁴² It indicates that detainees from Essex expressed frustration at the lack of responsiveness from the staff to their grievances and complaints.⁴³ Detainees

complained about mistreatment and verbal abuse from the staff, unacceptable food quality, and cold dormitories.⁴⁴ The Corrections Ombudsman's office should expand access to the Ombudsman's services to all those detained in county facilities, and appoint a dedicated staff person to deal exclusively with concerns stemming from county facilities as well as serve as a liaison with a civilian review board. A civilian review board should be formed to respond to detainee and inmate grievances, with the power to conduct site visits, examine all documents related to imposition of solitary confinement, and make recommendations.

3. Pre-hearing detention should be abolished or, in the interim, used only in a less restrictive setting and where necessary to protect the detainee or others from harm.

Despite New Jersey law limiting the use of pre-hearing detention to instances when detainees are a threat to themselves, others, or the orderly operation of the facility,⁴⁵ Essex's troubling use of pre-hearing detention in 95% of cases demonstrates the inadequacy of the existing constraints on the use of pre-hearing detention. Immigrant detainees are essentially punished in isolation before they are adjudicated guilty, and spend anywhere from one to 15 days in pre-hearing solitary confinement even in cases where the charges are ultimately dismissed.

4. Stacking charges for a single incident and upgrading conduct from "minor" to "major" should be entirely prohibited.

Because of the inherently stressful nature of a penal or detention facility, placing high levels of discretion in the hands of officers when it comes to charging conduct and imposing solitary confinement is very troublesome and counterproductive. Prohibiting the stacking of charges for a single incident – even when it involves multiple forms of conduct – would be a constructive step toward reining in officer discretion. In addition to that, if conduct is classified as "minor," officers should not have the discretion to upgrade the conduct to "major" in order to impose solitary as a sanction. At minimum, there should be very clear guidelines for what an officer is required to consider when making the determination to upgrade conduct and the reasons for upgrading should be clearly recorded.

5. The proposed solitary confinement restriction bill S.51 in New Jersey should be adopted as an important step in the right direction.

The bill would improve the situation in New Jersey detention facilities by compelling them to use less restrictive alternatives to solitary whenever possible, imposing stricter time limits on solitary confinement, and prohibiting the use of solitary for certain vulnerable populations. NJ S.51 would bring New Jersey law more in line with international standards regarding solitary confinement, and provides for crucial reforms to protect against egregious and inhumane treatment of incarcerated individuals until solitary confinement is entirely abolished.

6. End mass immigration detention

Immigrants should not be held in detention in the first place and should have the right to prepare their case with their families and in their communities. The mandatory detention law imposed by Congress should be repealed or modified to permit every immigrant to have his or her bond equities considered by an immigration judge, and end mass immigration detention.

**American Friends Service Committee (AFSC)
Immigrant Rights Program**
&
NJ Advocates for Immigrant Detainees (NJAID)
89 Market Street, 6th Floor
Newark, New Jersey 07102
973-643-1924

**Immigrant Rights Clinic
Washington Square Legal Services, Inc.**
New York University School of Law*
245 Sullivan Street, 5th Floor
New York, NY 10012
212-998-6430

* listed for identification purposes only

End notes

- 1 Essex County Correctional Facility ICE Detainee Handbook (Revised Sept 10, 2014) § 13.
- 2 *Id.*
- 3 See, e.g., Barack Obama, *Why We Must Rethink Solitary Confinement*, *Washington Post* (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html?tid=a_inl; Center for Constitutional Rights, *Torture: The Use of Solitary Confinement in U.S. Prisons* (May 2012), available at http://www.ccrjustice.org/sites/default/files/assets/CCR_PelicanBayFactsheet_20150520.pdf, Vera Institute, *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives* (May 2015), available at <http://www.vera.org/pubs/solitary-confinement-misconceptions-safe-alternatives>.
- 4 See Physicians for Human Rights, National Immigrant Justice Center, and Heartland Alliance, *Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention*, 12 (September 2012), available at https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.September%202012_7.pdf.
- 5 See Vera Institute, *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives*, 17 (quoting David H. Cloud, Ernest Drucker, Angela Browne, and Jim Parsons, “Public Health and Solitary Confinement in the United States,” *American Journal of Public Health*, 105, no.1 (2015): 18-26).
- 6 *Id.*
- 7 *Id.* at 18.
- 8 *Id.*
- 9 *Id.* at 20.
- 10 *Id.* at 26.
- 11 *Id.*
- 12 Eli Hager and Gerald Rich, “Shifting Away from Solitary”, *The Marshall Project* (December 2014), available at <https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary#.3FRqdNLmx>.
- 13 See New Jersey Advocates for Immigrant Detainees (NJAIID), *23 Hours in the Box*, 19-21 (June 2015), available at http://www.afsc.org/sites/afsc.civicaactions.net/files/documents/23%20Hours%20in%20the%20Box_2.pdf.
- 14 See 2011 Operations Manual ICE Performance-Based National Detention Standards § 3.1 Disciplinary System, available at https://www.ice.gov/doclib/detention-standards/2011/disciplinary_system.pdf.
- 15 *Id.*
- 16 See U.S. Immigration and Customs Enforcement Directive 11065.1: *Review of the Use of Segregation for ICE Detainees*, available at https://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.
- 17 N.J.A.C. § 10A:31-16.2.
- 18 *Id.*
- 19 N.J.A.C. §10A:31-16.10.
- 20 N.J.A.C. §10A:31-16.12.
- 21 N.J.A.C. §10A:31-16.11.
- 22 N.J.A.C. §10A:31-16.12.
- 23 N.J.A.C. §10A:31-16.15.
- 24 Universal Declaration of Human Rights, G.A. Res. 217A (III), at 71, art. 5, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter “UDHR”]; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 31st Sess., Supp. No. 16, art. 7, U.N. Doc. A/6316 (December 16, 1966), entered into force March 23, 1976 [hereinafter “ICCPR”]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A.

Res. 39/46, U.N. GAOR, 39th Sess., 93d mtg., art. 1, U.N. Doc. A/39/51 (December 10, 1984), entered into force June 26, 1987 [hereinafter “CAT”].

- 25 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].
- 26 *Id.* at 72.
- 27 Inter-American Commission on Human Rights, Report on Immigration in the United States: Detention and Due Process, Doc. 78/10 (December 30, 2010), [hereinafter “Inter-American Commission Report”] ¶ 337.
- 28 Aylin Manduric, Can International Laws and Standards Help Curb Solitary Confinement in the United States?, Solitary Watch (August 6, 2015), available at <http://solitarywatch.com/2015/08/06/can-international-laws-and-standards-help-curb-solitary-confinement-in-the-united-states/>.
- 29 S 51, 217th Leg. (N.J. 2016) [hereinafter NJ S 51].
- 30 *Id.*
- 31 *Id.*
- 32 *Id.*
- 33 N.J.A.C. § 10A:31-16.10; see also Essex County Correctional Facility ICE Detainee Handbook (revised Sept. 10, 2014) at § 14.
- 34 N.J.A.C. § 10A:31-17.2.
- 35 *Id.*
- 36 Essex County Correctional Facility ICE Detainee Handbook (Revised Sept 10, 2014) § 14.
- 37 S 51, 217th Leg. (N.J. 2016) [hereinafter NJ S 51].
- 38 Essex appears to have recognized the excessiveness of the sanctions in this instance by modifying the sentences after an appeal by the detainees involved. Three of the detainees received a modified sentence of 11 days, while one detainee received a modified sentence of 15 days. The appeal forms contain no explanation of why the modified sentences differ.
- 39 Essex County Correctional Facility ICE Detainee Handbook (Revised Sept 10, 2014) § 14.
- 40 This detainee ultimately received a modification of his sentence from 30 days to 11 days.
- 41 Essex County Correctional Facility ICE Detainee Handbook (Revised Sept 10, 2014) § 14.
- 42 New York University School of Law Immigrant Rights Clinic and New Jersey Advocates for Immigrant Detainees, Immigration Incarceration: The Expansion and Failed Reform of Immigration Detention in Essex County, NJ (March 2012), available at <http://afsc.org/sites/afsc.civicactions.net/files/documents/ImmigrationIncarceration2012.pdf>.
- 43 *Id.* at 20.
- 44 *Id.* at 4.
- 45 N.J.A.C. §10A: 31-16.10.