

Treating Humans Worse Than Animals?

Exposing a False Solitary Confinement Narrative

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10.1 INTRODUCTION

The “close linkages across [human] prisoner and [nonhuman] animal carcerality and captivity”¹ are especially salient in the context of solitary confinement. As social psychologist Craig Haney, who has extensively studied the impacts of solitary confinement on human prisoners, recently observed, “Some of the most dramatic demonstrations of the harmful effects of social deprivation have been found in animal research, where researchers are able to employ more intrusive scientific procedures and controls than with humans.”² Indeed, Harry Harlow’s notoriously cruel experiments socially isolating baby monkeys – as he described it, “total maternal deprivation” compounded by “no opportunity to form affectional ties with their peers”³ – both fueled the nascent animal rights movement⁴ and bolstered opposition to solitary confinement of human prisoners.⁵ Yet, even as both of these movements have gained traction, solitary confinement of humans and nonhuman animals alike has dramatically increased in the United States.

Karen M. Morin notes the “developmental similarities across the agricultural-industrial complex and prison-industrial complex,” both of which have rapidly

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¹ Karen M. Morin, *Carceral Space: Prisoners and Animals*, 48 *ANTIPODE* 1317, 1318 (2016).

² Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 *Nw. U. L. REV.* 211, 225 (2020).

³ Harry F. Harlow et al., *Total Isolation in Monkeys*, 54 *PROC. N.A.S.* 90, 90 (1965), www.ncbi.nlm.nih.gov/pmc/articles/PMC285801/pdf/pnas00159-0105.pdf.

⁴ Atul Gawande, *Hellhole*, *NEW YORKER* (Mar. 30, 2009), <https://www.newyorker.com/magazine/2009/03/30/hellhole>; John P. Gluck, *Harry F. Harlow and Animal Research: Reflection on the Ethical Paradox*, 7 *ETHICS & BEHAV.* 149, 151 (1997).

⁵ See Ruth Chan, *Buried Alive: The Need to Establish Clear Durational Standards for Solitary Confinement*, 53 *UIC J. MARSHALL L. REV.* 235, 249 (2020); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 *WASH. U. J.L. & POL'Y* 325, 366 (2006).

expanded in recent decades.⁶ As a result, tens of thousands of prisoners in the United States are in solitary confinement today (precise data is not available because, alarmingly, there is no federal mandate that this basic information be tracked or reported), while untold millions of animals are held alone in American laboratories, factory farms, roadside zoos, and other sites of exploitation, including tens of thousands of primates in laboratories.

Indeed, the United States holds the dubious distinction of being a world leader in solitary confinement of both human prisoners and nonhuman primates used for experiments. According to United Nations special rapporteur on torture, Juan E. Méndez, “the United States uses solitary confinement more extensively than any other country, for longer periods, and with fewer guarantees.”⁷ And, even as the United States recently became the last industrialized nation in the world to end the use of chimpanzees in invasive experiments, “the number of monkeys used in U.S. biomedical research reached an all-time high” of 74,498⁸ (with an additional 35,221 held by laboratories but not actively used for experiments).⁹ The number of primates held for experimentation in other countries pales in comparison.¹⁰

Despite these myriad linkages, there is a notable disconnect between efforts to end solitary confinement for humans and nonhumans. As Justin Marceau has detailed, incarcerating humans – which in the United States encompasses a high rate of solitary confinement – has become “a salient feature of efforts to protect non-humans.”¹¹ Meanwhile, those working to end solitary confinement of human prisoners appear to misunderstand deeply the reality of the situation for animals in the United States today. For example, Drs. James Gilligan and Brandy Lee’s influential *Report to the New York City Board of Correction* compared appalling conditions for human prisoners with those of animals in zoos, remarking that the former are kept “in physical environments in the likes of which no zoo director would be permitted to place wild animals.”¹² According to Gilligan and Lee, “we now allow animals to be kept only in ‘zoological parks’ designed to recreate the kinds of environments that they had evolved to survive in” and we “treat[] our jail

⁶ Morin, *supra* note 1, at 1320.

⁷ Juan E. Méndez, *Afterword: Exposing Torture*, in *HELL IS A VERY SMALL PLACE: VOICES FROM SOLITARY CONFINEMENT* 221, 224 (Jean Casella et al., eds., 2016).

⁸ David Grimm, *Record Number of Monkeys Being Used in U.S. Research*, *SCI.* (Nov. 2, 2018), <https://www.sciencemag.org/news/2018/11/record-number-monkeys-being-used-us-research>.

⁹ U.S. DEP’T OF AGRIC., ANIMAL & PLANT HEALTH INSPECTION SERV., ANNUAL REPORT ANIMAL USAGE BY FISCAL YEAR, FISCAL YEAR 2018, at 2 (Jan. 7, 2020), https://www.aphis.usda.gov/animal_welfare/annual-reports/Annual-Report-Summaries-State-Pain-FY18.pdf.

¹⁰ See Jonathan Balcombe et al., *Self-Harm in Laboratory Housed Primates: Where Is the Evidence That the Animal Welfare Act Amendment Has Worked?* 14 *J. APP. ANIMAL WELFARE SCI.* 361 (2011).

¹¹ JUSTIN MARCEAU, *BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT* 12 (2019).

¹² JAMES GILLIGAN & BRANDY LEE, *REPORT TO THE NEW YORK CITY BOARD OF CORRECTION* 17 (Sept. 5, 2013), <https://solitarywatch.org/wp-content/uploads/2013/11/Gilligan-Report-Final.pdf>.

and prison inmates worse than we treat animals.”¹³ This is not only a fundamentally inaccurate description of what our laws require for nonhuman animals, as discussed below; it also gives rise to headlines like “Treating Humans Worse Than Animals: Prison System Voices Decry Solitary Confinement of Mentally Ill”¹⁴ and “‘Animals Get Treated Better’: Life in Solitary Confinement”¹⁵ that pit human and nonhuman interests against one another unnecessarily.

Others working to challenge solitary confinement for human prisoners have made similarly inaccurate statements about requirements for animals. For example, a report by the Scientist Action and Advocacy Network summarizing scientific evidence against solitary confinement for human prisoners asserts, “It is federally mandated that most animals be housed with other animals of the same species. Only in extenuating circumstances is an animal to be housed in isolation, and for as little time as possible.”¹⁶ A *Scientific American* blog similarly proclaims that animals in laboratories “may only be housed alone in extenuating circumstances,” adding: “These guidelines are not just for show. There are multiple layers of oversight, to ensure labs treat animals in accordance with these standards.”¹⁷ Still others have broadly asserted, “In many cases, there are more legal protections and oversights concerning the protection of captive wild animals and the care and handling of farm animals than there are for incarcerated pregnant people in the United States.”¹⁸

Such proclamations are inaccurate at best, but more importantly, it is not a contest: depriving any social being, human or nonhuman, companionship is fundamentally cruel and torturous. Indeed, science has shown that “[s]ocial pain can elicit extreme distress, which may exceed that of physical pain.”¹⁹ And, as Lisa Guenther underscores, “there is nothing exclusively human about the need for everyday intercorporeal experience”;

¹³ *Id.*

¹⁴ *Treating Humans Worse Than Animals: Prison System Voices Decry Solitary Confinement of Mentally Ill*, DEMOCRACY NOW! (Apr. 1, 2014), https://www.democracynow.org/2014/4/1/treating_humans_worse_than_animals_prison.

¹⁵ Monique Ross & Damien Carrick, “‘Animals Get Treated Better’: Life in Solitary Confinement,” ABC RADIO NAT’L (Sept. 10, 2018), <https://www.abc.net.au/news/2018-09-11/life-in-solitary-confinement/10203686>.

¹⁶ Scientist Action and Advocacy Network, *Scientific Arguments against Solitary Confinement* (May 2017), https://scaan.net/docs/ScAAN_Solitary_report.pdf.

¹⁷ Kristina Pinikas, *We’ve Forgotten the “Human” in “Humane,”* SCI. AM. (Nov. 29, 2018), <https://blogs.scientificamerican.com/observations/weve-forgotten-the-human-in-humane/>.

¹⁸ Crystal Hayes, Lauren Kuhlik, & Kristie Puckett-Williams, *Pregnant Women in North Carolina Prisons Are Being Kept in Solitary Confinement*, MS. MAG. (Oct. 23, 2019), <https://msmagazine.com/2019/10/23/pregnant-women-in-north-carolina-prisons-are-being-kept-in-solitary-confinement/>; accord RIGHTS BEHIND BARS, SOLITARY CONFINEMENT, <https://www.rightsbehindbars.org/solitary-confinement>.

¹⁹ Franklin D. McMillan, *The Psychobiology of Social Pain: Evidence for a Neurocognitive Overlap with Physical Pain and Welfare Implications for Social Animals with Special Attention to the Domestic Dog (Canis familiaris)*, 167 *PHYSIOLOGY & BEHAV.* 154 (2016), <https://www.sciencedirect.com/science/article/abs/pii/S0031938416305583?via%3Dihub>.

it is not primarily as *human beings* ... that we are affected by solitary confinement ... but as *living beings* ... with corporeal relations to other embodied beings and to an open field of overlapping experience in a shared world. It is as *animals* that we are damaged or even destroyed by the supermax or SHU [Security Housing Unit – an extreme form of prison solitary confinement], just as our fellow animals are damaged or destroyed by confinement in cages at zoos, factory farms, and scientific laboratories.²⁰

Given the inherent cruelty in confining any social being alone, it is imperative to object to solitary confinement across the board, and work to effect legal and other changes to end the United States' shamefully widespread use of this tortuous practice in both human and nonhuman contexts. Notably, although the scientific literature about the impacts of social deprivation on animals has been widely used by those opposing solitary confinement in human prisons, there is not significant discourse or collaboration among advocates urging attention to the social needs of captive humans, on the one hand, and captive animals, on the other. This is a missed opportunity. While a full discussion of the potential benefits of such discourse and collaboration are beyond the scope of this chapter, they include enhanced information sharing (including scientific information and policy analysis), greater legitimacy, and heightened effectiveness.

Before such coalition building can succeed, it is important to delineate the common ground and facilitate common understanding. As an initial step in that direction, this rest of this chapter aims to articulate the current state of the law regarding solitary confinement of animals in the United States, and to correct what appear to be widespread misimpressions about the legal protections afforded to animals. Because the federal Animal Welfare Act provides the primary explicit protections against solitary confinement, the chapter focuses on those provisions, followed by a discussion of emerging possibilities under broader protections afforded by the Endangered Species Act and state anticruelty laws.

10.2 WHICH ANIMALS?

As a preliminary matter, it is important to consider how truly limited even de jure explicit protections against solitary confinement for nonhuman animals are. There are express federal mandates for any sort of social companionship for only three categories of animals: nonhuman primates, marine mammals, and, to a lesser extent, dogs. Thus, vast categories of animals known to be primarily social do not have express legal protection against solitary confinement. For example, every year more than 100 million “profoundly social” mice and rats are caged and subjected to

²⁰ Lisa Guenther, *Beyond Dehumanization: A Post-humanist Critique of Solitary Confinement*, 10 J. CRIT. ANIMAL STUD. 46, 56 (2012).

invasive experiments in US laboratories,²¹ without any protections whatsoever under the Animal Welfare Act (AWA) because they have been deemed not to be animals for the purposes of that statute.²² Solitary confinement of these highly social animals has been shown to cause brain damage,²³ and yet they are so lacking in legal protections that not only is solitary confinement routine, but so too is the denial of basic pain relief.²⁴

Likewise, “pigs are highly social animals”²⁵ who suffer when deprived of companionship, yet they too have also been deemed not to be animals for the purposes of the AWA,²⁶ at least when used for food or fiber, and have no express legal protection against social deprivation. Consider farmer Bob Comis’s chilling description of pigs’ deep sociality:

Pigs live in groups not only because they find safety and comfort in numbers, but because they are intensely, and I believe quite consciously, gregarious . . . Their social bonds run deep. . . When those bonds are broken, a pig suffers a tremendous amount of psychological stress, most often expressed in repeated deep, long, doleful groans, and when the circumstances are right, pigs express that psychological suffering (stress is an inadequate term) of broken bonds by totally and completely flipping out. They run back and forth squealing. They run aimlessly, in circles, screaming. They will jump fences, or they will plow right through them. When confined in a tight space, they will smash themselves against walls and gates, repeatedly. They will spastically chew on metal bars. They will try to climb whatever can be climbed. They will jam their snouts under the bottom rung of a gate over and over again and strain and struggle to lift it off of its hinges. They will smash themselves against the walls and gates again, repeatedly.²⁷

²¹ Alka Chandna, *Commentary: A Belmont Report for Animals: An Idea Whose Time Has Come*, 29 *CAMBRIDGE Q. HEALTHCARE ETHICS* 46, 50–51 (2019).

²² 7 U.S.C. § 2132(g) (“The term ‘animal’ . . . excludes. . . rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research.”).

²³ See Ruth Chan, *Buried Alive: The Need to Establish Clear Durational Standards for Solitary Confinement*, 53 *UIC J. MARSHALL L. REV.* 235, 249–50 (2020) (citation omitted); see also Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 *WASH. U. J.L. & POL’Y* 325, 366 (2006) (“One study produced agitation in mice and rats after a few days of isolation, a report which corroborated previous studies with rats. Others have also found isolation-induced aggressive behavior in mice [such as biting attacks].” [citations omitted]); Haney, *supra* note 2, at 255 n.49 (“Some researchers have discerned what they believe is a relationship between isolation and an animal world analogue of PTSD, noting, for example, that socially isolated mice manifest ‘an exacerbation of aggressive behavior and . . . an increase in anxiety- and depressive-like behaviors, as well as . . . exaggerated contextual fear responses and impaired fear extinction.’” [citation omitted]).

²⁴ Chandna, *supra* note 21, at 50–51.

²⁵ Lori Marino & Christina M. Colvin, *Thinking Pigs: A Comparative Review of Cognition, Emotion, and Personality in *Sus domesticus**, 28 *INT’L J. COMP. PSYCH.* (2015).

²⁶ 7 U.S.C. § 2132(g).

²⁷ Bob Comis, *What Humane Slaughterhouses Don’t Solve: The Last Pig Problem*, *THE DODO* (Mar. 10, 2014), <https://perma.cc/AJ8J-SL8W>.

Comis goes on to describe, in haunting detail, the consequences of this deep sociality for the “last pig” at the slaughterhouse:

One by one as the day at the slaughterhouse passes, pigs are pulled out of pens with groups of pigs in them, until there is one last pig left in the pen. Not always, but very, very often, that last pig loses it as described above. Regardless of whether the last pig completely loses it, it begins to suffer the moment it is alone. Sometimes, in their hysterical efforts to free themselves in order to find other pigs to be with – because that’s what it is all about – last pigs are so frantic and have become so mad under the strain of their psychological distress that they will hurt themselves.²⁸

Despite the highly social nature of pigs and of other farmed animals – and contrary to the assertion that “[i]n many cases, there are more legal protections and oversights concerning the . . . care and handling of farm animals than there are for incarcerated pregnant people in the United States”²⁹ – no federal law regulates the on-farm treatment of animals raised for food.³⁰ And state-level oversight of even basic physical conditions for farmed animals is virtually unheard of.³¹

The only categories of animals with something even approximating an express federal legal entitlement to social companionship are nonhuman primates, marine mammals, and dogs. And in all three cases, these legal promises have proven largely illusory. What follows is a detailed description of how we have failed to protect even the most social nonhuman animals against solitary confinement under the AWA despite gestures purporting to do so.

10.3 PRIMATES, PLANS, AND PRIVATION

In 1985, following the damning exposure of a federally funded laboratory in Silver Springs, Maryland, that held monkeys alone in appalling conditions, Congress amended the Animal Welfare Act to require that the Secretary of Agriculture promulgate standards that include “minimum requirements” “for a physical environment adequate to promote the psychological well-being of primates.”³² The author of this language, Senator John Melcher, a veterinarian from Montana, intended this language to ensure, *inter alia*, social companionship for primates.³³

To fulfill this mandate, the US Department of Agriculture (USDA) “engaged in extensive study of the environmental needs of nonhuman primates that must be met

²⁸ *Id.*

²⁹ Hayes et al., *supra* note 18.

³⁰ David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable* 205–33, in *ANIMAL RTS.: CURRENT DEBATES & NEW DIRECTIONS* (Cass R. Sunstein & Martha C. Nussbaum, eds., 2004).

³¹ *Id.*

³² 7 U.S.C. § 2143(a)(2)(B).

³³ See Jodie Kulpa-Eddy et al., *USDA Perspective on Environmental Enrichment for Animals*, 46 *ILAR J.* 83, 84 (2005).

to promote their psychological well-being,” and convened a committee of experts “to study the psychological needs of nonhuman primates” and “to make specific recommendations.”³⁴ The “expert committee . . . recommended social grouping to promote the psychological well-being of nonhuman primates,” and the USDA accordingly proposed a requirement that:

Nonhuman primates must be housed in primary enclosures with compatible members of the same species or with compatible members of other nonhuman primate species, in pairs, family groups, or other compatible social groupings, unless the attending veterinarian determines that doing so would endanger the health, safety, and well-being of the nonhuman primates.³⁵

In making this proposal, the USDA underscored that “[s]ocial deprivation is regarded by the scientific community as psychologically debilitating to social animals.”³⁶

Following opposition from the animal experimentation industry, however, the USDA fundamentally altered its approach. Instead of a default prohibition on solitary confinement, in 1991, the agency instead finalized a rule requiring regulated entities to “develop, document, and follow an appropriate plan for environment enhancement adequate to promote the psychological well-being of nonhuman primates” that included “specific provisions to address the social needs of nonhuman primates of species known to exist in social groups in nature.”³⁷

Lest there were any doubt as to how fundamentally the final rule differed from what the agency had originally proposed, the USDA underscored: “The regulations . . . do not specifically call for group housing of nonhuman primates” – even as it recognized that “housing in groups promotes psychological well-being more assuredly than does individual housing” and that “individual housing has been demonstrated to give rise to significantly more stereotypical behavior than does group housing.”³⁸

Two years after the rule went into effect, the agency polled its inspectors and found that a third of them were unable to determine whether a regulated entity was complying with the rule – and thus unable to enforce it.³⁹ The survey further found that at least half of all research facilities were still generally holding primates in solitary confinement, and that nearly half of inspectors believed this was done out of “convenience” rather than for legitimate reasons.⁴⁰

³⁴ Proposed Rule, 54 Fed. Reg. 10987, 10913 (Mar. 15, 1989).

³⁵ *Id.* at 10913, 10944.

³⁶ *Id.* at 10913.

³⁷ 9 C.F.R. § 3.81(a).

³⁸ Final Rule, Animal Welfare; Standards, 56 Fed. Reg. 6426, 6472, 6473 (Feb. 15, 1991).

³⁹ Kulpa-Eddy et al., *supra* note 33, at 86.

⁴⁰ *Id.*

Another survey of inspectors after the rule had been in effect for five years made similar findings, with “[a]lmost half” of inspectors believing “that the criteria in the regulations were not adequate for facilities to understand how to meet them and for inspectors to judge if a facility was in compliance.”⁴¹ The USDA concluded that regulated entities did not understand how to develop a plan that would meet the rule’s requirements and were confused about how their compliance would be judged, and that inspectors were also in need of guidance “on how to judge whether someone was meeting the requirements.”⁴²

Interviews with inspectors the following year similarly documented concerns about a lack of “solid criteria on which an inspector can judge the content of the plan as ‘in compliance’ or ‘out of compliance,’” including, specifically, compliance with the social requirements.⁴³ “Some inspectors said they had the impression that the only legally necessary condition for compliance was the existence of the document itself, regardless of its contents.”⁴⁴ Indeed, one regulated entity reportedly told an inspector:

You know, with regard to this plan for the psychological well-being of primates, there’s nothing you can do to me because there’s nothing in those regulations that tell me what I have to do. So long as I have a plan, that’s all that counts, and you can’t take any other action against me.⁴⁵

Not surprisingly, inspectors continued to note a high rate of primates held in solitary confinement for convenience.⁴⁶

Underscoring that “[s]ocial interactions are considered to be one of the most important factors influencing the psychological well-being of most nonhuman primates” and that “[t]he remarkable sociality of the primate order in general is the most relevant characteristic for their humane housing,”⁴⁷ the USDA deemed further guidance “necessary.”⁴⁸

Accordingly, the agency proposed policy guidance based “on an extensive review of the available primate literature, professional journals, and reference guides,” as well as consultation with “veterinarians, primatologists,” and inspectors.⁴⁹ “The draft

⁴¹ USDA, ANIMAL & PLANT HEALTH INSPECTION SERV., FINAL REPORT ON ENVIRONMENT ENHANCEMENT TO PROMOTE THE PSYCHOLOGICAL WELL-BEING OF NONHUMAN PRIMATES (July 15, 1999), https://www.nal.usda.gov/sites/default/files/environmentalenrichmentnhp_0.pdf.

⁴² Animal Welfare; Draft Policy on Environment Enhancement for Nonhuman Primates, 64 Fed. Reg. 38145, 38146 (July 15, 1999).

⁴³ USDA, *supra* note 41.

⁴⁴ *Id.*

⁴⁵ Quoted in Valerie Stanley, Animal Welfare Act Symposium Proceedings 109 (1996), https://archive.org/stream/CAT10860535/CAT10860535_djvu.txt.

⁴⁶ USDA, *supra* note 41.

⁴⁷ *Id.*

⁴⁸ 64 Fed. Reg. at 38146.

⁴⁹ *Id.*

policy identifie[d] five general elements” deemed “critical to environments that adequately promote the psychological well-being of nonhuman primates,” with “social grouping” at the top of the list.⁵⁰ The USDA elaborated:

According to our research, primates are clearly social beings and social housing is the most appropriate way to promote normal social behavior and meet social needs. In order to address the social needs of nonhuman primates . . . the plan must provide for each primate of a species known to be social in nature to be housed with other primates whenever possible.⁵¹

However, the USDA never finalized the guidance. Instead, in 2002, it announced its position that, contrary to all of the evidence it had gathered, the regulation was adequate on its own.⁵²

In the intervening years, evidence of how inadequate the regulation is has continued to mount. As scientists Jonathan Balcombe, Hope Ferdowsian, and Debra Durham observed in a 2011 peer-reviewed publication, “Perhaps the best-known contributor to psychological distress in primates in the laboratory is nonsocial housing; yet, available analyses suggest that little progress has been made in avoiding single-caging of these animals.”⁵³ They noted that a 2003 survey of “almost 36,000 macaques in 22 U.S. primate laboratories . . . found . . . that 54% of those animals (17,471) being used in research were singly caged.”⁵⁴ A separate 2003 study examined 362 rhesus monkeys held in solitary confinement at a single facility – and found that more than 80 percent of them engaged in at least one abnormal behavior.⁵⁵ “Between 2004 and 2006 at the National Primate Research Center in Seattle, Washington, 63% of monkeys (numbering between 709 and 884) were singly caged.”⁵⁶ A “separate analysis of detailed records . . . from three U.S. laboratories involving more than 200 macaques and baboons indicates that these animals spend, on average, more than 50% of their lives caged alone.”⁵⁷ And, according to a 2010 report, a survey of six research facilities holding more than 4,000 macaques found that 70 percent of the animals were held alone.⁵⁸ According to a 2015 analysis of publicly available enrichment plans from laboratories at state universities and

⁵⁰ *Id.*

⁵¹ *Id.* at 38147.

⁵² Animal Legal Def. Fund v. Veneman, No. C-03-3400 PJH, 2004 WL 5573950, at *1 (N.D. Cal. Mar. 2, 2004), *rev'd*, 469 F.3d 826 (9th Cir. 2006), *opinion vacated on reh'g en banc*, 490 F.3d 725 (9th Cir. 2007).

⁵³ Balcombe et al., *supra* note 10.

⁵⁴ *Id.* at 2 (citation omitted).

⁵⁵ C.K. Lutz et al., *Stereotypic and Self-Injurious Behavior in Rhesus Macaques: A Survey and Retrospective Analysis of Environment and Early Experience*, 6- AM. J. PRIMATOLOGY 1 (2003).

⁵⁶ Balcombe et al., *supra* note 10.

⁵⁷ *Id.* (citation omitted).

⁵⁸ Caring Hands Discussions by the Laboratory Animal Refinement & Enrichment Forum Vol. II, at 121 (ed. Viktor Reinhard, 2010), <https://awionline.org/sites/default/files/products/Pub-CaringHands-Part4-032912.pdf>.

laboratories receiving federal funding, single-housing rates remain very high, with multiple plans conceding that convenience is a common reason for such solitary confinement.⁵⁹

Though this chapter is focused on solitary confinement, it is worth underscoring that social housing alone is not a panacea for humans or nonhuman animals. Allowing – or forcing – incompatible animals to interact with no opportunity to retreat or escape can pose significant psychological and physical risks to primates and other animals. For example, an altercation between two chimpanzees at the Honolulu Zoo resulted in one of the animals losing half of his left middle finger,⁶⁰ while an altercation between chimpanzees through a metal mesh panel at a sanctuary resulted in a “large injury” to one of the animals.⁶¹ Generally, however, social housing of primates has been found to be safe and to outweigh the risks, especially if done with attention to compatibility and risk mitigation.⁶²

Nevertheless, decades after Congress amended the AWA to “promote the psychological well-being of primates” and the USDA underscored that “[s]ocial interactions are . . . one of the most important factors influencing the psychological well-being of most nonhuman primates,” tens of thousands of nonhuman primates across the United States continue to languish in solitary confinement.

10.4 DESERTED MARINE MAMMALS

Congress has not specifically mandated standards to address the psychological well-being of marine mammals as it did for nonhuman primates. Nevertheless, pursuant to its general mandate to promulgate standards to ensure the humane care and treatment of animals under the AWA,⁶³ in 2001 the USDA promulgated a regulation providing:

Marine mammals, whenever known to be primarily social in the wild, must be housed in their primary enclosure with at least one compatible animal of the same or biologically related species, except when the attending veterinarian, in consultation with the husbandry/training staff, determines that such housing is not in the best interest of the marine mammal’s health or well-being. However, marine mammals that are not compatible must not be housed in the same enclosure. Marine mammals must not be housed near other animals that cause them unreasonable stress or discomfort or interfere with their good health. Animals housed

⁵⁹ DEBRA DURHAM, ANALYSIS OF ENVIRONMENTAL ENHANCEMENT PLANS FROM PUBLIC UNIVERSITIES AND FEDERAL INSTITUTIONS 25–26 (2015).

⁶⁰ USDA, APHIS, INSPECTION REPORT, CITY AND COUNTY OF HONOLULU 1 (July 22, 2018).

⁶¹ USDA, APHIS, INSPECTION REPORT, SAVE THE CHIMPS 1 (Mar. 4, 2019).

⁶² See, e.g., Viktor Reinhardt, *Pair-Housing Rather Than Single-Housing for Laboratory Rhesus Macaques*, 23 J. MED. PRIMATOLOGY 426 (1994); Louis DiVincenti, Jr. & Jeffrey D. Wyatt, *Pair Housing of Macaques in Research Facilities: A Science-Based Review of Benefits and Risks*, 50 J. AM. ASSOC. LAB. ANIM. SCI. 856 (2011).

⁶³ 7 U.S.C. § 2143.

separately must have a written plan, approved by the attending veterinarian, developed in consultation with the husbandry/training staff, that includes the justification for the length of time the animal will be kept separated or isolated, information on the type and frequency of enrichment and interaction, if appropriate, and provisions for periodic review of the plan by the attending veterinarian.⁶⁴

Although this mandate affords considerable discretion to the attending veterinarian – which raises delegation concerns given that this person is on the regulated entity’s payroll and the USDA problematically has a long-standing practice of blindly deferring to the decisions of attending veterinarians – the standard appears to be more enforceable than the primate regulation. Rather than merely requiring a vague plan, it creates a presumption that social marine mammals will not be deprived of social companionship (though notably it does not require that they be held with conspecifics⁶⁵).

However, a review of publicly available AWA inspection reports spanning more than five years reveals that the USDA has not once cited any of the many facilities that hold marine mammals for violating this standard.

This lack of citations must not be considered an indication that the standard is being met and that no marine mammals are being denied of social companionship. Consider the case of Lolita, an orca whom the Miami Seaquarium has confined for more than five decades. Orcas are famously social, remaining with their mothers for life, but Lolita has not seen another orca since 1980, when her tank mate, Hugo, died after ramming his head into the side of their tank.⁶⁶ Nevertheless, Lolita reportedly continues to use vocalizations that are known only to her pod, and seemed to recognize the calls of her pod when played a recording of them.⁶⁷ To add insult to injury, Lolita is confined with Pacific white-sided dolphins, with whom she would never interact in nature and who rake her skin with their teeth, wounding her.⁶⁸

Such conditions appear to blatantly defy the mandates that marine mammals who are primarily social in the wild be held with “at least one compatible animal of the same or biologically related species”; that “marine mammals that are not compatible must not be housed in the same enclosure”; and that “[m]arine mammals must not be housed near other animals that cause them unreasonable stress or discomfort or interfere with their good health.”⁶⁹

⁶⁴ 9 C.F.R. 3.109.

⁶⁵ Cathy Liss, et al., *Animal Welfare Act: Welfare Standards*, 25 ANIMAL L. 157, 176 (2019).

⁶⁶ See *People for Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 879 F.3d 1142, 1145 n.4 (11th Cir.), *adhered to on denial of reh’g sub nom.* *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, 905 F.3d 1307 (11th Cir. 2018).

⁶⁷ Christopher Frizzelle, *The Fight to Free Lolita*, STRANGER (Sept. 30, 2015), <https://www.thestranger.com/features/feature/2015/09/30/22939219/its-time-to-free-lolita-a-puget-sound-killer-whale-thats-been-trapped-in-miami-for-45-years>.

⁶⁸ *Miami Seaquarium*, 879 F.3d at 1145 n.4.

⁶⁹ 9 C.F.R. § 3.109.

However, the USDA has steadfastly refused to cite the Seaquarium for Lolita's social conditions; a recent assessment of Lolita and what the agency referred to as her "cetacean companions" concluded that the conditions are fully compliant with all AWA requirements.⁷⁰ Not long thereafter, the USDA renewed the Seaquarium's license to exhibit Lolita. Although Lolita is the most well-known marine mammal who is denied the social companionship ostensibly guaranteed to her by law, she is hardly the only one.

The USDA's utter failure to enforce its own standard for marine mammal social companionship highlights that although there is a dire need to render the requirements for primates' social needs legible and enforceable, that alone is insufficient.

10.5 DOLEFUL DOGS, DERELICTIONS OF DUTY

At the same time that it amended the AWA to address the psychological needs of nonhuman primates, Congress also added a mandate that the USDA promulgate minimum standards "for exercise of dogs."⁷¹ This was a last-minute addition to the law by Senator Robert Dole, a response to the USDA's long-standing insistence that such a requirement was unnecessary. At the time, solitary confinement of dogs in laboratories was standard.⁷²

To fulfill the statutory mandate, the USDA proposed a rule titled "Exercise and Socialization for Dogs" that would have required social grouping.⁷³ The agency reasoned:

The scientific evidence available to us now leads us to conclude that space alone is not the key to whether a dog is provided the opportunity for sufficient exercise . . . [I]t appears that additional space provided to certain dogs would be underutilized – i.e., even if released into a relatively large run, many dogs will find a corner and lie down. The evidence available to us indicates that certain dogs can receive sufficient exercise, even in cages of the minimum size mandated by the regulations, if they are given the opportunity to interact with other dogs or with humans.

Intimately connected with the issue of exercise for dogs is the issue of the animals' socialization. The research data available, and in large measure simple observation, indicate that dogs given the opportunity to interact are more active than dogs housed individually. In short, social interaction among dogs is an effective means of promoting exercise.⁷⁴

Facing backlash, the USDA stepped back its proposal, removing references to "socialization" from the final rule. The agency explained:

⁷⁰ USDA, APHIS, INSPECTION REPORT, FESTIVAL FUN PARKS, LLC, MIAMI SEAQUARIUM 1 (Dec. 18, 2019).

⁷¹ 7 U.S.C. § 2143(a)(2)(B).

⁷² Kulpa-Eddy et al., *supra* note 33, at 85 (citation omitted).

⁷³ Animal Welfare—Standards, 54 Fed. Reg. 10897, 10904 (Mar. 15, 1989).

⁷⁴ Animal Welfare; Standards, 55 Fed. Reg. 33448, 33467 (Aug. 15, 1990).

we believe that socialization of dogs, including sensory contact, is the single most effective means of providing the opportunity for adequate exercise. Based on the evidence presented to us, however, we do not believe that it is essential for the health and well-being of dogs that they have sensory contact with other dogs, and do not believe that it is appropriate to include such a provision in the regulations as a required minimum standard.⁷⁵

Given that the deep sociality of dogs had already been documented for decades, the USDA's suggestion that contact with other dogs was not essential for the basic well-being of the species – and thus not something it could require under the broad mandate to ensure the humane care and treatment of these animals – is remarkable.

But perhaps even more remarkable, given the agency's history of failing to protect animals, was its simultaneous conclusion “that dogs housed singly . . . need regular interaction with humans,” and accompanying proposal that dogs held in solitary confinement “must receive positive physical contact with humans at least daily.”⁷⁶

Despite opposition, the USDA finalized this mandate – though it did so in the context of requirement of a “plan,” much like the plans required for primates discussed above. Thus, the USDA requires that regulated entities “develop, document, and follow an appropriate plan to provide dogs with the opportunity for exercise” and that “in developing their plan” they “should consider providing positive physical contact with humans that encourages exercise through play or other similar activities. If a dog is housed, held, or maintained at a facility without sensory contact with another dog, it must be provided with positive physical contact with humans at least daily.”⁷⁷ “Positive physical contact” is defined by regulation as “petting, stroking, or other touching, which is beneficial to the well-being of the animal.”⁷⁸

On first glance, this might appear to be tremendously progressive law. But it has been all but ignored. It is buried within a lengthy regulation focused on the requirement that regulated entities have a plan – a requirement that, unsurprisingly, poses similar challenges to the primate plans. Thus, the 1996 survey of AWA inspectors discussed above found that “25% felt the criteria for dog exercise plans did not make clear what facilities needed to do to be in compliance,” and approximately 40 percent felt that the criteria “were not adequate for enforcement purposes.”⁷⁹ An analysis of USDA citations involving this regulation over a four-year period by agency officials found that the “vast majority” were for total failure to develop, document, or follow an exercise plan – and that “[o]nly rarely was a facility cited for not providing an isolated dog with positive physical contact with

⁷⁵ *Id.* at 33468.

⁷⁶ *Id.*

⁷⁷ 9 C.F.R. § 3.8(c)(2).

⁷⁸ *Id.* at § 1.1.

⁷⁹ Kulpa-Eddy et al., *supra* note 33, at 87 (citation omitted).

humans.”⁸⁰ My analysis of more recent USDA citations, which span more than five years, reveals *no* citations for such violations, despite the fact that dogs are still routinely held in solitary confinement by laboratories and other regulated entities. Thus, while these animals theoretically have a legal right to “petting, stroking, or other touching” – a right that would understandably make anyone fighting to challenge solitary confinement of humans outraged – it has proven a wholly empty promise.

10.6. BEYOND THE AWA: SOLITARY CONFINEMENT UNDER THE ENDANGERED SPECIES ACT AND STATE CRUELTY LAWS

Although the AWA provisions discussed above provide the most explicit purported protections against solitary confinement for animals, emergent case law applying the Endangered Species Act’s (ESA) prohibition on taking protected animals has also assured such protections for other, albeit narrow, categories of animals. In addition, state-level cruelty-to-animals laws can also be interpreted to afford such protections.

10.6.1 *Solitary Confinement and the ESA*

The ESA, which applies to both captive and wild members of protected species,⁸¹ includes a prohibition “taking” such animals, including “harming” or “harassing” them.⁸² Harm is as “an act which actually kills or injures wildlife,” while harassment is “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.”⁸³

Federal courts reviewing citizen suits challenging conditions of captive wildlife belonging to highly evolved species have begun to recognize that solitary confinement can amount to unlawful harm and/or harassment under the ESA.⁸⁴ For example, a federal district judge in Maryland held that “[f]orcing a lemur to live a solitary existence . . . visits permanent psychological and physical injury on a species

⁸⁰ *Id.* at 88.

⁸¹ See Delcianna J. Winders, Jared Goodman, & Heather Rally, *Captive Wildlife, in* ENDANGERED SPECIES ACT 361, 369–70 (Donald C. Baur & Ya-Wei Li eds., 3d ed. 2021).

⁸² 16 U.S.C. §§ 1538(a), 1532(19).

⁸³ 50 C.F.R. § 17.3.

⁸⁴ See, e.g., *Kuehl v. Sellner*, 887 F.3d 845, 852 (8th Cir. 2018) (affirming district court ruling that roadside zoo harassed lemurs “by keeping them in social isolation”); *Mo. Primate Found. v. People for Ethical Treatment of Animals, Inc.*, No. 4:16-cv-02163-CDP, *slip op.* at 1–2 (E.D. Mo. Nov. 20, 2019) (holding that solitary chimpanzee was unlawfully taken).

born to engage in constant interaction with his kind” and thus violates the ESA.⁸⁵ The court further found that social interactions “are integral to the well-being of lions,” “[s]olitude is extremely stressful for lions and disrupts their natural social behaviors,” and “solitary confinement” of a lion “produce[d] a constant source of stress and negatively impact[ed] her physical and psychological health.”⁸⁶ In so holding, the court credited an expert’s testimony that “a lion forced to live in solitude with a single ball for company is tantamount to confining a human in a single room with a single book for years on end.”⁸⁷ Notably, the court also recognized the harms that can arise from confining naturally solitary animals together, noting that “[t]igers, in contrast to . . . lions, are generally solitary animals who should not be housed together,” and that “forced cohabitation ran contrary to their basic and natural instincts, which manifested in obvious signs of stress such as overt conflict and stereotypic pacing, as well as an imbalance in feeding.”⁸⁸

In addition, the United States recently filed an unprecedented civil ESA enforcement action alleging that removing ring-tailed lemurs from their social groups constitutes an unlawful take, explaining, “Removal of a ring-tailed lemur from its social group, even for a brief period of time, can cause a reshuffling of the social structure causing the briefly removed ring-tailed lemur to be ousted from or even attacked.”⁸⁹

Although these are promising developments, they mustn’t be overstated. Only a small fraction of animals belong to species that are protected under the ESA. In addition, enforcement of captive conditions like solitary confinement has been almost entirely relegated to private citizen suits, which are costly and face significant standing and other procedural hurdles.

10.6.2 Solitary Confinement and State Cruelty Laws

State animal cruelty laws may also offer at least some limited protection against solitary confinement of nonhuman animals. Through originally focused on the infliction of physical pain,⁹⁰ some state cruelty laws could be interpreted to reach the harms inflicted by solitary confinement.

⁸⁵ *People for Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Maryland, Inc.*, 424 F. Supp. 3d 404, 414 (D. Md. 2019), *aff’d*, No. 20-1010, 2021 WL 305546 (4th Cir. Jan. 29, 2021).

⁸⁶ *People for Ethical Treatment of Animals, Inc.*, 424 F. Supp. 3d. at 430, 416, 426.

⁸⁷ *Id.* at 417.

⁸⁸ *Id.*

⁸⁹ Compl. ¶¶ 154–57, *United States v. Lowe*, No. 20-cv-423-JFH (Nov. 19, 2020 E.D. Okla.).

⁹⁰ See Claire Priest, *Enforcing Sympathy: Animal Cruelty Doctrine after the Civil War*, 44 *LAW & SOC. INQUIRY* 136 (2019); David Favre & Vivien Tsang, *The Development of the Anti-Cruelty Laws during the 1800s*, 1 *DET. C. L. REV.* 1 (1993).

According to a 2005 analysis of state cruelty laws, “none include language specifically acknowledging or addressing emotional neglect, abuse, or suffering in their definitions of cruelty. Furthermore, nine states specifically prohibit consideration of emotional suffering by specifying that any injury or suffering must be physical in nature.”⁹¹

Between these two extremes, however, is a wealth of possible interpretation. Cruelty prohibitions are broad. Moreover, there is a growing body of “[e]vidence that emotional pain can be more distressing than physical pain.”⁹² Indeed, “[c]urrent research leaves little room for doubt that experiences of emotional pain in general, and social pain in particular, can be associated with distress and suffering equal to experiences of physical pain.”⁹³ Thus, to the extent a cruelty law prohibits “pain” or “suffering,” it should not be assumed to be limited to physical harms.

Consider North Carolina’s prohibition of “every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted.”⁹⁴ A 2012 permanent injunction recognized that the conditions in which a bear was held violated this prohibition by causing the animal *both* “unjustifiable physical *and psychological suffering* and physical pain,” elaborating that “suffering” “encompasses physical, mental, and psychological suffering” and that “the unjustifiable suffering” inflicted on the bear “would be sufficient by itself to constitute unlawful cruelty.”⁹⁵

Similarly, a lawsuit currently pending in federal district court in Maryland alleges that solitary confinement of a capuchin monkey, llama, New Guinea singing dog, squirrel monkey, and wolf “inflict[s] unnecessary suffering or pain on an animal” in violation of the state’s cruelty law.⁹⁶

Here again, however, it is important not to overstate the significance of these developments. These are rare examples, and notably they arise in the context of civil suits. Typically, state cruelty laws are enforced criminally, “and in a criminal statute, an ambiguity should be resolved in favor of lenity.”⁹⁷ Thus, any ambiguity as to whether psychological harm from solitary confinement is prohibited would be interpreted in favor of the defendant and against a finding of liability.⁹⁸

⁹¹ F.D. McMillan, *Emotional Maltreatment in Animals* 167, in *MENTAL HEALTH AND WELL-BEING IN ANIMALS* (F.D. McMillan, ed., 2005).

⁹² McMillan, *supra* note 19, at 162.

⁹³ *Id.* at 166.

⁹⁴ N.C. GEN. STAT. ANN. §§ 19A-1 to 19A-4.

⁹⁵ Permanent Injunction 16-17, *Ray v. Jambbas*, No. 12 CVD 669 (Cumberland Co, NC, District Court Aug. 27, 2012) (emphasis added).

⁹⁶ MD. CODE, CRIM. LAW § 10-604(a)(3); Compl. ¶¶ 66, 72-76, *Collins v. Tri-State Zoological Park of W. Md.*, No. 1:20-cv-01225 (D. Md. May 14, 2020); *see also* 514 F.Supp.3d 773 (D. Md. 2021) (denying motion to dismiss the case).

⁹⁷ *Amrein v. State*, 836 P.2d 862, 865 (Wyo. 1992).

⁹⁸ *See id.*; *State v. Cleve*, 1999-NMISC-017, ¶ 26, 127 N.M. 240, 250, 980 P.2d 23, 33; *Com. v. Kneller*, 2010 PA Super 122, ¶ 1, 999 A.2d 608, 609 (2010).

10.7. CONCLUSION

While it might seem on first glance that our laws provide robust protections for social animals against solitary confinement, such protections are illusory. They apply only to a small category of animals. And even for those animals who are explicitly provided some federal legal protection against solitary confinement – nonhuman primates, marine mammals, and dogs – they are not enforced in any meaningful way. Thus, suggestions that federal law “mandate[s] that most animals be housed with other animals of the same species”⁹⁹ are grossly inaccurate.

Notably, however, the federal government has at least acknowledged the fundamental importance of social contact for these animals – which, alarmingly, may be more than can be said for human prisoners. These acknowledgments – and the ever-increasing body of scientific evidence about the dire impacts that solitary confinement has on all social beings, human and nonhuman – can provide a foundation for a legal structure that meaningfully protects against these harms. But we must first acknowledge that we aren’t “Treating Humans Worse Than Animals.” We are subjecting both to appalling and unacceptable deprivation – and should work together to redress that.

⁹⁹ Scientist Action and Advocacy Network, *supra* note 16.