

CITIZEN STANDING TO ENFORCE ANTI-CRUELTY LAWS BY OBTAINING INJUNCTIONS: THE NORTH CAROLINA EXPERIENCE

By
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North Carolina law authorizes citizen standing for the enforcement of anti-cruelty laws, thus supplementing criminal prosecution by means not used in any other state. Citizens, cities, counties, and animal welfare organizations can enforce animal cruelty laws through a civil injunction. This article explores the various amendments to North Carolina's civil enforcement legislation and the present law's strengths and weaknesses. The Author suggests an ideal model anti-cruelty civil remedies statute.

I. INTRODUCTION	40
II. NORTH CAROLINA GRANTS STANDING TO ENJOIN ANIMAL CRUELTY TO ANY CITIZEN AND ANY ORGANIZATION	41
III. REDUCTION IN 2003 OF THE SCOPE OF ANIMALS PROTECTED BY THE NORTH CAROLINA LAW WAS ILL-ADVISED	45
IV. THE NORTH CAROLINA DEFINITION OF CRUELTY IN THE CIVIL REMEDIES ACT NEEDLESSLY EXCLUDES MENTAL SUFFERING	46
V. THE ACT'S PROVISION FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER WAS NEEDLESSLY ELIMINATED	49
VI. THE DOWNSIDE (PART I): CREATION OF EXEMPTIONS APPARENTLY BASED ON MISTRUST OF ACTIVIST ORGANIZATIONS AND INDIVIDUALS	53
VII. THE DOWNSIDE (PART II): THE EXEMPTIONS SPREAD FROM THE CIVIL ENFORCEMENT LAW INTO THE CRIMINAL STATUTE	60
VIII. CONCLUSION	61
IX. APPENDIX A	62
X. APPENDIX B	64
XI. APPENDIX C	65
XII. APPENDIX D	67

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I. INTRODUCTION

Many animal activists, both individuals and organizations, at times find themselves thwarted when attempting to use the courts to provide relief from suffering due to lack of standing to invoke a statute, the application of which would benefit animals.¹ In almost every state, the anti-cruelty law—a statute of major importance in protecting the interests of animals—has been enacted solely in the form of a criminal statute, usually enforceable only by a district attorney or other public prosecutor.²

Pro-animal persons and groups are often jealous or envious when they learn that North Carolina has a statute,³ unique in the United States,⁴ granting standing to any person or organization to enforce via

¹ See generally Sonia S. Waisman et al., *Animal Law Cases and Materials* 227–334 (2d ed., Carolina Academic Press 2002) (discussing the standing problem and many cases where standing was denied).

² Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 *Animal L.* 243, 244 (2003). Rackstraw analyzes processes by which citizens and pro-animal organizations can attempt to compel prosecutors to proceed with criminal animal cruelty cases. *Id.* at 252, 260–65. For example, in Hawaii a person appointed by a society for the prevention of cruelty to animals to carry out the function may arrest a person violating the state's anti-cruelty law. *Id.* at 261; Haw. Rev. Stat. § 711-1110 (2003). The statute says the arrested person is “to be dealt with according to law.” *Id.* This implies that a prosecuting attorney could exercise discretion to dismiss the action.

A number of other states authorize humane organizations, either in general or for a specifically named humane society, to participate in the jurisdiction's enforcement of the criminal anti-cruelty statute by arresting violators, performing investigations, or even participating in the prosecution. Ark. Code Ann. § 5-62-113 (1997); Cal. Corp. Code Ann. § 10404 (West 1991); Del. Code Ann. tit. 3, § 7901 (2001); D.C. Code Ann. § 22-1006 (LEXIS 2001); Fla. Stat. Ann. § 828.03 (West 2000); Ky. Rev. Stat. Ann. § 436.605 (LEXIS 1999); La. Rev. Stat. Ann. § 3:2391 (West 2003); 17 Me. Rev. Stat. Ann. § 1023 (2004); Md. Crim. Code Ann. § 10-609 (2002); Minn. Stat. Ann. § 343.01 (West 2004); N.H. Rev. Stat. Ann. § 105:18 (2004); N.J. Stat. Ann. § 4:22-3(d) (1998); N.Y. Agric. & Mkts. Law § 371 (McKinney 2004); Ohio Rev. Code Ann. §§ 1717.04, 1717.06 (West 1995); Tenn. Code Ann. § 39-14-210 (2004); Vt. Stat. Ann. tit. 13, § 354 (1998); Wash. Rev. Code Ann. § 16.52.015 (West Supp. 2005).

³ N.C. Gen. Stat. §§ 19A-1 to 19A-4 (2003).

⁴ A Pennsylvania statute provides that “[a]n agent of any society or association for the prevention of cruelty to animals, incorporated under the laws of this Commonwealth, shall have standing to request any court of competent jurisdiction to enjoin any violation of” the criminal anti-cruelty statute. 18 Pa. Consol. Stat. Ann. § 5511(i) (West Supp. 2004); see *Mohler v. Lab. Day Comm.*, 663 A.2d 162, 166 (Pa. Super. 1995) (construing other state statutes to limit qualified agents to those who have undergone training program). North Carolina's law seems unique in the United States, because its grant of standing is so much broader than Pennsylvania's.

A New Jersey statute authorizes “any person” to bring a civil action to establish a violation of that state's anti-cruelty statute and to recover civil fines on behalf of the New Jersey Society for the Prevention of Cruelty to Animals of “up to” \$500, \$1000, \$3000, or \$5000, depending on the type of violation. N.J. Stat. Ann. § 4:22-26 (1998). The injunction remedy is superior, and, in fact, the New Jersey remedy is rarely employed. Rackstraw, *supra* n. 2, at 262. Rutgers Law Professor Gary Francione advised the Author that if an animal activist brings an action under the New Jersey law which the New Jersey SPCA does not support, it is, as a practical matter, unlikely to be suc-

injunction a civil anti-cruelty statute that is just as broad as the state's criminal anti-cruelty statute.⁵ Since activists in several states would like to see their legislatures enact a similar law, this article was written to review, for their benefit, the history of North Carolina's civil enforcement legislation, highlighting its weaknesses and strengths.

As will be shown, the act has been amended several times since it first took effect in 1969. Some of these amendments strengthened the act and are recommended to legislators in other states. Other amendments have weakened the act, and lobbyists, legislators, and activists looking to North Carolina for a model civil enforcement law should be guided, in some instances, by now-repealed provisions of our law.

This article stresses that the greatest risk in asking a legislature to enact a law like North Carolina's is that institutions that routinely inflict pain on animals, and their paid lobbyists, very much fear being dragged into court by activists who, unlike district attorneys who enforce the criminal laws, are not politically accountable. Hog farmers, vivisectioners in laboratories, operators of race tracks for dogs and horses, and others that frequently interact with animals will likely seek an exemption so that the civil enforcement law cannot be used against them. Winning the battle against these institutions and their lobbyists will be the key to the enactment of a useful civil enforcement act. If the battle is lost, those protected by exemptions to the civil remedies law may be emboldened to seek similar exemptions to the criminal animal cruelty statute. Unfortunately, that is the North Carolina story.

II. NORTH CAROLINA GRANTS STANDING TO ENJOIN ANIMAL CRUELTY TO ANY CITIZEN AND ANY ORGANIZATION

The full title of the unique North Carolina legislation providing citizen standing to enforce the anti-cruelty laws in a civil action, as found in the session laws of 1969, is: "An Act to Provide a Civil Remedy for the Protection and Humane Treatment of Animals to Supplement Existing Criminal Remedies in G.S. 14-360."⁶ The 1969 act authorized a "person" to bring the civil suit to enjoin cruelty and defined "person" as follows: "[t]he term 'person' as used herein shall be held to include any persons, firm, or corporation, including any nonprofit corporation, such as a society for the prevention of cruelty to animals."⁷

Another section of the act provided in 1969, and still does today with only stylistic changes, that "[a] real party in interest as plaintiff

cessful. E-mail from Gary L. Francione, Prof. of Law, Rutgers U., to William A. Reppy, Jr., Prof. of Law, Duke U. (Nov. 9, 2004, 2:58 p.m. EDT) (copy on file with Author).

⁵ The civil remedies legislation in effect at the end of 2004 appears as Appendix A to this article.

⁶ 1969 N.C. Laws 926. "G.S. 14-360" refers to the criminal anti-cruelty law, section 14-360 of the North Carolina General Statutes, reproduced in Appendix B to this article. In the codified version of the civil enforcement act, the title is "Civil Remedy for Protection of Animals." N.C. Gen. Stat. § 19A-1 (2003).

⁷ 1969 N.C. Laws at 926 (enacting N.C. Gen. Stat. § 19A-1(3)).

shall be held to include a 'person' as hereinbefore defined even though such person does not have a possessory or ownership right in an animal"⁸

Since June of 2003, standing to bring a civil enforcement action is created by a completely rewritten section 19A-1(3), which provides that under the act "[t]he term 'person' has the same meaning as in G.S. 12-3."⁹ That statute in turn provides: "The word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary"¹⁰

Although the 2003 revision eliminated reference to nonprofit corporations, including a society for the prevention of cruelty to animals, its legislative history makes very clear that the purpose of rewriting section 19A-1(3) was to expand standing, not contract it.¹¹ Senate Bill 669 of the 2003 session of the General Assembly was a recommendation of the North Carolina General Statutes Commission,¹² and thus the new section 19A-1(3) has a far more extensive legislative history than a typical new enactment in North Carolina. The minutes of the Commission meetings in 2002 and 2003 when Docket No. 02-11 was considered—as well as the Memorandum from the Commission to the North Carolina General Assembly's House Judiciary Committee,¹³ concerning the Commission's bill to modify the civil enforcement laws—disclose that the purpose of revisiting the provision on standing was to broaden the scope of permissible plaintiffs.¹⁴ The Legislative Committee of the Task Force to Abolish Animal Fighting in North Carolina requested that the Commission rewrite section 19A-1 to make clear that "person" included a county, city, or town in the state.¹⁵ As a member of the Legislative Committee and the General Statutes Com-

⁸ *Id.* For the slightly different, current language, see N.C. Gen. Stat. § 19A-2 in Appendix A.

⁹ N.C. Gen. Stat. § 19A-1(3) (2003).

¹⁰ N.C. Gen. Stat. § 12-3(6) (2001).

¹¹ N.C. Gen. Stat. Commn., Meeting Minutes 12 (Oct. 4, 2002) (Docket No. 02-11, copy on file with *Animal Law*). See *infra* app. C (showing the General Statutes Commission's successful recommendation to the North Carolina House Judiciary Committee to incorporate a broader definition of "person").

¹² The bill was entitled "An Act to Amend the Law Regarding the Civil Remedy for Protection of Animals, as Recommended by the General Statutes Commission . . ." N.C. Sen. 669, 108th Gen. Assembly, 2003 Sess. 1 (June 9, 2003).

¹³ For a reproduction of the memo, see Appendix C.

¹⁴ N.C. Gen. Stat. Commn., Meeting Minutes 12 (Oct. 4, 2002) (Docket No. 02-11, copy on file with *Animal Law*); E-mail from P. Bly Hall, Asst. Revisor of Stats., N.C. Dept. of Just., to Jessica Minifie, Assoc. Ed., Animal L., *General Statute Commission Minutes* (Feb. 9, 2005 5:26 p.m. PST) (copy on file with *Animal Law*) (confirming that the Commission had substantive discussions regarding the bill at various meetings in 2002 and 2003).

¹⁵ E-mail from Dean R. Edwards, Chair of Legis. Comm. of N. C. Task Force to Abolish Animal Fighting, to Jessica Minifie, Assoc. Ed., Animal L., *N.C. Task Force to Abolish Animal Fighting* (Feb. 9, 2005 5:32 p.m. PST) (copy on file with *Animal Law*) (confirming that the Task Force did in fact request the amendment to clarify that towns, cities, and counties have standing).

mission in 2003,¹⁶ the Author is personally aware that some North Carolina municipal officials advised a Legislative Committee member that attorneys representing counties believed the pre-2003 definition of “person” in the act was unlikely to give municipalities standing. Since counties and cities are “bodies politic” under section 12-3(6), and humane organizations are “bodies . . . corporate,” the Commission achieved its goal by incorporating section 12-3(6) by reference.¹⁷ All activist animal organizations in North Carolina will be able to continue to bring what we call “19A suits.”¹⁸

Nevertheless, legislators from other states should be encouraged, when examining the North Carolina act as an aid to designing their own civil enforcement legislation, to employ the original wording to describe who has standing to sue and to specifically state that counties and cities may also employ the remedy. The pre-2003 specific reference in our standing statute to “any nonprofit organization, such as a society for the prevention of cruelty to animals”¹⁹ indicated to trial judges that the lawmakers truly intended pro-animal organizations to bring actions, thereby possibly reducing judicial hostility by courts that might tend to regard a plaintiff from outside the county as a “do-gooder” intermeddling in local affairs.

There are a number of reasons that towns, cities, and counties sought the 2003 amendment that would clarify that each municipality was a proper plaintiff under the civil remedies law. Those reasons reveal the benefits of the legislation. First, some law enforcers consider using the criminal law to prosecute many animal hoarders inappropriate and prefer a less severe civil remedy.²⁰ Hoarders often have good intentions and simply cannot give up a rescued animal, especially to the county animal shelter that may end up killing the dog or cat.²¹ However, the hoarders create living conditions that result in suffering of the animals and violations of the cruelty laws, because they acquire so many animals that they cannot, with limited funds, provide veterinary care or sometimes even sufficient food and shelter.²² For these violators, municipal officials consider removing the animals a sufficient “punishment.”²³

¹⁶ The Author continues to serve at this time on both bodies.

¹⁷ N.C. Gen. Stat. § 12-3(6) (2001).

¹⁸ Since chapter 19A of the North Carolina General Statutes also contains the state’s Animal Welfare Act, it would be more correct to refer to a “suit under article 1 of chapter 19A.”

¹⁹ 2003 N.C. Laws 294 (showing the pre-2003 definition of “person” struck through in favor of the new definition).

²⁰ Geoffrey L. Handy, *Handling Animal Collectors, Part 1: Interventions That Work*, “The Prosecution Dilemma,” http://www.hsus2.org/sheltering/library/animal_collectors.html (accessed Mar. 12, 2005).

²¹ Jordan Cornutt, *Animals and the Law: A Sourcebook* 83 (ABC-CLIO, Inc. 2001).

²² *Id.*

²³ Handy, *supra* n. 20, at http://www.hsus2.org/sheltering/library/animal_collectors.html (accessed Mar. 12, 2005).

Second, municipal officials like to have the option of proceeding under a civil anti-cruelty law because the burden of proof to establish a violation is the preponderance of the evidence standard, not the more difficult criminal law test of guilty beyond a reasonable doubt.²⁴ This does involve a tradeoff. A criminal conviction can readily be obtained based on proof of no more than just one incident of cruelty to animals. A judge asked to enjoin cruelty under the civil remedies law is unlikely to do so without credible evidence that cruelty will continue in the future.

The third reason to make North Carolina civil remedies law designate a town, city, or county as a proper plaintiff is to allow municipalities, in conjunction with animal rescue organizations, to use the legislation as a way to substantially reduce the cost of prosecuting criminal defendants who keep a large number of dogs for fighting that are seized at the time of arrest. It can cost the county animal shelter many thousands of dollars to maintain the defendants' dogs, which must be held as evidence and returned to the defendants in the event of an acquittal.²⁵ There is no state-wide bonding law that requires the owner of the dog at the shelter to give up title if he or she does not provide funds for the dog's upkeep.²⁶

A plaintiff in a civil remedies action will likely be able to prove that the owner of fighting dogs inflicted cruelty and that if the animals were to be returned to their owners, the defendants in the pending criminal action, cruelty would resume. A final order of the court can require that title to the fighting dogs that are not adoptable—usually all of them—vest in the municipality operating the shelter where they are being kept, which will euthanize them. Meanwhile, title to adoptable dogs could vest in the county or a rescue organization.

²⁴ The final section of the North Carolina civil remedies law makes clear that preponderance of the evidence is the standard for the plaintiff's burden of proof. N.C. Gen. Stat. § 19A-4 (2003); see *infra* app. A (providing the present version of the statute).

²⁵ See Barbara Barrett, *Impounded Pit Bulls Create Costly Problem in Durham*, The News & Observer (Raleigh, N.C.) (Durham edition) A1 (Jan. 31, 2002) (holding seven fighting dogs for thirteen months cost over \$40,000); Demorris Lee, *Defendant Guilty of Dog Fighting Charges*, The News & Observer (Raleigh, N.C.) B1 (Mar. 23, 2002) (two months later, dog owner in same case found guilty while dogs still at animal shelter, costing county \$42,000); see also Shawn Durham, *Seized Pit Bulls Crowd Shelter to Its Capacity*, Herald-Sun (Durham, N.C.) B1 (Mar. 17, 2001) (eleven pit bulls held for months creates overcrowding); Ben Evans, *Seized Dogs Put Shelter in a Bind*, Herald-Sun (Durham, N.C.) C1 (Sept. 29, 2001) (sixteen pit bulls seized in dog-fighting raid held for nine months at cost of \$10,000).

²⁶ One North Carolina county has provided for such a bond by ordinance. See Forsyth County Code (N.C.) § 6-52 (2004) (requiring owner to post bond in order to prevent disposition of animal after five days). See also 510 Ill. Comp. Stat. § 5-10 (2004); Iowa Code Ann. § 717B.4(3) (West 2003); and Kan. Stat. Ann. § 21-4316(b) (2003) (examples of bonding laws of other states).

III. REDUCTION IN 2003 OF THE SCOPE OF ANIMALS PROTECTED BY THE NORTH CAROLINA LAW WAS ILL-ADVISED

From 1969 to June of 2003, article 1 of chapter 19A could be invoked to protect “every . . . living creature.”²⁷ This was the same scope of the criminal anti-cruelty statute in 1969.²⁸ The stated purpose of the new remedy was to provide civil enforcement to prevent cruelty as criminally punished under section 14-360 of the General Statutes.²⁹ In 1999, however, the General Assembly reduced the scope of the criminal statute to “every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia.”³⁰ The General Statutes Commission in 2003 proposed that the civil remedies law once again cover the same group of animals as the criminal statute, according to the original legislative scheme,³¹ and the General Assembly agreed with this proposal.³² Thus the civil remedies law can now only be used to protect living creatures falling into the four classes of animals. Insects and fish are excluded.

²⁷ 1969 N.C. Laws at 926 (enacting N.C. Gen. Stat. § 19A-1(1)).

²⁸ See N.C. Gen. Stat. § 14-360 (1969) (providing that criminal cruelty to animals applies to “every living creature”).

²⁹ 1969 N.C. Laws at 926; N.C. Gen. Stat. § 14-360 (1969).

³⁰ 1999 N.C. Laws 436–37 (codified as N.C. Gen. Stat. § 14-360(c)). The cutting back of the scope of the criminal law in 1999 occurred because of a trial judge’s decision, in a suit brought by the operator of a pigeon shoot, to enjoin prosecution of the operator under section 14-360 on the theory that it was unconstitutionally vague. *Malloy v. Easley*, 551 S.E.2d 911 (N.C. App. 2001), *rev’d sub nom.*, *Malloy v. Cooper*, 565 S.E.2d 76 (N.C. 2002). The trial court’s theory that “every living creature”—as the scope of the criminal anti-cruelty statute was defined at that time—was vague was based upon the idea that this language would allow a prosecution for unjustifiably swatting a fly, stepping on a snail, running over a snake in one’s driveway, etc. *Malloy v. Cooper*, 592 S.E.2d 17, 19 (N.C. App. 2004). Actually, the word “every” precluded any viable finding of vagueness. The trial court’s theory was something quite different: a they-cannot-be-serious form of due process violation. See *Lock v. Falkenstein*, 380 P.2d 278, 279–80 (Okla. Crim. App. 1963) (statute criminalizing act of encouraging “any animal to attack” or “worry” another animal held unconstitutionally vague because it would include hunting foxes with hounds and numerous other activities the court just could not believe the legislature wished to prohibit).

The North Carolina Supreme Court in *Malloy* did not consider the “vagueness” holding of the trial court but remanded the case to the Court of Appeals to consider it. *Cooper*, 565 S.E.2d at 81. That court affirmed issuance of the injunction against prosecuting the operator of the pigeon shoot because of vagueness found not in the statutory phrase “every living creature,” but in an administrative regulation implementing the subsection of the criminal statute removing certain birds from the hunters’ exemption in section 14-360. *Cooper*, 592 S.E.2d at 22. The Wildlife Resources Commission of North Carolina promptly amended the regulation, 15A N.C. Admin. Code 10B.102 (2004), to delete the phrase that troubled the intermediate appellate court. Thus, pigeon shoots are once again illegal in the state, as the North Carolina Supreme Court held over 110 years ago in *State v. Porter*, 16 S.E. 915, 916 (N.C. 1893).

³¹ See *infra* app. C (memorandum from Commission to House Judiciary Committee advocating such a change).

³² 2003 N.C. Laws at 294 (enacting N.C. Gen. Stat. § 19A-1(1)).

Fish feel pain.³³ Fish kept as pets or for ornamentation (e.g., in a pond maintained for landscaping purposes)³⁴ can be abused by the persons owning these fish. Other states looking at North Carolina's civil remedies law as a possible model would be wise to adopt the original language, "every useful living creature," in order to fix the scope of any new laws there.³⁵ If legislators fear that suits by animal activists seeking to enjoin cruelty to insects might actually be filed and wish to ensure they are not, the class Pisces, which covers fish, can be added to North Carolina's "Amphibia, Reptilia, Aves, and Mammalia."³⁶

IV. THE NORTH CAROLINA DEFINITION OF CRUELTY IN THE CIVIL REMEDIES ACT NEEDLESSLY EXCLUDES MENTAL SUFFERING

Section 19A-1 has, since its enactment in 1969, defined cruelty as including "every act, omission or neglect whereby unjustifiable *physical* pain, suffering, or death is caused or permitted."³⁷ This was taken verbatim from the criminal cruelty statute as it was worded in 1969, which used the quoted language to define both the prohibited act of "torment[ing]" an animal as well as the word "cruelty" in the criminal statute.³⁸ In 1998, the criminal statute, section 14-360, was amended

³³ See Alex Kirby, *Fish Do Feel Pain, Scientists Say*, <http://news.bbc.co.uk/1/hi/sci/tech/2983045.stm> (last updated Apr. 30, 2003) (discussing evidence showing fish responding to painful stimuli); BBC News, *Head-to-Head: Feelings of Fish*, <http://news.bbc.co.uk/1/hi/sci/tech/2988501.stm>, (last updated Apr. 30, 2003) (scientific study showing fish feel pain). See also Michael W. Fox, *Do Fish Have Feelings? The Animals' Agenda* 24 (July/Aug. 1987) (providing additional support for a response to painful stimulus in fish); *People v. Baniqued*, 101 Cal. Rptr. 2d 835, 845 (Cal. App. 3d Dist. 2000) (dictum) ("every dumb creature" defining scope of anti-cruelty statute includes fish). See also *Knox v. Mass. Socy. for the Prevention of Cruelty to Animals*, 425 N.E.2d 393 (Mass. App. 1981), where the court decided whether "any live animal," in a statute barring an award of such an animal as a prize for winning a game or contest of skill or chance, included a goldfish awarded at a county fair to one who could toss a ping-pong ball into a bowl. The court held that goldfish were included because the purpose of the statute was to "prevent cruelty and neglect to animals." One could infer that this court was judicially noticing that fish feel pain. *Id.* at 395.

³⁴ If the legislature amended the statute to again protect fish, query whether the fish in the ornamental pond would be outside the scope of North Carolina's civil remedies law if the owner caught one of the fish in the pond and ate it, because of the exemption for "production of . . . aquatic species." *Infra* n. 60 and accompanying text. The Author suspects courts would hold that the exemption was intended only for commercial activities and for fish raised exclusively for food, so that an aquarium charging admission for people to enter and view fish in tanks would not be able to invoke the exemption.

³⁵ 1969 N.C. Laws at 926 (perhaps "all living creatures except human beings" is more technically correct). The word "useful" could possibly be the basis for a holding that the statute is vague.

³⁶ 1999 N.C. Laws at 436-37.

³⁷ N.C. Gen. Stat. § 19A-1(2) (2003) (emphasis added).

³⁸ N.C. Gen. Stat. § 14-360 (1969). This definition including the word "physical" was still in effect in the criminal statute in 1989. See 1989 N.C. Laws 1851 for the exact wording of the statute.

to delete the word “physical” from the definition of “torment” and “cruelly” (correcting the prior erroneous reference to “cruelty,” which was not a word used in defining any offense).³⁹

The General Statutes Commission in 2003 proposed numerous amendments, which were enacted, to the civil remedies act to assure that it would cover the same wrongs as the criminal statute.⁴⁰ During discussions at the Commission, the Author pointed out that the word “physical” had been removed from the criminal statute, allowing a criminal prosecution for causing mental suffering (e.g., by denying a monkey or ape any toys, divertissement, or socializing); however, the “physical pain” requirement in the civil statute would preclude enjoining the same activity in a civil action.⁴¹ The Commission’s decision not to conform section 19A-1 to the criminal statute’s definition of “cruelty” was deliberate, not an oversight.

Whether the Author’s fear that citizens and organizations cannot employ the civil remedies law to enjoin the infliction of mental suffering on animals is well-founded depends on whether the courts are willing to construe the adjective “physical” as modifying the noun “suffering” that follows “pain” in the list of three harms. Surely “physical” does not modify the third harm in the list, “death.” There is no such thing as a nonphysical death. If “physical” is held not to modify “suffering” then an injunction against causing mental suffering should be obtainable in a 19A suit.

A canon of construction for resolving ambiguities in statutes provides that “[g]enerally, relative and qualifying words or modifying words, phrases, and clauses should be referred to the word, phrase, or clause with which they are grammatically connected.”⁴² If “physical” does not modify “death,” it cannot grammatically apply to “suffering” either. Moreover, the location of “physical” in the sentence that makes up section 19A-1(2) would render applicable the canon of construction that states “where qualifying words are in the middle of a sentence,

North Carolina’s original anti-cruelty statute followed the New York model by listing a series of acts that were unlawful. It provided punishment for one who “by his act or neglect maliciously kill, maim, wound, injure, torture or cruelly beat” an animal. 1881 N.C. Laws 82. Compare N.Y. Rev. Stat. ch. 783, § 1-10 (1866); see also Michigan State U. College of Law, *Historical Statutes*, http://www.animallaw.info/historical/statutes/table_hist_stat.htm (accessed Mar. 15, 2005). Part (a) of the present North Carolina criminal anti-cruelty statute tracks verbatim the list of wrongs in the early New York statute, classifying as a misdemeanor “any person who shall intentionally overdrive, overload, wound, injure, torment, kill or deprive of necessary sustenance . . . any animal.” N.C. Gen. Stat. § 14-360(a) (2001). The broad definition of “torment” now found in subsection (c) (see Appendix B to this Article) eliminates the need of the prosecuting attorney to fit the alleged wrong into any of the prohibited acts in the New York style list in subsection (a), rendering subsection (a), in effect, superfluous.

³⁹ 1998 N.C. Laws 1192.

⁴⁰ N.C. Rpt. of the Gen. Stats. Commn. 2001–2003 at 8; *infra* app. C (memorandum to House Judiciary Committee on the purpose of Senate Bill 669).

⁴¹ *Id.*

⁴² 73 Am. Jur. 2d *Statutes* § 137 (2001).

and apply to a particular branch of it, they are not to be extended to that which follows.”⁴³

On the other hand, the two quoted maxims that would not view “physical” as modifying “suffering” are similar in nature to the last antecedent maxim, which provides that when a qualifying word appears at the end of a list, it presumptively modifies only the last entry in the list.⁴⁴ The North Carolina Supreme Court has declared that “[t]his doctrine is not an absolute rule, however, but merely one aid to the discovery of legislative intent.”⁴⁵

The maxims based on the impact of rules of grammar and of location of the modifier in the middle of a sentence are undoubtedly equally flexible. Courts will probably hold that “physical” modifies “suffering” as well as “pain.”⁴⁶ Not to do so would, in effect, read “physical” out of the statute, contrary to the maxim that if possible, effect must be given to every word in a statute.⁴⁷

In any event, for policy reasons, other states looking to North Carolina for model legislation granting citizen standing to enforce a civil anti-cruelty law should excise “physical” from the definition of cruelty.

Another aspect of the definition of cruelty in the North Carolina civil remedies law merits consideration. Section 19A-1 covers only “unjustifiable” pain, suffering, and death.⁴⁸ Some animal activists might object to this restriction. It could allow a research laboratory that does not, during experimentation, anesthetize rats or other animals that suffer pain to have a viable defense by proof that the experiment could result in development of a life-saving drug, and that there is no known anesthetic that would not possibly skew the results of the experiment.

Part VI of this article discusses how a series of absolute exemptions—including one for vivisectors—has seriously weakened the North Carolina civil remedies act. The best argument against lobbyists for enterprises—hog farmers, veterinarians, etc.—seeking an exemption is that the enterprise does not need it, as only unjustifiable pain

⁴³ *Id.*

⁴⁴ *Id.* at § 138.

⁴⁵ *HCA Crossroads Research Ctrs. v. Dept. of Human Resources*, 398 S.E.2d 466, 469 (N.C. 1990).

⁴⁶ *Compare City of Rolling Meadows v. Kyle*, 494 N.E.2d 766 (Ill. App. 1st Dist. 1986). This case involved a zoning ordinance that barred the keeping of “any bees, goats, sheep, hogs, cattle, fowl, reptile or serpent, spider, or other animal normally wild, dangerous to human life or carnivorous in nature, other than domesticated house pets.” *Id.* at 767. The court held that “other than domesticated house pets” modified “or other animal normally wild, dangerous, to human life, or carnivorous in nature.” *Id.* at 768-69. A monkey was at issue, so the court did not have to decide if “other than domesticated house pets” extended farther back into the list to modify, for example, goats or reptiles. *Id.* at 769.

⁴⁷ *See Dom. Elec. Servs., Inc. v. City of Rocky Mt.*, 203 S.E.2d 838, 843 (N.C. 1974) (courts avoid interpretation of one part of statute that renders another part surplusage); *In re Watson*, 161 S.E.2d 1, 6-7 (N.C. 1968) (courts avoid interpretation of one part of statute that renders another part surplusage).

⁴⁸ N.C. Gen. Stat. § 19A-1 (2003).

can be enjoined. The Author views the “unjustifiable” restriction as an essential element of a civil remedies law.

Moreover, organizations bringing 19A suits in North Carolina have used the “unjustifiable” element of the definition of cruelty for their own benefit. In the first reported case arising under North Carolina’s civil remedies law,⁴⁹ injunction was sought against several practices of a county animal shelter, including use of a drug to euthanize cats that was not approved by the euthanasia guidelines of any of the three organizations empowered by statute to provide standards and guidelines for the practice of euthanasia in the state.⁵⁰ The plaintiffs alleged not that the euthanasia by use of the particular drug was painful but that killing by such means was unjustifiable because it was contrary to statute.⁵¹ Neither the defendant nor the trial and appellate courts questioned that the concept of “unjustifiable” death in the civil remedies law meant that a violation could be proved in this case, although the death may have been painless.⁵²

V. THE ACT’S PROVISION FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER WAS NEEDLESSLY ELIMINATED

The original House Bill 1106 of the 1969 Session of the North Carolina General Assembly, in what would be codified as section 19A-3 of the General Statutes, authorized the courts after a 19A suit was filed to issue not only a preliminary injunction but an ex parte temporary restraining order.⁵³ The initial amendments to the bill retained the

⁴⁹ *Just. for Animals, Inc. v. Robeson County*, 595 S.E.2d 773, 774–75 (N.C. App. 2004). There is also one unpublished opinion in a 19A case, *Calloway v. Onderdonk*, 582 S.E.2d 80 (Table), 2003 WL 21499243 (N.C. App. 2003).

⁵⁰ N.C. Gen. Stat. § 130A-192 (2001).

⁵¹ *Just. for Animals*, 595 S.E.2d at 775.

⁵² Similarly, in *Just. for Animals v. Lenoir County Socy. for the Prevention of Cruelty to Animals, Inc.*, 607 S.E.2d 317 (N.C. App. 2005), which this Author argued, the plaintiffs claimed that euthanizing of feral cats without holding them for seventy-two hours as apparently required by a statute, N.C. Gen. Stat. § 130A-192 (2001), constituted the causing of unjustifiable deaths without regard to whether the euthanasia process was itself painful. The court’s opinion would permit a plaintiff who had exhausted administrative remedies to prevail on this argument based on the word “justifiable” in section 19A-1.

Cases are now being filed under the North Carolina civil remedies law on the theory that suffering of cats and dogs at municipal animal shelters can be enjoined as per se unjustifiable because of conditions in violation of North Carolina Department of Agriculture rules concerning required shelter, food, water, cleanliness, and veterinary care. 2 N.C. Admin. Code 52J.0101–0104 (2004) (rules for animal shelters). Recently amended statutes require the city and county shelters to adhere to these regulations. See N.C. Gen. Stat. §§ 153A-442 (counties), 160A-493 (cities) (2001).

⁵³ The proposed section 19A-3 would have provided:

Preliminary Injunction or Restraining Order. Upon the filing of a verified complaint in Superior Court in the county in which cruelty to an animal has allegedly occurred, and upon petition for a preliminary injunction or temporary restraining order, the resident judge or any judge holding a regular or special term of Court shall issue such preliminary injunction or temporary restraining order, the dura-

authorization for a temporary restraining order while adding provisions for judicial discretion.⁵⁴ Section 19A-3 was enacted in 1969 in that form.⁵⁵ After a verified complaint had been filed, the court could issue a temporary restraining order that would continue for up to twenty days.⁵⁶ Such an *ex parte* order could, according to the statute, authorize the plaintiff in the 19A suit to “temporarily correct” cruel conditions.⁵⁷ Moreover, section 19A-3 provided that if “the condition giving rise to the cruel treatment of an animal requires that plaintiff take custody of an animal, then it shall be proper for the Court in its discretion in the order to allow plaintiff to take possession of the animal” under the terms of the temporary restraining order.⁵⁸ The original section 19A-3 also provided for issuance of a preliminary injunction that could include an award of custody of animals at issue to the plaintiff, after notice to the opposing party giving opportunity to be heard in opposition.⁵⁹

In 1979, section 19A-3 was rewritten to remove all reference to a temporary restraining order,⁶⁰ while preserving the provision concerning a preliminary injunction that could, in the discretion of the court, award to the plaintiff “possession” of animals being subjected to cruelty. At the same time, the General Assembly created the position of animal cruelty investigator and authorized that official to, in effect, obtain a temporary restraining order.⁶¹

tion of which shall be twenty (20) days. Such injunction or order shall issue without prior notice to any person named as a defendant in the verified complaint, therein, and such injunction shall issue immediately and as soon as practical be served upon every person named as a defendant. Every such preliminary injunction or restraining order, if the petition or complaint so requests, shall give plaintiff the right to temporarily correct the condition giving rise to the cruel treatment of an animal; and if it shall appear upon the face of the complaint or verified petition, that the condition giving rise to the cruel treatment of an animal requires that plaintiff take custody of an animal, then it shall be proper for the Court in the order to allow plaintiff to take possession of the animal.

N.C. H. 1106, Gen. Assembly, 1969 Sess. § 19A-3 (May 16, 1969).

⁵⁴ The Second Edition Engrossed version of the bill, as amended May 28, 1969, provided that whether to issue the temporary restraining order or a preliminary injunction was a matter for exercise of the court's discretion, as was whether the order could be *ex parte*. N.C. H. 1106, Gen. Assembly, 1969 Sess. § 19A-3 (May 28, 1969). Whether the order would give the plaintiff the right to correct the conditions resulting in alleged cruelty or take custody of an animal would also have been a matter addressed to the discretion of the court. *Id.*

⁵⁵ 1969 N.C. Laws at 926-27.

⁵⁶ *Id.* at 926.

⁵⁷ *Id.*

⁵⁸ *Id.* at 927.

⁵⁹ *Id.* at 926-27. If service of process could be obtained, the court could issue the preliminary injunction immediately, to be served on defendant as soon as practicable. *Id.* at 926.

⁶⁰ 1979 N.C. Laws 963.

⁶¹ Section 19A-46(a) of the General Statutes provides:

Whenever an animal is being treated cruelly as defined in G.S. 19A-1(2), an animal cruelty investigator may file with a magistrate a sworn complaint re-

The rewritten section 19A-3 does not specifically bar issuance of an ex parte temporary restraining order when a party other than a cruelty investigator initiates a 19A suit.⁶² However, the wording of the state's rule of civil procedure authorizing such an order would seem to have that effect. It provides for such an order "if it clearly appears from specific facts by affidavit or by verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition."⁶³

Continuing suffering by the animal subjected to cruelty is certainly irreparable injury, but is it injury to the applicant who does not own the animal? He or she may feel very upset that such suffering is going on, but one suspects that is not the kind of irreparable injury Rule 65(b) of the North Carolina Rules of Civil Procedure quoted above is addressing.

The 1979 Legislature, in repealing authorization for an ex parte temporary restraining order in all 19A cases except those brought by a county cruelty investigator, may have considered that such an order giving possession of the affected animal to the private (i.e., nongovernmental) plaintiff deprived the defendant of use of his property unfairly or even unconstitutionally.⁶⁴

questing an order allowing the investigator to provide suitable care for and take immediate custody of the animal. The magistrate shall issue the order only when he finds probable cause to believe the animal is being cruelly treated and that it is necessary for the investigator to immediately take custody of it. Any magistrate's order issued under this section shall be valid for only 24 hours after its issuance. . . .

N.C. Gen. Stat. § 19A-46(a) (2001).

Subsection (c) directs the cruelty investigator to file a 19A suit "as soon as possible" after taking custody of an animal under subsection (a). *Id.* at § 19A-46(c). Another statute dealing with the activities of a county cruelty investigator states: "The necessary expenses of caring for seized animals, including necessary veterinary care, shall be a charge against the animal's owner and a lien on the animal to be enforced" pursuant to a North Carolina lien foreclosure statute. *Id.* at § 19A-47. It is unclear whether the expenses that the defendant must pay are those incurred during the twenty-four hours when the emergency order is in effect or during all of the time the subsequently filed 19A suit is pending. *Id.* In the Author's view such a charge may be appropriate when a county official initiates the 19A suit but not when the plaintiff is a private person or organization.

⁶² *Id.* at § 19A-3 (2003).

⁶³ *Id.* at § 1A-1, Rule 65(b)(i) (2003) (emphasis added).

⁶⁴ It will be recalled that section 19A-1 was amended in 2003 to explicitly provide that a town, city, or county could be the plaintiff in a suit brought under the civil remedies law. *Supra* nn. 11–18 and accompanying text. Not all North Carolina counties have cruelty investigators who can invoke the pre-filing remedy of section 19A-46. See Humane Socy. of Davidson County, *Organization Info*, "Facing the Reality," <http://www.petfinder.org/shelters/NC267.html> (accessed Mar. 12, 2005) (noting the need for a county-employed cruelty investigator in Davidson County). Section 19A-3 should at the very least be amended so that when a town, city, or county initiates a 19A suit, the governmental plaintiff can obtain a temporary restraining order under the procedure in effect in 1969–1979.

In a 1980 decision approving the issuance of an ex parte temporary restraining order under Rule 65(b), the court observed that the order had not resulted in a "seizure" of the property that the defendant was directed not to remove.⁶⁵ In the same way, the 1969 text providing for a temporary restraining order that authorized the plaintiff to enter the defendant's property to correct conditions causing cruelty to animals would also not result in any seizure or loss of use of the animals to the defendant owner or possessor.⁶⁶ If a state looking to North Carolina for model provisions for a civil enforcement law fears that an ex parte order to remove property might be unconstitutional, it should, nevertheless, look favorably on this now-repealed provision allowing abatement of cruelty pursuant to a temporary restraining order.

Admittedly, use of a temporary restraining order to halt cruelty is inconsistent with what the cases say is the basic purpose of such an order: preserving the status quo.⁶⁷ In the context of a 19A suit, where the status quo is ongoing cruelty, the order's purpose is to terminate the status quo, not maintain it. But preserving the status quo is also said to be the purpose of a preliminary injunction,⁶⁸ and the North Carolina civil enforcement law, from its enactment until today, provides for a preliminary injunction that can go so far as to authorize the plaintiff to take possession of the animals at issue.⁶⁹

In the Author's view, the law's original creative use of the temporary restraining order to protect animals is sound and is recommended to other states looking at North Carolina's experience in providing for civil enforcement of anti-cruelty laws. Without such an order, the defendant, upon being served process, might remove the animals from the jurisdiction before the plaintiff can obtain a preliminary injunction.

While the original act of 1969 properly provided that a temporary restraining order or preliminary injunction would give the plaintiff no more than "custody" of an animal subjected to cruelty, the original section 19A-4 (covering permanent injunctions) also confusingly spoke of the final order in favor of the plaintiff as giving mere "custody": the judge "shall enter orders as he deems appropriate, including the issuance of a permanent injunction or final determination of the custody of the animal where appropriate."⁷⁰ Did this mean the defendant de-

⁶⁵ *State ex rel. Gilchrist v. Hurley*, 269 S.E.2d 646, 654 (N.C. App. 1980).

⁶⁶ 1969 N.C. Laws at 926-27.

⁶⁷ See *Huff v. Huff*, 317 S.E.2d 65, 67 (N.C. App. 1984) (the purpose of an ex parte temporary restraining order is "to preserve the status quo"); *State ex rel. Gilchrist*, 269 S.E.2d at 655 (preserving status quo is "sole purpose" of such an order).

⁶⁸ *State v. Fayetteville St. Christian Sch.*, 261 S.E.2d 908, 913 (N.C. 1980); *Milner Airco, Inc. v. Morris*, 433 S.E.2d 811, 813 (N.C. App. 1993).

⁶⁹ Compare *infra* app. A, § 19A-3 with 1969 N.C. Laws at 831.

⁷⁰ 1969 N.C. Laws at 927 (enacting N.C. Gen. Stat. § 19A-4). Note that the authorized scope for the final order was broader than that for the temporary restraining order and preliminary injunction. Under the latter two types of orders, only the plaintiff could take custody of an animal. Section 19A-4 was not so restricted and would seem to have allowed the court to grant possession to a nominee of the plaintiff. The present law is

prived of “custody” still had legal title (perhaps including the obligation to buy dog tags for animals at issue and to pay any dog taxes imposed by municipalities)⁷¹ without the benefits of possession? As of 2003, this ambiguity was resolved. Section 19A-4 now provides that “the court may terminate the defendant’s ownership and right of possession.”⁷² An order specifically vesting title to the animals in the plaintiff or a third party, such as a rescue organization, enables the new owner to demonstrate to potential adopters of the animals that they will become legal owners of adopted pets free from claims of the former owner, the defendant in the 19A action.⁷³ Apparently, under the pre-2003 wording, approval of the adoption by the former defendant, who still had title, was required.

Turning to a final matter of procedure, it is useful that section 19A-4, as rewritten in 2003, specifically provides that final relief can be granted to the plaintiff if the plaintiff’s case is proved under the preponderance of evidence standard as the burden of proof.⁷⁴ Although the courts probably would apply that standard in any event, since the action is civil, not criminal, removing any doubt by including this specific language is recommended.

VI. THE DOWNSIDE (PART I): CREATION OF EXEMPTIONS APPARENTLY BASED ON MISTRUST OF ACTIVIST ORGANIZATIONS AND INDIVIDUALS

The criminal cruelty statute originally contained only one narrow exemption: “[b]ut nothing in this act shall be construed as prohibiting the [lawful] shooting of birds, deer and other game for the purpose of

quite specific in that regard. After being rewritten in 2003, the current section 19A-4 authorizes the court to “transfer ownership and right of possession to the plaintiff or other appropriate successor owner.” N.C. Gen. Stat. § 19A-4 (2003), reproduced in Appendix A.

⁷¹ See N.C. Gen. Stat. § 105-273(15) (2001) (defining tax to include dog license tax).

⁷² N.C. Gen. Stat. § 19A-4 (2003), reproduced in Appendix A.

⁷³ *Id.* When a private rescue organization in North Carolina acquires possession of an animal that was a stray or was surrendered to it by someone not the owner, the organization is unable to assure a potential adopter that he or she will get title to the animal. The animal would have to be held adversely to the true owner for three years to bar a claim and delivery action to recover it. N.C. Gen. Stat. § 1-52(4) (2001). A cumbersome remedy to get title would be for the rescue organization to take the animal to the county animal shelter to be held there for seventy-two hours, with the shelter then conveying title to the rescue organization. See N.C. Gen. Stat. § 130A-192 (2001) (establishing procedures for animals impounded because they were found without a rabies vaccination tag or an owner identification tag). Perhaps the county shelter could take possession of the animal for just a few minutes and designate the rescue organization’s shelter as the place of holding for the requisite seventy-two hours. Following Vermont’s lead in *Morgan v. Kroupa*, 702 A.2d 630 (Vt. 1997), North Carolina courts could hold that a pet is a special type of property subject to a strong policy that lost animals be able to find a new home soon, so that a common law rule like laches rather than the statute of limitations for replevin or claim and deliver applies to shift title to the new possessor of the animal.

⁷⁴ N.C. Gen. Stat. § 19A-4 (2003), reproduced in Appendix A.

human food.”⁷⁵ The original text of the civil remedy bill—House Bill 1106—created one exemption by following verbatim this language from the criminal statute, still in effect in 1969.⁷⁶

A House amendment added “or trapping” after the words “lawful shooting,”⁷⁷ all of which was replaced by an exemption for “lawful taking or attempting to take of birds, deer, and other game for human food” when the bill was passed in the House.⁷⁸ A Senate amendment dropped “for human food”⁷⁹ and, after the House concurred, the hunters’ exemption was ultimately ratified as part of section 19A-1.⁸⁰ Because “for human food” had been eliminated, the hunters’ exemption in the civil remedies act was substantially broader than the hunters’ exemption in section 14-360, the criminal cruelty statute.⁸¹

Despite the several amendments, if the bill had been enacted as of the stage when it contained just one exemption, for hunters, the bill would have basically carried over to the new civil remedies law the scope of the criminal cruelty statute, consistent with the purpose of the new law stated in the title of House Bill 1106.⁸² That is, each contained only one exemption, although the hunters’ exemption in the bill providing for civil remedies was broader.

This symmetry would not last long, and the original notion that an injunction could be obtained in each instance where a criminal prosecution would lie would soon be sacrificed. House Bill 1106 was soon amended in the House to introduce two new exemptions not found in the criminal statute: “[p]rovided further that such term [cruelty] shall not include activities sponsored by agencies or institutions conducting biomedical research or training or for sport as provided by the laws of North Carolina.”⁸³ These exemptions were added by an amendment

⁷⁵ 1881 N.C. Laws at 612 (This is codified in the North Carolina Code of 1883 § 2490, which somehow picked up the word “lawful”—absent in the original 1881 enactment—despite the apparent lack of any authority from the General Assembly authorizing the codifier to change the language of the statute. “Lawful” apparently referred to various sections of the 1883 Code that, among other regulations, barred hunting on posted lands, shooting fowl on Sunday, and shooting out of specified seasons for deer and certain birds, and also banned the use of fire in hunting wild fowl. N.C. Code §§ 2831, 2832, 2834, 2837 (1883)).

⁷⁶ N.C. H. 1106, Gen. Assembly, 1969 Sess. § 19A-1(1) (May 16, 1969).

⁷⁷ N.C. H. 1106, Gen. Assembly, 1969 Sess. § 19A-1 (May 28, 1969).

⁷⁸ N.C. H. 1106, Gen. Assembly, 1969 Sess. § 19A-1 (May 29, 1969).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ N.C. H. 1106, Gen. Assembly, 1969 Sess. § 19A-1 (May 16, 1969). After two amendments, it was enacted by 1969 N.C. Laws 926. In 1979, the hunters’ exemption in section 19A-1 was broadened even more to read: “but such term [cruelty] shall not be construed to include lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission . . .” 1979 N.C. Laws at 963.

⁸² N.C. H. 1106, Gen. Assembly, 1969 Sess. (May 16, 1969). *See supra* n. 6 and accompanying text (for title of bill).

⁸³ The final clause, “as provided by the laws of North Carolina,” apparently sought to remove from the exemption illegal sporting activities, such as racing horses so that spectators could bet on the order of finish, which was then and still is unlawful in the state. N.C. Gen. Stat. § 16-1 (2004).

just eight days after the bill was filed and assigned to the House Judiciary Committee.⁸⁴

It can be inferred that lobbyists for scientific laboratories,⁸⁵ who may have felt that district attorneys could be trusted not to criminally prosecute them for doing experiments on animals they considered worthwhile, convinced the North Carolina legislators there was a substantial risk that animal activists—individuals or organizations—would not be so restrained and would use the new chapter 1 of article 19A to attempt to enjoin proper experiments involving animals.⁸⁶

The fears of the biomedical researchers and participants in sports did not warrant the exemptions that these groups ultimately obtained. From the outset the new act's definition of cruelty that could be enjoined by animal activists was confined to "every act, omission or neglect whereby *unjustifiable* physical pain, suffering or death is caused or permitted . . ." ⁸⁷ The concept that the cruelty must be unjustifiable in order to warrant criminal punishment is found in most animal cruelty statutes, and courts usually hold that the prosecution has the burden of proof to show lack of justification.⁸⁸ Such placement of the burden of proof should apply in a civil action as well, since the purpose of the law is to make the same action that can be prosecuted criminally subject to suits for injunctive relief.⁸⁹ If a biomedical researcher's animal experiments were worthwhile, the activist plaintiff seeking to enjoin the experiments could not meet his burden of proof.

Moreover, if the unfounded action the vivisectors may have feared under the civil enforcement law terminated in a judgment for the defendant, the prevailing defendant (the laboratory researcher) should now be able to sue the plaintiff activist for committing the common law

⁸⁴ N.C. H. 1106, Gen. Assembly, 1969 Sess. § 1 (May 28, 1969). The next day the hunters' exemption was amended to change "shooting or trapping" to "taking or attempting to take." N.C. H. 1106, Gen. Assembly, 1969 Sess. § 1 (May 29, 1969).

⁸⁵ The Author can make no educated guess as to what type of sport involving animals (polo?) motivated its advocates also to lobby to get an absolute exemption for sports activities. The state Supreme Court had put an end to dog racing in 1954 by holding unconstitutional—because they granted an exemption from the basic anti-gambling law that the state constitution required to apply statewide—special laws under which dog racing with *pari mutuel* betting was being conducted in two locales in the eastern part of the state. *State ex rel. Taylor v. Carolina Racing Assn.*, 84 S.E.2d 390, 400 (N.C. 1954); *State v. Felton*, 80 S.E.2d 625, 633 (N.C. 1954). The indices for the session laws enacted between 1955 and 1969 reveal no new laws authorizing racing of dogs or any other animals.

⁸⁶ See Rackstraw, *supra* n. 2, at 262 (discussing self-help prosecution statutes in other states).

⁸⁷ 1969 N.C. Laws at 926 (enacting N.C. Gen. Stat. § 19A-1(1)) (emphasis added). See *infra* app. A (showing the continued inclusion of the "unjustifiable" element).

⁸⁸ See *e.g. Motes v. State*, 375 S.E.2d 893, 894 (Ga. App. 1988) (lack of justification was element of the prosecution's case on which it met its burden of proof); *Rushin v. State*, 267 S.E.2d 473, 474 (Ga. App. 1980) (no error in failing to instruct jury on justification as a defense, because jury was instructed it could convict only upon finding unjustifiable infliction of pain or death on dogs).

⁸⁹ See 1969 N.C. Laws at 926 (describing purpose of law in title).

tort of malicious prosecution.⁹⁰ That ought to discourage abuse by activists of the civil remedies law.

Long prior to 1969, North Carolina law had established that the malice element for the tort of malicious prosecution could be inferred—although not presumed—from a person's bringing suit without probable cause,⁹¹ and the requirement of special damages satisfied by proof of expenses paid to defend and win the suit.⁹²

Legislators considering today whether to add exemptions when enacting a civil remedies law like North Carolina's should further consider that now almost all states have a provision like Rule 11 of the Federal Rules of Civil Procedure, enabling the court to impose sanctions on a plaintiff's attorney for filing a frivolous lawsuit.⁹³ The threat of such liability surely will weed out almost all attorney-brought actions that are abusive to the vivisector. To further discourage frivolous actions under a civil remedies law, a provision could be added providing for an award of attorneys fees to the prevailing party.

Still another device for protecting defendants from unfounded suits is to authorize a motion by the defendant made even before filing an answer to the complaint that seeks a determination by the judge—based on affidavits or even live witnesses—that the defendant is likely to prevail.⁹⁴ Such a finding could be the basis for a mandatory dismissal of the suit or for an order requiring the plaintiff to post a substantial bond as a condition of continuing the action.

In any event, the bill that was ultimately enacted in 1969 unnecessarily provided very broad exemptions for (1) hunters, (2) trappers, (3) biomedical researchers, (4) biomedical educators, and (5) promoters of and participants in sporting events.⁹⁵ The expansion of broad exemptions would continue. In 1979, new exemptions were added to section 19A-1 to cover "the production of livestock or poultry, or the lawful

⁹⁰ The tort is committed by one who brings an action, civil or criminal, against another with malice and without probable cause, terminating in favor of the victim, who suffers special damages (i.e., emotional distress does not suffice). 20 Strong's N.C. Index 4th, *Malicious Prosecution* § 3 (1992).

⁹¹ See *Mitchum v. Natl. Weaving Co.*, 188 S.E. 329, 330 (N.C. 1936) (holding the absence of probable cause was not the equivalent of malice, though it was evidence from which malice could have been inferred).

⁹² *Carver v. Lykes*, 137 S.E.2d 139, 145 (N.C. 1964).

⁹³ See e.g. N.C. R. Civ. P. 11, explained in *Daimlerchrysler Corp. v. Kirkhart*, 561 S.E.2d 276, 287 (N.C. App. 2002) (corporation protected from frivolous lawsuits by N.C. R. Civ. P. 11).

⁹⁴ Compare California's anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, which provides:

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California constitution in connection with a public issue shall be subject to a special motion to strike unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Code. Civ. P. 425.16(b)(1).

⁹⁵ 1969 N.C. Laws at 926 (enacting N.C. Gen. Stat. § 19A-1(1)).

destruction of any animal for the purpose of protecting such livestock or poultry.”⁹⁶ The list of exemptions was completed in 2003, when all the exemptions were moved to a new section of the act, section 19A-1.1. Added were exemptions for “[l]awful activities conducted . . . for purposes of production of . . . aquatic species,” “[l]awful activities conducted for the primary purpose of providing food for human or animal consumption,” and “[a]ctivities conducted for lawful veterinary purposes.”⁹⁷ The new exemptions were recommended by the General Statutes Commission so that all of the exemptions in the criminal anti-cruelty statute were also applicable to the civil enforcement act.⁹⁸

In order to benefit from the exemptions, the person causing unjustifiable pain, suffering, or death to an animal must be conducting his enterprise in a “lawful” manner.⁹⁹ This qualification does little to reduce applicability of the exemptions. However, it would apply to a veterinarian practicing after having been stripped of his license who could not then invoke the veterinarian’s exemption. Similarly, neither a hunter shooting animals out of season nor a hog farmer whose operation violates zoning laws could claim an exemption.

Because, as shown in Part VI of this article, the same exemptions are now found in the criminal anti-cruelty statute,¹⁰⁰ lack of lawfulness cannot be predicated on its violation.¹⁰¹ Thus many egregious and

⁹⁶ 1979 N.C. Laws at 963. It is likely the courts would have construed “the production of livestock or poultry” as qualified by the phrase “lawful activities for,” despite the grammatical problem in doing so. *See supra* nn. 42–47 and accompanying text (discussing how North Carolina courts construe “physical” and “suffering”). After the 1979 amendment, the exemption clause provided:

[B]ut such term [cruelty] shall not be construed to include lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission, lawful activities sponsored by agencies conducting biomedical research or training, *lawful activities for sport*, the production of livestock or poultry, or the *lawful* destruction of any animal for the purpose of protecting such livestock or poultry.

1979 N.C. Laws at 963 (emphasis added).

Was the exemption for livestock and poultry producers restricted to “lawful” production? The issue is moot, as the present exemption reads: “Lawful activities conducted for purposes of biomedical research or training or for purposes of production of livestock, poultry or aquatic species.” N.C. Gen. Stat. § 19A-1.1(2) (2003).

⁹⁷ 2003 N.C. Laws at 294.

⁹⁸ *See infra* app. C (memorandum from Commission recommending such exemptions). The civil enforcement act has ended up, nevertheless, with one exemption not found in the criminal statute: “[l]awful activities for sport.” N.C. Gen. Stat. § 19A-1.1(6) (2003). The Author was present when the General Statutes Commission discussed this discrepancy but chose not to recommend adding the sports exemption to the criminal statute, since the scope of its docket was reform of Article 1 of chapter 19A of the General Statutes.

⁹⁹ N.C. Gen. Stat. § 19A-1.1 (2003).

¹⁰⁰ N.C. Gen. Stat. § 14-360 (2001), reproduced in Appendix B.

¹⁰¹ There is one curious exception. “Lawful activities for sport” is an exemption in the civil remedies law, N.C. Gen. Stat. § 19A-1.1(6) (2003), but not in the criminal statute. Arguably, a polo player who regularly abuses his horse so as to violate the criminal statute (although acting lawfully in every other respect) could be enjoined from doing so under the civil remedies law because of his violation of section 14-360. But since the

malicious acts of cruelty cannot be remedied by civil actions. A veterinarian can regularly perform major surgery on animals without anesthesia,¹⁰² and a hog farmer can routinely kill diseased hogs by torturing them to death.¹⁰³ These “lawful” acts cannot be enjoined.

Suppose a hog farmer finds sport in shooting sick animals—not killing them at once but repeatedly wounding them—and on one occasion, due to faulty aim, his bullet strikes and kills a nearby person. This particular incident of cruelty would encompass the crime of manslaughter.¹⁰⁴ Arguably it would not be “lawful” as that term is used in section 19A-1.1. But if a humane organization sought to enjoin the shooting of pigs for fun by the hog farmer in a 19A suit, the judge would have no reason to conclude that the defendant would commit manslaughter in the future. There would be no reason to believe that a future shooting would be other than “lawful,” as that term is used in the exemption statute.

“lawful” restriction as used with respect to every other exemption in the civil remedies law does not implicate the criminal animal cruelty statute, “lawful” as restricting the sports exemption probably has the same meaning, and the polo player could not be enjoined in a 19A suit.

Moreover, since during 1979–1998 the civil remedies law exempted “lawful” biomedical research and training and “lawful” destruction of any animal in order to protect livestock or poultry, but the criminal statute had no exemptions at all for these activities, lack of lawfulness could not be predicated on a violation of the criminal statute. If that could be done, the exemptions in the civil remedies law could not apply in a case where the plaintiff could establish the cruelty by the standard necessary for a criminal conviction: proof beyond a reasonable doubt. Since 19A suits are usually brought in cases of egregious wrong to animals, that would be the usual fact pattern. Thus, since at least 1979, the legislature has intended “lawful” in the civil remedies act exemption to refer to violations of some other law than the criminal animal cruelty statute, section 14-360.

¹⁰² This veterinarian is acting unlawfully in that a chapter of the North Carolina laws regulating the practice of veterinary medicine provides that a civil penalty of five thousand dollars may be imposed on a veterinarian who commits “the act of cruelty to animals.” N.C. Gen. Stat. § 90-187.8(c)(12) (2001) (not requiring a conviction under the criminal cruelty statute). However, “cruelty” as used in this statute is defined in the same terms as is cruelty in the civil remedies law: “every act, omission, or neglect causing or permitting unjustifiable physical pain, suffering, or death.” N.C. Gen. Stat. § 90-181(3a) (2001); N.C. Gen. Stat. § 19A-1 (2003), reproduced in Appendix A. If conduct that violated the statute providing for the five thousand dollar fine constituted an unlawful act under the veterinarians’ exemption in the civil remedies law, the exemption would never apply. The maxim of construction that requires a statutory phrase to be construed, if possible, so that it has some legal effect, precludes defining unlawful acts of a veterinarian to include acts that would incur the five thousand dollar fine. See *Dom. Elec. Servs., Inc. v. City of Rocky Mt.*, 203 S.E.2d at 843 (interpretation of one part of a statute cannot make another mere surplusage); *In re Watson*, 161 S.E.2d at 6–7 (statutory interpretation cannot make another section redundant).

¹⁰³ The hog farmer’s killing of hogs would not be “unlawful” under the civil action law because it is a lawful “activity[y]” for the production of livestock, exempted from the law.

¹⁰⁴ *State v. Wrenn*, 185 S.E.2d 129, 132 (N.C. 1971) (defining involuntary manslaughter as unintentional and unpremeditated killing of a human being).

Suppose a veterinarian routinely crops the ears of dogs using only local anesthesia, causing unjustifiable pain.¹⁰⁵ Suppose this veterinarian, sued by an animal activist seeking to enjoin the cruel practice, has been doing so without the informed consent of the dogs' owners, possibly committing the tort of trespass to chattels. A court might hold that an activity that is tortious is not a "lawful" activity under the veterinarians' exemption. Surely, however, the defendant would be able to limit the injunction against him to prohibit only cropping dogs' ears in the future with inadequate anesthesia in situations where consent of the owner has not been obtained. The cruel act itself could not be enjoined because it is "lawful."

If proponents of a civil remedies law in other states believe it would not be enacted without providing some new exemptions not found in the jurisdiction's criminal animal cruelty statute, the exemptions agreed to need not be so absolute as North Carolina's. For example, the 2003 bill that revised the civil remedies law and moved the exemptions to a new section, 19A-1.1, originally stated at the beginning of the section: "[t]his article shall not apply to the following activities conducted in compliance with commonly accepted practices."¹⁰⁶

When the bill was referred to the Senate Judiciary Committee, lobbyists for veterinarians and bioscience interests worked to get the italicized clause removed.¹⁰⁷ The rejected language would have made the exemptions, although unnecessary overall, more acceptable. Had the proposed qualification of the 19A exemptions been enacted, the veterinarian performing surgery on animals without anesthesia, and the hog farmer beating to death diseased animals, would have been subject to injunctions under the civil remedies law, as neither practice is "commonly accepted." If the wording of an exemption to Maryland's criminal anti-cruelty statute were borrowed as a qualification to the exemptions in a civil remedies law, they would apply even more narrowly. The Maryland law exempts "an activity that may cause *unavoidable* physical pain to an animal, including food processing, pest

¹⁰⁵ See N.Y. Agric. & Mkts. Law § 365 (McKinney 2004) (a veterinarian who crops a dog's ear without an anesthetic is guilty of a misdemeanor); *People v. Rogers*, 703 N.Y.S.2d 891, 894 (City Ct. 2000) (construing anesthesia requirement in section 365 to mean cropping must be "done painlessly").

¹⁰⁶ N.C. Sen. Gen. Assembly, 2003–2004 Sess. § 1 (Mar. 24, 2003) (emphasis added). Such a restriction on exemptions is found in several criminal anti-cruelty statutes. See e.g. Conn. Gen. Stat. § 53-247(b) (1991) (exempting veterinarian "while following accepted standards of practice" and livestock operator "while following generally accepted agricultural practices"); Fla. Stat. § 828.125(5) (1999) (exempting "conduct of recognized livestock husbandry practices"); Kan. Stat. Ann. § 21-4310(b)(6) (1995) (exempting "normal or accepted practices of animal husbandry"); see also N.J. Stat. Ann. § 4:22-16(a) (1997) (exempting "[p]roperly conducted scientific experiments performed under the authority of the Department of Health or the United States Department of Agriculture").

¹⁰⁷ E-mail from P. Bly Hall, Asst. Revisor of Stats., N.C. Dept. Just., to William A. Reppy, Jr., Prof. of Law, Duke U., *lobbyists* (Oct. 7, 2003, 5:24 p.m. EDT) (copy on file with Author).

elimination, animal training, and hunting, if the person performing the activity uses *the most humane method reasonably available . . .*"¹⁰⁸

VII. THE DOWNSIDE (PART II): THE EXEMPTIONS SPREAD FROM THE CIVIL ENFORCEMENT LAW INTO THE CRIMINAL STATUTE

As discussed above, the North Carolina General Assembly, apparently to silence opposition to the 1969 civil anti-cruelty law, included a substantial number of nearly absolute exemptions.¹⁰⁹ In 1998, the state legislature amended the criminal cruelty statute to add North Carolina's first animal cruelty felony provision.¹¹⁰ The same act created exemptions not just to the new felony clause but also to the nearly 120-year old misdemeanor animal cruelty law as well. These exemptions consisted of all those found in the civil remedies statute except for sporting events,¹¹¹ plus a new exemption for veterinarians.¹¹² In 1999, two more exemptions were added to the criminal statute, one for producers of aquatic species and the other for producers of food products.¹¹³

Like the exemptions in the civil remedies law, those in the criminal statute are nearly absolute. They apply not only to acts of cruelty that are misdemeanors, but also to those that are felonies.¹¹⁴ The most malicious and grotesque acts of cruelty by the exempted actors cannot be punished.

While there may be a rational basis for the exemptions in the civil remedies law—a legislative judgment that the protected actors would be likely targets of unfounded suits brought by out-of-control animal activists—the reason for having absolute exemptions to the criminal statute is not apparent, since district attorneys accountable to the public will screen out unfounded criminal cruelty charges made by citizens.

In a separate article that the Author is now writing, he argues that the exemptions in the criminal statute for favored actors who interact with animals—vissectors, hog farmers, veterinarians, etc.—are unconstitutional, even under the easy-to-satisfy “any rational basis test,” because they result in a denial of equal protection of the law to disfavored potential defendants who also interact with animals with

¹⁰⁸ Md. Crim. Code Ann. § 10-603(3) (2002) (emphasis added). For the reasons stated *supra* Part IV, the Author would urge excising the word “physical” if this Maryland limitation on exemptions were to be borrowed.

¹⁰⁹ 1969 N.C. Laws at 926 (enacting N.C. Gen. Stat. § 19A-1).

¹¹⁰ N.C. Gen. Stat. § 14-360(b) (added by 1998 N.C. Laws 1192–93).

¹¹¹ See *supra* nn. 95–98 and accompanying text (discussing the civil remedies statute exemptions).

¹¹² 1998 N.C. Laws at 1193.

¹¹³ 1999 N.C. Laws at 437. All the criminal law exemptions are now found in section 14-360(c) of the General Statutes. *Infra* app. B.

¹¹⁴ N.C. Gen. Stat. § 14-360(a) (2001), reproduced in Appendix B.

about the same frequency, such as kennel operators, groomers, and animal trainers.

Whether or not courts will agree with this constitutional argument, the North Carolina experience with a civil remedies law should be a warning to other states: if enactment of such a law means broad exemptions have to be included, and if those exemptions will then spread to the criminal cruelty statute, the net result may be a substantial loss of protection for animals.

VIII. CONCLUSION

Piecing together some past and present provisions of the North Carolina civil remedies legislation, while drawing on a few other sources such as our criminal statute, provides the framework for a viable model for other states that might want to consider such a law.¹¹⁵ An ideal model includes, from the original civil remedies law, the definition of the party having standing to bring an action, as well as an express mention of humane organizations. In the 2003 revision of the North Carolina law one finds the useful specific reference to cities and counties as permissible plaintiffs.¹¹⁶ The model act also includes the current provision that the plaintiff does not have to have any proprietary claim to the animals the plaintiff seeks to benefit.¹¹⁷

Animals covered by the act are broadly defined with language very similar to that employed by North Carolina in 1969.¹¹⁸ What constitutes cruelty is drawn from North Carolina's criminal statute, which does not restrict the concept to physical cruelty.¹¹⁹

Like the 1969 law, the recommended statute provides for issuance of a temporary restraining order as well as a preliminary injunction.¹²⁰ The court's authority in the final order to transfer title to an animal from the defendant to a new owner, and the designation of the burden of proof standard as a preponderance of the evidence, are drawn from section 19A-4 as amended in 2003.¹²¹

The recommended statute contains no absolute exemptions. An option is provided that closely follows an exemption clause found in the Maryland criminal cruelty statute.

¹¹⁵ The Author's proposed model is provided in Appendix D to this article (incorporating shortened verbiage of the North Carolina clauses). *Infra* app. D, § 1(a).

¹¹⁶ N.C. Gen. Stat. § 19A-1(3) (2003); N.C. Gen. Stat. § 12-3(6) (2001). The Author explains this, *supra* Part II.

¹¹⁷ *Infra*, app. D, § 1(a).

¹¹⁸ *See supra* nn. 27-28 and accompanying text (discussing the "every . . . living creature" language of the 1969 Act).

¹¹⁹ N.C. Gen. Stat. § 14-360(c) (2001).

¹²⁰ *Infra* app. D, § 3.

¹²¹ N.C. Gen. Stat. § 19A (2003); *infra* app. D, § 4.

IX. APPENDIX A

WEST'S NORTH CAROLINA GENERAL STATUTES ANNOTATED
CHAPTER 19A. PROTECTION OF ANIMALS
ARTICLE 1. CIVIL REMEDY FOR PROTECTION OF ANIMALS
2003**§ 19A-1. Definitions**

The following definitions apply in this Article:

- (1) The term "animals" includes every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia except human beings.
- (2) The terms "cruelty" and "cruel treatment" include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted.
- (3) The term "person" has the same meaning as in G.S. 12-3.

§ 19A-1.1 Exemptions

This Article shall not apply to the following:

- (1) The lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission, except that this Article applies to those birds exempted by the Wildlife Resources Commission from its definition of "wild birds" pursuant to G.S. 113-129 (15a).
- (2) Lawful activities conducted for purposes of biomedical research or training or for purposes of production of livestock, poultry, or aquatic species.
- (3) Lawful activities conducted for the primary purpose of providing food for human or animal consumption.
- (4) Activities conducted for lawful veterinary purposes.
- (5) The lawful destruction of any animal for the purposes of protecting the public, other animals, or the public health.
- (6) Lawful activities for sport.

§ 19A-2. Purpose

It shall be the purpose of this Article to provide a civil remedy for the protection and humane treatment of animals in addition to any criminal remedies that are available and it shall be proper in any action to combine causes of action against one or more defendants for the protection of one or more animals. A real party in interest as plaintiff shall be held to include any person even though the person does not have a possessory or ownership right in an animal; a real party in interest as defendant shall include any person who owns or has possession of an animal.

§ 19A-3. Preliminary injunction

Upon the filing of a verified complaint in the district court in the county in which cruelty to an animal has allegedly occurred, the judge

may, as a matter of discretion, issue a preliminary injunction in accordance with the procedures set forth in G.S. 1A-1, Rule 65. Every such preliminary injunction, if the complainant so requests, may give the complainant the right to provide suitable care for the animal. If it appears on the face of the complaint that the condition giving rise to the cruel treatment of an animal requires the animal to be removed from its owner or other person who possesses it, then it shall be proper for the court in the preliminary injunction to allow the complainant to take possession of the animal.

§ 19A-4. Permanent injunction

In accordance with G.S. 1A-1, Rule 65, a district court judge in the county in which the original action was brought shall determine the merits of the action by trial without a jury, and upon hearing such evidence as may be presented, shall enter orders as the court deems appropriate, including a permanent injunction and dismissal of the action along with dissolution of any preliminary injunction that had been issued. In addition, if the court finds by a preponderance of the evidence that even if a permanent injunction were issued there would exist a substantial risk that the animal would be subjected to further cruelty if returned to the possession of the defendant, the court may terminate the defendant's ownership and right of possession of the animal and transfer ownership and right of possession to the plaintiff or other appropriate successor owner.

X. APPENDIX B

WEST'S NORTH CAROLINA GENERAL STATUTES ANNOTATED
CHAPTER 14. CRIMINAL LAW
SUBCHAPTER XI. GENERAL POLICE REGULATIONS
ARTICLE 47. CRUELTY TO ANIMALS
2001

§ 14-360. Cruelty to animals; construction of section

- (a) If any person shall intentionally overdrive, overload, wound, injure, torment, kill, or deprive of necessary sustenance, or cause or procure to be overdriven, overloaded, wounded, injured, tormented, killed, or deprived of necessary sustenance, any animal, every such offender shall for every such offense be guilty of a Class 1 misdemeanor.
- (b) If any person shall maliciously torture, mutilate, maim, cruelly beat, disfigure, poison, or kill, or cause or procure to be tortured, mutilated, maimed, cruelly beaten, disfigured, poisoned, or killed, any animal, every such offender shall for every such offense be guilty of a Class I felony. However, nothing in this section shall be construed to increase the penalty for cockfighting provided for in G.S. 14-362.
- (c) As used in this section, the words "torture", "torment", and "cruelly" include or refer to any act, omission, or neglect causing or permitting unjustifiable pain, suffering, or death. As used in this section, the word "intentionally" refers to an act committed knowingly and without justifiable excuse, while the word "maliciously" means an act committed intentionally and with malice or bad motive. As used in this section, the term "animal" includes every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia except human beings. However, this section shall not apply to the following activities:
 - (1) The lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission, except that this section shall apply to those birds exempted by the Wildlife Resources Commission from its definition of "wild birds" pursuant to G.S. 113-129 (15a).
 - (2) Lawful activities conducted for purposes of biomedical research or training or for purposes of production of live-stock, poultry, or aquatic species.
 - (2a) Lawful activities conducted for the primary purpose of providing food for human or animal consumption.
 - (3) Activities conducted for lawful veterinary purposes.
 - (4) The lawful destruction of any animal for the purposes of protecting the public, other animals, property, or the public health.

XI. APPENDIX C

**STATE OF NORTH CAROLINA
GENERAL STATUTES COMMISSION
POST OFFICE BOX 629
RALEIGH, NORTH CAROLINA 27602
(919) 716-6800**

MEMORANDUM

TO: House Judiciary III Committee
FROM: General Statutes Commission
DATE: May 7, 2003
RE: Senate Bill 669 (Civil Remedy for Animal Cruelty)

General Comments

This bill amends Article 1 of Chapter 19A of the General Statutes (Civil Remedy for Protection of Animals), which currently provides a definition of “cruelty” and “cruel treatment” of animals and also provides that any “person” may bring an action under the article for the protection and humane treatment of animals. Possible remedies include an injunction determining the animal’s “custody.”

The General Statutes Commission was asked to clarify that “person” includes counties and municipalities and that “custody” includes the ability to euthanize an animal or make other permanent dispositions of that animal. The request came as a result of a number of recent instances in which dogs, usually pit bulls, were seized pursuant to a dog fighting prosecution under G.S. 14-362.2 and were required to be held by the local animal shelter until the defendant’s criminal case was completed, when G.S. 14-363.2 allows the animals to be confiscated from the defendant. Because dog fighting is now a felony, prosecutions are typically taking longer. Shelters must give space to these dogs, which are very rarely adoptable, and have less space to accommodate other, more adoptable dogs. The result is that potentially adoptable animals must be euthanized for lack of the space that is being taken up by the dogs that were kept for fighting. At present, a county or municipality or animal protection society can obtain an order under Article 1 of Chapter 19A more quickly than under G.S. 14-363.2.

Specific Comments

The bill makes the following specific amendments:

- (1) G.S. 19A-1(1): The definition of “animals” is conformed to the one in G.S. 14-360 (the criminal statute on cruelty to animals).
- (2) G. S. 19A-1(2): The list of exemptions in the definition of “cruelty” and “cruel treatment” is moved to a new G.S. 19A-1.1.
- (3) G.S. 19A-1(3) and G.S. 19A-2: These sections are amended to utilize the definition of “person” in G.S. 12-3 (rules for construction of statutes), which definition is believed to be broad enough to include

State agencies, counties, and municipalities as well as nonprofit corporations, such as a society for the prevention of cruelty to animals.

- (4) G.S. 19A-1.1: This section carries forward the list of exemptions currently in G.S. 19A-1(2), modified in part to conform to the equivalent list in G.S. 14-360.
- (5) G.S. 19A-3: The phrase “in his discretion” is amended to make it gender neutral.
- (6) G.S. 19A-4: This section is amended to clarify that the final order may change the animal’s ownership and to state the standard that the plaintiff must meet before such a change can be ordered.

XII. APPENDIX D

MODEL CIVIL REMEDIES FOR ANTI-CRUELTY
ENFORCEMENT ACT

1. Definitions

- a. "person" means any human being, firm, town, city, county and corporation, including a nonprofit corporation concerned with humane treatment of animals. A person as plaintiff need not have a possessory interest in or other claim of right to an animal.
- b. "animal" means every living creature except a human being.
- c. "cruelty" means every act or omission or neglect that causes or permits unjustifiable pain, suffering or death.

2. Purpose and procedures

This act authorizes any person to bring suit in [insert title] court in the county in which the cruelty complained of has allegedly occurred to enjoin cruelty to an animal or animals.

The purpose of this act is to provide a civil remedy for the protection and humane treatment of animals to supplement criminal remedies. The person bringing suit may combine causes of action against one or more defendants for the protection of one or more animals.

3. Temporary restraining order and preliminary injunction

- a. Upon filing of suit under this act, the plaintiff may, upon satisfactory proof by sworn affidavit or testimony demonstrating that such an order is necessary to prevent continued cruelty to animals, obtain from the court ex parte a temporary restraining order, not to exceed 10 days in duration, ordering the defendant not to remove the animals and to cease actions causing cruelty to the animals. The order may also, if appropriate, give the plaintiff the right, by action of the plaintiff or the plaintiff's agents, to temporarily correct conditions giving rise to cruelty including the right to enter on to the premises where the cruelty is occurring and, upon proof that removal of the animals is necessary to terminate the cruelty, the right to take temporary possession of the animals.
- b. After notice and hearing as provided for by [insert statutory or court rules reference], the court may issue a preliminary injunction containing the same provisions authorized in subparagraph a. for a temporary restraining order.

4. Final judgment

The court shall determine the merits of the action by the taking of evidence without a jury. The plaintiff is required to establish the plaintiff's case by the preponderance of the evidence.

The court's final order may

- a. dismiss the case and dissolve any preliminary injunction; or

- b. enter an injunction with appropriate mandatory and preventive terms while permitting the defendant to retain or recover possession of one or more of the animals; or
- c. upon a finding that even with the issuance of an injunction there would exist a substantial risk that an animal would be subjected to further cruelty if possessed by the defendant, terminate the defendant's ownership and right of possession of the animal and transfer ownership and right of possession to the plaintiff or other appropriate successor owner.
- d. in an action brought by a town, city, or county in which the plaintiff took temporary possession of an animal under a temporary restraining order or preliminary injunction and the court finds that cruelty by the defendant warranted such relief, order the defendant to pay the costs of maintenance of the animal from the time possession was taken by the plaintiff until entry of the final order by the court, or, if possession was returned to the defendant at an earlier time, until the relinquishment of possession by the plaintiff.

[Optional provision]

5. Exemption

This act does not apply to an activity that may cause unavoidable pain to an animal if the individual performing the activity uses the most humane method reasonably possible.