

# BROAD EXEMPTIONS IN ANIMAL- CRUELTY STATUTES UNCONSTITUTIONALLY DENY EQUAL PROTECTION OF THE LAW

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## I

### INTRODUCTION

This article considers the history, interpretation, and constitutionality of statutory exemptions that preclude prosecution either for misdemeanor or felony violation of North Carolina's criminal animal-cruelty statute, section 14-360<sup>1</sup> of the General Statutes, in nine situations.<sup>2</sup> The beneficiaries include

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1. The statute provides:

(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 livestock, 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.

N.C. GEN. STAT. § 14-360 (2006).

medical researchers, persons raising livestock, hunters, and veterinarians. Even under the loose any-rational-basis test, these exemptions violate the equal-protection clauses of the federal and state constitutions because many nonprotected actors have claims for exemption based on frequent contacts with animals. No matter what theory is employed to defend the existing exemptions, the claims of those with frequent contacts with animals are as strong as any claim to the exemptions found in the statute benefiting favored groups.

Although the focus of this article is on North Carolina exemptions, the conclusion that they are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment would apply to a large number of unqualified exemptions found in the criminal animal-cruelty statutes of many other states.<sup>3</sup>

## II

### HISTORY OF EXEMPTIONS IN NORTH CAROLINA ANIMAL CRUELTY LAWS

North Carolina's first animal-cruelty statute, enacted in 1881, contained one exemption, which was very narrow in scope compared to those found in the present statute: "[B]ut nothing in this act shall be construed as prohibiting the shooting of birds, deer and other game for the purpose of human food."<sup>4</sup> In the process of codifying the session laws in 1883, this hunters' exemption was narrowed even more by adding the word "lawful" before "shooting."<sup>5</sup> What constituted hunting that was not "lawful"—so that the exemption did not apply—was laid out in chapter 21 of the 1883 Code, which included sections that prohibited hunting on posted lands,<sup>6</sup> barred hunting wild fowl on Sunday,<sup>7</sup> created hunting seasons for deer and certain birds,<sup>8</sup> and banned use of fire in hunting wild fowl.<sup>9</sup> The hunters' exemption was subsequently rewritten to provide that criminalizing cruelty to animals should not "be construed to prohibit the lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission."<sup>10</sup> This broadened the exemption in three

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2. The nine exemptions are found in five subsections of subsection (c) of section 14-360, quoted in full in the preceding footnote. One reaches the total of nine exemptions by breaking subsection (c)(2) into five subparts: biomedical research, biomedical training, production of livestock, production of poultry, and production of aquatic species.

3. See Appendix.

4. N.C. LAWS ch. 368, § 15 (1881).

5. N.C. CODE § 2490 (1883). I am unable to find in statutes enacted by the General Assembly a grant of authority to codifiers to substantively change the statutes being codified in such a manner, but the General Assembly subsequently re-enacted this law with the word "lawful" in the hunters' exemption several times, see *infra* notes 10, 27, and 29, thus confirming the validity of the insertion of a word at the original codification process.

6. *Id.* § 2831.

7. *Id.* § 2837.

8. *Id.* § 2832 (no hunting of "deer running wild in the woods" between February 15 and August 15); *id.* § 2834 (no taking of "partridges, quail, doves, robins, lark, mocking-birds or wild turkeys" from April 1 through October 15).

9. *Id.* § 2839.

10. N.C. LAWS ch. 641 (1979). Subsequently minor amendments were made to clarify that the ban on cruelty did extend to birds, such as pigeons, that the Wildlife Resources Commission had the power

ways: (1) it applied whether or not the animal was killed for the purpose of eating it as food, (2) it was not limited to shooting but extended to trapping and other modes of capturing or killing animals,<sup>11</sup> and (3) it extended to cruelty inflicted on inland fish and aquatic life because they are within the jurisdiction of the Wildlife Resources Commission.<sup>12</sup>

In 1969, at the urging of private citizens and organizations, the General Assembly enacted statutes providing for injunctions to enforce the animal-cruelty law—the civil enforcement law.<sup>13</sup> The hunters' exemption was carried forward in the new law. Two new exemptions were created that applied only to animal-cruelty enforcement in civil actions. The new exemptions “provided . . . that [cruelty] shall not include activities sponsored by agencies or institutions conducting bio-medical research or training or for sport as provided by the laws of North Carolina.”<sup>14</sup>

In 1979, the civil enforcement law was amended to rewrite the exemptions for hunters, biomedical researchers, and persons involved with sports and to add two more exemptions: for “lawful activities for . . . the production of livestock or poultry, or the lawful destruction of any animal for the purpose of protecting such livestock or poultry.”<sup>15</sup> The apparent reason for the General Assembly's 1969 and 1979 enactments of new exemptions to the civil enforcement law, but not to the criminal animal-cruelty law, was that legislators worried that the civil law might spur unfounded suits by individual animal activists or avant-garde animal rights organizations. Activists might file a complaint against groups they despised, making unrealistic claims that the

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to regulate but chose not to. In 1998 the General Assembly added an exception clause to the hunters' exemption: “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).” N.C. LAWS ch. 212, § 17.16(c)(1) (1998). In 2004 the exception was temporarily not in effect due to a holding that an implementing regulation promulgated by the Wildlife Resources Commission was unconstitutionally vague. *Malloy v. Cooper*, 592 S.E.2d 17, 22 (N.C. Ct. App. 2004). The Wildlife Resources Commission soon rewrote the regulation at issue to solve the problem. 15A N.C. ADMIN. CODE § 10B.102 (2005). For more details about the litigation leading up to the holding and revision of the regulation, see William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39, 45 n.30 (2005).

11. See N.C. GEN. STAT. § 113-130 (7) (defining “to take,” quoted in text at *infra* note 34).

12. See N.C. GEN. STAT. § 113-292 (authorizing Wildlife Resources Commission to regulate all fishing in inland fishing waters and the taking of inland game fish in coastal fishing waters); N.C. GEN. STAT. § 113-1323(b) (conferring jurisdiction over “wildlife resources”); N.C. GEN. STAT. § 113-129(17) (defining “wildlife resources” to include “animal life inhabiting or depending upon inland fishing waters”). Note that due to the 1999 revision (see *infra* note 32) of the definition of animals protected by section 14-360 to exclude the class Pisces (that is, fish) from the scope of the basic animal-cruelty statute, the extension of the hunters' exemption in 1979 to cover some activities of fishers became largely redundant.

13. This law now comprises sections one through four of chapter 19A of the General Statutes (entitled “Protection of Animals”). For the history of the civil remedies law, see Reppy, *supra* note 10.

14. N.C. LAWS ch. 831 (1969).

15. *Id.* ch. 808, § 2 (1979).

defendants' practices were "unjustifiable," as required by section 19A-1 of the General Statutes.<sup>16</sup>

The criminal animal-cruelty statute included punishment only at the level of a misdemeanor until revisions in 1998 and 1999. The 1998 revisions added six new exemptions to the original hunters' exemption as well as a felony provision, now subsection (b).<sup>17</sup> The initial bill seeking to create the felony-level cruelty offense would have classified cruelty as a Class I felony if done "willfully."<sup>18</sup> A new subsection (c) was also proposed:

c) In *this section*, the term "animal" shall be held to include every domestic or otherwise useful animal. *This section* shall not be construed to prohibit the 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.<sup>19</sup>

The drafter of this bill intended "this section" to refer only to subsection (b)—the new felony provision—and not to the entire section 14-360. This limitation is clear because the bill left unchanged the clause of the misdemeanor provision, subsection (a), making it applicable to "every living creature," not just to useful domestic animals, and because the bill did not drop the hunters' exemption from subsection (a) when restating it in subsection (c).<sup>20</sup>

The House Judiciary II Committee substituted a revised version of the bill,<sup>21</sup> which was enacted by the House<sup>22</sup> and sent on to the Senate the next day. It added a definition of "willfully" to subsection (b): "The word 'willfully,' as used

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16. For example, the exemption for biomedical researchers might have been intended to protect them from suits brought by a supporter of the National Anti-Vivisection Society, a group founded in 1929 whose "goal is the elimination of animal use in product testing, education, and biomedical research." National Anti-Vivisection Society, *About NAVS*, [http://www.navs.org/site/PageServer?pagename=about\\_main](http://www.navs.org/site/PageServer?pagename=about_main) (last visited Sept. 9, 2006). For the suggestion that availability of an award of damages for committing the tort of malicious prosecution and of monetary sanctions under civil procedure laws should have been viewed by the legislators as adequate deterrents against the filing of such unwarranted suits, see Reppy, *supra* note 10, at 55–56. For a discussion of what acts of cruelty are "unjustifiable," see *infra* text at notes 135–38.

17. "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." N.C. GEN. STAT. § 14-360(b).

18. H.B. 1049, Gen. Assem., 1997 Sess. (N.C. 1997).

19. *Id.* (emphasis added).

20. The proposal that exemptions apply to felony prosecutions but not to misdemeanor prosecutions seems illogical. Why would the law excuse a crime involving cruelty to animals committed by a sportsman or researcher with the more culpable mens rea, while giving no relief to the defendant who performed the same act of cruelty with a less culpable mental state so that his wrong was only a misdemeanor? Logic would suggest that the less culpable actor is the party who merits some exemption from prosecution if an exemption is considered appropriate. Note that the proposed amendment would allow the prosecuting attorney to pursue the researcher whose mens rea was at the felony level on a charge of misdemeanor cruelty.

21. The Committee's favorable report as to the substitute bill is referenced at N.C. HOUSE JOURNAL 774 (1997).

22. *Id.* at 842.

in this subsection, shall mean an act done intentionally, with bad motive or purpose and without justifiable excuse.”<sup>23</sup> Subsection (c) was unchanged, indicating the House still intended the new exemptions to apply only to felony convictions.

The Senate Judiciary Committee rewrote the bill to change the mens rea for felony animal cruelty from acts “willfully” done to acts “maliciously” done.<sup>24</sup> The revised bill applied the hunters’ exemption to both the misdemeanor subsection and the new felony provision<sup>25</sup> and offered a list of animals covered by the felony provision rather than the category “domestic or otherwise useful animal.”<sup>26</sup> It did not create any new exemptions.

In the conference committee’s consideration of the bill, yet a fourth version of the rewritten section 14-360 emerged, replacing the House version of subsection (c). This version was ultimately enacted.<sup>27</sup> Subsection (c) defined “maliciously” to mean “an act committed intentionally and with malice or bad motive” and made some minor wording changes but retained all but one of the House’s exemptions. The House exemption dropped was “lawful activities for sports.” The exemptions are introduced with the words, “However, this section shall not apply to the following activities . . . .” This language unambiguously directs the exemption both to misdemeanor prosecutions under subsection (a) and to felonies under subsection (b). There is no legislative history to explain why the adopted text departed from the House’s plan to grant exemptions only from felony prosecutions, although this position was also endorsed by a senator active in promoting a felony provision that would extend to all animals and not, as under the House version, just to domestic and other “useful” animals.<sup>28</sup>

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23. Committee Substitute of April 30, 1997, H.B. 1049, Gen. Assem., 1997 Sess. (N.C. 1997).

24. This Committee Substitute in subsection (b) provided: “The word ‘maliciously’ as used in this subsection, shall mean an act done with bad motive, without justifiable excuse, and with the intent to cause physical pain, suffering, or death.” Senate Judiciary Committee Substitute of June 29, 1998, H.B. 1049, Gen. Assem., 1997 Sess. (N.C. 1997). The favorable report of the Senate Judiciary Committee as to its substitute bill is referenced at N.C. SENATE JOURNAL, 2d Sess., at 228 (1998).

25. The bill’s subsection (c) provided: “*This section* does not apply to the taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission” (emphasis added). “This section” covered both subsection (a) misdemeanors and subsection (b) felonies.

26. Subsection (b) of the Senate Judiciary Committee Substitute would have applied to “any equine animal, bovine animal, sheep, goat, swine or other livestock, dogs, cats, and other animals kept as pets or mascots.”

27. N.C. LAWS ch. 212, § 17.16(c) (1998) (part of a 700-plus-page budget bill).

28. Some pro-animal organizations had expressed their displeasure with this feature of the bill enacted by the House. Glenna B. Musante, *Animal Activists Want Bill Altered*, NEWS & OBSERVER (Raleigh), Apr. 6, 1998, at B1; *Sen. Brad Miller of Raleigh Agreed to Help*, NEWS & OBSERVER (Raleigh), Apr. 6, 1998, at B1. A later media report quotes Senator Miller’s words to the Senate Judiciary Committee in favor of enacting a law recognizing felony animal cruelty. According to this newspaper report, “Miller said the proposal excludes animals used in medical research as well as hunters and veterinarians.” *Bill Would Stiffen Law on Cruelty to Animals*, NEWS & OBSERVER (Raleigh), June 26, 1998, at A3.

That the General Assembly would exempt producers of livestock from the misdemeanor liability they previously incurred for acts of cruelty as well as liability under the new felony provision is surprising in light of the publicity during the time the legislators were considering amending the criminal animal cruelty statute to instances of disturbing cruelty to livestock. *See Chatham Man*

The final two exemptions in the criminal cruelty statute—bringing the total to nine—were added in 1999. They exempt “lawful activities conducted for purposes of . . . production of . . . aquatic species” and “for the primary purpose of providing food for human or animal consumption.”<sup>29</sup>

### III

#### THE EXEMPTIONS ARE SO BROAD AS TO AUTHORIZE UNJUSTIFIABLE ACTS OF CRUELTY

The exemptions protecting certain favored actors who interact with animals from prosecution for violations of North Carolina’s criminal animal-cruelty statute are denied to other actors who frequently interact with animals. Does this disparity violate principles of equal protection of the law, assured by the Fourteenth Amendment and the North Carolina Constitution? Whether there is a denial of equal protection is determined under the “any-rational-basis” test.

As a preliminary matter, the scope of the exemptions must be explored. If they are narrow in scope, the degree of favoritism for the protected actors vis-à-vis those not benefited by the exemptions can be seen as slight. Granting a small benefit to some actors but not to others who seem to be similarly situated may be more easily defended as rational than granting a far more substantial benefit. This question then arises: Are the North Carolina exemptions absolute? I conclude that they are; that is, they are within the scope of the favored “activities.”

#### A. The Exemptions Are Not Based on the Status of the Actor

The exemptions are not accorded to a potential animal-cruelty defendant based solely on his or her status but rather on participation in an activity. The veterinarian qua veterinarian is not exempt and thus could be prosecuted for tormenting his own pet dog at his home but not for doing the same act in connection with giving medical treatment to the dog. Similarly, a medical researcher who deliberately runs over a cat on the road on the way to work can be prosecuted for violating section 14-360 but not for torturing the cat in his or her research laboratory.

There is as yet no case law that in any way helps define the scope of the favored “activities.” Because the original reason for the exemptions focused on felony cruelty prosecutions, including the malicious torturing of an animal, the courts must hold that the General Assembly intended “activities” to apply

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*Convicted of Animal Cruelty*, CHAPEL HILL HERALD, May 2, 1997, at 3 (sick and starving cows dying in ponds with bodies left to rot); *Granville Man Faces 2 Charges of Cruelty*, HERALD-SUN (Durham), Apr. 2, 1997, at C1 (three emaciated pigs shot to death); *Crimewatch: Father, Son Charged with Animal Cruelty*, ASHEVILLE CITIZEN-TIMES, Apr. 15, 1998, at B2 (cattle tormented and deprived of sustenance).

29. N.C. LAWS ch. 209, § 8 (1999). This law also redefined the animals covered by section 14-360 from “every living vertebrate except human beings” to “every living vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia.”

broadly;<sup>30</sup> nevertheless, a common-sense approach would indicate some boundaries. Thus, a veterinary hospital employee who inflicts pain on an animal at the clinic for boarding and not medical care may likely be prosecuted, even though a large majority of veterinary hospitals also provide boarding services for pets. Similarly, under the “activities conducted for . . . providing food” exemption,<sup>31</sup> a restaurant chef probably cannot be prosecuted for cruelly killing a duck he or she is about to cook in the kitchen but can be prosecuted for brutally kicking a cat that has strayed into the restaurant’s dining area, since the cat has no direct relationship to the cook’s preparing a meal.

## B. The Hunters’ Exemption May Have a Narrow Scope in the Temporal Sense

The first exemption in the animal-cruelty statute applies to the “activity” described as the “taking of animals” regulated by the North Carolina Wildlife Resources Commission.<sup>32</sup> The term “taking” is not defined in chapter 14, but a definition does appear in section 113-130, which applies to certain statutes regulating hunting, trapping, fishing, and the like:<sup>33</sup>

To Take.—All operations during, immediately preparatory, and *immediately subsequent* to an attempt, whether successful or not, to capture, kill, pursue, hunt, or otherwise harm or reduce to possession any fisheries resources or wildlife resources.<sup>34</sup>

These regulatory provisions do not by their terms apply this definition to chapter 14, which deals with crimes, but the General Assembly might have had this definition in mind when broadening the exemption in 1979 from “shooting” animals and birds to “taking” such animals.

Assume “taking” an animal includes “an attempt to . . . harm . . .” an animal and that a licensed hunter, in season, shoots deliberately to wound without killing a wild animal merely to get a thrill out of watching it writhe in pain. The hunter has committed an unjustifiable act of cruelty, but the act of shooting would obviously be exempt from prosecution. On the other hand, section 14-360 includes as part of the definition of “torture” and “torment” an “omission, or neglect causing or permitting unjustifiable pain.”<sup>35</sup> The hunter’s failure to put the animal out of its misery arguably<sup>36</sup> is such an omission, a violation of the

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30. See *supra* text at notes 17–20.

31. N.C. GEN. STAT. § 14-360(c)(2a).

32. *Id.* § 14-360(c)(1).

33. *Id.* § 113-130.

34. *Id.* (emphasis added). This definition was enacted in 1965, N.C. LAWS ch. 957, § 2 (1965), fourteen years before the General Assembly used the word “taking” in broadening the hunters’ exemption to the anticruelty statute.

Note that if this definition of “taking” is read into section 14-360(c)(1), the hunters have the constitutional argument that there is no rational basis for restricting their exemption by limiting it to cruelty caused immediately after an act that triggers the exemption, when the statute imposes no such temporal limitation on the exemptions enjoyed by the eight other categories of actors favored by the exemptions provision.

35. N.C. GEN. STAT. § 14-360(c).

36. I would not expect the courts to construe section 14-360 as imposing on a hunter a duty to track down and humanely kill an animal he has wounded that remained mobile and hobbled away from the place where it was shot. (*But see* State v. Porter, 16 S.E. 915 (N.C. 1893), where a cruelty conviction of

cruelty statute that apparently extends in time beyond the period “immediately subsequent” to the “successful” effort to “harm” the animal. If courts thought the General Assembly intended to exempt such an omission<sup>37</sup> from prosecution under the animal-cruelty statute, they would decline to hold that the word “taking” in the revision of the hunters’ exemption has the same meaning it has in the subchapter of the General Statutes dealing with conservation matters. The courts might turn instead to common-law sources for guidance in defining “taking” as used in the hunters’ exemption. There they would find definitions that did not include a strict time limitation.<sup>38</sup>

On the other hand, a variety of a hunter’s acts of cruelty—punishable as both misdemeanor and felony—would be exempted if the section 113-130 definition of “taking” were applied to the criminal animal-cruelty statute, despite its “immediately subsequent to” restriction. Under section 113-130, it seems that if the hunter sets out to make a live capture of a wounded animal, the time period of “taking” is extended until the attempt to capture is given up. Before doing so, the hunter may have passed up opportunities to shoot the fleeing animal to put it out of its misery. Likewise, brutally kicking a wounded animal at the time of capture would seem to be within the “immediately subsequent to” period of “taking” so that the hunters’ exemption would apply. Since use of the section 113-130 definition of “taking” in section 14-360 would not nullify the hunters’ exemption, North Carolina courts might find such borrowing to be logical.

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persons who owned pigeons released to be shot at during a pigeon shoot was apparently based in part on the defendants’ knowing some wounded birds would escape so they could not be put out of their misery.) However, I would expect the courts to impose the duty to euthanize an animal owned by a person (such as a pet) when the owner caused the suffering. The legislature surely did not intend to make a criminal of one who encountered a dog or cat someone else had injured if the person did not take the animal to a veterinarian. If a person captures a wild or feral animal, he becomes its owner. *See Buie v. Parker*, 63 N.C. 131, 134 (1869) (feral mule); *State v. House*, 65 N.C. 315, 316 (1871) (otter). I predict that if a hunter has wounded an animal so that it cannot move and the hunter approaches the wounded animal, then assuming a position quite near to it, he has taken possession and become its owner. That would also seem to be the case—the person taking a position very close to the animal would become the owner—even though someone else had shot and disabled the animal but then abandoned it. It would be reasonable to construe section 14-360’s provision that links failure to act with causing suffering to impose a duty on the finder who becomes owner to put the animal out of its misery.

37. Another fact situation involving cruelty to which the hunters’ exemption would not apply if section 113-130 is held to define “taking” in section 14-360(c)(1) is this: The hunter wounds a rabbit, squirrel, duck, or other animal, picks up the wounded animal (capturing it and ending any basis for arguing that the hunter is acting “immediately subsequent to” a taking), puts it in a bag, and perhaps hours later carries the bag home, jostling the still suffering but not yet comatose animal.

38. *See State ex rel. Visser v. State Fish and Game Comm’n*, 437 P.2d 373, 376 (Mont. 1968) (“The word ‘take’ [used in a statute regulating hunting] . . . indicates the process used to physically reduce the freedom of the animal—to pursue, hunt, shoot and kill the animal.”); *Seufort Bros. Co. v. Hoptowit*, 237 P.2d 949, 952 (Or. 1951) (“[T]aking fish . . . is a continuous process beginning from the time when the preliminary preparations are being made for the taking of the fish and extending down to the moment when they are finally reduced to actual and certain possession.”).



### C. “Lawful” Does Not Significantly Restrict the Exemptions

All nine of the exemptions are facially restricted by the qualifying term “lawful.” The hunters’ exemption applies only if the “taking” of an animal is “lawful.” The veterinarian’s exemption can be invoked only if the “purpose” of the veterinarian’s activity involving cruelty is “lawful.” The public health exemption is available only if the “destruction” of an animal is “lawful.” Other exemptions apply only if the “activities” involving cruelty are themselves “lawful.”

People for the Ethical Treatment of Animals (PETA) has taken the position that an egregious act of animal cruelty is not “lawful” as that term is used in the exemption for production of livestock—a theory that would in most cases render each of the nine exemptions inapplicable to a prosecution based on similar egregious cruelty. However, the legislative history of the animal-cruelty act demonstrates that this argument is unsupportable. That history, bolstered by at least one maxim of construction employed to resolve ambiguities in criminal statutes, requires that “lawful” as used in the North Carolina exemptions means “otherwise lawful.” “Otherwise lawful” is a more precisely accurate term, and, in Arizona, it is used in the exemption provision applicable to cruelty occurring during an “activity” relating to “possession” or use of an animal during falconry, hunting, rodeos, ranching and training of dogs.<sup>39</sup> “Otherwise” is used in the Arizona statute to permit acts and omissions that are unlawful solely under the animal-cruelty statute without any exemption.<sup>40</sup>

#### 1. How to Construe “Unlawful Purpose” in the Veterinarians’ Exemption

A problem arises as to whether the “otherwise unlawful” construction can apply to the North Carolina veterinarians’ exemption when asserted to bar prosecution for felonious animal cruelty. This is because “lawful” in the veterinarians’ exemption qualifies not the “activity” of the actor but the actor’s “purpose” in committing an act or omission that constitutes animal cruelty. For instance, suppose a veterinarian reasonably determines that a pet brought in for treatment needs surgery, which the veterinarian performs unjustifiably without anesthesia, causing avoidable extreme suffering to the animal. The acts causing the pain—cutting open the body of the animal and removing, perhaps, a tumor—were done for the purpose of curing a health problem. The omission to use anesthesia probably had as its purpose saving money, arguably a “legitimate veterinary purpose.” Thus the exemption would bar a misdemeanor prosecution.

Suppose instead that while being readied for surgery, the animal bites the veterinarian, who becomes enraged and punishes the animal by beating it severely. The veterinarian is charged with a felony violation under the North

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39. ARIZ. REV. STAT. § 13-2910.06 (2006). *See also* GA. CODE ANN. § 16-12-4(e) (2006) (“conduct which is otherwise permitted under the laws of this state or of the United States”).

40. ARIZ. REV. STAT. § 13-2910.06.

Carolina animal-cruelty statute on the ground he or she tortured the animal with “malice or bad motive.”<sup>41</sup> Because there simply is no “lawful veterinary purpose” for the act of beating the animal, the trier of fact would readily find malice or bad motive on which to base a felony conviction. It would seem that due to the malice and bad motive element of the crime, there could never be a lawful veterinary purpose for the act or omission that constitutes felony animal cruelty.

Yet the legislative history of the Act strongly suggests that veterinarians, like the other preferred actors dealing with animals, are to be exempt from all felony prosecutions. To give effect to this intent, “lawful veterinary purpose” can be construed to refer to the veterinarian’s state of mind when he or she began to interact with the animal he or she subsequently subjected to felonious cruelty. In the hypothetical beating case, that initial purpose was to prepare the animal for surgery, clearly a “lawful veterinary purpose.”

At the very least, the term “lawful veterinary purpose” is ambiguous when the issue is whether the veterinarian’s exemption can bar a felony animal-cruelty prosecution just because the term is found in a list of exemptions worded in terms of “lawful activities,” meaning not in violation of any law other than the criminal cruelty statute. The rule of lenity, which requires ambiguities in a criminal statute to be resolved against the state and in favor of the defendant,<sup>42</sup> counsels resolving this ambiguity in favor of the construction enabling a veterinarian, along with the other preferred actors, to benefit from an exemption against felony cruelty prosecutions.

## 2. PETA’s Interpretation of “Lawful” as Applied to the Agribusiness Exemption

In February 1999, an investigator for PETA sent to the district attorney for the district including Camden County five videotapes showing employees of a Camden County hog farm allegedly beating and torturing hogs with metal implements. The cover letter urged prosecutions under the felony provision of section 14-360, which had become effective on January 1, 1999, along with six new exemptions. The letter dealt with the exemption for livestock production as follows:

The statute does not apply to “lawful activities . . . for purposes of production of livestock or poultry.” As you will see, the behavior of [the farm’s] employees does not remotely relate to lawful activities. In fact, it clearly violates the statute’s prohibition on malicious torture, mutilation, maiming, and cruel beatings and killings.<sup>43</sup>

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41. N.C. GEN. STAT. § 14-360(c), quoted in *supra* note 1.

42. *See* State v. Smith, 373 S.E.2d 435, 437, 438 (N.C. 1988) (“[T]he general rule in North Carolina [is] that statutes creating criminal offenses must be strictly construed against the State”; “any ambiguity should be resolved in favor of lenity”); State v. Hanton, 623 S.E.2d 600, 606 (N.C. Ct. App. 2006) (“[W]here there is ambiguity in a criminal statute, the rule of lenity requires court to interpret the statute in favor of the defendant”), citing State v. Boykin, 337 S.E.2d 678, 680 (N.C. Ct. App. 1985). *See also* United States v. Cotoia, 785 F.2d 497, 502 (4th Cir. 1986) (applying rule of lenity to North Carolina defendant in prosecution under federal criminal statute).

43. *Pig Cruelty Exposed*, <http://www.meatstinks.com/pigcaselet.html> (last visited Sept. 26, 2002).

Felony charges were filed against three employees working at the hog farm.<sup>44</sup>

The attorney for one of the videotaped defendants said his client was “trying to kill the hog to put it out of its misery.”<sup>45</sup> Euthanizing severely injured animals is certainly an integral aspect of production of livestock. It is surprising that defense counsel did not invoke the exemption. Instead, the two Camden County defendants pleaded guilty or no contest to misdemeanor charges.<sup>46</sup>

PETA’s position in the letter to the district attorney seems to be that deliberate torturing of an animal could *never* be an aspect of “lawful” production of livestock, apparently relying on the theory that on such facts the defendant necessarily satisfies the evil intent requirement of the felony cruelty provision of section 14-360. But the “production of livestock” exemption clearly applies to the felony provision of section 14-360 and, as has been shown, the exemption was originally intended to apply *solely* to the felony provision. As enacted, it applies to felony as well as misdemeanor animal cruelty provisions.

The list of exemptions is introduced in section 14-360 by the words “this section shall not apply to the following activities . . . .”<sup>47</sup> PETA’s theory would rewrite this introduction of the exemptions to read “subsection (a) hereof shall not apply to the following activities,” reading the word “section” out of the statute so that the exemptions do not apply to felony prosecutions under subsection (b) but only to misdemeanor prosecutions under subsection (a).<sup>48</sup>

### 3. “Lawful,” as Applied to the Original Hunters’ Exemption, Provides a Context for Its Interpretation

When in 1883 the hunters’ exemption was restricted to the “lawful shooting” of game, the intent was to deny the exemption to a hunter whose act of cruelty occurred during hunting that was unlawful under certain hunting regulations in the 1883 Code.<sup>49</sup> Applying the same reasoning today, it seems clear that “lawful,” as applied to hunters, trappers, and fishers, means their “taking” is in compliance with statutes such as those that require the hunter to be licensed,<sup>50</sup> that restrict hunting of many animals to a specified season and to permissible

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44. Jeffrey S. Hampton, *3 Indicted in Hog Case: PETA Investigation Leads to Charges of Cruelty to Animals*, VIRGINIAN-PILOT (Norfolk, Va.), July 7, 1999, at B1 (describing this as the first North Carolina prosecution for felonious animal cruelty).

45. *Two Hog Farm Workers Sentenced for Beating Injured Animals*, HERALD-SUN (Durham), May 18, 2000, at C7. The attorney told the newspaper that ordinarily injured hogs at the farm “were killed instantly with guns that send a steel rod into the animal’s brain, but [the client] had run out of cartridges.” *Id.*

46. *Id.*

47. N.C. GEN. STAT. § 14-360(c) (emphasis added).

48. To avoid an absurd result, the term “section” at least once has been narrowly construed to refer to a paragraph and not the entire numbered section. *State v. Scales*, 90 S.E. 439, 441 (N.C. 1916) (interpreting statute covering inheritance tax). *Scales* is distinguishable because the legislative history of section 14-360’s exemption provision reveals an intent that it apply to felony prosecutions as well as to misdemeanor prosecutions, whereas legislative history was not referred to in *Scales*.

49. See *supra* notes 4–9 and accompanying text.

50. See N.C. GEN. STAT. § 113-270.1B(a).

hours,<sup>51</sup> that require use only of approved devices for taking animals,<sup>52</sup> that impose on hunters a bag limit,<sup>53</sup> and that bar hunters from trespassing on posted land.<sup>54</sup>

Applying this “otherwise-lawful” reasoning to the other exemptions, the exemption for a bioscience laboratory or livestock-producing ranch is lost if the operation illegally has hired laborers in violation of laws to protect children or bar illegal immigrants, or if employees have not been paid legally mandated overtime remuneration. If the activity occurs in a structure occupied by more people than permitted by a fire code regulation, the exemption is lost, as it is if the structure or activity violates zoning ordinances. In the case of cruelty committed on a hog or poultry farm, there is no exemption if the waste lagoons are not in compliance with detailed regulations of the state for hog-waste disposal.<sup>55</sup> If the cruelty occurs at a facility not in compliance with the federal or state Occupational Safety and Health Administration (OSHA) regulations, the activity is not “otherwise lawful,” and no exemption can be claimed.

In several states, exemptions to animal-cruelty prosecutions are qualified not by the term “lawful” but are restricted to “commonly accepted practices” or similarly worded qualification.<sup>56</sup> There is no basis at all for construing “lawful”

51. See N.C. GEN. STAT. § 113-291.1(a) (“between a half hour before sunrise and a half hour after sunset”).

52. See *id.* (permitting taking of game by rifle, shotgun not larger than ten-gauge, bow and arrow, dog, or falcon).

53. See N.C. GEN. STAT. §§ 113-291.2, 113-135, 113-135.1.

54. See N.C. GEN. STAT. § 113-285(a); see generally Mark R. Sigmon, Note, *Hunting and Posting on Private Land in America*, 54 DUKE L.J. 549 (2004).

55. See, e.g., N.C. GEN. STAT. §§ 106-800 through 106-805 (also known as the Swine Farm Siting Act), 143-215.10A through 215.10M (farm waste management system regulation, including poultry waste).

56. See, e.g., ALASKA STAT. § 11.61.140(c)(3) (“accepted veterinary or animal husbandry practices”); COLO. REV. STAT. § 18-9-201.5(1) (“accepted animal husbandry practices”); CONN. GEN. STAT. § 53-247(b) (“generally accepted agricultural practices”); DEL. CODE ANN. tit. 11, § 1325(b)(5) (“accepted veterinary practices”); FLA. STAT. § 828.02(9)(e) and (10) (“customary hunting or agricultural practices”; “recognized animal husbandry and training techniques”); HAW. REV. STAT. § 711-1109(2) (“accepted veterinary practices”); IOWA. CODE § 717B.2(11) (“accepted practices” of research); KAN. STAT. ANN. § 21-4310(b)(1) & (6) (“accepted veterinary practices”; “accepted practices of animal husbandry”); LA. REV. STAT. ANN. § 14.102.1(C) (“accepted veterinary practices”; “accepted standards” of medical research); MD. CODE ANN. § 10-603(1) (“customary and normal veterinary and agricultural husbandry practices”); MICH. COMP. LAWS § 750.50(b)(7) (“customary accepted animal husbandry or farming practice involving livestock”); MO. REV. STAT. § 578.007(8) (“normal or accepted practices of animal husbandry”); MONT. CODE ANN. § 45-8-211(4)(b) (“commonly accepted agricultural and livestock practices”); NEB. REV. STAT. § 28-1013(4)(5)(7)(10) and (11) (“commonly accepted practices” relating to hunting, rodeos, farming, slaughter for food, and animal training); N.M. STAT. § 30-18-1(I)(4) and (5) (“commonly accepted . . . practices” relating to farming, ranching, and rodeos); OHIO REV. CODE ANN. § 959.131(D)(3) and (4) (“commonly accepted practices for the care of hunting dogs”; “use of common training devices”); PA. CONS. STAT. tit. 8, § 5511(h.1) (“normal agricultural operation”); S.C. CODE ANN. § 47-1-40(C) (“accepted animal husbandry practices”); TENN. CODE ANN. § 39-14-202(b) and (e)(1) (“accepted veterinary practices”; “usual and customary practices” relating to agriculture); TEX. PENAL CODE ANN. § 42.09(h) (“generally accepted” conduct relating to hunting, wildlife control and animal husbandry); UTAH CODE ANN. § 76-9-301(5)(a) (“accepted veterinary practices”); VT. STAT. ANN. tit. 13, § 351b(2) (“scientific research governed by accepted procedural standards”); WASH. REV. CODE § 16.52.185 (“accepted husbandry practices” and usage in “normal and usual course of rodeo events” and

to restrict the permitted activities causing cruelty to animals to commonly accepted practices in order to save the North Carolina exemptions from a constitutional attack.

An actor engaging in a commonly accepted practice of his profession that caused pain to animals would usually be justified in doing so and thus not in violation of section 14-360. In any event, no commonly accepted practice of an industry affecting animals is performed with malice and bad motive, elements of felony animal cruelty under section 14-360(b). Yet the legislature clearly intended the exemptions to bar felony prosecutions. That “lawful” creates an exemption far broader than “commonly accepted practices” in North Carolina is confirmed by the response of veterinarians and bioscience researchers to a bill that would have restricted the exemptions as they appear in the statute that parallels section 14-360 by calling for civil law enforcement via injunction.<sup>57</sup> The exemptions to the civil enforcement statute are qualified by “lawful” in precisely the same manner that that term qualifies the criminal law exemptions. Senate Bill 699, filed during the 2003 session of the General Assembly, would have amended the part of the civil enforcement statute by introducing the list of exemptions with this new language: “This article shall not apply to the following activities conducted *in compliance with commonly accepted practices*.”<sup>58</sup>

The bill was referred to the Senate Judiciary I committee. When lobbyists for the North Carolina Veterinary Medical Association and for the North Carolina Biosciences Organization first appeared before that committee, they objected to the “commonly accepted practices” language, which was eliminated in the Committee Substitute Bill promptly adopted on April 29, 2003.<sup>59</sup>

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exhibiting animals at fairs); W. VA. CODE § 7-10-4(h) (“usual and accepted standards” relating to livestock, poultry, and wildlife); WIS. STAT. § 951.09 (shooting animals in accordance with normally accepted husbandry practices); WYO. STAT. ANN. § 6-3-203(m)(ii) (“industry accepted agricultural and livestock practices”). All of the foregoing statutes are quoted in the appendix to this article.

57. At the time Senate Bill 699 was filed in the 2003 session of the General Assembly, section 19A-1(2) of the General Statutes provided:

The terms “cruelty” and “cruel treatment” include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted; but these terms 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.

The exemptions to the civil enforcement law are now collected in section 19A-1.1. Section 19A-1.1(2) eliminates any uncertainty in the language in effect in 2003, quoted above, as to whether the word “lawful” before “sport” also qualified “production of livestock or poultry.”

58. S. 699, § 1, Gen. Assem., 2003 Sess. (N.C. 2003) (emphasis added).

59. Memorandum to the author from P. Bly Hall, assistant revisor of statutes, North Carolina Department of Justice (Oct. 7, 2003) (on file with author). The Committee substitute bill, which was enacted and became law, also added the “lawful” qualification to all of the exemptions in the Civil Enforcement statute. See *supra* note 57 for the prior language that, probably, did not qualify with the term “lawful” the exemptions for production of livestock and poultry.

#### D. “For Purposes of” Must Be Broadly Construed and Does Not Significantly Restrict the Exemptions

All of the exemptions except the first one for hunters, trappers, and fishers cover activities “for purposes” specified, such as raising livestock, biomedical research, veterinary practice, et cetera. The word “for” (as used in “for purposes of”) is a word with many meanings in the law, depending on the context. The interpretation most favorable to a holding that the exemptions have a rational basis—and thus do not violate equal-protection principles—would render each exemption inapplicable unless the cruelty advanced or helped achieve the goal of the lawful activity.<sup>60</sup> Under this interpretation of “for purposes of,” if a rat used in an experiment bit a medical researcher who became enraged and repeatedly stabbed the animal, the cruelty would not be exempt from prosecution. Similarly, suppose a farm worker, directed by his foreman to euthanize a sickly piglet unfit for human consumption, tortured it for several minutes before it died. The death itself would advance the purpose of livestock production but not the wasted time and energy devoted to torturing in lieu of instantly killing the animal; thus the livestock exemption would not apply.

“For,” when coupled with “purposes of,” can mean “to advance the cause of.” However, “for” has also frequently been held to mean “arising out of,”<sup>61</sup> “growing out of,”<sup>62</sup> “with respect to,” or “with regard to.”<sup>63</sup> These broader interpretations of “for” are not per se negated by the fact that the words that follow are “purposes of.” If “for” is interpreted in this broad manner, the enraged medical researcher and the torturing hog-farm worker cannot be criminally convicted.

*In re J.A.*<sup>64</sup> is a North Carolina case in which the court construed “for purposes of” very broadly, almost as broadly as the concept of “in connection with.” The case concerned the application of a hearsay exception in the Rules

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60. See *Alexander v. U.S. Dep’t of Hous. and Urban Dev.*, 441 U.S. 39, 64 (1979) (determining that under statute providing relocation benefits after a HUD acquisition of real property “‘for’ a federal program or project,” Congress meant acquisition “must further or accomplish a program”); *Aronberg v. Federal Trade Com.*, 1332 F.2d 165, 168 (7th Cir. 1942) (construing “for” to mean it would provide a cure, in determining whether advertisement that certain pills were “for this purpose” of dealing with the problem of female’s delayed menstrual period) (citing *United States v. 11 1/4 Dozen Packages*, 40 F. Supp. 208, 210 (W.D.N.Y. 1941) (construing “for drunkenness” to mean “cure, mitigation, treatment, or prevention” of drunkenness, in regards to drug advertisement)); *Robert V. Clapp Co. v. Fox*, 178 N.E. 586, 588 (Ohio 1931) (construing “for” to mean “with a view of reaching” or “[w]ith reference to the needs . . . of” when determining whether architect who drew up building plans was entitled to mechanic’s lien under statute referring to “material . . . for erecting . . . a . . . building”); *Harris v. Cincinnati*, 607 N.E.2d 15, 19 (Ohio App. 1992) (construing “for” to mean public had to benefit from project, not just that public agency own the structure, under prevailing wage statute for construction “for a public authority”).

61. *Tomlinson v. Skolnik*, 540 N.E. 2d 716, 720 (Ohio 1998), overruled on other ground in *Schaefer v. Allstate Ins. Co.*, 668 N.E.2d 913 (Ohio 1996).

62. *Cormier v. Hudson*, 187 N.E. 625, 626 (Mass. 1933).

63. *State v. Consol. Va. Mining Co.*, 16 Nev. 432, 445 (1882).

64. 407 S.E.2d 873 (N.C. Ct. App. 1991).

of Evidence for “statements made for purposes of medical diagnoses or treatment.”<sup>65</sup> Suspecting their four-year-old daughter had been sexually abused by her babysitter, the parents took her to be examined by a physician, who found signs of vaginal and anal abuse. The next day, the child was seen by a social worker to whom the child made statements about how she had been abused by the babysitter. In delinquency proceedings against the babysitter, the social worker was allowed to testify as to what the child had said under the hearsay exception for statements made “for purposes of” medical diagnosis or treatment, because the social worker had coordinated her “findings with the physician to constitute the team’s medical evaluation.”<sup>66</sup> The social worker herself was obviously not making a medical diagnosis or recommending medical treatment. Her purpose in talking to the child did not “advance” or “help achieve” any “medical diagnosis or treatment.” Her action was merely involved in the overall process of helping the child, that is, it was “in connection with” the medical diagnosis.<sup>67</sup>

By its plain language, the section 14-360 exemptions provision gives little reason to select either the narrow or broad definition of “for purposes of.” The phrase is ambiguous. One solution to the ambiguity is to apply the rule of lenity<sup>68</sup> and adopt the “arising out of” construction. Another is to declare the exemptions using the phrase “for purposes of” to be unconstitutionally vague, dismissing the cruelty charges against the first defendant who asserts the “arising out of” or “in connection with” interpretation.

#### E. The “Absurd Result” Maxim Cannot Be Applied to Narrow the Scope of the Exemptions

Because construing section 14-360 to invite a hog farmer, researcher, veterinarian, or other exemption-favored actor to maliciously torture an innocent and helpless animal with impunity would produce an absurd and unjust result, the maxim that a statute must be construed to avoid an absurd result could require that the exemptions be somewhat narrowly interpreted. The maxim is well established in North Carolina,<sup>69</sup> but so is the rule of lenity maxim, according the defendant the most favorable resolution of statutory ambiguities.<sup>70</sup> It would seem that the two maxims would cancel each other out if

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65. N.C. R. EVID. 803(4).

66. 407 S.E.2d at 877.

67. *In re J.A.* will be distinguishable in many animal-cruelty cases in which the defendant invokes one of the nine exemptions. There, the social worker’s interaction with the child did not undercut the process of medical diagnosis. On the other hand, when a veterinarian, charged with treating an animal, causes it pain and suffering due to the infliction of cruelty, that activity is actually counterproductive to the task of the veterinarian. In such a case, “for purposes of” has to be construed as meaning “in connection with,” in the broadest sense, if the veterinarian defendant is to have the benefit of the exemption the North Carolina General Assembly intended to cast upon him or her.

68. *See infra* note 70.

69. *See State v. Jones*, 538 S.E.2d 917, 926 (N.C. 2000); *In re Brake*, 493 S.E.2d 418, 420 (N.C. 1997); *Best v. Wayne Mem’l Hosp., Inc.*, 556 S.E.2d 629, 634 (N.C. Ct. App. 2001).

70. *See supra* note 42.

each were applied to the exemptions provision of section 14-360.<sup>71</sup> But North Carolina courts would surely agree with the analysis of the Oregon Court of Appeals in a 1998 case<sup>72</sup> concluding that the absurd result maxim has no application when the courts are clear as to what the legislature intended.<sup>73</sup> “[T]he legislative power,” declared that court, “includes the authority to write a seemingly absurd law, so long as the intent to do that is stated clearly.”<sup>74</sup>

That the “absurd result” maxim actually does require a narrow construction of an exemption to an animal cruelty statute that in effect makes it inapplicable, despite its plain meaning, to felon cruelty finds support in an alternative holding in the 2000 *Thomason* case, decided by California’s Second District Court of Appeal.<sup>75</sup> In that case, the defendants had made a “crush video” in which mice and rats were crushed and mutilated by the heel of a woman’s shoe worn by one of the defendants. Twelve animals were “taunted, maimed, tortured, mutilated, disemboweled and ultimately slowly killed.”<sup>76</sup> The defendants were convicted of felony animal cruelty under a statute providing that “every person who maliciously and intentionally maims, mutilates, tortures, or wounds a living animal, or maliciously and intentionally kills an animal, is guilty of an offense punishable by imprisonment in the state prison . . . .”<sup>77</sup> An exemption statute

71. The leading treatise on statutory interpretation notes that at one time courts employed a maxim that exceptions to the general operation of a statute were to be narrowly construed. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:11 at 245 (2000 rev.). But that approach has been displaced, and in general today “exceptions . . . are interpreted according to the usual criteria of decision applicable to other kinds of provisions.” *Id.* The old maxim appears to have survived in North Carolina only with respect to statutes strongly affecting public policies, such as open meeting laws. *See Boney Publ’rs, Inc., v. Burlington City Council*, 566 S.E.2d 701, 704 (N.C. Ct. App. 2002); *News & Observer Pub. Co. v. Interim Bd. of Educ.*, 223 S.E.2d 580, 586 (N.C. Ct. App. 1976). In other states, too, the maxim that exemptions are narrowly construed is generally applied only to statutes creating significant public benefits that would be restricted by the exemptions. *See, e.g., Popplewell’s Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 461 (Ky. 2004) (exemption to obligation to pay a general sales tax); *Dawson v. Daly*, 845 P.2d 995, 1000 (Wash. 1993) (exemption to freedom of information statute). The same public policy would seem to explain the widely followed rule that exemptions in statutes that make a judgment debtor’s property liable to the holder of the judgment are given a “liberal interpretation.” 3A SINGER, *supra*, § 70:5 at 507.

72. *Young v. State*, 983 P.2d 1044 (Or. Ct. App. 1998).

73. The absurd result “maxim is best suited for helping the court to determine which of two or more plausible meanings the legislature intended. In such a case, the court will refuse to adopt the meaning that would lead to an absurd result that is inconsistent with the apparent policy of the legislation as a whole. *When the legislative intent is clear from an inquiry into text and context, or from resort to legislative history, however, it would be inappropriate to apply the absurd-result maxim. If we were to do so, we would be rewriting a clear statute based solely on our conjecture that the legislature could not have intended a particular result.*” *Id.* at 1048, quoting *State v. Vasquez-Rubio*, 917 P.2d 494, 497 (Or. 1996) (emphasis added by the court in *Young*).

74. *Young*, 983 P.2d at 1048.

75. *People v. Thomason*, 101 Cal. Rptr. 2d 247 (Cal. Ct. App. 2000).

76. *Id.* at 249.

77. CAL. PENAL CODE § 597(a). Note that “maliciously”—part of the mens rea for felony animal cruelty in California—is also part of the mens rea of North Carolina’s felony animal-cruelty provision, section 14-360(b), quoted in *supra* note 1. In addition, California defines “torture” in its animal-cruelty statutes in the same manner as North Carolina in section 14-360(c). California Penal Code section 599b say that “[i]n this title . . . the words ‘torment,’ ‘torture,’ and ‘cruelty’ include every act, omission, or neglect, whereby unnecessary or unjustifiable physical pain or suffering is caused or permitted . . . .”



provided that the California criminal animal-cruelty statutes (“this title”), including the quoted provision at issue in *Thomason*, were not to “be construed as interfering with the right to destroy . . . any animal known as dangerous to life, limb, or property . . . .”<sup>78</sup> Both statutes were located in Title 14 of the California Penal Code, entitled “Malicious Mischief.” The defendants invoked the exemption on the ground that mice and rats are dangerous to life and limb because they carry diseases such as bubonic plague and hantavirus.<sup>79</sup> The court’s initial holding was that only wild mice and rats carried diseases that were dangerous to humans, whereas those subjected to cruelty in making the video were domestic mice and rats bred to be food for other animals; such mice and rats were outside the scope of the exemption.

The alternative holding is as follows:

[E]ven if the bred mice and rats used by defendant could be classified as animals “known as dangerous to life, or property,” it is one thing to kill by traps or poison, rats and mice that run wild and create a health hazard, but quite another to intentionally and maliciously maim, mutilate, and torture the animals until they die . . . .

Assuming Penal Code section 599c could be construed to permit the destruction of all mice and rats, wild or bred and domesticated, as deadly or dangerous or destructive, it does not permit defendant to intentionally and maliciously torture or maim or taunt or mutilate or wound or disembowel and kill any living animal in the process. As the trial judge stated, “it is my view beyond a reasonable doubt that what I saw on that tape was malicious torture . . . no animal, whether the animal is a deer or rat or a rodent, a mouse—no animal under the Fish and Game Code, or any other code, is subject to that kind of malicious torture that I saw.”

Our construction of Penal Code section 597 . . . [provides] a reasonable meaning . . . and [is] a “construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute . . . .”

Even if the killing of mice and rats should fall within the exception to Penal Code section 597, subdivision (a), as set up in Penal Code section 599c, intentionally and maliciously torturing, mutilating, wounding, tormenting, and maiming the animals causes unnecessary physical pain or suffering before slowly killing them do not.<sup>80</sup>

In other words, California’s felony animal-cruelty statute was removed from the scope of the exemption apparently in reliance on the maxim that a statute must be construed to avoid an absurd result. But the absurd-result maxim ought to be cancelled out in such a case by the rule of lenity, a point ignored by the California court. *Thomason* is also just wrong in ignoring the words “this title”

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78. CAL. PENAL CODE § 599c (emphasis added). The full text of this exemption statute provides: No part of this title shall be construed as interfering with any of the laws of this state known as the “game laws,” or any laws for or against the destruction of certain birds, nor must this title be construed as interfering with the right to destroy any venomous reptile, or any animal known as dangerous to life, limb, or property, or to interfere with the right to kill all animals used for food, or with properly conducted scientific experiments or investigations performed under the authority of the faculty of a regularly incorporated medical college or university of this state.

79. *Thomason*, 101 Cal. Rptr. 2d at 250.

80. *Id.* at 251–52.

in the exemption statute, which in very plain language extended it to the felony cruelty statute.<sup>81</sup>

In any event, *Thomason* is distinguishable from the construction problem faced in North Carolina. The California exemption statute was enacted in 1905 together with a provision rewriting the misdemeanor animal-cruelty law.<sup>82</sup> California first enacted felony provisions in 1972 by adding a subsection to the misdemeanor law without referring to the exemption statute. Thus, contrary to the legislative history in North Carolina, in California there was arguably a basis for concluding that the legislators actually did not intend the 1905 exemptions to apply to the 1972 felony statute.

#### F. The Effect of the Exemptions Cannot Be Avoided by Prosecuting Animal Cruelty under Section 14-361 of the General Statutes

Section 14-361 of the North Carolina General Statutes provides,

Instigating or promoting cruelty to animals  
If any person shall willfully set on foot, or instigate, or move to, carry on , or promote,  
*or engage in*, or do any act towards the furtherance of *any act of cruelty* to any animal,  
he shall be guilty of a Class 1 misdemeanor.<sup>83</sup>

Although the caption, re-enacted as part of this statute as recently as 1993,<sup>84</sup> suggests the statute is intended to reach accessories before the fact of an act of animal cruelty, the statute's plain language extends to the engaging in the act of cruelty itself. In the face of such specific wording, the caption, or title, of the statute cannot reduce its scope.<sup>85</sup>

Although section 14-361 on its face contains no exemptions, a court would likely hold that the nine exemptions of section 14-360 are incorporated by reference because section 14-361 uses the term "any act of cruelty to animals." Section 14-361 was enacted as section 6 of chapter 368 of the North Carolina Laws of 1881. Section 1 of that enactment was the basic animal-cruelty statute and contained a list of acts of cruelty including most of those found in section 14-360 today, including to "overdrive, overload, torture, torment, deprive of necessary sustenance" and others.<sup>86</sup> Sections 2, 3, and 5 of the 1881 enactment

81. "No part of this title," the words introducing the exemption statute and fixing its scope, unquestionably embrace the words "maims, mutilates, tortures, or wounds" in the felony animal-cruelty statute. Both are in Title 14.

82. 1905 CAL. STAT. ch. 519, §§ 1, 2, at 679–81. Section 1 revised the basic misdemeanor animal-cruelty statute; section 2 enacted eleven new statutes relating to animal cruelty, including section 599c of the Penal Code, the exemption statute. All the statutes were codified in title XIV of the California Penal Code.

83. N.C. GEN. STAT. § 14-361 (emphasis added).

84. 1993 N.C. Sess. Laws 2446.

85. See Appeal of Forsyth County, 203 S.E.2d 51, 55 (N.C. 1974) ("The law is clear that captions of a statute cannot control when the text is clear."); *Javurek v. Tax Review Bd.*, 605 S.E.2d 1, 4 (N.C. Ct. App. 2004) (same). At one point in the history of this statute, its title did refer to the act of cruelty itself. N.C. CODE § 2487 (1883) ("misdemeanor to instigate or engage in any act of cruelty to animals").

86. N.C. LAWS ch. 368, § 1 (1881).

also described acts of cruelty.<sup>87</sup> In context, the generalized reference in section 6 of the 1881 enactment must have been intended to incorporate the specific acts of animal cruelty spelled out in the preceding sections.<sup>88</sup> Moreover, the 1881 enactment exempted hunting for food from the scope of the crime of animal cruelty.<sup>89</sup> North Carolina law has long recognized that one statute can, when enacted, incorporate by reference a provision found in another statute, even a repealed statute.<sup>90</sup> When in 1943, section 1 became section 14-360 of the General Statutes and section 6 became 14-361,<sup>91</sup> “any act of cruelty” in the latter could readily be viewed as continuing to refer to those acts of cruelty laid out specifically in the statute immediately preceding it.<sup>92</sup> By a parity of reasoning section 6 would have excluded wounding or killing an animal by one hunting for food from “any act of cruelty to any animals.”

A court may not, however, use the doctrine of incorporation by reference to include the exemptions in section 14-360 in section 14-361. Section 14-361 was last re-enacted in 1993.<sup>93</sup> Since then the hunters’ exemption has been substantially rewritten in section 14-360,<sup>94</sup> and the other eight exemptions did not exist in any form until 1998 and 1999.<sup>95</sup> Because the writings that constitute the exemptions now found in section 14-360 did not exist at all (or exist in their present form) in 1993, the doctrine of incorporation by reference is not available.<sup>96</sup> If the exemptions were held to qualify section 14-361, then, because

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87. Section 2 criminalized dog fighting and baiting, section 3 the failure to provide food and water to confined animals, and section 5 the cruel transporting of animals.

88. Section 14-363 today, as when enacted in 1881 as section 5 of the session law that also included section 14-361 and the original text of what is now section 14-360, punishes as a misdemeanor any person who “shall carry or cause to be carried in or upon any vehicle, or other conveyance, any animal in a cruel or inhuman manner.” This statute defines a particular act of cruelty; hence the term “cruel” used in 14-363 was in 1881 and is still today not dependent in any manner on the definition of cruelty in what is now section 14-360, which lists such acts as overdriving, overloading, torturing, and tormenting. For that reason, there is no basis for implying into section 14-363 the exemptions found in section 14-360. Producers of cows and chickens can be prosecuted for cruel transportation of their animals on the highways of North Carolina and even from one place to another on the farm if a vehicle or “conveyance” device is used. Similarly, the term “animal” in section 14-363 should include fish even though section 14-360 does not cover fish. *See infra* note 99.

89. *See supra* note 4 and accompanying text.

90. *See Lassiter v. Northampton County Bd. of Elections*, 102 S.E.2d 853, 860–61 (N.C. 1958); *Lutz Indus., Inc. v. Dixie Home Stores*, 88 S.E.2d 333, 339 (N.C. 1955).

91. N.C. CODE (1943) (Michie). In the Codes of 1919, 1924, 1927, 1931, 1935, and 1939, what is now section 14-361 also immediately followed what is now section 14-360, the code sections being 4484 and 4483. In the Code of 1883, however, two statutes did not adjoin but were section numbers 2487 and 2492, with four intervening sections.

92. Whether “any act of cruelty” in section 14-361 continued to also refer to dog fighting, baiting and cruel transport of animals is debatable. The statutes creating the latter crimes were codified in 1919 to follow rather than precede section 14-361, at least opening the door to the argument that section 14-361 did not incorporate them by reference.

93. 1993 N.C. Sess. Laws 2446.

94. *See supra* note 10, discussing a 1998 amendment that excluded certain birds from the hunters’ exemption.

95. *See supra* notes 19–32 and accompanying text.

96. *Lassiter v. Northampton County Bd. of Elections*, 102 S.E.2d 853, 860 (N.C. 1958), states that the writing to be incorporated by reference into a statute must be “existing” at the time of the statute’s enactment. This is consistent with application of the doctrine of incorporation by reference into a will

they were added or rewritten after 1993, the legal theory would have to be amendment of that statute by implication.

Finding a statute amended by implication is “not favored,”<sup>97</sup> and the doctrine will be applied only when legislative intent for an implied amendment is “manifestly clear.”<sup>98</sup> It would seem, however, that even if legislative intent did not reach that level of clarity, the argument for amendment by implication to incorporate the section 14-360 exemptions into section 14-361 is strong enough to lead a court to hold that a potential defendant is not given the kind of notice required by due process of law as to just what conduct section 14-361 criminalizes. Such a defendant could rely on one of the section 14-360 exemptions as a basis for quashing a section 14-361 prosecution.<sup>99</sup>

#### IV

##### THE EXEMPTIONS DENY EQUAL PROTECTION TO PERSONS ENGAGED IN LAWFUL ACTIVITIES

There are many “lawful activities” involving animals that would seem to have just as much claim to an exemption from cruelty prosecutions as the nine activities expressly exempted in section 14-360. Examples would include grooming services for dogs and cats, boarding kennels for pets, dog day-care centers, pet resorts,<sup>100</sup> pet sitters, breeders of dogs, horses and pot-bellied pigs to be sold as pets, operators of rodeos and dog and pony shows,<sup>101</sup> dog trainers,

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of writings existing at the time of execution of the will. See *In re Estate of Norton*, 410 S.E.2d 484, 489 (N.C. 1991).

97. *In re Halifax Paper Co.*, 131 S.E.2d 441, 445 (N.C. 1963); 1A SINGER, *supra* note 71, § 22:13 at 292–95 (2002 rev.).

98. *In re Halifax*, 131 S.E.2d at 445.

99. On the other hand, North Carolina prosecutors may be able to invoke section 14-361—subject to the nine exemptions found in section 14-360—to prosecute a defendant for cruelty to some fish, a class of animal excluded from the scope of section 14-360, which since 1998 has defined “animal” as a vertebrate in the classes Amphibia, Reptilia, Aves, and Mammalia. N.C. GEN. STAT. § 14-360(c). See *supra* note 29. The fish that may be protected by section 14-361 are those not regulated by the Wildlife Resources Commission (see *supra* note 12 and accompanying text) and thus not within the expanded hunters’ exemption found in section 14-360(c), which apparently must be read into section 14-361. Section 14-361 still contains the original wording from its 1881 enactment that criminalizes an “act of cruelty to any animal.” Section 15 of the 1881 session law defined “animal” as used in what is now section 14-361—as well as what is now section 14-360—as “every living creature.” Because of that definition, the term “animal” in what is now section 14-361 did not refer to or depend on the use of the term in what is now section 14-360. I do not think it is at all “manifestly clear” that the legislative amendment shrinking the scope of “animal” was also intended to affect section 14-361, particularly since the restricted definition of “animal” refers to that term “[a]s used in this section.” N.C. GEN. STAT. § 14-360(c). That should have alerted members of the General Assembly that the definition did not apply to the term “animal” in other statutes, including the one immediately following this section, 14-361. Section 14-361 has not been impliedly amended, and the term “any animal” in it is not vague and still means “any living creature.” N.C. LAWS ch. 368, § 15 (1881).

100. See Travel Pets Home Page, <http://travelpets.com> (last visited Sept. 8, 2006).

101. They, like some others in this list are regulated by the federal Animal Welfare Act, but it does not preempt prosecution of regulated activities under state and local anticruelty laws. See 7 U.S.C. § 2143(a)(1) (2000) (The A.W.A. does “not prohibit any State (or a political subdivision of such State) from promulgating [animal protection] standards in addition to those standards promulgated by the

horse trainers,<sup>102</sup> farriers (horse-shoers), operators of dog-rescue services, businesses that specialize in transporting animals,<sup>103</sup> and pet stores that sell live pets. The only thing the nine exempt activities have in common is they often involve frequent contact with animals, but the same is true of these examples of nonexempt “lawful activities.”

Since the exemptions in section 14-360 involve neither a suspect classification such as race or gender nor a fundamental right, whether they deny equal protection would be decided under the “rational basis test.”<sup>104</sup> This was the test used by the Supreme Court of Florida in one of the few reported cases involving the constitutionality of an exemption to an animal-cruelty criminal statute.<sup>105</sup> The basic statute reads like North Carolina’s, providing criminal punishment for

[w]hoever unnecessarily overloads, overdrives, tortures, torments, deprives of necessary sustenance or shelter, or unnecessarily or cruelly beats, mutilates or kills any animal, or causes the same to be done, or carries in or upon any vehicle, or otherwise, any animal in a cruel or inhuman manner . . . .<sup>106</sup>

The exemption provided that “[n]othing in [the above-quoted statute] shall be construed to apply to poultry shipped on steamboats or other crafts.”<sup>107</sup>

The court held that the exemption rendered the statute invalid due to denial of equal protection:

Under these sections of the statute a person engaged in breeding and training game cocks may spend considerable sums of money . . . for pens and runs for his chickens, but if he permits them to get together in the back yard, or in a pen, or a run, where a fight results, he is guilty of cruelty to animals and is subject to a fine or imprisonment. On the other hand, he may be able to rent or buy a steamboat, or other floating craft, on which to ship his roosters anywhere on the waters of Dade County and not be guilty of cruelty to animals because of any fight which might take place on the steamboat or other craft. There is no difference between the fighting of roosters on a steamboat, or other craft, and the fighting of roosters on land, in the back yard or in the chicken runs. . . . Under the statute one is a violation of the law and the other is not.

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Secretary.”). *Cf. Dehart v. Town of Austin*, 39 F.3d 718 (7th Cir. 1994) (municipal ban on exotic and wild animals not preempted by federal A.W.A.).

102. In September 2003 felony cruelty charges were brought in Harnett County against a horse trainer for beating a horse boarding at his facility. DUNN DAILY REC., Sept. 23, 2003, at D1. After trial in Harnett County district court, the defendant was found guilty of misdemeanor animal cruelty. A newspaper account of the proceeding states that the defendant was accused of beating a horse he was training with a shovel until the shovel broke. DUNN DAILY REC., Sept. 29, 2003, at D1.

103. Cruelty in the conveying or transporting of animals is made a criminal offense in a separate misdemeanor statute, N.C. GEN. STAT. § 14-363 (*see supra* note 88), and thus probably cannot be prosecuted under the felony provision of section 14-360.

104. *See Texfi Indus. v. City of Fayetteville*, 269 S.E.2d 142, 149 (N.C. 1980); *State v. Howard*, 580 S.E.2d 725, 730 (N.C. Ct. App. 2003) (“[T]he test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation. A statute is only void as denying equal protection when similarly situated persons are subject to different restrictions or are given different privileges under the same conditions.”).

105. *Mikell v. Henderson*, 63 So. 2d 508 (Fla. 1953). This was a declaratory judgment action brought by persons raising birds for cock-fighting.

106. Former FLA. STAT. ANN. § 828.12, *quoted in Mikell*, 63 So. 2d at 509.

107. *Id.*

There is no reasonable basis for the classification of cock fighting on a steamboat, or other craft, and cock fighting on land or in the back yard. The discrimination is unreasonable and arbitrary and denies to the appellant equal protection of the law.<sup>108</sup>

Several North Carolina cases have used the rational-basis test to hold exemptions in criminal statutes and ordinances unconstitutional as denying equal protection of the law to persons similarly situated who are not exempted. *State v. Glidden*,<sup>109</sup> decided in 1948, involved prosecution under a statute that criminalized the polluting of waterways with substances deleterious to fish but that exempted "corporations chartered . . . before the 4th day of March, 1915."<sup>110</sup> Affirming the trial court's quashing the prosecution of a post-1915 corporation because the statute violated the North Carolina constitution, the state supreme court declared,

[A] statute or ordinance is void as contravening the equal protection guaranty which makes an act a crime when committed by one person, but not so when committed by another in like situation . . . or which makes a question as to whether a certain act is criminal or not depend on an arbitrary or unreasonable distinction between persons or classes of persons committing it.<sup>111</sup>

Another equal-protection case applying the rational-basis test to statutory exemptions, *Cheek v. City of Charlotte*,<sup>112</sup> was a suit to restrain enforcement of an ordinance that, among other things, made it unlawful for massage therapists to give a massage to a person of the opposite sex without an order signed by a physician. An exemption provision included the following:

[N]or shall the provisions of this article apply to health club activities of the Young Men's Christian Association or the Young Women's Christian Association; nor shall the provisions of this article apply to duly licensed barber shops and beauty shops.<sup>113</sup>

The North Carolina Supreme Court held the exemptions arbitrary and unreasonable:

[I]t is clear that the ordinance in suit cannot withstand plaintiffs' [equal protection] attack. There is no reasonable ground for putting barber shops, beauty parlors, Y.M.C.A. and Y.W.C.A. health clubs in a separate classification from massage parlors, health salons, or physical culture studios. Therefore an ordinance which prohibits a person of one sex from giving a massage to a patron of the opposite in the latter, and permits it in the former, makes a purely arbitrary selection. It "has no reasonable relation to the purpose of the law, only serving to mechanically split into two groups persons in like situations with regard to the subject matter dealt with but in sharply contrasting positions as to the incidence and effect of the law." . . .

Obviously, the city council felt that the activities which the ordinance seeks to eliminate were not then being carried out in the exempted establishments. Notwithstanding, as presently written, the ordinance prohibits the proprietors and employees of a massage parlor from doing acts which can be done with impunity

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108. *Mikell*, 63 So.2d at 509.

109. 46 S.E.2d 860 (N.C. 1948).

110. *Id.* at 861.

111. *Id.* at 862.

112. 160 S.E.2d 18 (N.C. 1968).

113. *Id.* at 20.

under similar circumstances in a barber shop or any of the other exempted places of business. Such favoritism cannot be sustained.<sup>114</sup>

The same is true of the state's current criminal animal-cruelty statute. The act of unjustly causing pain to a dog can be done with impunity at a veterinarian's place of business but not at a groomer's place of business or a boarding kennel. And just because the General Assembly may have believed veterinarians in causing pain likely were not engaging in cruelty but a groomer or boarding kennel operator in causing pain likely was, the discrimination is not constitutional.

In other equal-protection cases, the statute's exemption flaw also involved classifications that had no rational basis. In *State v. Greenwood*<sup>115</sup> the owner of a billiard hall was prosecuted for violating an ordinance forbidding such a business to operate on Sundays. No other business was so restricted. The district court dismissed the action, holding that the ordinance denied operators of billiard halls equal protection of the law. The North Carolina Court of Appeals reinstated the prosecution, but the state supreme court reversed, agreeing with the trial court's equal-protection analysis:

The crucial question is whether, in relation to the purpose of the ordinance, there is a rational basis for placing billiard halls in a unique class, separate and apart from all other businesses which offer facilities and opportunities for recreation, sports and amusements. An affirmative answer would require that we hold that the operation of billiard halls on Sunday constitutes an interference with the peace and quiet of that day in a manner . . . different from the operation of other sporting or recreational facilities. To so hold would require us to disregard plain facts. Bowling alleys, dance halls, skating rinks, swimming pools, amusement parks, spectator games and sports, and similar businesses, no less than billiard halls, are *potential* gathering places for idlers and trouble-makers and *potential* centers for boisterousness, immorality and crime. However, all are facilities for wholesome recreation. In terms of the *purpose* of the ordinance, all are within *the same classification*.<sup>116</sup>

Again, by the same reasoning, the act of unjustifiably subjecting an animal to pain is no less likely to occur in a research setting than in some not specifically exempted—no less likely in a biomedical laboratory than on the premises of a horse trainer. All businesses in which people interact with animals must be treated the same under the law.

*State v. McCleary*<sup>117</sup> held an exemption to a criminal statute banning lottery activity unconstitutional as a denial of equal protection, although that holding did not result in reversal of the defendant's conviction. A defendant convicted of advertising and operating a lottery in violation of statewide statutes appealed on the ground that various exemptions to the anti-lottery statutes rendered the criminal prohibition a violation of equal protection. The exemption statute allowed raffles and bingo games to be conducted by an organization exempt from taxation if the organization was "a bona fide nonprofit charitable, civic,

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114. *Id.* at 23.

115. 187 S.E.2d 8 (N.C. 1972).

116. *Id.* at 12.

117. 308 S.E.2d 883 (N.C. Ct. App. 1983), *aff'd*, 316 S.E.2d 870 (N.C. 1984).

religious, fraternal, patriotic or veterans' organization, or . . . a nonprofit volunteer rescue squad or a bona fide homeowners' or property owners' association."<sup>118</sup> The Court of Appeals held that it was rational to exempt charities so that raffles and bingo could be used as a source of revenue for their activities that benefit the public. But the final two exemptions were invalid:

The privilege to conduct a bingo game or raffle by private homeowner associations whose sole purpose is the landscaping of the common areas and facilities owned by such an association or its members has no relation whatsoever to the basic goal of the gambling prohibition or charitable exemption; these organizations do not have a general charitable orientation *by nature*, and are not required to so conduct themselves *by law*. The activity of homeowner associations conducting raffles to raise revenue for clubhouse construction or landscaping projects on their private property cannot be rationally distinguished from the activity of defendant conducting a lottery to sell a three bedroom brick home with oil heat or of any other private nonprofit group organized for its own self-serving purposes, which is also excluded by G.S. 14-292.1 from conducting a raffle or lottery.<sup>119</sup>

After quoting a severability clause applicable to the statute,<sup>120</sup> the Court of Appeals held that the exemptions for homeowners and property owners associations did "not affect the other provisions of the act"—those under which the defendant had been convicted—and severed them from the statute.<sup>121</sup> Without citing a single case, it then affirmed the conviction. The North Carolina Supreme Court affirmed *per curiam* the judgment of the Court of Appeals.<sup>122</sup>

The relationship of the *McCleary* defendant selling his own home via lottery and a homeowners association raising money for landscaping by holding a lottery is no less close than the relationship between a farmer interacting with animals raised for sale as meat products and the operator of a kennel who interacts with animals boarding there. In each situation, it defeats the purpose of the animal-cruelty law to exempt the unjustified infliction of pain on an animal from the criminal sanction.

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118. N.C. GEN. STAT. § 14-292.1, *quoted in McCleary*, 308 S.E.2d at 886.

119. *McCleary*, 308 S.E.2d at 896 (emphasis in original).

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"If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications to the act which can be given effect without the invalid provision or application and to this end the provisions of this act are severable."

*Id.* at 897.

121. *Id.* Nothing in *McCleary* suggests that a severability clause is binding on a court, and it is well settled elsewhere that such a clause at most praises a presumption that severability would be appropriate. *E.g.*, *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1101 (Ill. 1997).

Issues arising out of the affirmance of the conviction after unconstitutional exemptions are excised from a statute are considered in part V, *infra*.

122. 316 S.E.2d 870 (N.C. 1984).



## A. The Denial of Equal Protection in the Animal-Cruelty Criminal Statute Can Be Judicially Cured Only by Excising the Discriminatory Exemptions

### 1. A Court Faced with a Statute Containing an Unconstitutional Provision May Have Three Remedial Choices

When part of a statute is unconstitutional due to its resulting in a denial of equal protection of the law by favoring one group—as by giving it an exemption or other benefit denied another group similarly situated—courts may remedy the problem in one of three ways: (a) by declaring the entire statute unconstitutional, (b) by severing the unconstitutional exemption and leaving the remainder of the statute operable, or (c) by curing the denial of equal protection by extending the exemption to those denied it by the unconstitutional legislation or by a modest redrafting of the language to make the classification rational. In the case of the unconstitutional exemptions in section 14-360, only solution (b) is available to a court. The exemptions must be excised and the main part of the statute creating misdemeanor and felony crimes of animal cruelty retained.

### 2. Voiding the Entire Statute Is Not an Option

Voiding section 14-360 entirely would leave North Carolina without any law regulating the overwhelming number of acts of animal cruelty that occur repeatedly in the state,<sup>123</sup> an unacceptable result that is unnecessary given the alternative remedy of striking the unconstitutional exemptions. Guidance on the appropriate procedure to deal with the unconstitutionality of the animal-cruelty exemptions is found in two decisions of the North Carolina Supreme Court. *Constantian v. Anson County*<sup>124</sup> concerned a section of the state constitution requiring counties to fund the construction, maintenance, and operation of public schools. The section also contained a requirement that violated equal protection of the law—that such schools be racially segregated.<sup>125</sup> Certain litigants contended that unconstitutionality of the clause providing for segregated schools meant the entire section was invalid, so that counties did not have authority to issue bonds to fund public schools. The North Carolina Supreme Court responded,

If [this] contention were adopted, all authorized (unissued) bonds for school plant facilities, as well as all previously authorized special tax supplements within

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123. The following animal cruelty statutes contain no exemptions and would remain in effect: N.C. GEN. STAT. §§ 14-361.1 (misdemeanor abandonment of animals), 14-361 (felony cockfighting); 14-362.1 (misdemeanor animal fighting and baiting), 14-362.2 (felony dog fighting), 14-362.3 (misdemeanor cruelly restraining of dogs), 14-363 (misdemeanor cruelly transporting of animals), and 14-366 (misdemeanor killing or injuring of livestock running at large).

See text accompanying *supra* notes 82–97 for an explanation that the exemptions found in section 14-360 must be implied into section 14-361, which also criminalizes acts of cruelty to animals, meaning the latter section must be treated under equal-protection analysis the same as section 14-360.

124. 93 S.E.2d 163 (N.C. 1956).

125. The unconstitutionality of the segregation proviso became apparent by the decision of the United States Supreme Court in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

administrative units, throughout the State, would be invalidated. Applicable legal principles impel the opposite conclusion. . . . The provisions [of the section], absent the mandatory requirement of enforced separation, are complete in themselves and capable of enforcement. Their separable and independent status is manifest. They antedate the [segregation] amendment. They survive the invalidation of the mandatory requirement of enforced separation . . . .<sup>126</sup>

In striking only the unconstitutional clause in the section of the state constitution, the *Constantian* court relied on authorities concerning unconstitutional clauses in a statute, such as section 14-360: “A statute may be valid in part and invalid in part. If the parts are independent, or separable, but not otherwise, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement.”<sup>127</sup> The misdemeanor and felony provisions of the animal-cruelty statute are similarly “complete” and can thus be enforced without the exemptions, particularly in light of the obligation of the prosecutor to prove beyond a reasonable doubt that the act of cruelty at issue was not justifiable.

In the absence of an applicable severability clause, *Constantian* applied solution (b)—severing the unconstitutional provision from the otherwise viable statute. As will be shown below, seven of the nine exemptions in section 14-360 may be subject to a severability clause, which strengthens the case for preserving the statute while excising the exemptions that deny equal protection of the law. This is illustrated by the statute at issue in *Fulton Corp. v. Faulkner*,<sup>128</sup> which imposed an intangibles tax on corporate stock but totally exempted stock owned by a potential taxpayer that earned all of its taxable income in North Carolina, an exemption the United States Supreme Court had held unconstitutional.<sup>129</sup> On remand, the North Carolina Supreme Court rejected the argument that invalidity of the exemption required invalidation of the entire statute imposing the intangibles tax on corporate stock. Before considering the severability clause applicable to the intangibles tax statute, the court stated this rule: “[I]f the separate parts of the statute are not so interrelated and mutually dependent that one part cannot be enforced without reference to another, the offending part must be severed and the rest of the statute enforced.”<sup>130</sup> The court held there was no such interdependence between the exemption provision and the basic rule imposing the tax. The severability clause bolstered the decision to leave invalidated only the exemption provision.

To sum up, the North Carolina Supreme Court will not sacrifice an important governmental program—such as funding local schools or raising revenue to run the state government by taxing investments—by invalidating an

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126. *Constantian*, 93 S.E.2d at 167, 168.

127. *Id.* at 168 (citing *Norfolk S. R. Co. v. Reid*, 121 S.E. 534 (N.C. 1924)).

128. 481 S.E.2d 8 (N.C. 1997).

129. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996). This decision also invalidated partial exemptions from the property tax based on the percentage of income of the corporation subject to North Carolina’s income tax.

130. *Faulkner*, 481 S.E.2d at 9. The severability clause in *Faulkner* provided “for the severance of any part of the statute which is declared unconstitutional.” *Id.* at 10 (citing N.C. GEN. STAT. § 105-215).

entire statutory scheme when the rest of the statute is not dependent on its invalid proviso and can be enforced with the latter stricken. As will be seen, seven of the nine exemptions in section 14-360 may be subject to a severability clause; but even in its absence, section 14-360 may not be held wholly unconstitutional because the exemptions deny equal protection of the law.<sup>131</sup>

### 3. Extending the Exemptions to Cure the Unconstitutional Discrimination Is Impossible; Redrafting to Eliminate the Irrationality Is Not a Judicial Function with Respect to the Anti-Cruelty Statute

As noted above, the third remedy sometimes available to a court to make constitutional a statute found to contain an unconstitutional exemption is rewriting the provision: either to extend the scope of the exemption so it is available to similarly situated actors presently unable to benefit from it or to shrink its scope so that it becomes rational despite the discrimination. The first approach to curing by rewriting—expanding the scope—is unavailable with respect to the exemptions in section 14-360 because of an inability to define the similarly situated actors who are unconstitutionally discriminated against by the existing nine exemptions.

Putting aside for the moment the exemptions for hunters and trappers, the common thread among the eight other exemptions in section 14-360 seems to be that the protected actors interact frequently with animals while performing a service of some benefit to the public. The ideal plaintiff to attack these exemptions as discriminatory would be a person accused of animal cruelty who interacts often with animals and also performs a service of benefit to the public, but who is not protected by one of the other exemptions. Could a court or legislature draft and supplement the exemption provisions with a list of such actors—described by reference to what they do when interacting with animals—that would protect all who could claim they are presently discriminated against by the section 14-360 exemptions? That would seem to be a very difficult task.

A different approach would be to add a tenth exemption of the catch-all variety, such as for “any person who interacts frequently with animals while performing services that benefit the public” or “any activity that is similar to the activities described in subsection (c)(2) through (c)(4).”<sup>132</sup> Exemptions worded in this manner, however, would make section 14-360 void for vagueness. Would the first formulation advise a farrier that shoeing horses is a service of public benefit? Is shoeing a horse similar to performing veterinary services? To producing livestock?

The hunters’ exemption, in any event, cannot be put aside. It cannot be construed as available only to a person who hunts often; an eighty-year-old person going hunting for the first time in his life is entitled to it and under present law is permitted to torture an animal to death with intent to cause it

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131. *But see infra* Part V and accompanying text.

132. These subsections lay out the eight existing exemptions other than that for hunters or trappers.

severe pain (although the hunter may have to do so immediately after wounding the animal). Could the hunters' exemption possibly be extended judicially beyond the activity of hunters without use of language that is void for vagueness and without broadening it far beyond what the legislatures that created it could have intended? What of an exemption for "activities relating to recreation?" "Activities involving wild animals?" Surely they are unconstitutionally vague. The General Assembly could rewrite the exemption provision to delete the hunters' exemption while retaining exemptions for actors who interact frequently with animals while performing a service of benefit to the public (assuming that would survive a void for vagueness attack). But could a court pick and choose which exemptions to strike and which to "cure," given that the process of judicial cure rests on the notion that the court is doing what the legislature would want it to do? I would think it cannot.

#### 4. Irrationality and the Mens Rea for Felony Animal Cruelty

Questions concerning possible cure of the unconstitutional denial of equal protection of the exemptions by extending them to more actors become irrelevant when the possibility of such a cure, as applied to the felony cruelty provision in section 14-360, is considered. There simply is no rational basis that can explain why the law would permit a hog farmer, scientist, veterinarian, hunter, or other actor currently covered by the exemptions to maliciously kill, torment, or maim an animal with bad motive—the elements of felony cruelty—yet criminally punish another actor for the identical conduct whether or not the other actor interacted frequently with animals while performing useful services or was involved with wildlife. If malice and bad motive are excusable for the group now protected by section 14-360, upon what rationale can malice and bad motive possibly be criminal in the case of any other actors? It is difficult to think of one.

An "exemption" for everyone would repeal the felony provision, totally frustrating legislative intent underlying its enactment.<sup>133</sup> Thus the only alternative for the courts in seeking a remedy for the discriminatory effect of the exemptions when applied to felony cruelty is to strike all the exemptions in full.

#### 5. Irrationality and the Mens Rea for Misdemeanor Animal Cruelty

The same argument can be made, of course, with respect to the misdemeanor animal-cruelty provision: that it is inherently irrational for the law to authorize anyone to commit unjustifiable cruelty to animals even though the person does not—as in the case of felony animal cruelty—act with malice or bad motive. If that argument is sound, consideration of redrafting the exemption to expand its scope as applied to misdemeanors becomes a moot point. The

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133. See Note, *The Effect of an Unconstitutional Exception Clause upon the Remainder of a Statute*, 55 Harv. L. Rev. 1030, 1035 (1942) (citing *People v. Morgan*, 246 P. 1024 (Colo. 1926)).

argument is not as convincing, however, in the misdemeanor context as when applied to an actor with bad motive or malice.

The mens rea for misdemeanor cruelty is “intentionally.”<sup>134</sup> The statute goes on to provide that “the word ‘intentionally’ refers to an act committed knowingly and without justifiable excuse.”<sup>135</sup> If the defendant is accused of the misdemeanor described as “torment[ing]” an animal, lack of justification also becomes an element of the crime. Likewise, the definition of “torment” includes reference to “unjustifiable pain, suffering, or death.”<sup>136</sup> These definitions make lack of justification an element of the misdemeanor. Justification is not an affirmative defense as to which the defendant in a criminal case carries the burden of proof by a preponderance of the evidence.<sup>137</sup> Rather, “the State must prove that defendant . . . without justifiable excuse” committed the act of cruelty alleged by the prosecution.<sup>138</sup>

Placing of the burden of proof on the prosecution to establish lack of justification will make one of the nine exemptions redundant in many cases: the exemption for “destruction of any animal for the purposes of protecting the public, other animals, property, or the public health.”<sup>139</sup> Any defendant who could establish applicability of that exemption would usually negate the prosecution’s case of lack of justification.

The prosecution’s burden to prove lack of justification also might render other exemptions likewise unnecessary in some fact settings. A district attorney would not charge a chicken farmer with cruelty for debeaking chickens, for example, since that procedure would be justifiable as a commonly used measure to prevent the birds from inflicting wounds on each other while in confinement.<sup>140</sup>

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134. N.C. GEN. STAT. § 14-360(a).

135. *Id.* § 14-360(c). This codifies the case-law rule, developed under the statute when the statutory mens rea was “willfully,” that the prosecutor’s evidence had to show that the defendant acted (or failed to act) “without just cause, excuse, or justification.” *State v. Fowler*, 205 S.E.2d 749, 751 (N.C. Ct. App. 1974). *Accord* *State v. Dickens*, 1 S.E.2d 837, 839 (N.C. 1939) (act of animal cruelty must be “without just cause, excuse or justification”).

136. N.C. GEN. STAT. § 14-360(c).

137. In North Carolina criminal law, the preponderance of the evidence instruction to the jury is given in terms of proof “to the satisfaction of the jury.” *State v. Andrews*, 572 S.E.2d 798, 801 (N.C. Ct. App. 2002) (affirmative defense of automatism); *Stave v. Davis*, 485 S.E.2d 329, 330 (N.C. Ct. App. 1997) (affirmative defense of entrapment).

138. *State v. Dietrich*, No. COA03-748, 2004 WL 1490064, at \*2 (N.C. Ct. App. July 6, 2004) (unpublished decision tabled at 600 S.E.2d 521); *see also* *State v. Neal*, 27 S.E. 81, 85 (N.C. 1897) (in animal cruelty prosecution “[i]t was not incumbent on the defendant to prove justification” as a matter of criminal procedure rather than specific statutory mandate). That is the general rule in the United States. *See, e.g.,* *Rushin v. State*, 267 S.E.2d 473 (Ga. Ct. App. 1980); *Barnett v. State*, 35 S.W.2d 441, 443 (Tex. Crim. App. 1931).

139. N.C. GEN. STAT. § 14-360(c)(4).

140. The “biological . . . training” exemption is unnecessary in a case of bona fide use of animals by a qualified instructor in a classroom setting, because the pain caused to the animals will be justifiable. *See* N.J. Soc’y for Prevention of Cruelty to Animals v. Bd. of Educ., 219 A.2d 200 (N.J. Super. Ct. 1966), *aff’d per curiam*, 227 A.2d 506 (N.J. 1967) (justifiable in high school science project to induce cancerous tumors in live chickens that will later be killed and dissected).

With respect to other commonly performed procedures affecting animals, the General Assembly in enacting exemptions could rationally be concerned that some triers of fact might find justification whereas others would not. Examples of this could include a veterinarian's docking a dog's tail or declawing a cat. A legislative pronouncement addressed to activities as to which triers of fact might disagree with respect to justification and that barred prosecution would be rational and not a denial of equal protection to actors whose acts of alleged cruelty are not of debatable justification. Such a clause in the cruelty statute would probably be more accurately described as a conclusive legislative declaration of justifiability rather than as an exemption. "Exemption" should refer only to an act or omission that is not justifiable, so that the would-be defendant would be free of culpability due to the proviso even though the prosecution could otherwise prove every element of the crime, including lack of justification.

A legislative or judicial cure would have to carefully negotiate the straits between language so specific as to be discriminatory and language so broad as to be unconstitutionally vague. It would be impossible for the legislature (or a court, for that matter) to cure the discrimination inherent in the present statute by creating a list that identifies additional actors (such as a farrier, dog groomer, movie director using animals, dog-show promoter, et cetera) whose acts or omission might fall into the category in which triers of fact could reach different conclusions on the issue of justifiability; yet any more general, "catch-all" phrase inserted to pick up overlooked actors likely would be void for vagueness. To avoid inadvertently depriving some group of the benefit of the statement of justifiability, broad language is required, such as "practices that are commonly accepted within an industry, profession, business, or sport." But limiting the expanded declaration of justifiability by reference to four specific categories of actor risks a judicial finding of discriminatory exclusion of actors engaging in commonly accepted practices respecting animals in other areas of activities. Perhaps the equal protection problem in the misdemeanor provisions of section 14-360 could be cured by extension if the nine exemptions were replaced by a broad statement such as, "Commonly accepted practices with respect to animals are justifiable." This leaves it to the courts to answer the question, "Justifiable by whom?" Actors in an industry? The general public? If the proviso answered the "by whom" question, void for vagueness problems would be substantially reduced.

Rewriting the nine existing exemptions to restrict them to activities of the specified actors that are commonly accepted practices probably would not cure the existing denial of equal protection. A horse trainer or pet motel operator, for example, would argue that he or she is as much entitled to be free from prosecution for engaging in commonly accepted practices within his or her profession as is a hog farmer or instructor in laboratory sciences.

Nonetheless, according a special benefit to just nine categories of actors while denying it to others similarly situated might pass muster under some

decisions of the United States Supreme Court that apply what can be called the part-by-part or step-by-step theory of what is valid governmental regulation that treats similarly situated persons differently. These cases find no equal-protection violation when a legislature has decided to regulate only part of a problem and leave similar issues for later consideration.<sup>141</sup> These equal-protection decisions do not require that there be a rational basis for deciding which part of a problem to regulate,<sup>142</sup> which step of many possible steps to take legislatively. They essentially give carte blanche to lawmakers.

However, there appears to be no United States Supreme Court decision upholding an exemption to a statute criminalizing specified activity under the step-by-step excuse for discriminatory legislation, and such an approach is certainly inconsistent with the equal-protection decisions by North Carolina courts dealing with such exemptions. The notion that partial regulation of a problem does not deny equal protection would have validated the criminal law held unconstitutional in North Carolina's *Glidden* case, a law that applied the prohibition to corporations formed after March 4, 1915, but not those previously incorporated.<sup>143</sup> The theory also would have required validating the ordinance in the *Cheek* case by which Charlotte took the "step" of banning certain massages by most actors but not barber shops and beauty shops.<sup>144</sup> In *State v. Greenwood*, involving the ordinance that criminalized operating billiards halls on Sunday but not a bowling alley, the supreme court rejected the partial regulation theory. The court declared,

The equal protection clauses [i.e., state and federal] do not require perfection in respect of classifications. In borderline cases, the legislative determination is entitled to great weight. However, this is not a borderline case. The Sunday closing ordinance here involved singles out and bans one particular business but permits other which provide facilities for recreation, sports and amusements, and potentially are equally disruptive.<sup>145</sup>

These cases apply the rational-basis test to exemptions to criminal laws that the regulation-by-"steps" theory evades. It is irrational to assume there is a commonly accepted practice that constitutes cruelty to animals done by the nine categories of actors protected by section 14-360 as to which triers of fact might

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141. See *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 819 (1969); *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 50-51 (1966), overruled on other grounds; *Healey v. Beer Inst.*, 491 U.S. 324 (1989); *Hughes v. Super. Ct. of Ca.*, 339 U.S. 460, 468-69 (1950).

142. Would the rational-basis test be satisfied by a supposition that members of the North Carolina General Assembly were aware of cruel practices impacting animals—considered justifiable by the legislators who believed that some triers of fact would disagree—that were done by veterinarians, hog farmers, hunters, and others benefiting from the nine exemptions, but were not aware of such practices by other actors frequently interacting with animals such as horse trainers and rodeo operators?

143. *State v. Glidden*, 46 S.E.2d 860 (N.C. 1948). See *supra* text accompanying note 111.

144. *Cheek v. City of Charlotte*, 160 S.E.2d 18 (N.C. 1968).

145. *State v. Greenwood*, 187 S.E.2d 8, 13 (N.C. 1972). Cf. *State v. Tanner*, 251 S.E.2d 705, 706 (N.C. Ct. App. 1979) (no denial of equal protection in a criminal law that prohibited possession of a firearm by felon who committed crime of violence but not nonviolent felony, not under step- or partial-regulation theory but under test providing that "[t]he equal protection clauses do not require perfect classification" (citing *Greenwood*)).

disagree concerning justifiability, but no such commonly accepted practices performed by nonprotected actors such as dog trainers, pet sitters, and rodeo operators. Therefore, reforming the nine exemptions to be declarations of justifiability of commonly accepted practices cannot cure the denial of equal protection of the law currently caused by section 14-360.

The legislature might be able to restrict the misdemeanor cruelty provision with a proviso—which could be invoked by any defendant—that commonly accepted practices are justifiable, but no court would ever “cure” the existing denial of equal protection in such a manner. Such a major rewriting of the statute is not an “extension” of any of the nine exemptions to cover everyone in the state. Any “extension” would have to allow additional actors to share the benefit of immunity from prosecution, even if the prosecution were able to establish beyond a reasonable doubt that the act or omission of the defendant was not justifiable. The “commonly accepted” practices solution, rather than being an extension of exemptions, is a rewriting of the statute, something no court would do as a remedy for its holding that a portion of the statute is unconstitutionally underinclusive, for such rewriting is strictly a legislative function. As the United States Supreme Court declared as recently as 2006 with respect to its own power to cure a statute containing an unconstitutional proviso, “[M]indful that our constitutional mandate and institutional competence are limited, we restrain ourselves from ‘rewrit[ing] state law to conform it to constitutional requirements’ even as we strive to salvage it.”<sup>146</sup> This limitation on judicial power is based on the conclusion that such a rewriting “entail[s] quintessentially legislative work.”<sup>147</sup>

In sum, then, in the context of misdemeanor cruelty, no judicial cure of the unconstitutional denial of equal protection is possible by rewriting the scope of the exemptions. The exemptions must be stricken by the courts.

## V

### STANDING TO ASSERT THE UNCONSTITUTIONALITY OF THE EXEMPTIONS

#### A. The Majority Rule: A Conviction Obtained Prior to Any Judicial Cure Must Be Reversed

Even if a court could cure the unconstitutionality now infecting section 14-360, any defendant convicted of animal cruelty before such a cure was devised would be entitled to reversal of the conviction and would thus have standing to challenge the constitutionality of the exemptions.

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146. *Ayotte v. Planned Parenthood*, 126 S. Ct. 961, 968 (2006) (quoting *Virginia v. Am. Booksellers Assn., Inc.*, 484 U.S. 383, 397 (1988)).

147. *Ayotte*, 126 S. Ct. at 968. *See also* *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (stating that the court will not cure constitutional violation in part of act of Congress if “valid and invalid provisions [are] so intertwined that the Court would have to rewrite the law to allow it to stand”) (describing holding of *Hill v. Wallace*, 259 U.S. 44, 70–72 (1922)).



Because it is unlikely—almost inconceivable, given precedent—that the North Carolina Supreme Court would “cure” the denial of equal protection by rewriting the animal-cruelty exemptions, the cure would have to be, instead, excision of all the exemptions. If such a cure were ordered and a defendant convicted under pre-cure law, all but one of the pertinent decisions of the North Carolina Supreme Court would require reversal of the conviction. The rule emerging from these cases is that a conviction obtained under a criminal statute containing discriminatory exemptions cannot stand and a prosecution pending under such a statute must be quashed, even though the unconstitutionality can be cured. Thus in *Glidden*,<sup>148</sup> in which a post-1915 corporation was prosecuted for polluting state waters under a statute exempting pre-1915 corporations from criminal responsibility, the exemption was held to be unconstitutionally discriminatory. The Supreme Court affirmed a judgment quashing the prosecution, even though it was clear the defendant understood that the statute sought to declare what it had done to be a crime. An earlier case, *State v. Nash*,<sup>149</sup> seems to state a flat rule that a conviction under a criminal statute containing a discriminatory provision cannot stand, despite a judicial rewriting that eliminates the discrimination. In *Nash*, the state law criminalized the sale of “any spirituous liquor” in “dry” counties and cities but exempted sale of “wines from grapes, blackberries, currants, gooseberries, raspberries, and strawberries manufactured in this State” sold in sealed bottles and not to be consumed on the premises where the wine was sold.<sup>150</sup> A Raleigh ordinance had adopted the “dry” option, and the defendant sold wine in Raleigh. The jury specially found that the defendant sold wine made from North Carolina grapes in a sealed bottle not to be consumed on the premises. The state appealed the judgment of acquittal on the ground that the exemption should have been ignored—in effect stricken from the statute—because the discrimination in favor of in-state produce violated the Commerce Clause of the federal Constitution. Holding the state could not appeal, the court declared it nevertheless would address the state’s argument:

The discrimination may be inoperative when it affects injuriously the interests and rights of those who undertake to dispose of similar products of other States introduced into this, but it cannot lop off an essential exception or qualification of the penal statute, and leave the penal part of it in force. *It must stand or fall in the form which the legislative will has assumed . . .*<sup>151</sup>

A majority of U.S. jurisdictions agree that a conviction obtained under a statute that is unconstitutional because of an exemption that denies equal protection of the law cannot stand, even when the conduct of the defendant was

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148. *State v. Glidden*, 46 S.E.2d 860 (N.C. 1948); *see supra* notes 109–11 and accompanying text.

149. 2 S.E. 645 (N.C. 1887).

150. *Id.* at 646.

151. *Id.* (emphasis added). *Nash* is not factually on point because the conduct of the accused fell within the exemption and the state’s argument was that the defendant should have known the exemption was unconstitutional; moreover, because the court held the state could not appeal, this pronouncement is dicta.

clearly not within the exemption. A 1999 case decided by the Georgia Supreme Court considered the conviction of a defendant for driving a motor vehicle while having traces of marijuana in his blood. The statute under which he was convicted exempted drivers who had legally ingested marijuana.<sup>152</sup> Holding that the exemption could not survive rational-basis scrutiny, the court reversed the conviction because the statute denied equal protection of the law.<sup>153</sup> Since the defendant had made no claim to have legally used marijuana, minority rule states would have excised the exemption while affirming the conviction. Similar majority rule decisions are also found in cases from California,<sup>154</sup> Florida,<sup>155</sup> Kentucky,<sup>156</sup> Mississippi,<sup>157</sup> Ohio,<sup>158</sup> and Tennessee.<sup>159</sup>

The majority rule has been aptly defended as essential to accord standing to individuals who alert the courts to an unconstitutional exemption in a criminal statute. A 1996 case from Oklahoma considered an obscenity statute that exempted from criminal prosecution a nonmanagerial employee of a movie theater that displayed an obscene movie, but not a nonmanagerial employee of a bookstore offering obscene magazines for sale.<sup>160</sup> The majority of the Oklahoma Court of Criminal Appeals, affirming the conviction of the bookstore clerk, held the exemption rational because a bookstore employee could direct customers to obscenity, whereas the theater ticket-salesman could

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152. *Love v. State*, 517 S.E.2d 53 (Ga. 1999). Persons with traces of legally ingested marijuana in their blood would be liable only if the amount thereof were proved to have rendered them “incapable of driving safely.” GA. CODE ANN. § 40-6-391(b) (2006). Under this subsection of the statute, the jury hung on the issue of whether the defendant was driving while impaired due to marijuana, but under the broader statute the jury convicted on the strict-liability crime.

153. *Love*, 517 S.E.2d at 57.

154. *Ghafari v. Municipal Ct.*, 150 Cal. Rptr. 813 (Cal. Ct. App. 1978) (statute that criminalized wearing mask in public to conceal identity, with exemption for masks worn for amusement, denied equal protection; thus, prosecution of defendant who wore mask for political reasons was quashed); *but see* *People v. Hofsheier*, 129 P.3d 29, 42 (Cal. 2006) (favorably citing in dictum the minority rule case of *People v. Liberta*, 474 N.E.2d 567 (N.Y. 1984)).

155. *Rollins v. State*, 354 So. 2d 61 (Fla. 1978) (statute criminalizing “play[ing] in any billiard parlor,” by a person under twenty-one with an exemption for “[p]ersons playing billiards in bona fide bowling establishments,” denied equal protection; the prosecution of the operator of billiard parlor was quashed).

156. *Burrow v. Kapfhammer*, 145 S.W.2d 1067 (Ky. 1940) (granting a restaurateur injunction against enforcement of overtime pay statute, violation of which was misdemeanor carrying thirty-day jail sentence (1940 Ky. Acts 421–22) because of exemption granted to hotels for employees doing cooking, waiting tables, and washing dishes).

157. *Tatro v. State*, 372 So. 2d 283 (Miss. 1979) (statute criminalizing fondling of child applicable only to “any male person,” thereby exempting female fondlers, denied equal protection, requiring reversal of male defendant’s conviction; dissent would have affirmed conviction upon curing statute by striking word “male”).

158. *City of Cleveland v. Maistros*, 762 N.E.2d 1065 (Ohio Ct. App. 2001) (statute criminalizing soliciting a person of the same gender for sex, thereby exempting heterosexual solicitation, denied equal protection, requiring reversal for the defendant who had made a homosexual solicitation).

159. *State v. Whitehead*, 43 S.W.3d 921 (Tenn. Crim. App. 2000) (statute criminalizing county commissioner’s receiving payments from party awarded county contracts not applicable in some counties denied equal protection, requiring reversal for defendant acting in county covered by statute).

160. *Trim v. State*, 909 P.2d 841 (Okla. Crim. App. 1996).

not.<sup>161</sup> In dissent, Presiding Judge Johnson could find no rational basis for the discrimination. Addressing the appropriate remedy, he stated,

Equal protection emphasizes a difference in treatment between classes of individuals whose situations are the same. . . . It is obvious to me that the members of the class within [the protection of the obscenity statute] will never be heard to complain because they are criminally exempt under the statute. Thus, only one outside the class, but similarly circumstanced, will ever be heard to cry “foul” at the different treatment. We have that very scenario before us at this time. . . . I would hold [the statute] unconstitutional as it denies equal protection to individuals whose situations are arguably indistinguishable. I would further reverse this case with instructions to dismiss.<sup>162</sup>

## B. The Minority Rule: The Conviction Stands

The leading American case applying the minority rule is *People v. Liberta*,<sup>163</sup> decided by New York’s highest court in 1984. It addressed a defendant’s conviction under a rape statute that exempted rapes of men committed by women and rapes by men of their wives. Holding that the exemptions were unconstitutional as denying equal protection to rapists who did not qualify for their protection, the Court of Appeal cured these defects by excising both exemptions and then affirmed the defendant’s conviction for violating the reformed statute, stating,

The defendant cannot claim that our decision to retain the rape and sodomy statutes, and thereby affirm his conviction, denies him due process of the law. The due process clause of the Fourteenth Amendment requires that an accused have had fair warning at the time of his conduct that such conduct was made criminal by the State (see *Bouie v. City of Columbia*, 378 U.S. 347). Defendant did not come within any of the exemptions which we have stricken, and thus his conduct was covered by the statutes as they existed at the time of his attack . . . .

Neither can it be said that by the affirmance of his conviction the defendant is deprived of a constitutionally protected right to equal protection. The remedy chosen by our opinion is to extend the coverage of the provisions for forcible rape and sodomy to all those to whom these provisions can constitutionally be applied. While this remedy does treat the defendant differently than, for example, a married man who, while living with his wife, raped her prior to this decision, the distinction is rational inasmuch as it is justified by the limitations imposed on our remedy by the notice requirements of the due process clause (US Const, [amend. XIV]), and the prohibition against ex post facto laws (US Const, art I, § 10). Thus, for purposes of choosing the proper remedy, the defendant is simply not similarly situated to those persons who were not within the scope of the statutes as they existed prior to our decision.<sup>164</sup>

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161. *Id.* at 844.

162. *Id.* at 845.

163. 474 N.E.2d 567 (N.Y. 1984), *cert. denied*, 471 U.S. 1020 (1985).

164. *Id.* at 579.

Based on this reasoning, the minority rule has been applied to preserve criminal convictions under unconstitutional statutes in Alabama,<sup>165</sup> Alaska,<sup>166</sup> Illinois,<sup>167</sup> and South Carolina,<sup>168</sup> as well as New York.

The logic of *Liberta* is flawed. Asserting that a statute with an unconstitutional exemption gives notice to a nonexempted potential defendant that an act he may commit is a crime ignores the fact that the potential defendant cannot know whether a court addressing the unconstitutional exemption will cure the denial of equal protection by excising the exemption or by voiding the entire statute.<sup>169</sup> That the potential defendant cannot know what the statute will criminalize until a court has addressed it is true, even if the statute is subject to a severability clause, for such a clause is not binding on courts.<sup>170</sup> At the most, it raises a presumption that the proper remedy is to strike the unconstitutional exception rather than to void the entire statute.<sup>171</sup>

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165. *Williams v. State*, 494 So. 2d 819 (Ala. Crim. App. 1986) (excising spousal exemption from forcible sodomy statute, quoting liberally from *Liberta*); *Merton v. State*, 500 So. 2d 1301 (Ala. Crim. App. 1986) (same treatment of rape statute).

166. *Plas v. State*, 598 P.2d 966 (Alaska 1979) (striking “by a female” from a prostitution statute to cure denial of equal protection extending its scope to male prostitutes, and affirming conviction of female defendant for violation, with no discussion of due process and equal protection problems addressed in *Liberta*).

167. *People v. M.D.*, 595 N.E.2d 702 (Ill. App. Ct. 1992) (striking spousal exemption from one portion of rape statute to cure denial of equal protection, while affirming conviction under another provision when victim was defendant’s wife).

168. *State v. Watkins*, 191 S.E.2d 135 (S.C. 1972), *vacated*, 413 U.S. 905 (1973) (affirming obscenity conviction after excising from statute unconstitutional exemption for films with Motion Picture Association of America seal of approval).

The minority rule has also been applied to strike an unconstitutional exemption from a criminal sentencing provision. *See State v. Tester*, 879 S.W.2d 823 (Tenn. 1994) (voiding as denial of equal protection provision that defendant convicted of second drunk-driving conviction in three of state’s counties was subjected to mandatory forty-five-day term of work release, whereas in other counties sentence was forty-five days in jail); *Ex parte Tullos*, 541 S.W.2d 167 (Tex. Crim. App. 1976) (sentencing statute providing jail term for seventeen-year-old male drunk drivers but not seventeen-year-old females denied equal protection, but males could be subjected to confinement after judicial cure by striking female exemption). But an exemption affecting only the applicable sentence is distinguishable from an exemption that negates criminal responsibility, which affects whether a potential defendant is given notice of what conduct is criminal. *See Gryger v. Burke*, 334 U.S. 728, 732 (1948); *McDonald v. Mass.*, 180 U.S. 311, 313 (1901).

169. *See Note, The Effect of an Unconstitutional Exception Clause, supra* note 133: “By far the most common fate of statutes containing unconstitutional exceptions is complete destruction. And generally the broader the exception the more likely are courts to void the entire statute.” *Id.* at 1030. “[C]ourts have usually refused to extend the scope of a criminal statute” by excising the exemption. *Id.* at 1031.

For the quite different argument that at least federal courts are compelled to apply the majority rule by the grant to them of judicial power in Article III of the U.S. Constitution, *see* Bruce K. Miller, *Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of Heckler v. Mathews*, 20 HARV. C.R.-C.L. L. REV. 79, 105, 115–16 (1985).

170. *See Sheffield v. Consolidated Foods Corp.*, 276 S.E.2d 422 (N.C. 1981); *State ex rel. Andrews v. Chateau X, Inc.*, 250 S.E.2d 603 (N.C. 1979), *vacated on another ground*, 445 U.S. 947 (1980). 2 SINGER, *supra* note 71, § 44.8 at 585–86; John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203 (1993).

171. *See Heckler v. Mathews* 456 U.S. 728 (1984); Note, *The Effect of an Unconstitutional Exception Clause, supra* note 133, at 1036 (severability clause “merely serves to indicate a presumption of severability”). In North Carolina the presumption appears to be fairly strong. *See Fulton Corp. v. Faulkner*, 481 S.E.2d 8 (N.C. 1997).

Certainly, too, one can disagree with *Liberta's* assertion that under equal-protection analysis one who rapes his fiancée or live-in lover is not “similarly situated” to one who rapes his wife. Each such rapist has violated without consent the body of a woman who has placed faith and trust in him.<sup>172</sup> Courts applying the majority rule can ascertain no rational basis for different treatment under the criminal law of such actors. It thus becomes necessary to reverse the conviction of the defendant who rapes his fiancée or lover prior to invalidation of the spousal exemption because persons who raped their spouses on the same day the convicted defendant acted cannot be prosecuted.

In cases involving noncriminal statutes, the United States Supreme Court has applied to litigants to their disadvantage a statute the Court reformed to cure an unconstitutional exemption.<sup>173</sup> It has not, however, saved a criminal conviction by applying the minority rule.<sup>174</sup> The distinction rests on the due-process rule that in the criminal context the statutory language must clearly advise a potential defendant what conduct will be punished by imprisonment. Justice Harlan considered the issue of appropriate remedy to be presented in the 1970 *Welsh* case,<sup>175</sup> in which the defendant had been convicted of refusing to submit to induction into the armed services under a statutory scheme that exempted religious-founded conscientious objectors. Unlike the majority, Harlan was unable to construe the exemption to extend to objectors adhering to nontheistic religions, which, in his view, made the exemption unconstitutional. Although recognizing that the Court had in civil cases cured a denial of equal protection arising out of a discriminatory exemption by striking the exemption,<sup>176</sup> since *Welsh* had been convicted under an unconstitutional criminal statute, Harlan declared, “[I]t is clear to me that this conviction must be reversed . . . .”<sup>177</sup>

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172. Justice Ginsburg quite clearly disagrees with the notion of *Liberta* that punishing the current defendant, but not a prior accused because of the bar of *ex post facto* application of the reformed statute, does not deny equal protection: “Nor is prospective extension of a tax, penalty or other burden an altogether satisfactory response, for that would leave the challenger unrelieved with respect to past unequal treatment.” Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301, 319 (1979). She then applies this reasoning to the criminal case of *Tatro v. State*, 372 So. 2d 283 (Miss. 1979), criticizing the dissenting opinion for proposing to affirm a conviction of a male defendant for fondling a child under a statute applicable only to a “male person” by excising the word “male,” thereby eliminating the exemption for female fondlers. The dissent, according to Justice Ginsburg, overlooked that “persons similarly situated”—females—were not subject to prosecution at the time the defendant acted. *Id.* at 319–20 n.114.

173. *See, e.g., Heckler v. Mathews*, 465 U.S. 728 (1984), strongly criticized in Miller, *supra* note 169; *Orr v. Orr*, 440 U.S. 268 (1979).

174. *Cf. Truax v. Corrigan*, 257 U.S. 312, 335 (1921) (“not clear” if defendant convicted despite exemption invalid under equal protection analysis entitled to reversal of conviction of statute criminalizing picking business) (dictum).

175. *Welsh v. United States*, 398 U.S. 333 (1970).

176. 398 U.S. at 361 (Harlan, J., concurring).

177. *Id.* at 362. Justice Ginsburg seems to agree with Justice Harlan’s view that reversal was necessary after he interpreted the exemption in a way that made it unconstitutional. *See* Ginsburg, *supra* note 172, at 308–10.

### C. Lack of Clarity in North Carolina after *McCleary*

In *McCleary*, the North Carolina Court of Appeals, it has been shown, excised the unconstitutional exemption in an anti-lottery statute in favor of homeowners' organizations, and then affirmed the defendant's conviction. This was done without citing any case, including the North Carolina Supreme Court's decision in *Glidden*, which had reversed a defendant's conviction upon holding an exemption favoring pre-1915 corporations in a criminal pollution statute to be unconstitutional. *Glidden* surely required reversal in *McCleary*, unless *McCleary* was distinguishable because the statute at issue there was subject to a severability clause, while that in *Glidden* was not.

After the North Carolina Supreme Court granted review in *McCleary*,<sup>178</sup> both sides filed new briefs that focused the court's attention away from the issue whether the court of appeals could affirm the lottery operator's conviction after the exemptions from the anti-gambling statute had been excised. The defense brief presented four distinct bases for reversal, which were unrelated to the question whether a conviction could be affirmed in such circumstances. On the last page of the brief, defense counsel devoted only eight garbled lines to the latter point and cited not a single authority, even though, as shown above, several North Carolina Supreme Court decisions had reversed a conviction in such a situation.<sup>179</sup>

On the other hand, the state made no attempt to defend the asserted power exercised by the court of appeals to affirm a conviction under a criminal statute after curing the constitutional defect by striking its unconstitutional exemptions. Instead, the prosecution argued that the court of appeals was wrong in invalidating the exemptions for raffles and bingo games conducted by homeowners' or property owners' associations, on the ground that the proper construction of the statute was that the proceeds of such endeavors had to be spent on land or buildings that the public could use.<sup>180</sup>

The six-line per curiam opinion of the North Carolina Supreme Court in *McCleary* does not address in any way whether the conviction could be affirmed after excision of the unconstitutional portion of the statute. Instead it considers only whether the statute was constitutional after that act of reformation. The opinion stated that the "thoughtful, well-reasoned, and thoroughly documented majority opinion" of the court of appeals "justif[ied] its decision sustaining the

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178. 308 S.E.2d 883, 897 (N.C. App. 1983).

179. Def.-Appellant's New Br., *State v. McCleary*, No. 13A84, Supreme Court of North Carolina, at 9 (filed Mar. 13, 1984). The eight lines of "argument" are as follows:

Defendant McCleary contends that the North Carolina legislative [sic] had a particular scheme or plan as to what classes of organizations it intended to exempt. If it appears that certain classes selected by the legislative [sic] as exempt constitute unconstitutional class legislation in deriving the classes was [sic] likewise unconstitutional. Defendant further contends that for the Court to find two classes to be unconstitutional . . . is in effect taking over the legislative process and developing it [sic] own plan or scheme as to what organizations should be exempt.

180. *Id.* at 11-12.

constitutionality of the questioned statutes.”<sup>181</sup> Whether this brief per curiam opinion by the North Carolina Supreme Court is a decision on the merits that it was proper to affirm the conviction after reforming the statute to make it constitutional can be debated, because that court has explained that the reason why its per curiam decisions have the same force as precedent as “regular” opinions is that the former contain citations to authorities.<sup>182</sup> The *McCleary* per curiam cited only to the very statute whose constitutionality had been cured by the lower court.

Assuming, however, that the *McCleary* per curiam is precedent that in some cases a conviction obtained under an unconstitutional statute can be affirmed by an appellate court that cures the unconstitutionality, the decision cannot be read as overruling *Glidden* and the general rule employed by the North Carolina Supreme Court that reversal of a conviction is often required in such a circumstance. A supreme court precedent such as *Glidden* will not be held to have been overruled by implication unless the inference of intent to do so is “compelling.”<sup>183</sup> At most, the *McCleary* per curiam can be viewed as holding that *Glidden* is distinguishable when, as in *McCleary*, the unconstitutional criminal statute is subject to a severability clause, creating the opportunity in some cases of severability clauses to affirm the conviction obtained under an unconstitutional statute—that is, to apply the minority rule.

#### D. Severability Clauses as a License to Cure?

The short *McCleary* per curiam certainly does not establish that North Carolina courts should employ the minority rule in every situation in which a curable unconstitutional criminal statute is subject to a severability clause. In fact, the severability clause in the 1998 session law that created six of the nine exemptions found in section 14-360 and re-enacted the hunters’ exemption is readily distinguishable from that before the courts in *McCleary*.

The clause in *McCleary* appeared in a relatively short enactment and was addressed narrowly to “any provision” of the law and to “any application there to any person or circumstance.”<sup>184</sup> By the latter language, even a subsection of one of the affected gambling statutes could be invalid in part but valid as applied in different circumstances. The severability clause arguably applicable to seven of the nine exemptions in section 14-360 applies to “any section or provision” of the lengthy bill to which it was attached<sup>185</sup> but does not address the possibility that a “provision” could be constitutional in one application but not in another. Further, the severability clause in *McCleary* was part of a short

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181. *State v. McCleary*, 316 S.E.2d 870 (N.C. 1984).

182. *See Bigham v. Foor*, 158 S.E. 548, 549 (N.C. 1931) (“*Per curiam* decisions stand upon the same footing as those in which *fuller citations* of authorities are made and more extended opinions are written.”) (emphasis added); *Hyder v. Bd. of Rd. Trustees*, 130 S.E. 497, 497 (N.C. 1925) (explaining that a *per curiam* opinion “supported by full citation of authorities” has “force as a precedent”).

183. *Riley v. Debaer*, 547 S.E.2d 831, 833 (N.C. Ct. App. 2001).

184. *See supra* note 118.

185. *See supra* note 120.

session law dealing solely with criminal laws concerning gambling.<sup>186</sup> After section 1 of this law amended a statute dealing broadly with gambling, all other sections of the law concerned the narrow area of gambling in the form of bingo and raffles.<sup>187</sup>

The severability clause arguably applicable to seven of the section 14-360 exemptions,<sup>188</sup> on the other hand, appears to be what a scholar writing in the *North Carolina Law Review* calls a “general severability clause” in contradiction to one that is “specific.”<sup>189</sup> The severability clause at issue in considering the effect of the per curiam affirmance in *McCleary*—whether a person convicted of violating a criminal statute is entitled to a reversal of his or her conviction because of the unconstitutionality of its exemptions—does not apply to every statute in effect in North Carolina. But it is applicable to hundreds of them. This severability clause was appended to the state’s budget bill for 1999, a law that not only included matters relating to finance but which also enacted or amended scores of statutes on myriad topics tacked onto the budget bill. The revision of section 14-360 was among those “tack-on” provisions. The severability clause at issue is found at the end of a session law that was 399 pages long and comprised of thirty-five parts, each containing numerous sections and often subsections as well. Provisions dealing with the budget—mainly appropriations measures—comprise about ninety percent of the 399 pages. Other types of legislation in the session law concerned reporting requirements and regulatory and administrative changes. Only six and one half of the 399 pages in the bill made changes with respect to criminal law.<sup>190</sup>

Courts are quick to deny the broadest possible effect to general severability clauses. In a case from Indiana,<sup>191</sup> the state supreme court considered the effect of what it called a “general severability clause” that literally applied to all sections of the Indiana Code of 1976. The court declared that because the severability clause applied to so many provisions, the notion was “ludicrous” that the Indiana legislature had intended to preclude courts from holding that the relationship between two related statutes was such that the unconstitutionality of one could not lead to a holding that the other statute also had to fall.<sup>192</sup> The high court of Maryland held that a severability proviso

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186. N.C. LAWS ch. 893 (1979). Section 8 is the severability clause, quoted in *supra* note 120. The statute occupies just over three pages in the volume of 1979 laws. It substantively altered only four sections of the General Statutes and made conforming technical language changes in four more.

187. *Id.* §§ 2–7, 10–11.

188. Section 30.5 of the budget act, N.C. LAWS ch. 212 (1998), provides, “If any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part so declared to be unconstitutional.”

189. Nagle, *supra* note 170, at 243 (“Severability clauses include both specific provisions in a particular statute detailing which provisions of that statute are severable and general severability clauses stating that all statutes are severable.”).

190. *See* N.C. LAWS ch. 212, §§ 17.16, 17.19 (1998).

191. *Ind. Educ. Employment Relations Bd. v. Benton Cmty. Sch. Corp.*, 365 N.E.2d 752, 762 (Ind. 1977).

192. *Id.*



applicable by its terms to all statutes enacted in Maryland after July 1, 1973, that did not contain a nonseverability clause, was “merely declaratory of an established rule of construction” found in the case law.<sup>193</sup>

The point is this: A potential defendant who is not protected by any exemption who considers future actions that might constitute cruelty to animals but who believes the exemptions to section 14-360 are plainly unconstitutional will wonder whether *Glidden* would apply to him, quashing his prosecution, or whether *McCleary* would apply, permitting his conviction. Since *McCleary* is an exception to general applicability in North Carolina of the majority rule requiring acquittal if charges are brought, and because the severability clause in *McCleary* was much narrower than that applicable to section 14-360, the potential defendant is not put on notice as to what will happen to him. Due process considerations require that judicial expansion of the *McCleary* remedy to criminal statutes covered by a general severability clause, not written in terms of specific applications, be prospective only in application. They require that a defendant obtain reversal of his conviction for animal cruelty in the litigation in which an appellate court does expand *McCleary* in such manner.

In any event, *McCleary* can apply only to the seven of section 14-360’s nine exemption provisions first enacted. The last two—for producers of aquatic species and producers of food for humans and animals<sup>194</sup>—were added to section 14-360 in 1999 by a session law that did not contain a severability clause.<sup>195</sup> Whether this means the severability clause attached to the 1998 law that added seven exemptions was nullified is uncertain.<sup>196</sup> It also need not be decided, because at present, a nonexempt defendant who is convicted of animal cruelty in violation of section 14-360 can seek reversal of his or her conviction under *Glidden* and the majority rule. The defendant can evade application of *McCleary* by arguing only that he or she is denied equal protection by the

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193. *Barry Properties, Inc. v. Fick Bros. Roofing Co.*, 353 A.2d 222, 234 (Md. 1976).

194. N.C. GEN. STAT. § 14-360(c)(2), (2a), *quoted supra* note 1.

195. N.C. LAWS ch. 209 (1999), containing ten sections dealing primarily with the regulation of fisheries and shellfish.

196. *Nolichuckey Sand Co., Inc. v. Huddleston*, 896 S.W.2d 782, 790–91 (Tenn. App. 1994), involved constitutional problems with a property-tax statute enacted in 1985 without a severability clause. It replaced a similar 1984 tax statute that had such a clause. Referring to the 1985 law as a new act, not an amendment, the court held it should not rely on the severability clause in the 1984 act in deciding whether to invalidate all of the 1985 law but instead on common-law principles of severability. This case is distinguishable because the inclusion of the already-enacted seven exemptions in the text of the 1999 revision of section 14-360 seems more properly classified as a re-enactment for the purpose of amending rather than creating a new act. On the other hand, the re-enactment of an anti-pornography statute that dropped a severability clause contained in its predecessor was described by the court in *State v. Honore*, 564 So. 2d 345, 350 (La. Ct. App. 1990), as a re-enactment without substantial changes. Nevertheless, the court severed the unconstitutional part of the new law, not based on the severability clause in the prior statute, but based on case-law approaches to severability in Louisiana. *Honore* is factually quite similar to the problem raised by the 1999 “re-enactment” of section 14-360.

*People v. District Court*, 834 P.2d 181, 189–90 n.10 (Colo. 1992), involved constitutional problems with 1988 changes to some of the sections of the state’s death penalty statute. The 1984 legislature had added a severability provision to the law in the form of a codified section. Because it was codified, it was held applicable to the 1988 amendments. The problem raised by the North Carolina animal-cruelty statute is distinguishable because the 1998 severability clause was not codified.

existence of the aquatic species and food production exemptions, which are not subject to a severability clause.

## VI

### CONCLUSION

The nine exemptions that have been appended over the years to North Carolina's criminal animal-cruelty statute, section 14-360, deprive nonprotected actors of equal protection of the law. Cure by extension of the exemptions is impossible. Rather, upon holding the exemptions unconstitutional, a court would cure the constitutional defect by excising them from the statute.

Under the remedial law employed in North Carolina, any defendant prosecuted for violating section 14-360 has standing to assert the statute's invalidity due to its discriminatory exemption. If *Glidden* controls, North Carolina courts will reverse that defendant's conviction even while curing the constitutional defect.

This article has focused on exemptions in the North Carolina criminal animal-cruelty statute, but similar equal-protection issues are raised by exemptions in a majority of other states' animal-cruelty statutes. All such statutes containing exemptions that are absolute or qualified—as well as those containing what are termed herein as legislative declarations of justifiability of an act causing pain or death to an animal—are collected in the appendix that follows.

Georgia Code section 16-12-4(e) surely raises constitutional problems of equal protection as serious as those that North Carolina's exemptions present. One can count eighteen exempt categories in the Georgia statute, and they apply to both misdemeanor and felony cruelty, the latter constituting malicious maiming or killing of an animal.<sup>197</sup>

Kentucky provides at least eleven exemptions applicable to misdemeanor cruelty<sup>198</sup> and to felony torture of a dog or cat.<sup>199</sup> Montana's statute offers at least eight, applicable to misdemeanor cruelty and to felony cruelty, arising out of a

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197. GA. CODE ANN. § 16-12-4(c) (2006). Since the legislative intent in Georgia is, as with North Carolina, clearly to provide an exemption to prosecutions for felony cruelty, the limiting clause in the Georgia exemption proviso purporting to restrict the exemptions to "conduct which is otherwise permitted under the laws of this state or of the United States," GA. CODE ANN. § 16-12-4(e)—reminiscent of the "lawful activities" language in North Carolina's section 14-360—almost certainly cannot be construed literally. No Georgia or federal law permits killing or maiming an animal "maliciously." Thus, a literal interpretation of the Georgia restriction would disregard the words that introduce the exemptions—"[i]he provisions of this Code section shall not be construed as prohibiting"—and reform it to exclude subsection (c) of the section, the felony provision. The predicted interpretation is that the "conduct otherwise permitted" language refers to lawful conduct in connection with which the unlawful felonious cruelty was committed.

198. KY. REV. STAT. ANN. § 525.130(2) (2006). I exclude subdivisions (c) and (i) thereof as describing actions that are justifiable.

199. *Id.* § 525.135(4).

second conviction for violating the statute.<sup>200</sup> Maybe the courts of Kentucky, Montana, and other states can find a way to give a narrow construction to what appear to be absolute exemptions applied to misdemeanor cruelty, saving them from an equal-protection attack under the step-by-step theory of regulation. And maybe not.

At the very least, an increased amount of litigation concerning the constitutionality of exemptions in criminal animal cruelty statutes can be predicted.

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200. MONT. CODE ANN. § 45-8-211(4) (2005). The felony provision is subsection (2)(a) of the statute.

APPENDIX<sup>201</sup>

This Appendix reproduces the text of nonliability provisions found in criminal animal-cruelty statutes in American states (other than North Carolina) and the District of Columbia. Exemptions that appear to be basically absolute are in bold face. Exemptions that are qualified are in italics. Provisions in regular Roman typeface are considered to be not exemptions at all but statements by the legislature of conduct respecting animals that is justified and for that reason would not be a violation of the animal-cruelty prohibition.

**ALABAMA STATUTES**

§13A-11-246

This article shall not apply to any of the following persons or institutions:

**(1) Academic and research enterprises that use dogs or cats for medical or pharmaceutical research or testing.**

(2) Any owner of a dog or cat who euthanizes the dog or cat for humane purposes.

*(3) Any person who kills a dog or cat found outside of the owned or rented property of the owner or custodian of the dog or cat when the dog or cat threatens immediate physical injury or is causing physical injury to any person, animal, bird, or silvicultural or agricultural industry.*

(4) A person who shoots a dog or cat with a BB gun not capable of inflicting serious injury when the dog or cat is defecating or urinating on the person's property.

(5) A person who uses a training device, anti-bark collar, or an invisible fence on his or her own dog or cat or with permission of the owner.

**ALASKA STATUTES**

§ 11.61.140

(c) It is a defense to a prosecution under this section that the conduct of the defendant

*(1) was part of scientific research governed by accepted standards;*

(2) constituted the humane destruction of an animal;

*(3) conformed to accepted veterinary or animal husbandry practices;*

*(4) was necessarily incidental to lawful fishing, hunting or trapping activities;*

*(5) conformed to professionally accepted training and discipline standards.*

*(e) This section does not apply to generally accepted dog mushing or pulling contests or practices or rodeos or stock contests.*

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201. Amy Kalman, Duke Law School class of 2006, is largely responsible for the preparation of this Appendix.

**ARIZONA REVISED STATUTES**

§ 13-2910.06. DEFENSE TO CRUELTY TO ANIMALS AND BIRD FIGHTING

**It is a defense to sections 13-2910, 13-2910.01, 13-2910.02, 13-2910.03 and 13-2910.04 that the activity charged involves the possession, training, exhibition or use of a bird or animal in the otherwise lawful sports of falconry, animal hunting, rodeos, ranching or the training or use of hunting dogs.**<sup>202</sup>

§ 13-2910.05. EXEMPT ACTIVITIES

**Activity involving the possession, training, exhibition or use of an animal in the otherwise lawful pursuits of hunting, ranching, farming, rodeos, shows and security services shall be exempt from the provisions of sections 13-2910.01, 13-2910.02, 13-2910.03 and 13-2910.04.\***

**ARKANSAS CODE**

§ 5-62-110. DEFINITIONS

(b) Nothing in this section . . . shall be construed as prohibiting the shooting of a bird or other game for the purpose of human food.

**COLORADO REVISED STATUTES**

§ 18-9-201.5. SCOPE OF PART 2.

*(1) Nothing in this part 2 shall affect accepted animal husbandry practices utilized by any person in the care of companion or livestock animals or in the extermination of undesirable pests as defined in articles 7, 10, and 43 of title 35, C.R.S.*

§ 18-9-202. CRUELTY TO ANIMALS - AGGRAVATED CRUELTY TO ANIMALS - NEGLECT OF ANIMALS - OFFENSES - REPEAL.

*(VII) This paragraph (a.5) does not apply to the treatment of pack or draft animals by negligently overdriving, overloading, or overworking them, or the treatment of livestock and other animals used in the farm or ranch production of food, fiber, or other agricultural products when such treatment is in accordance with accepted agricultural animal husbandry practices, **the treatment of animals involved in activities regulated pursuant to article 60 of title 12, C.R.S. [dealing with horse racing], the treatment of animals involved in research if such research facility is operating under rules set forth by the state or federal government, the treatment of animals involved in rodeos, the treatment of dogs used for legal hunting activities, wildlife nuisances, or to statutes regulating activities concerning wildlife and predator control in the state, including trapping.***

§ 18-9-204. ANIMAL FIGHTING - PENALTY.

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202. This provision is classified as an absolute exemption on the ground that the activity exempted is not in violation of any law other than the animal-cruelty law. Hereinafter, an asterisk added to a statute in this Appendix signifies that the provision is classified as an absolute exemption on the same theory as to the significance of the requirement that the activity be "lawful" or in accordance with specified laws.

(3) *Nothing in this section shall prohibit normal hunting practices as approved by the division of wildlife.*

(4) Nothing in this section shall be construed to prohibit the training of animals or the use of equipment in the training of animals for any purpose not prohibited by law.

### CONNECTICUT STATUTES

#### § 53-247

(b) . . . *The provisions of this subsection shall not apply to any licensed veterinarian while following accepted standards of practice of the profession or to any person while following approved methods of slaughter under section 22-272a, while performing medical research as an employee of, student in or person associated with any hospital, educational institution or laboratory, while following generally accepted agricultural practices or while lawfully engaged in the taking of wildlife.*

### DELAWARE STATUTES

#### TIT. 7, § 1709 INJURING OR KILLING DOGS FOR CERTAIN ACTS

(a) Any police officer, constable or dog warden who finds a dog running at large and deems such dog to be an immediate threat to the public health and welfare may kill such dog.

(b) Any person may injure or kill a dog in self-defense or to protect livestock, poultry or another human being at the time such dog is attacking such livestock, poultry or human being.

(c) Any person may injure or kill a dog at the time such dog is wounding another dog if the dog being wounded is on the property of its owner or under the immediate control of its owner and being wounded by a dog that is running at large.

#### TIT. 11, § 1325

(b) A person is guilty of cruelty to animals when the person intentionally or recklessly:

(3) Kills or injures any animal belonging to another person without legal privilege or consent of the owner; or

(4) Cruelly or unnecessarily kills or injures any animal whether belonging to the actor or another. *This section does not apply to the killing of any animal normally or commonly raised as food for human consumption, provided that such killing is not cruel.* A person acts unnecessarily if the act is not required to terminate an animal's suffering, to protect the life or property of the actor or another person or if other means of disposing of an animal exist which would not impair the health or well-being of that animal

(5) *Paragraphs (1), (2) and (4) of this subsection are inapplicable to accepted veterinary practices and activities carried on for scientific research.*

**(f) This section shall not apply to the lawful hunting or trapping of animals as provided by law.\***

#### **DISTRICT OF COLUMBIA STATUTES**

##### § 22-1012

*(b) Nothing contained in §§ 22-1001 to 22-1009, inclusive, and §§ 22- 1011 and 22-1309 shall be construed to prohibit or interfere with any properly conducted scientific experiments or investigations, which experiments shall be performed only under the authority of the faculty of some regularly incorporated medical college, university, or scientific society.*

#### **FLORIDA STATUTES**

##### § 828.02 DEFINITIONS

In this chapter, and in every law of the state relating to or in any way affecting animals, the word “animal” shall be held to include every living dumb creature; the words “torture,” “torment,” and “cruelty” shall be held to include every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused, **except when done in the interest of medical science**, permitted, or allowed to continue when there is reasonable remedy or relief; and the words “owner” and “person” shall be held to include corporations, and the knowledge and acts of agents and employees of corporations in regard to animals transported, owned, employed by or in the custody of a corporation, shall be held to be the knowledge and act of such corporation.

##### § 828.12

**(3) A veterinarian licensed to practice in the state shall be held harmless from either criminal or civil liability for any decisions made or services rendered under the provisions of this section. Such a veterinarian is, therefore, under this subsection, immune from a lawsuit for his or her part in an investigation of cruelty to animals.**

##### § 828.122 FIGHTING OR BAITING ANIMALS, OFFENSE, PENALTIES

(9) This section shall not apply to:

(a) Any person simulating a fight for the purpose of using the simulated fight as part of a motion picture which will be used on television or in a motion picture, provided s. 828.12 is not violated.

**(b) Any person using animals to pursue or take wildlife or to participate in any hunting regulated or subject to being regulated by the rules and regulations of the Fish and Wildlife Conservation Commission.**

**(c) Any person using animals to work livestock for agricultural purposes.**

*(e) Any person using dogs to hunt wild hogs or to retrieve domestic hogs pursuant to customary hunting or agricultural practices.*

*(10) This section shall not prohibit, impede, or otherwise interfere with recognized animal husbandry and training techniques or practices not otherwise specifically prohibited by law.*

§ 828.125 KILLING OR AGGRAVATED ABUSE OF REGISTERED BREED HORSES OR CATTLE; OFFENSES; PENALTIES

(5) *This section shall not be construed to abridge, impede, prohibit, or otherwise interfere in any way with the application, implementation, or conduct of recognized livestock husbandry practices or techniques by or at the direction of the owner of the livestock so husbanded; nor shall any person be held culpable for any act prohibited by this chapter which results from weather conditions or other acts of God, providing that the person is in compliance with recognized livestock husbandry practices.*

§ 828.14. WATER AND FOOD FOR STOCK ON TRAINS, VESSELS, ETC.

(2) Nothing in this section shall apply to owners, officers, or crew of water craft detained on the navigable waters of this state by storms and prevented by bad weather from reaching port.

**GEORGIA CODE**

**§ 4-8-5 PERFORMING CRUEL ACTS ON, OR HARMING, MAIMING OR KILLING DOGS**

**(c) This Code section shall not be construed to limit in any way the authority or duty of any law enforcement officer, dog or rabies control officer, humane society, or veterinarian.**

§ 4-11-13. ARTICLE NOT APPLICABLE TO PERSONS RAISING ANIMALS FOR HUMAN CONSUMPTION

**The provisions of this article shall not apply to any person who raises, keeps, or maintains animals solely for the purposes of human consumption.**

§ 16-12-4. CRUELTY TO ANIMALS

(a) As used in this Code section, the term:

(1) “Animal” shall **not include any fish** nor shall such term include any pest that might be exterminated or removed from a business, residence, or other structure.

**(e) The provisions of this Code section shall not be construed as prohibiting conduct which is otherwise permitted under the laws of this state or of the United States,\* including, but not limited to, agricultural, animal husbandry, butchering, food processing, marketing, scientific, research, medical, zoological, exhibition, competitive, hunting, trapping, fishing, wildlife management, or pest control practices or the authorized practice of veterinary medicine nor to limit in any way the authority or duty of the Department of Agriculture, Department of Natural Resources, any county board of health, any law enforcement officer, dog, animal, or rabies control officer, humane society, veterinarian, or private landowner protecting his or her property.**

(f)(1) Nothing in this Code section shall be construed as prohibiting a person from:

(A) Defending his or her person or property, or the person or property of another, from injury or damage being caused by an animal; or



(B) Injuring or killing an animal reasonably believed to constitute a threat for injury or damage to any property, livestock, or poultry.

## HAWAII STATUTES

### § 711-1109 CRUELTY TO ANIMALS

*(2) Subsection (1)(a), (b), (d), (e) and the following subsection (3) are not applicable to accepted veterinary practices and to activities carried on for scientific research governed by standards of accepted educational or medicinal practices.*

### § 711-1109.03 CRUELTY TO ANIMALS; FIGHTING DOGS

(2) Nothing in this section shall prohibit any of the following:(a) The use of dogs in the management of livestock by the owner of the livestock or the owner's employees or agents or other persons in lawful custody thereof;(b) The use of dogs in hunting wildlife including game; or(c) **The training of dogs or the use of equipment in the training of dogs for any purpose not prohibited by law.\***

## IDAHO STATUTES

### § 25-3506 EXHIBITION OF COCKFIGHTS

Every person who participates in a public or private display of combat between two (2) or more gamecocks in which the fighting, killing, maiming or injuring of gamecocks is a significant feature is guilty of a misdemeanor and shall, upon conviction, be punished in accordance with section 25-3520A, Idaho Code. Nothing in this section prohibits any customary practice of breeding or rearing game fowl, regardless of the subsequent uses of said game fowl.

### § 25-3507 EXHIBITION OF DOGFIGHTS

Every person who participates in a public or private display of combat between two (2) or more dogs in which the fighting, killing, maiming or injuring of dogs is a significant feature is guilty of a misdemeanor and shall, upon conviction, be punished in accordance with section 25-3520A, Idaho Code. Nothing in this section prohibits demonstrations of the hunting, herding, working or tracking skills of dogs or the lawful use of dogs for hunting, herding, working, tracking or self and property protection.

## ILLINOIS COMPILED STATUTES

### CH. 510 § 70/3.03: ANIMAL TORTURE

(b) For the purposes of this Section, "animal torture" does not include any death, harm, or injury caused to any animal by any of the following activities:

(1) any hunting, fishing, trapping, or other activity allowed under the Wildlife Code . . . , the Wildlife Habitat Management Areas Act . . . , or the Fish and Aquatic Life Code;

**(2) any alteration or destruction of any animal done by any person or unit of government pursuant to statute, ordinance, court order, or the direction of a licensed veterinarian;**

(3) *any alteration or destruction of any animal by any person for any legitimate purpose, including, but not limited to: castration, culling, declawing, defanging, ear cropping, euthanasia, gelding, grooming, neutering, polling, shearing, shoeing, slaughtering, spaying, tail docking, and vivisection*

510 ILCS 70/3.13: NORMAL HUSBANDRY PRACTICES; CONSTRUCTION WITH OTHER ACTS *Nothing in this Act affects normal, good husbandry practices utilized by any person in the production of food, companion or work animals, or in the extermination of undesirable pests.*

## INDIANA CODE

### § 35-46-3-12 INTENTIONALLY BEATING AN ANIMAL

(c) It is a defense to a prosecution under this section that the accused person:

(1) reasonably believes the conduct was necessary to:

(A) prevent injury to the accused person or another person;

(B) protect the property of the accused person from destruction or substantial damage; or

(C) prevent a seriously injured vertebrate animal from prolonged suffering; or

(2) *engaged in a reasonable and recognized act of training, handling, or disciplining the vertebrate animal.*

### § 35-46-3-11.5 INTERFERENCE WITH ASSISTANCE TO IMPAIRED PERSONS; DEFENSES

(d) It is a defense that the accused person:

(1) *engaged in a reasonable act of training, handling, or disciplining the service animal; or*

(2) reasonably believed the conduct was necessary to prevent injury to the accused person or another person.

### § 35-46-3-5 EXEMPT ACTIVITIES; AUTHORIZATION FOR DESTRUCTION OF ANIMAL BY ELECTROCUTION

(a) Except as provided in subsections (b) through (c), this chapter does not apply to the following:

**(1) Fishing, hunting, trapping, or other conduct authorized under IC 14-22.**

(3) Veterinary practices authorized by standards adopted under IC 15-5-1.1-8.

(4) *Conduct authorized by a local ordinance.*

(5) *Acceptable farm management practices.*

(6) Conduct authorized by the Indiana Meat and Poultry Inspection and Humane Slaughter Act, IC 15-2.1-24, and rules adopted under IC 15-2.1-24 for state or federally inspected livestock slaughtering facilities.

**(7) A research facility registered with the United States Department of Agriculture under the federal Animal Welfare Act (7 U.S.C. 2131 et seq.).**

(8) Destruction of a vertebrate defined as a pest under IC 15-3-3.6-2(22).

*(c) Destruction of an animal by electrocution is authorized under this section only if it is conducted by a person who is engaged in an acceptable farm management practice, by a research facility registered with the United States Department of Agriculture under the Animal Welfare Act, or for the animal disease diagnostic laboratory established under IC 15-2.1-5-1, a research facility licensed by the United States Department of Agriculture, a college, or a university.*

## **IOWA CODE**

### § 717B.2. ANIMAL ABUSE

A person is guilty of animal abuse if the person intentionally injures, maims, disfigures, or destroys an animal owned by another person, in any manner, including intentionally poisoning the animal. A person guilty of animal abuse is guilty of an aggravated misdemeanor. This section shall not apply to any of the following:

1. *A person acting with the consent of the person owning the animal, unless the action constitutes animal neglect as provided in section 717B.3.*

2. A person acting to carry out an order issued by a court.

3. **A licensed veterinarian practicing veterinary medicine as provided in chapter 169.**

4. A person acting in order to carry out another provision of law which allows the conduct.

5. **A person taking, hunting, trapping, or fishing for a wild animal as provided in chapter 481A.**

11. *An institution, as defined in section 145B.1, or a research facility, as defined in section 162.2, provided that the institution or research facility performs functions within the scope of accepted practices and disciplines associated with the institution or research facility.*

## **KANSAS STATUTES**

### § 21-4310. CRUELTY TO ANIMALS.

(b) The provisions of this section shall not apply to:

(1) *Normal or accepted veterinary practices;*

(2) *bona fide experiments carried on by commonly recognized research facilities;*

(3) **killing, attempting to kill, trapping, catching or taking of any animal in accordance with the provisions of chapter 32 or chapter 47 of the Kansas Statutes Annotated;**

(4) *rodeo practices accepted by the rodeo cowboys' association;*

(5) the humane killing of an animal which is diseased or disabled beyond recovery for any useful purpose, or the humane killing of animals for population control, by the owner thereof or the agent of such owner residing outside of a city or the owner thereof within a city if no animal shelter, pound or

licensed veterinarian is within the city, or by a licensed veterinarian at the request of the owner thereof, or by any officer or agent of an incorporated humane society, the operator of an animal shelter or pound, a local or state health officer or a licensed veterinarian three business days following the receipt of any such animal at such society, shelter or pound;

(6) *with respect to farm animals, normal or accepted practices of animal husbandry;*

(7) the killing of any animal by any person at any time which may be found outside of the owned or rented property of the owner or custodian of such animal and which is found injuring or posing a threat to any person, farm animal or property;

(8) an animal control officer trained by a licensed veterinarian in the use of a tranquilizer gun, using such gun with the appropriate dosage for the size of the animal, when such animal is vicious or could not be captured after reasonable attempts using other methods; or

(9) laying an equine down for medical or identification purposes.

#### **KENTUCKY REVISED STATUTES**

##### § 525.130 CRUELTY TO ANIMALS IN THE SECOND DEGREE; EXEMPTIONS

(2) Nothing in this section shall apply to the killing of animals:

(a) **Pursuant to a license to hunt, fish, or trap;**

(b) **Incident to the processing as food or for other commercial purposes;**

(c) *For humane purposes;*

(d) **For veterinary, agricultural, spaying or neutering, or cosmetic purposes;**

(e) **For purposes relating to sporting activities, including but not limited to horse racing at organized races and training for organized races, organized horse shows, or other animal shows;**

(f) *For bona fide animal research activities of institutions of higher education; or a business entity registered with the United States Department of Agriculture under the Animal Welfare Act or subject to other federal laws governing animal research;*

(i) For animal or pest control; or

(j) For any other purpose authorized by law.

(3) **Activities of animals engaged in hunting, field trials, dog training** other than training a dog to fight for pleasure or profit, and other activities authorized either by a hunting license or by the Department of Fish and Wildlife shall not constitute a violation of this section.

##### § 525.135 TORTURE OF DOG OR CAT

(4) Nothing in this section shall apply to the killing or injuring of a dog or cat:

(a) **In accordance with a license to hunt, fish, or trap;**

(b) *For humane purposes;*

(c) **For veterinary, agricultural, spaying or neutering, or cosmetic purposes;**

**(d) For purposes relating to sporting activities including but not limited to training for organized dog or cat shows, or other animal shows in which a dog or a cat, or both, participate;**

*(e) For bona fide animal research activities, using dogs or cats, of institutions of higher education; or a business entity registered with the United States Department of Agriculture under the Animal Welfare Act or subject to other federal laws governing animal research;*

(h) For animal or pest control; or

(i) For any other purpose authorized by law.

**(5) Activities of animals engaged in hunting, field trials, dog training** other than training a dog to fight for pleasure or profit, and other activities authorized either by a hunting license or by the Department of Fish and Wildlife Resources shall not constitute a violation of this section.

## LOUISIANA REVISED STATUTES

### § 14:102.1 CRUELTY TO ANIMALS; SIMPLE AND AGGRAVATED

C. This Section shall not apply to the **lawful hunting or trapping of wildlife as provided by law**,\* *herding of domestic animals, accepted veterinary practices, and activities carried on for scientific or medical research governed by accepted standards.* § 14:102.5 Dogfighting; training and possession of dogs for fighting

E. Nothing in this Section shall prohibit any of the following activities: (1) **The use of dogs for hunting.** (2) **The use of dogs for management of livestock by the owner, his employees or agents, or any other person having lawful custody of livestock.** (3) The training of dogs or the possession or use of equipment in the training of dogs for any purpose not prohibited by law. (4) The possessing or owning of dogs with ears cropped or otherwise surgically altered for cosmetic purposes.

## MAINE REVISED STATUTES

### Tit. 7, § 4011 CRUELTY TO ANIMALS

1-A. Animal cruelty. Except as provided in paragraphs A and B, a person is guilty of cruelty to animals if that person kills or attempts to kill a cat or dog.

A. A licensed veterinarian or a person certified under Title 17, section 1042 may kill a cat or dog according to the methods of euthanasia under Title 17, chapter 42, subchapter IV.

B. A person who owns a cat or dog, or the owner's agent, may kill that owner's

cat or dog by shooting with a firearm provided the following conditions are met.

(1) The shooting is performed by a person 18 years of age or older using a weapon and ammunition of suitable caliber and other characteristics to produce instantaneous death by a single shot.

(2) Death is instantaneous.

(3) Maximum precaution is taken to protect the general public, employees and other animals.

(4) Any restraint of the cat or dog during the shooting does not cause undue suffering to the cat or dog.

2. Affirmative defenses. It is an affirmative defense to this section that:

A. **The conduct was performed by a licensed veterinarian** or was a part of scientific research governed by accepted standards

### MARYLAND CODE

§ 10-603. APPLICATION OF §§ 10-601 THROUGH 10-608

Sections 10-601 through 10-608 of this subtitle do not apply to:

(1) *customary and normal veterinary and agricultural husbandry practices including dehorning, castration, tail docking, and limit feeding;*

(2) *research conducted in accordance with protocols approved by an animal care and use committee, as required under the federal Animal Welfare Act or the federal Health Research Extension Act*

(3) *an activity that may cause unavoidable physical pain to an animal, including food processing, pest elimination, animal training, and hunting, if the person performing the activity uses the most humane method reasonably available; or*

(4) normal human activities in which the infliction of pain to an animal is purely incidental and unavoidable.

### MICHIGAN COMPILED LAWS

§ 750.49. ANIMALS; FIGHTING, BAITING, OR SHOOTING; DOGS TRAINED FOR FIGHTING; APPLICATION

(15) Subsections (8) to (14) do not apply to any of the following:

(a) A dog trained or used for fighting, or the first or second generation offspring of a dog trained or used for fighting, that is used by a law enforcement agency of the state or a county, city, village, or township.

(b) A certified leader dog recognized and trained by a national guide dog association for the blind or for persons with disabilities.

(c) A corporation licensed under the private security guard act of 1968, 1968 PA 330, MCL 338.1051 to 338.1085, when a dog trained or used for fighting, or the first or second generation offspring of a dog trained or used for fighting, is used in accordance with the private security guard act of 1968, 1968 PA 330, MCL 338.1051 to 338.1085.

(22) This section does not apply to conduct that is permitted by and is in compliance with any of the following:

(a) Part 401 (wildlife conservation) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.40101 to 324.40119.

(b) Part 435 (hunting and fishing licensing) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.43501 to 324.44106.

(c) Part 427 (breeders and dealers) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.42701 to 324.42714.(d) Part 417 (private shooting preserves) of the natural resources and environmental protection act, 1994 PA 451, MCL 324.41701 to 324.41712.

§ 750.50. DEFINITIONS; CRIMES AGAINST ANIMALS, CRUEL TREATMENT, ABANDONMENT, FAILURE TO PROVIDE ADEQUATE CARE; PENALTIES, PAYMENT OF COSTS; EXCEPTIONS

(8) This section does not prohibit the lawful killing or other use of an animal, including, but not limited to, the following:

**(a) Fishing.**

**(b) Hunting, trapping, or wildlife control regulated pursuant to the natural resources and environmental protection act, 1994 PA 451, MCL 324.101 to 324.90106.**

**(c) Horse racing.**

**(d) The operation of a zoological park or aquarium.**

**(e) Pest or rodent control.**

**(f) Farming** or a *generally accepted animal husbandry or farming practice involving livestock.*

*(h) Scientific research pursuant to 1969 PA 224, MCL 287.381 to 287.395.*

*(i) Scientific research pursuant to sections 2226, 2671, 2676, and 7333 of the public health code, 1978 PA 368, MCL 333.2226, 333.2671, 333.2676, and 333.7333.*

§ 750.50B. WILLFULLY AND MALICIOUSLY KILLING OR INJURING ANIMALS; ADMINISTERING POISON TO ANIMALS; PUNISHMENT, COSTS OF ANIMAL CARE; PROBATION, NEED FOR COUNSELING, RELINQUISHMENT OF ANIMALS; EXCEPTIONS

(7) **This section does not prohibit the lawful killing of livestock\*** or a customary animal husbandry or farming practice involving livestock. As used in this subsection, "livestock" has the meaning attributed to the term in the animal industry act of 1987, Act No. 466 of the Public Acts of 1988, being sections 287.701 to 287.747 of the Michigan Compiled Laws.

(8) This section does not prohibit the lawful killing of an animal pursuant to any of the following:\*\***(a) Fishing.(b) Hunting, trapping, or wildlife control regulated pursuant to part 401 (wildlife conservation) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being sections 324.40101 to 324.40119 of the Michigan Compiled Laws, and orders issued under that act.(c) Pest or rodent control regulated pursuant to part 83 (pesticide control) of Act No. 451 of the Public Acts of 1994, being sections 324.8301 to 324.8336 of the Michigan Compiled Laws.**

**(9) This section does not prohibit the lawful\*\*\* killing or use of an animal for scientific research pursuant to any of the following or a rule promulgated pursuant to any of the following:(a) Act No. 224 of the Public Acts of 1969, being sections 287.381 to 287.395 of the Michigan Compiled Laws [authorizing use of dogs and cats in research].(b) Sections 2226, 2671, 2676, 7109, and 7333 of**

**the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.2226, 333.2671, 333.2676, 333.7109, and 333.7333 of the Michigan Compiled Laws [relating to use of animals in research by the state Public Health Department].**

#### MISSISSIPPI STATUTES

§ 97-41-19. DOG FIGHTS

**(4) Nothing in subsection (1) of this section shall prohibit any of the following:**

**(a) The use of dogs in the management of livestock, by the owner of such livestock or other persons in lawful custody thereof;**

**(b) The use of dogs in lawful hunting; and**

**(c) The training of dogs for any purpose not prohibited by law.**

§ 97-41-23. INJURY AND KILLING OF PUBLIC SERVICE ANIMALS; PENALTIES

*(5) The provisions of this section shall not apply to the lawful practice of veterinary medicine.\**

#### MISSOURI STATUTES

§ 578.007. ACTS AND FACILITIES TO WHICH SECTIONS 578.005 TO 578.023 DO NOT APPLY

The provisions of sections 578.005 to 578.023 shall not apply to:

(1) Care or treatment performed by a licensed veterinarian within the provisions of chapter 340, RSMo;

(2) *Bona fide scientific experiments;*

(3) Hunting, fishing, or trapping as allowed by chapter 252, RSMo, including all practices and privileges as allowed under the Missouri Wildlife Code;

**(4) Facilities and publicly funded zoological parks currently in compliance with the federal “Animal Welfare Act” as amended;\***

(5) *Rodeo practices currently accepted by the Professional Rodeo Cowboy’s Association;*

(6) The killing of an animal by the owner thereof, the agent of such owner, or by a veterinarian at the request of the owner thereof;

(7) The lawful, humane killing of an animal by an animal control officer, the operator of an animal shelter, a veterinarian, or law enforcement or health official;

(8) *With respect to farm animals, normal or accepted practices of animal husbandry;*

(9) The killing of an animal by any person at any time if such animal is outside of the owned or rented property of the owner or custodian of such animal and the animal is injuring any person or farm animal but shall not include police or guard dogs while working;

(10) The killing of house or garden pests; or



(11) *Field trials, training and hunting practices as accepted by the Professional Houndsmen of Missouri.*

§ 578.025 DOGS, FIGHTING, TRAINING TO FIGHT OR INJURING FOR AMUSEMENT OR GAIN, PENALTY—SPECTATOR, PENALTY

3. Nothing in this section shall be construed to prohibit:

**(1) The use of dogs in the management of livestock by the owner of such livestock or his employees or agents or other persons in lawful custody of such livestock;**

**(2) The use of dogs in hunting; or**

(3) *The training of dogs or the use of equipment in the training of dogs for any purpose not prohibited by law.\**

### **MONTANA STATUTES**

§ 45-8-211. CRUELTY TO ANIMALS—EXCEPTIONS

(4) This section does not prohibit:

(a) a person humanely destroying an animal for just cause;

(b) *the use of commonly accepted agricultural and livestock practices on livestock;*

(c) *rodeo activities that meet humane standards of the professional rodeo cowboys association;*

**(d) lawful fishing, hunting, and trapping activities;\***

(e) lawful wildlife management practices;

**(f) lawful scientific or agricultural research or teaching that involves the use of animals;\***

**(g) services performed by a licensed veterinarian;**

(h) lawful control of rodents and predators and other lawful animal damage control activities; or

(i) *accepted training and discipline methods.*

### **NEBRASKA STATUTES**

§ 28-1013. SECTIONS; EXEMPTIONS.

Sections 28-1008 to 28-1017 shall not apply to:

**(1) Care or treatment of an animal by a veterinarian licensed under the Nebraska Veterinary Practice Act;**

(2) *Commonly accepted care or treatment of a police animal by a law enforcement officer in the normal course of his or her duties;*

(3) *Research activity carried on by any research facility currently meeting the standards of the federal Animal Welfare Act, 7 U.S.C. 2131 et seq., as such act existed on January 1, 2003;*

(4) *Commonly accepted practices of hunting, fishing, or trapping;*

(5) *Commonly accepted practices occurring in conjunction with rodeos, animal racing, or pulling contests;*

(6) Humane killing of an animal by the owner or by his or her agent or a veterinarian upon the owner's request;

(7) *Commonly accepted practices of animal husbandry with respect to farm animals, including their transport from one location to another and nonnegligent actions taken by personnel or agents of the Nebraska Department of Agriculture or the United States Department of Agriculture in the performance of duties prescribed by law;*

(8) Use of reasonable force against an animal, other than a police animal, which is working, including killing, capture, or restraint, if the animal is outside the owned or rented property of its owner or custodian and is injuring or posing an immediate threat to any person or other animal;

(9) Killing of house or garden pests;

(10) *Commonly followed practices occurring in conjunction with the slaughter of animals for food or byproducts; and*

(11) *Commonly accepted animal training practices.*

#### NEVADA REVISED STATUTES

§ 206.150. KILLING, MAIMING, DISFIGURING OR POISONING ANIMAL OF ANOTHER PERSON; KILLING ESTRAY OR LIVESTOCK

3. The provisions of subsection 1 do not apply to any person who kills a dog pursuant to NRS 575.020 [relating to vicious animals running at large].

§ 574.070. INSTIGATING OR WITNESSING FIGHTS BETWEEN BIRDS OR OTHER ANIMALS UNLAWFUL; PENALTIES; EXCEPTIONS

7. This section does not prohibit the use of dogs or birds for:

**(a) The management of livestock by the owner thereof, his employees or agents or any other person in the lawful custody of the livestock; or**

**(b) Hunting as permitted by law.\***

§ 574.100. OVERDRIVING, TORTURING, INJURING OR ABANDONING ANIMALS; FAILURE TO PROVIDE PROPER SUSTENANCE; PENALTIES; EXCEPTIONS

5. *The provisions of this section do not apply with respect to an injury to or the death of an animal that occurs accidentally in the normal course of:*

**(a) Carrying out the activities of a rodeo or livestock show; or**

**(b) Operating a ranch.**

§ 574.105. MISTREATMENT OF POLICE ANIMAL AND INTERFERENCE WITH DUTIES OF POLICE ANIMAL OR HANDLER UNLAWFUL; PENALTIES; EXCEPTION

3. The provisions of this section do not prohibit a euthanasia technician licensed pursuant to chapter 638 of NRS, a peace officer or a veterinarian from euthanizing a police animal in an emergency if the police animal is critically wounded and would otherwise endure undue suffering and pain.

§ 574.150. POISONING OR ATTEMPTING TO POISON ANIMALS UNLAWFUL; PENALTIES

3. This section does not prohibit the destruction of noxious animals.

## § 574.340. APPLICABILITY

The provisions of NRS 574.210 to 574.510, inclusive, do not apply to:

**1. The exhibition, production, marketing or disposal of any livestock, poultry, fish or other agricultural commodity.**

**2. Activities for which a license is required by the provisions of chapter 466 of NRS [ regulating horse racing].**

**3. The housing of domestic cats or dogs kept as pets or cared for, without remuneration other than payment for reasonable expenses relating to the care of the cats or dogs, on behalf of another person in a home environment.**

**4. The exhibition of dogs or cats.**

**NEW HAMPSHIRE REVISED STATUTES**

## § 644:8 CRUELTY TO ANIMALS

III. A person is guilty of a misdemeanor for a first offense, and of a class B felony for a second or subsequent offense, who:

(a) Without lawful authority negligently deprives or causes to be deprived any animal in his possession or custody necessary care, sustenance or shelter;

**V. A veterinarian licensed to practice in the state shall be held harmless from either criminal or civil liability for any decisions made for services rendered under the provisions of this section or RSA 435:11-16. Such a veterinarian is, therefore, under this paragraph, protected from a lawsuit for his part in an investigation of cruelty to animals.**

**NEW JERSEY STATUTES**

## § 4:22-16 PERMITTED ACTIVITIES

Nothing contained in this article shall be construed to prohibit or interfere with:

*a. Properly conducted scientific experiments performed under the authority of the Department of Health or the United States Department of Agriculture. Those departments may authorize the conduct of such experiments or investigations by agricultural stations and schools maintained by the State or federal government, or by medical societies, universities, colleges and institutions incorporated or authorized to do business in this State and having among their corporate purposes investigation into the causes, nature, prevention and cure of diseases in men and animals; and may for cause revoke such authority;*

b. The killing or disposing of an animal or creature by virtue of the order of a constituted authority of the State;

c. The shooting or taking of game or game fish in such manner and at such times as is allowed or provided by the laws of this State;

*d. The training or engaging of a dog to accomplish a task or participate in an activity or exhibition designed to develop the physical or mental characteristics of that dog. These activities shall be carried out in accordance with the practices, guidelines or rules established by an organization founded for the purpose of promoting and enhancing working dog activities or exhibitions; in a manner*

*which does not adversely affect the health or safety of the dog; and may include avalanche warning, guide work, obedience work, carting, dispatching, freight racing, packing, sled dog racing, sledding, tracking, and weight pull demonstrations;*

e. *The raising, keeping, care, treatment, marketing, and sale of domestic livestock in accordance with the standards developed and adopted therefor pursuant to subsection a. of section 1 of P.L.1995, c. 311 (C. 4:22-16.1); and*

f. The killing or disposing, by a reasonable or commercially acceptable method or means, of a Norway or brown rat (*Rattus norvegicus*), black rat (*Rattus rattus*), or house mouse (*Mus musculus*) by any person, or with the permission or at the direction of that person, while the animal is on property either owned or leased by, or otherwise under the control of, that person, provided that the animal is not a pet

### NEW MEXICO STATUTES

§ 30-18-1. CRUELTY TO ANIMALS; EXTREME CRUELTY TO ANIMALS; PENALTIES; EXCEPTIONS

I. The provisions of this section do not apply to:

**(1) fishing, hunting, falconry, taking and trapping, as provided in Chapter 17 NMSA 1978;**

**(2) the practice of veterinary medicine, as provided in Chapter 61, Article 14 NMSA 1978;**

(3) rodent or pest control, as provided in Chapter 77, Article 15 NMSA 1978;

*(4) the treatment of livestock and other animals used on farms and ranches for the production of food, fiber or other agricultural products, when the treatment is in accordance with commonly accepted agricultural animal husbandry practices;*

*(5) the use of commonly accepted Mexican and American rodeo practices, unless otherwise prohibited by law;*

*(6) research facilities licensed pursuant to the provisions of 7 U.S.C. Section 2136, except when knowingly operating outside provisions, governing the treatment of animals, of a research or maintenance protocol approved by the institutional animal care and use committee of the facility; or*

**(7) other similar activities not otherwise prohibited by law.\***

### NEW YORK AGRICULTURE AND MARKETS LAW

§ 353. OVERDRIVING, TORTURING AND INJURING ANIMALS; FAILURE TO PROVIDE PROPER SUSTENANCE

Nothing herein contained shall be construed to prohibit or interfere with any properly conducted scientific tests, experiments or investigations, involving the use of living animals, performed or conducted in laboratories or institutions, which are approved for these purposes by the state commissioner of health. The

state commissioner of health shall prescribe the rules under which such approvals shall be granted, including therein standards regarding the care and treatment of any such animals. Such rules shall be published and copies thereof conspicuously posted in each such laboratory or institution. The state commissioner of health or his duly authorized representative shall have the power to inspect such laboratories or institutions to insure compliance with such rules and standards. Each such approval may be revoked at any time for failure to comply with such rules and in any case the approval shall be limited to a period not exceeding one year.

**§ 353-a**

**2. Nothing contained in this section shall be construed to prohibit or interfere in any way with anyone lawfully engaged in hunting, trapping, or fishing, as provided in article eleven of the environmental conservation law,** the dispatch of rabid or diseased animals, as provided in article twenty-one of the public health law, or the dispatch of animals posing a threat to human safety or other animals, where such action is otherwise legally authorized, or any *properly conducted scientific tests, experiments, or investigations involving the use of living animals, performed or conducted in laboratories or institutions approved for such purposes by the commissioner of health pursuant to section three hundred fifty-three of this article.\**

**NORTH DAKOTA CENTURY CODE**

§ 36-21.1-02 OVERWORKING, MISTREATING, OR ABANDONING ANIMALS

8. No person may cage any animal for public display purposes unless the display cage is constructed of solid material on three sides to protect the caged animal from the elements, and unless the horizontal dimension of each side of the cage is at least four times the length of the caged animal. **This subsection does not apply to the North Dakota state fair association, to agricultural fair associations, to any agricultural display of caged animals by any political subdivision, or to district, regional, or national educational livestock or poultry exhibitions. Zoos which have been approved by the health district or the governing body of the political subdivision which has jurisdiction over the zoos are exempt from this subsection.**

**OHIO REVISED CODE**

§ 959.02 INJURING ANIMALS

No person shall maliciously, or willfully, and without the consent of the owner, kill or injure a horse, mare, foal, filly, jack, mule, sheep, goat, cow, steer, bull, heifer, ass, ox, swine, dog, cat, or other domestic animal that is the property of another. **This section does not apply to a licensed veterinarian acting in an official capacity.**

§ 959.131 PROHIBITIONS CONCERNING COMPANION ANIMALS

(D) Divisions (B) and (C) of this section do not apply to any of the following:

*(1) A companion animal used in scientific research conducted by an institution in accordance with the federal animal welfare act and related regulations;*

**(2) The lawful practice of veterinary medicine by a person who has been issued a license, temporary permit, or registration certificate to do so under Chapter 4741. of the Revised Code;\***

*(3) Dogs being used or intended for use for hunting or field trial purposes, provided that the dogs are being treated in accordance with usual and commonly accepted practices for the care of hunting dogs;*

*(4) The use of common training devices, if the companion animal is being treated in accordance with usual and commonly accepted practices for the training of animals;*

### **OKLAHOMA STATUTES**

#### TIT. 21 § 1692.9. EXEMPTION

Nothing in this act shall prohibit any of the following:

A. Hunting birds or fowl in accordance with Oklahoma regulation or statute, including but not limited to the sport of hunting game with trained raptors.

**B. Agricultural production of fowl for human consumption.**

#### TIT. 21 § 1699.2 EXEMPTIONS

Nothing in this act shall prohibit any of the following:

1. The use of dogs in hunting as permitted by the Game and Fish Code and by the rules and regulations adopted by the Oklahoma Wildlife Conservation Commission;

**2. The use of dogs in the management of livestock by the owner of such livestock or his employees or agents or other persons in lawful custody thereof;**

**3. The training of dogs or the use of equipment in the training of dogs for any purpose not prohibited by law;\*** or

**4. The raising, breeding, keeping or training of dogs or the use of equipment for the raising, breeding, keeping or training of dogs for sale or show purposes.**

### **OREGON REVISED STATUTES**

#### § 167.315. ANIMAL ABUSE IN THE SECOND DEGREE

*(2) Any practice of good animal husbandry is not a violation of this section.*

#### § 167.320. ANIMAL ABUSE IN THE FIRST DEGREE

*(2) Any practice of good animal husbandry is not a violation of this section.*

#### § 167.335. EXEMPTION FROM ORS 167.315 TO 167.333

*Unless gross negligence can be shown, the provisions of ORS 167.315 to 167.333 do not apply to:*

*(1) The treatment of livestock being transported by owner or common carrier;*

*(2) Animals involved in rodeos or similar exhibitions;*

*(3) Commercially grown poultry;*

- (4) *Animals subject to good animal husbandry practices;*
- (5) *The killing of livestock according to the provisions of ORS 603.065;*
- (6) *Animals subject to good veterinary practices as described in ORS 686.030;*
- (7) *Lawful fishing, hunting and trapping activities;*
- (8) *Wildlife management practices under color of law;*
- (9) *Lawful scientific or agricultural research or teaching that involves the use of animals;*
- (10) *Reasonable activities undertaken in connection with the control of vermin or pests; and*
- (11) *Reasonable handling and training techniques.*

### **PENNSYLVANIA CONSOLIDATED STATUTES**

#### **TIT. 3 § 2387. INAPPLICABILITY OF PENAL CRUELTY TO ANIMALS STATUTES**

No action taken by the department [of Agriculture] or decision not to act made by the department or condition or action required of another by the written instruction of the department shall be construed as cruelty to animals under any penal statute of this Commonwealth provided that such an action, decision or condition is taken, made or required under the authority of this chapter and its attendant regulations.

#### **TIT. 18 § 5511. CRUELTY TO ANIMALS**

(a)(3) This subsection shall not apply to:

(iii) such reasonable activity as may be undertaken in connection with vermin control or pest control.

(H.1) Animal fighting

*This subsection shall not apply to activity undertaken in a normal agricultural operation.*

### **RHODE ISLAND STATUTES**

#### **§ 4-1-3 UNNECESSARY CRUELTY**

(b) The substances proscribed by subsection (a) do not include any drug having curative and therapeutic effect for disease in animals and which is prepared and intended for veterinary use.

#### **§ 4-1-5 MALICIOUS INJURY TO OR KILLING OF ANIMALS**

**(b) This section shall not apply to licensed hunters during hunting season or a licensed business killing animals for human consumption.**

### **SOUTH CAROLINA CODE**

#### **§ 47-1-40. ILL-TREATMENT OF ANIMALS GENERALLY.**

**(C) This section does not apply to fowl, accepted animal husbandry practices of farm operations and the training of animals, the practice of veterinary medicine, agricultural practices, forestry and silvicultural practices, wildlife management practices, or activity authorized by Title 50 [relating to fishing and hunting].**

§ 47-1-70. ABANDONMENT OF ANIMALS; PENALTIES; HUNTING DOG EXCEPTION

**(C) A hunting dog that is positively identifiable in accordance with Section 47-3-510 or Section 47-3-530 is exempt from this section.**

#### **SOUTH DAKOTA CONSOLIDATED LAWS**

§ 40-1-16. SCIENTIFIC EXPERIMENTS NOT PROHIBITED—GUIDELINES

*Nothing in this chapter may be construed to interfere with any properly conducted scientific experiments or investigations, which experiments or investigations are performed by personnel following guidelines established by the National Institute of Health and the United States Department of Agriculture.*

§ 40-1-17 EXEMPTIONS FROM CHAPTER—DESTRUCTION OF DANGEROUS ANIMALS

**The acts and conduct of persons who are lawfully engaged in any of the activities authorized by Title 41 [relating to hunting and fishing] or laws for the destruction or control of certain animals known to be dangerous or injurious to life, limb, or property, and persons who properly kill any animal used for food and sport hunting, trapping, and fishing as authorized by the South Dakota Department of Game, Fish and Parks, are exempt from the provisions of this chapter.**

§ 40-1-20. POISONING ANIMAL OF ANOTHER—PENALTY—EXCEPTIONS

Except as specifically provided for in this chapter, no person may intentionally administer poison to any animal which belongs to another, nor intentionally expose any poisonous substance so that it may be taken by an animal which belongs to another. A violation of this section is a Class 1 misdemeanor. This section may not be construed to prevent euthanasia by a licensed veterinarian with proper authority from the animal's owner nor may it prevent acts of euthanasia authorized by this chapter. This section may not be construed to prevent animal control activities conducted by municipalities or counties, separately or through contract with a humane society, in accordance with chapters 36-12 and 34-20B.

§ 40-1-21. KILLING OR INJURING ANIMAL OF ANOTHER—PENALTY—EXCEPTIONS

No person may intentionally kill any animal of any age or value, the property of another, nor intentionally injure any such animal. A violation of this section is a Class 1 misdemeanor. This section may not be construed to prevent euthanasia by a licensed veterinarian with proper authority from the animal's owner nor may it prevent acts of euthanasia authorized by this chapter. This section may not be construed to prohibit euthanasia conducted by the municipality or under a municipality's animal control activities. This section may not be construed to prohibit activities conducted under chapter 40-34.

#### **TENNESSEE CODE**

§ 39-14-201 DEFINITIONS



(4) “Torture” means every act, omission, or neglect whereby unreasonable physical pain, suffering, or death is caused or permitted, but nothing in this part shall be construed as prohibiting the shooting of birds or game for the purpose of human food or the **use of animate targets by incorporated gun clubs.**

§ 39-14-202 CRUELTY TO ANIMALS

(b) *It is a defense to prosecution under this section that the person was engaged in accepted veterinary practices, medical treatment by the owner or with the owner’s consent, or bona fide experimentation for scientific research.*

(e)(1) *Nothing in this section shall be construed as prohibiting the owner of a farm animal or someone acting with the consent of the owner of such animal from engaging in usual and customary practices which are accepted by colleges of agriculture or veterinary medicine with respect to such animal.*

§ 39-14-203 COCK AND ANIMAL FIGHTING

**(b) It is the legislative intent that the provisions of this section shall not apply to the training or use of hunting dogs for sport or to the training or use of dogs for law enforcement purposes.**

§ 39-14-212 AGGRAVATED CRUELTY TO ANIMALS; DEFINITIONS; PENALTIES

(c) The provisions of subsection (a) shall not be construed to prohibit or interfere with the following endeavors:

(1) The provisions of this section shall not be construed to change, modify, or amend any provision of title 70, involving fish and wildlife;

**(3) The provisions of this section do not apply to equine animals or to animals defined as livestock by the provisions of § 39-14-201;**

(4) Dispatching an animal in any manner absent of aggravated cruelty;

(5) *Engaging in lawful hunting, trapping, or fishing activities, including activities commonly associated with the hunting of small game as defined in § 70-1-101(a)(34);*

(8) *Performing or conducting bona fide scientific tests, experiments or investigations within or for a bona fide research laboratory, facility or institution;*

(9) *Performing accepted veterinary medical practices or treatments;*

(11) *Engaging, with the consent of the owner of a farm animal, in usual and customary practices which are accepted by colleges of agriculture or veterinary medicine with respect to such animal;*

**TEXAS PENAL CODE**

§ 42.09. CRUELTY TO ANIMALS

(b) *It is a defense to prosecution under this section that the actor was engaged in bona fide experimentation for scientific research.*

(h) *It is an exception to the application of this section that the conduct engaged in by the actor is a generally accepted and otherwise lawful.\**

(1) *use of an animal if that use occurs solely for the purpose of:*

(A) *fishing, hunting, or trapping; or*

- (B) *wildlife control as regulated by state and federal law; or*  
 (2) *animal husbandry or farming practice involving livestock.*

§ 42.10. DOG FIGHTING

(d) It is a defense to prosecution under Subdivision (1) or (2) of Subsection (a) that the actor caused a dog to fight with another dog to protect livestock, other property, or a person from the other dog, and for no other purpose.

**UTAH CODE**

§ 76-9-301 CRUELTY TO ANIMALS

(5) *It is a defense to prosecution under this section that the conduct of the actor towards the animal was:*

- (a) *by a licensed veterinarian using accepted veterinary practice;*  
 (b) *directly related to bona fide experimentation for scientific research, provided that if the animal is to be destroyed, the manner employed will not be unnecessarily cruel unless directly necessary to the veterinary purpose or scientific research involved;*

(c) *permitted under Section 18-1-3 [relating to dogs attacking other animals];*

(d) *by a person who humanely destroys any animal found suffering past recovery for any useful purpose; or*

(e) *by a person who humanely destroys any apparently abandoned animal found on the person's property.*

§ 76-9-301.1 DOG FIGHTING—TRAINING DOGS FOR FIGHTING—DOG FIGHTING EXHIBITIONS

(5) Nothing in this section prohibits any of the following:

- (a) the use of dogs for management of livestock by the owner, his employees or agents, or any other person in the lawful custody of livestock;**  
**(b) the use of dogs for hunting; or**  
**(c) the training of dogs or the possession or use of equipment in the training of dogs for any purpose not prohibited by law.\***

**VERMONT STATUTES**

TIT. 13, § 351B CRUELTY TO ANIMALS: SCOPE OF SUBCHAPTER

This subchapter shall not apply to:

**(1) activities regulated by the department of fish and wildlife pursuant to part 4 of Title 10;**

*(2) scientific research governed by accepted procedural standards subject to review by an institutional animal care and use committee;*

**(3) livestock and poultry husbandry practices for raising, management and use of animals;**

**(4) veterinary medical or surgical procedures; and**

*(5) the killing of an animal as provided by sections 3809 and 3545 [both dealing with an attacking pet wolf] of Title 20.*

## TIT. 13, § 352B RULES; AFFIRMATIVE DEFENSE

(b) Except as provided in subsection (c) of this section, an affirmative defense to prosecution under section 352 or 352a of this title may be raised when:

(1) *except for vivisection or research under section 352(7) of this title, the defendant was a veterinarian whose conduct conformed to accepted veterinary practice for the area, or was a scientist whose conduct was a part of scientific research governed by accepted procedural standards subject to review by an institutional care and use committee;*

(2) the defendant's conduct was designed to control or eliminate rodents, ants or other common pests on the defendant's own property;

(3) **the defendant was a person appropriately licensed to utilize pesticides under chapter 87 of Title 6;**

(4) the defendant humanely euthanized any animal as a representative of a duly organized humane society, animal shelter or town pound according to rules of this subchapter, or as a veterinarian destroying animals under chapter 193 or sections 3511 and 3513 of Title 20; or

(5) a state agency was implementing a rabies control program.

## VIRGINIA STATUTES

## § 3.1-796.74. EXCEPTIONS REGARDING VETERINARIANS

**Sections 3.1-796.68 through 3.1-796.73, 3.1-796.78 through 3.1-796.83:2, 3.1-796.105 through 3.1-796.108, 3.1-796.120, and 3.1-796.126:1 through 3.1-796.126:7 shall not apply to: (i) a place or establishment which is operated under the immediate supervision of a duly licensed veterinarian as a hospital or boarding establishment where animals are harbored, boarded and cared for incident to the treatment, prevention, or alleviation of disease processes during the routine practice of the profession of veterinary medicine, or (ii) animals boarded under the immediate supervision of a duly licensed veterinarian.**

## § 3.1-796.122. CRUELTY TO ANIMALS; PENALTY

B. Any person who (i) tortures, willfully inflicts inhumane injury or pain *not connected with bona fide scientific or medical experimentation*, or cruelly and unnecessarily beats, maims, mutilates or kills any animal whether belonging to himself or another; (ii) sores any equine for any purpose or administers drugs or medications to alter or mask such sores for the purpose of sale, show, or exhibit of any kind, unless such administration of drugs or medications is under the supervision of a licensed veterinarian and solely for therapeutic purposes; (iii) instigates, engages in, or in any way furthers any act of cruelty to any animal set forth in clause (i); or (iv) causes any of the actions described in clauses (i) through (iii), or being the owner of such animal permits such acts to be done by another; and has been within five years convicted of a violation of this subsection or subsection A, shall be guilty of a Class 6 felony if the current violation or any previous violation of this subsection or subsection A resulted in the death of an animal or the euthanasia of an animal based on the

recommendation of a licensed veterinarian upon determination that such euthanasia was necessary due to the condition of the animal, and such condition was a direct result of a violation of this subsection or subsection A.

**E. This section shall not prohibit authorized wildlife management activities or hunting, fishing or trapping as regulated under other titles of the Code of Virginia, including, but not limited to Title 29.1, or to farming activities as provided under this title or regulations promulgated thereto.\***

#### **WASHINGTON REVISED CODE**

##### § 16.52.180 LIMITATIONS ON APPLICATION OF CHAPTER

No part of this chapter shall be deemed to interfere with any of the laws of this state known as the “game laws,” nor be deemed to interfere with the right to destroy any venomous reptile or any known as dangerous to life, limb or property, **or to interfere with the right to kill animals to be used for food** or with any properly conducted scientific experiments or investigations, which experiments or investigations shall be performed only under the authority of the faculty of some regularly incorporated college or university of the state of Washington or a research facility registered with the United States department of agriculture and regulated by 7 U.S.C. Sec. 2131 et seq.

##### § 16.52.185 EXCLUSIONS FROM CHAPTER

*Nothing in this chapter applies to accepted husbandry practices used in the commercial raising or slaughtering of livestock or poultry, or products thereof or to the use of animals in the normal and usual course of rodeo events or to the customary use or exhibiting of animals in normal and usual events at fairs as defined in RCW 15.76.120.*

#### **WEST VIRGINIA CODE**

§ 19-20-12 DOGS, OTHER ANIMALS AND REPTILES PROTECTED BY LAW; UNLAWFUL KILLING THEREOF; AGGRIEVED OWNER’S REMEDY; PENALTIES; PENALTIES FOR UNLAWFUL STEALING OF COMPANION ANIMALS

(a) Any dog which is registered, kept and controlled as provided in this article or any dog, cat or other animal or any reptile which is owned, kept and maintained as a companion animal by any person, irrespective of age, is protected by law; and, except as otherwise authorized by law, any person who shall intentionally, knowingly or recklessly kill, injure, poison or in any other manner, cause the death or injury of any dog, cat, other animal or any reptile is guilty of a misdemeanor and, upon conviction thereof, shall be ordered to provide public service for not less than thirty nor more than ninety days or fined not less than three hundred dollars nor more than five hundred dollars, or both. However, this section does not apply to a dog who is killed while attacking a person, a companion animal or livestock.

##### § 7-10-4 CRUELTY TO ANIMALS; PENALTIES; EXCLUSIONS

(h) The provisions of this section do not apply to **lawful\* acts of hunting, fishing, trapping or animal training** or farm livestock, poultry, gaming fowl or

wildlife kept in private or licensed game farms if kept and maintained according to usual and accepted standards of livestock, **poultry, gaming fowl or wildlife or game farm production and management**, nor to humane use of animals or activities regulated under and in conformity with the *provisions of 7 U.S.C. § 2131, et seq., and the regulations promulgated thereunder, as both statutes and regulations are in effect on the effective date of this section.*

## WISCONSIN STATUTES

### § 951.015. CONSTRUCTION AND APPLICATION

**(1) This chapter may not be interpreted as controverting any law regulating wild animals that are subject to regulation under ch. 169, the taking of wild animals, as defined in s. 29.001(90), or the slaughter of animals by persons acting under state or federal law.**

### § 951.02. MISTREATING ANIMALS

No person may treat any animal, whether belonging to the person or another, in a cruel manner. *This section does not prohibit bona fide experiments carried on for scientific research or normal and accepted veterinary practices.*

### § 951.06. USE OF POISONOUS AND CONTROLLED SUBSTANCES

No person may expose any domestic animal owned by another to any known poisonous substance, any controlled substance included in schedule I, II, III, IV or V of ch. 961, or any controlled substance analog of a controlled substance included in schedule I or II of ch. 961, whether mixed with meat or other food or not, so that the substance is liable to be eaten by the animal and for the purpose of harming the animal. This section shall not apply to poison used on one's own premises and designed for the purpose of rodent or pest extermination *nor to the use of a controlled substance in bona fide experiments carried on for scientific research or in accepted veterinary practices.*

### § 951.09. SHOOTING AT CAGED OR STAKED ANIMALS

(3) This section does not apply to any of the following animals:

(d) *Animals that are treated in accordance with normally acceptable husbandry practices.*

## WYOMING STATUTES

### § 6-3-203 CRUELTY TO ANIMALS; PENALTIES; LIMITATION ON MANNER OF DESTRUCTION

(f) Nothing in subsection (c) of this section may be construed to prohibit:

(i) **The use of dogs in the management of livestock by the owner of the livestock, his employees or agents or other persons in lawful custody of the livestock;**

(ii) **The use of dogs or raptors in hunting;** or

(iii) **The training of dogs or raptors or the use of equipment in the training of dogs or raptors for any purpose not prohibited by law;\***

(m) Nothing in subsection (a), (b) or (n) of this section shall be construed to prohibit:

(i) A person from humanely destroying an animal;<sup>825;825</sup>

(ii) *The use of industry accepted agricultural and livestock practices on livestock;*

(iii) **Rodeo events, whether the event is performed in a rodeo, jackpot or otherwise;** or (iv) **The hunting, capture or destruction of any predatory animal;<sup>865;865</sup> or other wildlife in any manner not otherwise prohibited by law.\***