

BACKYARD BREEDING: REGULATORY NUISANCE, CRIME PRECURSOR

LISA MILOT*

INTRODUCTION.....	707
I. REGULATION OF DOG BREEDING.....	713
A. <i>Federal Law</i>	713
B. <i>State Laws</i>	716
C. <i>Local Ordinances</i>	720
D. <i>The Existing Regulatory Scheme Overall</i>	722
II. SMALL-VOLUME DOG BREEDERS AND HARM.....	725
A. <i>Small-Volume Breeding Generally</i>	725
B. <i>Direct Harms of Backyard Breeding</i>	727
C. <i>Backyard Breeding as a Precursor to Criminal Activity</i>	731
D. <i>Harms of the Small-Volume Dog Breeding, Conclusions</i>	736
III. FIXING THE LAWS, FIXING THE DOGS, FIXING THE PROBLEM.....	737
A. <i>Regulation of Low Risk Activities</i>	737
B. <i>Fixing the Laws</i>	740
C. <i>Fixing the Dogs</i>	742
D. <i>Beginning to Fix the Problem</i>	746
E. <i>Fixing Backyard Breeding: Conclusions</i>	747
CONCLUSION	748

INTRODUCTION

Walk through any municipal dog shelter in the United States and you will see kennel upon kennel of dogs looking back, tens or hundreds per shelter in various conditions: from physically neglected or injured, to scared and under-socialized, to seemingly healthy and well-adjusted. A variety of ages, sizes, and breeds are represented; no one type can claim exclusivity in open admission shelters.¹ There simply are more dogs of all types than there are homes that want them.

* Associate Professor, University of Georgia School of Law. Many thanks to Eric Franklin Amarante, Joan Heminway, and the law faculty of the University of Tennessee for their thoughtful comments on an earlier draft, and to the staff of Athens-Clarke County (GA) Animal Control for access to data and opportunities to observe closely the work of a municipal animal control.

1. Open admission shelters are public facilities that accept all animals that fit a defined class (for example, all cats, dogs, and injured wildlife found loose within the county or brought to the facility by a county resident), regardless of temperament,

Currently, this oversupply of dogs is dealt with after the dogs are born. Those surrendered to shelters or brought in as strays are held for anywhere from a few days to a few months at government expense, then, nationally, approximately one-sixth of them are killed.² Even “no kill” shelters euthanize dogs; within the industry, the term refers to shelters with a live release rate greater than 90%—and thus a euthanasia or other death rate of up to 10%.³ In all, approximately 700,000 dogs are killed each year in U.S. shelters.⁴ No one actually knows the real number, however, due to inconsistent record-keeping and a general lack of transparency by the sheltering agencies.⁵

Financially, homeless dogs cost U.S. taxpayers more than a billion dollars each year, with countless volunteer hours and more funds spent by private rescue organizations.⁶ And it costs shelter workers their health: the euthanasia of healthy but unwanted animals is well-

health, or availability of space to house the animal. Thus, the population at an open admission shelter represents the range of covered animals that are homeless within a community at any given time. See *What Is an Open-Admission Facility? Young Williams Animal Center Explains*, YOUNG WILLIAMS ANIMAL CENTER (May 18, 2017), <https://www.young-williams.org/news/2017/05/18/what-is-an-open-admission-facility-young-williams-animal-center-explains/>.

2. See Shelter Intake and Surrender Pet Statistics, ASPCA, <https://www.aspc.org/animal-homelessness/shelter-intake-and-surrender/pet-statistics> (last visited Feb. 11, 2018) (showing 3,300,000 dogs impounded and 670,000 dogs euthanized each year).

3. See Arin Greenwood, *What’s a ‘No-Kill’ Animal Shelter? The Answer Is More Complicated Than It Seems*, WASH. POST: ANIMALIA (Jan. 23, 2017), <https://www.washingtonpost.com/news/animalia/wp/2017/01/23/whats-a-no-kill-animal-shelter-the-answer-is-more-complicated-than-it-seems/>.

4. See Shelter Intake and Surrender Pet Statistics, *supra* note 2; Kimberly A. Woodruff & David R. Smith, *An Estimate of the Number of Dogs in U.S. Shelters...and the factors affecting their fate*, available at c.yumcdn.com/sites/sawanetwork.org/resource/resmgr/Conferences/An_Estimate_of_Number_of_Dog.pdf (providing an estimate of 776,970 dogs euthanized each year in U.S. shelters based on a capture-recapture methodology).

5. See Reporting, ASPCA, <https://www.aspc.org/about-us/aspc-policy-and-position-statements/position-statement-data-collection-reporting> (last visited Feb. 11, 2017). Delaware is unusual in this regard, listing the percentages and numbers of dogs and cats euthanized in its municipal shelters for 2002-2005 in its state code (2002: 57% of impounded dogs and cats were euthanized (n=12,659); 2003: 56% (n=13,653); 2004: 61.4% (n=13,067); 2005: 64.4% (n=13,583)). DEL. CODE ANN. tit. 16, § 3011F (2016).

6. In 2007 the Humane Society of the United States estimated that American taxpayers spent approximately \$2.4 billion each year for municipalities to care for and dispose of homeless animals, with the majority of those funds being spent on dogs. Andrew N. Rowan, *Animal Sheltering Trends in the U.S.*, THE HUMAN SOCIETY OF THE UNITED STATES, http://www.humanesociety.org/animal_community/resources/timelines/animal_sheltering_trends.html (last visited Sept. 18, 2017).

recognized as a source of mental health strain on shelter workers, at times leading to suicide.⁷

Some state legislatures have directly acknowledged these costs. The Florida legislature, for example, found that:

[T]he uncontrolled breeding of dogs and cats in[] this state pose[s] risks to the well-being of dogs and cats, the health of humans and animals, and the agricultural interests in this state. . . . Uncontrolled breeding results in the birth of many more puppies and kittens than are needed to provide pet animals to new owners or to replace pet animals that have died or become lost. This leads to many dogs, cats, puppies, and kittens being unwanted, becoming strays and suffering privation and death, being impounded and destroyed at great expense to the community, and constituting a public nuisance and public health hazard.⁸

Other state legislatures, including California⁹ and New Jersey,¹⁰ have similarly included specific statements concerning the public costs of private breeding in their state codes.

Given the recognition that the overproduction of dogs is a problem, why does it continue to happen? One easy answer is that the benefits of the production—the cost savings of not paying to have a dog sexually altered and the proceeds from the sales of puppies—are enjoyed privately while the costs are borne societally and by the dogs.

This can be seen clearly in the case of puppy mills. Large-scale commercial dog breeding facilities that place a priority on profits rather than animal welfare, puppy mills entered the popular consciousness in 2008 when *The Oprah Winfrey Show* aired an

7. See, e.g., Charlie L. Reeve, et al., *The Caring-Killing Paradox: Euthanasia-Related Strain Among Animal-Shelter Workers*, 35 J. APPLIED SOCIAL PSYCH. 119 (2005).

8. FLA. STAT. ANN. § 823.15(1) (2018).

9. CAL. HEALTH & SAFETY CODE § 122330 (West 2018) (“[t]he Legislature finds and declares all of the following: (a) Uncontrolled and irresponsible breeding of animals contributes to pet overpopulation, inhumane treatment of animals, mass euthanasia at local shelters, and escalating costs for animal care and control”).

10. N.J. STAT. ANN. § 4:19A-1 (West 2017) (“[t]he purpose of this program shall be to reduce the population of unwanted and stray dogs and cats . . . thereby reducing potential threats to public health and safety posed by the growing population of these unwanted and stray animals”).

investigative report on them.¹¹ The show brought into millions of homes the image of hundreds of small-breed dogs crammed into wire rabbit hutches piled several layers high and bred as often as physically possible until their reproductive usefulness fails and they are disposed of.¹² The larger breed dogs used to fulfill the demand for Labrador retrievers, golden retrievers, and poodles and their trendy mixes—labradoodles, goldendoodles, and such—were shown housed in mud-filled outdoor pens. The injuries and ailments of these animals—including barbaric debarking procedures, chains embedded in the dogs’ skin, and the ever-present threat of being shot for not sufficiently producing puppies for sale—were described vividly and shown on video for a horrified audience. Bill Smith, the founder of Main Line Animal Rescue who drew Winfrey’s attention to the issue of puppy mills, described one kennel as “probably the worst place I’ve ever been to in my life.”¹³ The show revealed that nearly all puppies sold in pet stores or over the internet are produced under these conditions.

The puppy mill business model requires a high volume of sales over the reproductive life of the breeding stock.¹⁴ As a result, puppy mills seek to produce dogs attractive to a wide range of customers, exploiting trends such as “teacup” dogs, “designer” mixes, and breeds showcased in popular movies.¹⁵ They are notorious for producing dogs with genetic defects and communicable diseases, as short-term profits take priority over the dogs’ health.¹⁶ The ultimate costs are then borne by the consumers who purchase the puppies without knowledge of the ailments, and taxpayers who fund the municipal shelters responsible for caring for and disposing of excess dogs.

However, while puppy mill dogs represent some portion of the dogs impounded at U.S. shelters, they are not the dogs that fill the shelters for months on end before being euthanized. These dogs are medium- to large-breed dogs of mixed heritage, many bearing the

11. See *The Oprah Winfrey Show: Lisa Ling Investigates the Hidden World of Puppy Mills* (Harpo Productions television broadcast Apr. 4, 2008).

12. *Id.* The description that follows is based on this report.

13. *Id.*

14. *What Is A Puppy Mill*, ASPCA, <https://www.aspc.org/animal-cruelty/puppy-mills>, (last visited Feb. 12, 2018).

15. See *Puppy Mills: Dogs Abused for the Pet Trade*, PETA, <https://www.peta.org/issues/companion-animal-issues/companion-animals-factsheets/puppy-mills-dogs-abused-pet-trade/>, (last visited Feb. 12, 2018).

16. See generally, *Veterinary Problems in Puppy Mill Dogs*, THE HUMANE SOCIETY OF THE UNITED STATES (2012), http://www.humanesociety.org/assets/pdfs/pets/puppy_mills/veterinary_problems_puppy_mills.pdf.

heavier heads and muscular builds of bully mixes.¹⁷ Nationally, the Humane Society of the United States (HSUS) reports that one-third of dog impounds are bully mixes, and in urban areas that number can be as high as 70% or more.¹⁸ Moreover, these dogs tend to take longer to be adopted or rescued than other types of dogs, utilizing more public resources along the way.

These dogs are not the dogs of choice for puppy mills; they are too large, too strong to easily house and breed in volume, and lack the mainstream appeal that entices the many puppy mill customers. Instead, the breeders producing these dogs may be doing so inadvertently, by leaving their dogs sexually intact and not restraining their access to other intact opposite-sex dogs. The forces driving inadvertent breeding are often financial, cultural, or educational ones: one study found that more than one-quarter of the dogs in underprivileged communities are reproducing because of financial constraints alone.¹⁹ As a result, in these and other communities with low spay/neuter rates, intact dogs and their resulting litters are the norm.

In other cases, though, the breeding is intentional. No one really knows the scope of small-volume commercial breeding in the United States, but that it exists is not in debate: simply look at any Craigslist Community/Pets page or For Sale/Farm & Garden page to find dozens of litters offered for fees ranging from an undisclosed “rehoming fee” to thousands of dollars per puppy.²⁰ Licensed, professional breeders

17. “Bully” is a catchall term for a collection of common dog breeds and generally include American pit bull terriers, American Staffordshire terrier, boxers, Boston terriers, and bulldogs, and mixed breed dogs that appear to have characteristics common to these breeds. See *What is a Bully Breed?*, ANIMAL PLANET, <http://www.animalplanet.com/pets/about-bully-breeds/> (last visited Feb. 18, 2018).

18. Nancy Lawson, *A Nation in the Ring (Part 2: The Costs of Dogfighting)*, THE HUMANE SOCIETY OF THE UNITED STATES (Sept. 7, 2007), <http://www.lb7.uscourts.gov/documents/09-3010130.pdf>; see also Julie Richard, *Dangerous Breeds?*, BEST FRIENDS MAGAZINE, Sept./Oct. 2004, at 12 (“Shelters are packed with [bullies] as breeding them explodes along with drug dealing and dog fighting.”).

19. Joshua Frank, *An Interactive Model of Human and Companion Animal Dynamics: The Ecology and Economics of Dog Overpopulation and the Human Costs of Addressing the Problem*, 32 HUMAN ECOLOGY 107, 115 (2004).

20. For example, a search of the Farm & Garden section of the Athens, GA Craigslist using the search term “puppies” yielded 68 listings of litters for sale. One litter was offered at no charge and another at \$50 per puppy. Eight litters required an unspecified “rehoming fee.” The remaining litters were being sold for \$150-\$1500 per puppy, with most in the \$400-\$800 range. Screen shots of listings on file with the author.

shun such venues, selling through industry magazines or word-of-mouth; instead, these “backyard breeders” are operating in contravention of or outside of existing regulatory schemes.

The harms produced by backyard breeders include the costs to impound and destroy hundreds of thousands of dogs annually, damage to the rule of law through widespread noncompliance with local business license requirements and state and federal tax laws, and financial injury to purchasers of puppies who turn out to be sick.²¹ Even more troublingly, though, unlicensed breeders of large breed dogs are ideal sources for fighting dogs and for guard dogs for criminal enterprises like drug, weapon, and human trafficking.²² Backyard breeding is, at best, a nuisance that produces some unpleasant externalities and low-level law-breaking. At worst, it is an important, and at times integral, step towards violent criminal acts.

Not all backyard breeders, even those whose dogs are purchased for and used in dogfighting or as guard dogs, are intentionally participating in these criminal enterprises. However, the very factors that allow breeders to evade tax and business licensing regimes—a cash economy with no record-keeping or outside accountability, with many operations run from the breeder’s residence—make them an attractive source of dogs for use in illicit activities since neither the business nor the purchase is tracked in any way.

Moreover, in communities in which it is common for people to have unspayed and unneutered dogs, this pernicious form of breeding is nearly invisible to outsiders. The small scale of the breeding operations means their existence is not immediately obvious to state inspectors and violations of existing breeding regulations are unlikely to be worth investigating when enforcement resources are limited. The superficial resemblance to the nuisance-level activities of breeding inadvertently or to make an extra buck makes the most pernicious form of backyard breeding labor-intensive to identify: it is far more likely that any given litter is the result of nuisance-level breeding than that it is of the pernicious sort. Yet the costs of this breeding are enormous, collectively and in the instances in which production of the dogs is a precursor to a crime.

While backyard breeding is a phenomenon that is well-known in the animal rescue and animal control communities, it is not one that has drawn rigorous scrutiny. In fact, there are no legal or other academic writings focused on the problem of backyard breeding. This

21. See *infra* Part I (describing direct harms caused by backyard breeding).

22. See *infra* Part II (describing the criminal enterprises that seek out dogs from unlicensed breeders and the traits for which those dogs are bred).

Article fills this gap by addressing the problems of unregulated, small-volume dog breeding. Part I provides an overview of the regulatory regimes that govern dog breeding in the United States; an Appendix provides citations to and summaries of the relevant provisions of each state's laws. Part II steps back and describes backyard breeding operations and their harms, including, at times, their role in larger criminal enterprises. Part III reviews literature on the regulation of "low risk" activities and develops a practical, three-step approach to regulating backyard breeding, to efficiently resolve much nuisance-level backyard breeding and illuminate the pernicious breeding. Part IV concludes the Article.

I. REGULATION OF DOG BREEDING

Dog breeding in the United States is regulated on both the state and federal levels. However, these regimes focus on the problem of mass breeding of companion animals for commercial or research purposes and explicitly exclude small-volume breeders from coverage. To claim the benefit of the exclusion, no registration or notification is required; breeders simply do not obtain a license if they are not subject to regulation under applicable law. Only in the patchwork of laws on the local level is there any regulation of this breeding activity.

A. Federal Law

The only federal law governing dog breeding is the Animal Welfare Act (AWA).²³ Passed in 1966, the AWA establishes standards governing the procurement and care of animals in research laboratories²⁴ by providing for the licensing and inspection of certain commercial enterprises and a minimum level of care for the covered animals. Amendments to the AWA have expanded the types of animals covered, increased penalties for noncompliance, added categories of care required, provided rules for the importation of dogs

23. Laboratory Animal Welfare Act of 1966, 7 U.S.C. § 2131 (2014).

24. See Benjamin Adams & Jean Larson, *Legislative History of the Animal Welfare Act*, UNITED STATES DEPT OF AGRIC., <https://www.nal.usda.gov/awic/legislative-history-animal-welfare-act-introduction> (last visited Sept. 12, 2017). Of particular concern was the theft and sale of owned animals to research facilities. Two articles generally credited with spurring passage of the act were Coles Phinizy, *The Lost Pets that Stray to the Labs*, SPORTS ILLUSTRATED, Nov. 29, 1965, at 36 and Stan Wayman, *Concentration Camps for Dogs*, LIFE, Feb. 4, 1966, at 22.

for sale in the United States, required minimum hold times before cats or dogs could be the subject of experiments, and prohibited actions in furtherance of animal fighting ventures.²⁵ The AWA authorizes the Secretary of Agriculture to promulgate associated standards and rules and the Secretary, in turn, has charged the Animal and Plant Health Inspection Service (APHIS), a part of the United States Department of Agriculture, with implementing and enforcing the AWA.

In certain instances, commercial dog breeders selling puppies intended as pets must be licensed as animal dealers under the AWA.²⁶ In such cases, the breeding facility is subject to a pre-license inspection and must pay a fee based on its actual or anticipated annual gross volume of sales.²⁷ Later inspections are largely based on a risk assessment; noncompliant facilities have an increased risk of inspection in later years and consumer or other complaints may also trigger inspections.²⁸ Animal dealers must, among other things,²⁹ employ a veterinarian³⁰ and maintain disposition records for each animal in their care, including the name and address of each person to whom they transfer a puppy or dog.³¹

The primary exception for the licensing of breeding facilities in the AWA concerns “retail pet stores.”³² APHIS defines a retail pet store as “a place of business or residence at which the seller, buyer, and the animal available for sale are physically present.”³³ This exception provides that dog breeders that sell puppies intended as pets are only subject to the licensing, inspection, and care standards of the AWA if they sell the puppies wholesale or in some other way that means the purchaser does not have a chance prior to the sale to determine the health of the puppy, such as over the internet. In its “Costs and Benefits” analysis to the 2013 revision to its rules governing

25. See 7 U.S.C. § 2131; Adams & Larson, *supra* note 24.

26. 7 U.S.C. § 2133 (2014).

27. 9 C.F.R. § 2.3(b) (2017); 9 C.F.R. § 2.6 (2017). For new businesses, the fee is based on anticipated gross sales for the first year of operation. *Id.*

28. *Risk Based Inspection System*, UNITED STATES DEPT OF AGRIC. (Aug. 15, 2016), https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/sa_awa/ct_awa_risk_based_inspection_system.

29. For a full list of requirements, see 9 C.F.R. §§ 2.1-2.55 (2017).

30. 9 C.F.R. § 2.40 (2017).

31. 9 C.F.R. § 2.75(a)(1)(iv) (2017).

32. 7 U.S.C. § 2132(f) (2014).

33. 9 C.F.R. § 1.1 (2017).

exemptions to licensing in which it added the physical presence requirement, APHIS explained that:

When a buyer receives a sick or abused pet animal, sight unseen, the responsibility for correcting inadequate care has been effectively transferred from the seller to the buyer without the buyer's knowledge or consent. If that buyer is unwilling or unable to provide the pet animal with needed care, a shelter may become the default caregiver for that animal. . . . Public shelters provide for care of these unwanted pet animals, usually at local taxpayer expense.³⁴

Thus, any breeder selling puppies to consumers in person, whether at flea markets, by the side of the road, or through advertisements placed on Craigslist or Facebook yard sale sites, is exempt from the AWA regardless of the size of the breeding operation. Only breeders who sell wholesale to retailers and those conducting business over the internet, shipping puppies to buyers who have never actually met them, have federal standards potentially applied.

The AWA provides a second exemption for businesses of *de minimis* size.³⁵ The definition of *de minimis* is not defined in the AWA; instead, it is specifically left to the Secretary to determine the appropriate cut-off.³⁶ Initially defined as a business with three or fewer breeding females, in 2013 APHIS raised the threshold to four breeding females.³⁷ At the time, APHIS explained that, based on its experience, breeders of this size adequately provided for the care and treatment of their animals making federal oversight unnecessary.³⁸

Thus, federal law provides some regulation of dog breeding, requiring those that sell through intermediaries (generally a pet store) or over the internet to comply with the AWA's requisites. Breeders that sell directly to consumers in face-to-face interactions and small-volume breeders are not regulated federally; in one

34. Animal and Plant Health Inspection Service, 78 Fed. Reg. 57,227, 57,228 (Sept. 18, 2013) (to be codified at 9 C.F.R. pts. 1 & 2).

35. 7 U.S.C. § 2133 (2014).

36. 7 U.S.C. § 2133 (2014).

37. 9 C.F.R. § 2.1(a)(3)(iii) (2017).

38. Animal and Plant Health Inspection Service, 78 Fed. Reg. 57,227, 57,239 (Sept. 18, 2013) (to be codified at 9 C.F.R. pts. 1 & 2) ("An individual who maintains four or fewer such females on his or her premises has demonstrated that they are capable of providing adequate care and treatment for the animals on their premises.").

estimate, this includes nearly 40% of the cats and dogs sold through pet stores and nearly all of the animals sold outside pet stores.³⁹

B. State Laws

The impetus for much state dog breeding legislation was *The Oprah Winfrey Show*'s⁴⁰ puppy mill exposé. In the two years following its airing, seven states passed legislation or strengthened existing law to tackle the problem of puppy mills;⁴¹ more have since done so. These laws require many large-scale commercial pet breeders to obtain breeding or sale licenses, be subject to health and other inspections, and/or provide consumer protections with respect to the animals they sell.

In discussing amendments to Nevada's statute regulating dog breeding in 2011, one Assemblyman skeptical of regulating dog breeding generally condemned puppy mills stating, "I do not like the puppy mill thing that was described. Seeing a few of them, I did not like them. I cannot go along with that."⁴² The legislators contrasted these large-volume breeders with caring hobby breeders who have "a dog and intend[] to breed it or the breed came accidentally,"⁴³ someone like another Assemblyman's hypothetical friend who:

[H]as a great bird dog. He decides he wants to have a litter with that dog to get some pups and will sell a couple of those

39. See Michael Symons, *Christie Signs Law Aimed at Puppy & Kitten Mills*, APP. (Feb. 5, 2015, 3:42 PM), <http://www.app.com/story/news/politics/new-jersey/2015/02/05/nj-puppy-mill-law-christie-signed/22931335/> ("The Pet Industry Joint Advisory Council, which opposed the new law, said as many as 40 percent of dogs and cats sold in New Jersey pet stores come from local hobby breeders and other small-scale breeders exempt from U.S. Department of Agriculture licensing requirements.").

40. See *The Oprah Winfrey Show: Lisa Ling Investigates the Hidden World of Puppy Mills*, *supra* note 11.

41. See Rebecca F. Wisch, *Overview of Recent Dog Breeding Laws*, ANIMAL LEGAL & HISTORICAL CENTER (2010), <https://www.animallaw.info/article/overview-recent-dog-breeding-laws-2010>.

42. *Hearing on S.B. 226 Before the Comm. on Nat. Res., Agric., and Mining*, 76th Sess. 21 (Nev. 2011) (statement of Assemb. Kelly Kite, Member, Comm. on Nat. Res., Agric., and Mining) <https://www.leg.state.nv.us/Session/76th2011/Minutes/Assembly/NRAM/Final/1225.pdf>.

43. *Hearing on S.B. 226 Before the Comm. on Nat. Res., Agric., and Mining*, 76th Sess. 21 (Nev. 2011) (statement of Assemb. Pete Livermore, Member, Comm. on Nat. Res., Agric., and Mining) <https://www.leg.state.nv.us/Session/76th2011/Minutes/Assembly/NRAM/Final/1225.pdf>.

pups. This is not a commercial operation; he is just a guy who has a good dog and wants to make sure the line keeps going.⁴⁴

The resulting legislation passed by the Nevada Assembly added restrictions and accountability for puppy mill operators and other commercial breeders while exempting hobby breeders.⁴⁵

Similarly, activists have condemned puppy mills while lauding small-volume breeders. HSUS contrasted puppy mills with “traditional small hobby and show breeders” in its 2012 report criticizing the American Kennel Club (AKC), stating that the “AKC should stand up for dogs, not puppy mills.”⁴⁶ One of HSUS’s high priority campaigns in 2017 is a “pledge to stop puppy mills”⁴⁷ and its website includes an “issue” area of “puppy mills” under “pet protection.”⁴⁸ There is no similar campaign or issue listing concerning backyard breeders. Even publications that nominally cover both types of breeding generally include, at most, a passing reference to the smaller breeders in the text. For example, one article entitled “Puppy Mills and Backyard Breeders” only mentions backyard breeders in the title and initial paragraph, stating simply, “If you decide to purchase a pooch, it should be from a reputable breeder—not a backyard breeder or puppy mill” and then proceeds to explain and criticize puppy mills for the remainder of the article, ignoring small-volume breeders.⁴⁹

44. *Hearing on S.B. 226 Before the Comm. on Nat. Res., Agric., and Mining*, 76th Sess. 20 (Nev. 2011) (statement of Assemb. David P. Bobzien, Member, Comm. on Nat. Res., Agric., and Mining) <https://www.leg.state.nv.us/Session/76th2011/Minutes/Assembly/NRAM/Final/1225.pdf>.

45. NEV. REV. STAT. § 574.245 (2011) (“Breeder” defined. “Breeder” means a dealer, operator or other person who is responsible for the operation of a commercial establishment engaged in the business of breeding dogs or cats for sale or trade. The term does not include a person who breeds dogs or cats as a hobby.”).

46. *The American Kennel Club: No Longer “The Dog’s Champion?”*, THE HUMANE SOCIETY OF THE UNITED STATES (July 6, 2012), available at http://animalstudiesrepository.org/hsus_pmc_iae/1.

47. *Stop Puppy Mills*, THE HUMANE SOCIETY OF THE UNITED STATES, http://www.humanesociety.org/issues/campaigns/stop_puppy_mills/?credit=web_id80597225 (last visited Sept. 7, 2017).

48. *Issues*, THE HUMANE SOCIETY OF THE UNITED STATES, http://www.humanesociety.org/issues/?credit=web_id80597225 (last visited Sept. 7, 2017).

49. *See Puppy Mills and Backyard Breeders*, DOGSTER (Dec. 2, 2009), <http://www.dogster.com/lifestyle/puppy-mills-and-backyard-breeders>. For some negative media references to backyard breeders, see Stu Bykofsky, *Opinion, Politician’s pet project: protecting puppies*, THE PHILADELPHIA DAILY NEWS, Apr. 5,

Because of the focus on the harms of puppy mills by both activists and legislators, state legislators have focused on the harms presented by large-volume breeders in designing legislation. To this end, some states have capped the number of animals a breeding facility may have; Oregon, for example, makes it illegal for a breeder to have more than fifty intact adult female dogs,⁵⁰ whereas Virginia⁵¹ and Washington⁵² set the limit at fifty intact dogs regardless of sex, and Louisiana at seventy-five.⁵³ In all, thirty-five states⁵⁴ provide licensing, record-keeping, and/or care standards for dog breeding operations.⁵⁵

While the specifics vary widely, statutes in all states exempt some number of breeders from regulation.⁵⁶ Some exclude those with fewer than a stated number of dogs kept for breeding; others define coverage by the number of dogs⁵⁷ or litters of puppies produced or sold in a year. For example, Virginia's statute, which has been lauded as a model for its protectiveness of the covered breeding stock,⁵⁸ limits the total

2016,

http://www.philly.com/philly/columnists/stu_bykofsky/20160405_Philly_bites_puppy_mills_-_again.html (stating that a proposed bill would “ban[] selling dogs at parks or roadsides—anywhere in public—to constrain the so-called ‘backyard breeder’, many of whom are notorious for inbreeding; bad breeding; filthy conditions; and birthing animals that have genetic, medical, and socialization problems”); Susan Shroder, *County: ‘Backyard Breeder’ had 44 dogs*, THE SAN DIEGO UNION-TRIBUNE, Nov. 11, 2015, <http://www.sandiegouniontribune.com/sdut-county-backyard-breeder-had-44-dogs-2015nov10-story.html> (“This is a backyard breeder who was more concerned about making money than providing the necessary care for the animals on the property.”); Jim Schoettler, *Backyard Breeders, puppy mills pose danger to dogs, cats and consumers*, THE FLORIDA TIMES-UNION, June 17, 2012, <http://jacksonville.com/news/metro/2012-06-16/story/backyard-breeders-puppy-mills-pose-danger-dogs-cats-and-consumers> (“[O]ne of the common dangers facing dogs, cats and consumers citywide—illegal backyard breeding. . .”).

50. OR. REV. STAT. ANN. § 167.374(2) (2009).

51. VA. CODE ANN. § 3.2-6507.2 (1) (2008); this limit may be raised after a public hearing.

52. WASH. REV. CODE ANN. §§ 16.52.310(1), 16.52.310(5) (2010); breeders licensed prior to January 1, 2010 under the AWA are exempt from this limit.

53. LA. STAT. ANN. § 3:2772(H) (2010).

54. See *infra* Appendix for a list of the states. Until recently, Maryland also had legislation on point, MD. CODE ANN., LOCAL GOV'T § 13-108 (West 2018), which exempted breeders with fewer than six intact female dogs over the age of six months and who sold from fewer than six litters, but it expired on September 30, 2017.

55. See Ann K. Wooster, Annotation, *State and Local Regulation of Operation of Dog Breeding and Kennel Facilities*, 77 A.L.R.6th 393 (2012) for case law and more information about the specific requirements of each state.

56. See *infra* Appendix for details on the exemptions for each state.

57. OHIO REV. CODE ANN. § 956.01 (2017).

58. See Robyn F. Katz, *Detailed Discussion of Commercial Breeders and Puppy Mills*, ANIMAL LEGAL & HISTORICAL CENTER (2008),

number of dogs that may be used for breeding and has enforcement provisions that exempt breeders with fewer than thirty adult female dogs from coverage.⁵⁹ Meanwhile, Pennsylvania exempts breeders who produce and transfer no more than sixty dogs in a calendar year,⁶⁰ and Ohio excludes up to eight litters a year from its breeding regulations.⁶¹

In a few cases, the exemption provided could cover an unlimited number of animals. Nevada, as discussed earlier, exempts from coverage any person who breeds dogs as a “hobby.”⁶² Similarly, Massachusetts exempts “personal kennels” from its licensing and inspection requirements,⁶³ and South Carolina excludes an individual “who . . . owns an animal which occasionally is bred or produces a litter from which animals are sold.”⁶⁴ In general, statutes only apply to “commercial” breeders allowing any small-volume breeder to argue the statutory scheme does not apply to him.

Enforcement of the state-level laws governing breeding is generally vested in a centralized state agency. The Georgia Department of Agriculture (GDA), for example, is charged with enforcing the Georgia Animal Protection Act, which contains the provisions concerning the licensing and sale of animals in Georgia.⁶⁵ Specifically, the Companion Animal/Equine Section of the GDA performs pre-licensing and annual inspections of all licensed “pet dealers” (which include all legally-operating dog breeders), including

<https://www.animallaw.info/article/detailed-discussion-commercial-breeders-and-puppy-mills>; K. Michelle Welch, *Animal Law*, 44 U. RICHMOND L. REV. 185, 195 (2009).

59. VA. CODE ANN. § 3.2-6500 (2015). Michigan has the lowest threshold for application of its laws; it only exempts commercial breeding enterprises with fewer than three dogs. *See* MICH. COMP. LAWS ANN. § 287.270 (1973).

60. 3 PA. CONS. STAT. ANN. § 459-102 (West 2017). At the low end, New Jersey sets the cap on individual sales before regulations apply at five dogs. N.J. STAT. ANN. 13:45A-12.1 (2012).

61. OHIO REV. CODE ANN. § 956.01 (2017). Delaware, Georgia, and New York only exempt individuals breeding and selling one litter each year. DEL. CODE ANN. tit. 16, § 3041F(8) (West 2018); GA. COMP. R. & REGS. § 40-13-13-.07(2)(d) (2017); N.Y. COMP. CODES R. & REGS. tit. 1, § 81.1 (West 2018).

62. *See* NEV. REV. STAT. § 574.245 (2016).

63. *See* MASS. GEN. LAWS ANN. ch. 140 § 136A (West 2018) (defining “personal kennel”, which is then excepted from the definition of “kennel”, to which licensing and inspection statutes apply).

64. S.C. CODE ANN. § 47-13-160(G)(3) (1993).

65. GA. CODE ANN., T. 4, CH. 11, ART. 1 (2011).

reviewing holding facilities and records for compliance with state law.⁶⁶

In all, while state laws augment the federal scheme in many instances, covering some number of otherwise unregulated breeders and providing state-level oversight to their operations, significant numbers of breeders are still able to operate without any oversight due to the focus in existing legislation on large-volume breeding.

C. Local Ordinances

Some localities also regulate dog breeding. These ordinances may be in addition to state-level requirements; for example, many New Jersey counties have their own dog breeder licensing ordinances.⁶⁷ In other cases, they exist without statewide legislation; localities in New Mexico, for example, have ordinances governing these activities despite the lack of regulation on the state level.⁶⁸

Unlike the federal and state schemes, some of these local provisions require registration of *all* litters produced and/or before transfer of any puppies. For example, Albuquerque, New Mexico requires that pet owners apply for and receive a “litter permit” from its Animal Welfare Division within one week of the birth of a litter of puppies.⁶⁹ Households are limited to four permits each year and no

66. For more information about the Companion Animal/Equine Section, see <http://www.agr.georgia.gov/companion-animal-equine-division.aspx> (last visited Sept. 13, 2017).

67. See HARRISON, N.J., CODE OF ORDINANCES § 6.08.090 (LexisNexis 2015); ELIZABETH, N.J., CODE OF ORDINANCES § 6.04.100 (LexisNexis 2017); TEWKSBURY TWP., N.J., CODE OF ORDINANCES § 6.04.100 (LexisNexis 2016); STRATFORD BOROUGH, N.J., CODE OF ORDINANCES § 6.04.060 (2009), https://library.municode.com/nj/stratford_borough/codes/code_of_ordinances?nodeId=T6_C6.04_6.04.060.

68. See ALBUQUERQUE, N.M., CODE OF ORDINANCES § 9-2-3-7 (2017), [http://library.amlegal.com/nxt/gateway.dll/New%20Mexico/albuqwin/chapter9healthsafetyandsanitation?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:albuquerque_nm_mc\\$sanc=JD_9-2-3-7](http://library.amlegal.com/nxt/gateway.dll/New%20Mexico/albuqwin/chapter9healthsafetyandsanitation?f=templates$fn=default.htm$3.0$vid=amlegal:albuquerque_nm_mc$sanc=JD_9-2-3-7); BELEN, N.M., CODE OF ORDINANCES § 6.20.010 (LexisNexis 2016); FARMINGTON, N.M., CODE OF ORDINANCES § 6-3-1 (LexisNexis 2017); CLOVIS, N.M., CODE OF ORDINANCES § 6.12.020(B) (LexisNexis 2014); BERNALILLO CTY., N.M., CODE OF ORDINANCES § 6-39B (LexisNexis 2017).

69. ALBUQUERQUE, N.M., CODE OF ORDINANCES § 9-2-3-7(A) (2017). This approach is also used in, *inter alia*, Lee’s Summit, Missouri (<http://cityofls.net/Police/Programs-and-Services/Animal-Control/Key-Regulations/Dog-Breeding>); St. Joseph, Missouri (<http://www.stjoemo.info/index.aspx?NID=224>); San Antonio, Texas (<http://www.sanantonio.gov/Portals/0/Files/AnimalCare/Laws/Permit-Litter.pdf>), Richmond, Virginia (<http://www.richmondgov.com/AnimalControl/forms/formBreedingPermit.pdf>).

more than one permit for each female dog being bred.⁷⁰ Albuquerque charges a \$150 litter permit fee⁷¹ and the litter permit number must be included in all advertisements.⁷² The Animal Welfare Department of Albuquerque maintains a webpage clearly stating the law and providing a hotline to which the public can report unpermitted sales.⁷³

Similarly, Fort Wayne, Indiana requires that all breeders, even those categorized as “minor breeders,” apply for a permit. This category covers people whose pets produce a single litter of dogs or cats in a twelve-month period.⁷⁴ The fee charged for the permit depends on the actions taken by the owner after the birth; if all of the kittens or puppies born are surrendered to animal control, there is no fee.⁷⁵ If even a single puppy or kitten is not surrendered but the adult animal is neutered or surrendered to animal control within ten weeks of the birth of the litter, the fee is \$10; if not, it is \$100.⁷⁶ The permit number must be provided to each recipient of a puppy or kitten, and the recipient’s name and contact information must be provided to the city.

Using a slightly different approach, Fresno, California limits the number of litters each female dog may produce to one per year.⁷⁷ It requires that the mother’s “Unaltered Dog License” number be included in each advertisement and on each sales receipt.⁷⁸ However, there is no fee in excess of the dog license fee for the litter.⁷⁹

One commonality frequently seen in this local-level legislation is the requirement that a unique identifier be included in all paperwork and advertisements concerning the litter. This approach allows animal control officers and the public to confirm readily that a given breeder is complying with the law. In practice, though, the coverage of these ordinances is uneven; one county may have such an ordinance

70. ALBUQUERQUE, N.M., CODE OF ORDINANCES §§ 9-2-3-7(B) & (C) (2017).

71. See *Animal Welfare FAQ*, CITY OF ALBUQUERQUE, <http://www.cabq.gov/pets/education-resources/frequently-asked-questions#autotoc-item-autotoc-9> (last visited Jan. 31, 2018).

72. ALBUQUERQUE, N.M., CODE OF ORDINANCES §§ 9-2-3-7(H)(6) & (7) (2017).

73. See *Illegal Pet Sales*, CITY OF ALBUQUERQUE, <https://www.cabq.gov/pets/education-resources/illegal-pet-sales> (last visited Jan. 31, 2018).

74. Ft Wayne, In, Code § 91.056 (https://www.cityoffortwayne.org/images/stories/public_safety/animal_control/docs/Animal_Care__Control_Ordinance.pdf).

75. See https://www.cityoffortwayne.org/images/stories/public_safety/animal_control/docs/minorbreederapp_2013.pdf.

76. *Id.*

77. FRESNO, CAL., CODE OF ORDINANCES § 10-328(a)(1) (LexisNexis 2006).

78. *Id.* at § 10-328(a)(3).

79. See *id.*

while a neighboring one does not.⁸⁰ The effect of this patchwork approach, then, is to push much small-volume breeding into counties without such regulation, doing nothing to establish uniform standards and little to prevent the harms of unregulated breeding.

D. *The Existing Regulatory Scheme Overall*

The exceptions under federal and state law for breeders that sell directly to consumers and for those with small-scale operations make sense if the focus of the legislation is consumer protection and the welfare of the breeding stock, respectively.

To the extent a purchaser meets the puppy and seller prior to purchase, he is assumed to be able to make a rational decision about whether to purchase and at what cost. In these instances, legislators assume the market can operate and weed out the bad breeders so that additional regulations, in the form of inspections and specification of minimum care standards, are unnecessary.⁸¹ More intensive regulation is left to local governments that have a better understanding of the needs and problems of a particular community.

Moreover, it makes sense from an animal welfare perspective to focus most regulation on large-volume breeders, because the quantity of harm they can cause far exceeds that of a small-volume breeder. Restricting oversight to those types of breeders that have failed to adequately provide for their breeding stock in the past while allowing those that have historically shown themselves to be responsible and caring—in federal and some state laws defined by the number of breeding females involved in the program, in other states by the number of animals or litters produced and sold⁸²—to continue to operate without interference makes economic and practical sense.

However, the *de minimis* exceptions provided under the federal and state regulatory schemes prevent effective enforcement of existing laws. Without close inspection and absent any licensing

80. Compare LINCOLN CTY., NEV., CODE §§ 6-1-1, 6-1-2, & 6-1-3 (2017), http://www.sterlingcodifiers.com/codebook/index.php?book_id=612 (no provisions regarding the licensing of animal breeders) with CLARK CTY., NEV., CODE OF ORDINANCES § 10.08.135(f) (LexisNexis 2017) (provision requiring that all breeder pet sales have a unique license number in all advertising).

81. This, of course ignores the fact that many people knowingly purchase sick or injured pets, rather than selecting only healthy ones, in order to rescue them, undermining this market presumption. Thus, the protection against risk-shifting afforded by the “physical presence” requirement is illusory in many instances. However, these criticisms are not the focus of this Article.

82. See NEB. REV. STAT. ANN. § 54-626(8) (2010 & Supp. 2015); IND. CODE ANN. § 15-21-1-4 (LexisNexis 2017).

requirements, it is impossible to discern how many female dogs, for example, on a property are intact and being bred. Are there four, as allowed free of registration in Maine, or five, which requires a license?⁸³ Similarly, a state inspector cannot efficiently track the number of litters produced and sold by a kennel to know when the breeder has exceeded the number allowed free of licensing requirements if no notification is required to receive an exemption. These exceptions, then, mean that small-volume breeders operating within the excluded range make identification of those violating the laws nearly impossible.

Because there is no way to efficiently sort between small-volume dog breeders that comply with existing licensing schemes by fitting into an exclusion and those that violate the law by remaining unregistered despite existing requirements, the volume of backyard breeding overwhelms the available enforcement resources. The amount of resources inspectors would need to invest to determine whether any given unregistered breeder was selling his first or third litter in a twelve-month period, or whether the dogs heard barking from the property included three or six breeding females, means there is little realistic chance that a breeder operating in violation of the law will be caught.

Consider, for example, a state like Georgia. Georgia has one of the stricter standards for registration: A breeder producing and selling more than one litter in a twelve-month period must apply for and receive a pet dealer's license.⁸⁴ An online search of the Georgia Department of Agriculture database⁸⁵ shows that there are eight

83. See ME. REV. STAT. ANN. tit. 7, § 3931-A(1) (2002 & Supp. 2015) (imposing licensing requirements on businesses with five or more female dogs used for breeding).

84. GA. COMP. R. & REGS. § 40-13-13-.07(2)(d) (2017).

85. Listing of licensed pet dealers in Athens, GA, GA. DEP'T OF AGRIC., <http://www.kellysolutions.com/ga/petdealers/> (searchbyCity.asp (search "Athens" in "enter your city to search" box)).

licensed pet dealers⁸⁶ in Athens, Georgia.⁸⁷ All are pet supply stores of various sorts, none of which breed or sell puppies or dogs.⁸⁸

Compare this to local Craigslist advertisements that specify that puppies are being sold from an Athens location.⁸⁹ They include listings such as “2 male pups ready for forever homes. First shots and wormed twice. Sweet, good family dogs. \$40.” “German Shepherd Puppies: 7 Females and 5 males. Born July 24th, 1st shots and deworming. Re-homing fee \$400 Pure Bred German Shepherd-not registered. Text/Call.” “I am a red hair Belgian Malinos I just had a litter of babies. My human and I looking for forever homes, for my babies. They have their first deworming. They ready for their for[e]ver homes. My human wants to make sure they’re going to a good forever home. 4 males left Give my human a call Rehoming fee \$350.” Do state or federal law require any of these breeders to be registered, or is each covered by an exception? There is no way to tell without long-term observation of each breeder. As a result, noncompliance is the rule.

State enforcement agencies have admitted as much. In a survey conducted by the Missouri Better Business Bureau of states that have licensing statutes, nearly one-third of the respondents claimed to make no effort to identify unlicensed breeders.⁹⁰ And those that do try to do so find it tough going given understaffing of the departments responsible for ensuring compliance,⁹¹ the sheer volume of puppies

86. Licenses are required for any person acting as a pet dealer or operating a kennel, stable, or animal shelter. GA. CODE ANN. § 4-11-3 (2013). A pet dealer can be any person who sells, offers to sell, exchanges, or offers for adoption animals ordinarily kept as pets in Georgia. GA. CODE ANN. § 4-11-2(7) (2016). This could include breeder sales, retail stores, or individuals reselling animals.

87. These pet dealers are Aquarium Outfitters #1, Exotics for Less, Fin-Alley, Pet Supplies Plus #8029, Petsense, LLC, Petsmart #2123, Walmart Supercenter #1400, and Wal-Mart Supercenter 2811. GA. DEP’T OF AGRIC., *supra* note 85.

88. Because of this, it is likely the licenses were procured to cover the fish, reptile, and insect breeding that inevitably occurs when these animals are held for sale in communal containers.

89. Screen shots of each advertisement quoted as well as the listing of advertisements retrieved on September 17, 2017 in the “community” listing section of the Athens, GA craigslist under the search term “puppies” are on file with the author. All ads are quoted as written; errors are those of the original authors.

90. See BETTER BUSINESS BUREAU, THE PUPPY INDUSTRY IN MISSOURI: A STUDY OF THE BUYERS, SELLERS, BREEDERS AND ENFORCEMENT OF THE LAWS 4 (2010), <https://stlouis.bbb.org/Storage/142/Documents/Puppy%20Mills%20study.pdf>.

91. Georgia, for example, has seventeen Department of Agriculture inspectors responsible for ensuring compliance by the over 4000 licensed pet dealers, kennels, and shelters licensed in the state. See *Companion Animal/ Equine Division*, GA. DEP’T OF AGRIC., <http://www.agr.georgia.gov/companion-animal-equine-division.aspx> (last visited Jan. 31, 2018). Similarly, one commentator has noted that, “There is a profound

advertised for sale, and the lack of an easy way to identify when a breeder is obligated to apply for a license.

The thousands of breeders that legally operate without a license due to federal and state *de minimis* requirements provide a smokescreen that prevents effective enforcement of the existing laws against breeders that have more than the specified number of breeding animals or that produce and sell more than the excepted number of litters each year.

II. SMALL-VOLUME DOG BREEDERS AND HARM

Putting aside the illicit breeding that *de minimis* exclusions invite, does the almost exclusive focus on puppy mills in statutes governing dog breeding make sense? From an animal welfare perspective, puppy mills produce a quantity of harm to the dogs and puppies themselves, as well as to consumers, that small-volume breeders simply cannot match. If so, perhaps the lack of regulation and of academic attention to the issue is appropriate. If, however, the harms produced by small-volume breeding, while distinct from those of puppy mills, are sufficiently significant, then the current regulatory regime needs to be rethought.

A. *Small-Volume Breeding Generally*

The exceptions carved out in the AWA and every state statute for smaller breeders that sell puppies they produce directly to consumers invariably imagine two types of small-volume breeders: the hobby breeder, looking to produce specific working dogs or a few personal pets, and the inadvertent breeder.

In these portrayals, hobby breeders are loving and responsible dog owners, producing at most a few litters of dogs each year. They choose matches to improve the breed quality and may show the puppy or two they retain⁹² or they are producing other specialized working dogs:

lack of enforcement [of the AWA] by the government.” Sandra K. Jones, *Dealing Dogs: Can We Strengthen Weak Laws in the Dog Industry?*, 7 RUTGERS J. L. & PUB. POL’Y 442, 457 (2010).

92. See, e.g., *Hobby Breeder License*, MIAMI-DADE COUNTY, http://www8.miamidade.gov/global/license.page?Mduid_license=lic1455645758490336&Mduid_organization=org1450714342984597 (last visited Feb. 1, 2018) (defining “hobby breeder” for licensing purposes). See also, *Responsible Breeding*, AMERICAN KENNEL CLUB, <http://www.akc.org/dog-breeders/responsible-breeding/> (last visited

those for police use or seeing-eye dogs, for example.⁹³ Alternatively, they might have a beloved family pet produce a litter to perpetuate his or her bloodline. The puppies not kept for personal enjoyment are sold at little or no profit to carefully screened families who have sufficient resources to pay for the care the puppy needs and will return it to the breeder if they can no longer properly care for the dog.⁹⁴

Inadvertent breeders, on the other hand, are envisioned as people whose pets accidentally get pregnant. These are caring and responsible dog owners who are not in breeding as a business venture. The resulting puppies are given away to neighbors or show up on craigslist or Facebook yard sale groups as “free to a good home” or with a nominal fee. In most instances, this breeder is imagined to produce at most one or two litters over a pet’s lifespan and likely gets the dog spayed after that.

But spend any time at a municipal animal control facility looking at the dogs and talking with the people there to reclaim them and it becomes obvious that there are at least three other types of small-volume breeders, less savory than the examples used so commonly in supporting *de minimis* exceptions to breeding regulations.⁹⁵

In one case, the breeder himself is rarely seen as his dogs come in as strays and he does not reclaim them. These are female dogs, often bully mixes, with stretched out abdomens and extended teats from nursing successive litters of puppies. These dogs have heavy callouses or abrasions on their elbows and hips from lying on concrete or packed dirt all day and are malnourished; they may be trailing a tether or have a too-small collar that has become embedded in the dog’s skin. They are inevitably under-socialized, withdrawn and a bit fearful but extremely submissive to people. They may have been discarded when their fertility started to wane or simply escaped the chain or kennel where they previously lived. Their puppies have been advertised on craigslist for a few hundred dollars each, cash only, producing \$3,000 or more in income for their owners a few times a year.

The second type of breeder that is often seen in the shelter setting has a dog she keeps as a pet, maybe a Chihuahua or small scruffy

Feb. 6, 2018) (the motto of responsible breeders is “Breed to improve . . . The goal of breeding, after all, is to produce a better dog and a quality pet.”).

93. *Hobby Breeder License*, *supra* note 92.

94. *See Responsible Breeding*, *supra* note 92.

95. The author is a director for Athenspets, the volunteer group for Athens-Clarke County (GA) Animal Control, and has been involved in shelter volunteering for more than a decade. The following descriptions are based on personal experience at these shelters and information provided by animal control personnel throughout the U.S.

terrier of some sort. The dog may live indoors and be considered a member of the family, but she is bred regularly with her puppies sold to anyone willing to buy them. She may have mammary tumors or mastitis by the time she is brought the shelter.

The third breeder is proud of what he does and happy to tell you how many puppies each of his dogs had the last time they gave birth when he reclaims them from being quarantined after a bite. His male dogs are large and healthy-looking, and he is horrified at the thought of having them neutered—what good would they be then? These dogs are confident and often become territorial in their kennels, snarling when a stranger approaches. They are used for status in the community, as guard dogs, and to make a steady stream of income selling the puppies to others seeking similar dogs. Their puppies sell for \$1,000 or more each to buyers found by word of mouth.

These breeders are the reality of much small-volume dog breeding. Together with the inadvertent breeder, they are at times collectively referred to as “backyard breeders.” As unpleasant as the images and reality of much backyard breeding is, if animal welfare concerns are sufficiently covered by animal neglect and cruelty statutes, and consumers meet the puppies before agreeing to purchase them so that they have some ability to assess the condition of the puppies, consumer education and the enforcement of existing laws might be a more appropriate approach to cutting back on its worst manifestations, rather than regulation. However, a closer look reveals both direct and indirect effects of this breeding that prove more problematic.

B. Direct Harms of Backyard Breeding

The current exceptions to regulatory regimes for small-volume breeding produce three direct harms: contribution to pet overpopulation; lack of compliance with existing business and tax regulations; and failure to provide consumer protections.

First, backyard breeders are a significant source of puppy and dog impounds for municipal shelters.⁹⁶ Unlike puppy mill operators, which select and breed dogs based on their mass-market appeal⁹⁷,

96. See Melissa Riesen, *The Pet Overpopulation Crisis: How Training the Public Can Make a Difference*, 1 J. OF APPLIED COMPANION ANIMAL BEHAV. 1, 22 (2007) (stating that “[t]he responsibility for the pet overpopulation crisis is shared by irresponsible pet owners, backyard breeders and puppy mills”).

97. See *Puppy Mills*, ASPCA (last visited Nov. 3, 2017), <https://www.aspc.org/animal-cruelty/puppy-mills> (defining a puppy mills as a “large-

inadvertent breeders do not consider the market for the puppies they produce prior to conception.⁹⁸ Similarly, other backyard breeders wait until after the puppies are born to identify purchasers.⁹⁹ In both cases, excess inventory—unpurchased puppies—must be disposed of, often at a local animal control¹⁰⁰ or abandoned by the side of a road with a low likelihood of any consequences despite legal prohibitions on such action in at least some states.¹⁰¹ Absent licensing and record-keeping requirements, proving the origin of a puppy that has been abandoned is exceedingly difficult.

Moreover, because the primary criterion for a sale is that the buyer be present and have the sales price in hand, little or no screening is done to ensure the buyer is prepared for the expense and responsibility of dog ownership.¹⁰² Unlike many breeders that only produce a litter when all puppies are pre-sold, backyard breeders do not require that unwanted dogs be returned to them.¹⁰³ This means that shelters fill with young adult dogs, just out of the cute (and more manageable) puppy stage. While the profit is taken by the breeders, the expense of paying to impound, care for, and often ultimately euthanize, unpurchased puppies and dogs whose purchasers could not (or simply did not) keep them, falls on taxpayers.

By and large, these taxpayers do not include the backyard breeding businesses that produced the puppies. Small businesses, and particularly those operating in a cash economy, significantly underreport income for federal (and likely state) tax purposes and

scale commercial dog breeding facility where profit is given priority over the well-being of the dogs.”).

98. See Jenna Stregowski, *Signs of a Bad Breeder or a Backyard Breeder: Learn Which Dog Breeders to Avoid*, The Spruce (updated Oct. 11, 2017), <https://www.thespruce.com/signs-of-a-bad-breeder-1117328> (including in the definition of “backyard breeder” those cases “where someone has dogs that were accidentally bred and a litter of puppies was the result. Or, a family decided to breed its dogs ‘just one time’ or ‘just for fun.’”).

99. *Id.*

100. See Jacqueline M. Logan, *Detailed Discussion of Emerging Issues in Municipal Ordinances*, Animal Legal & Historical Center (2013).

101. See, e.g., O.C.G.A. § 4-8-3 (“No person shall release a dog on any property, public or private, with the intention of abandoning the dog”).

102. See *Buyer Beware: The Problem with Puppy Mills and Backyard Breeders*, PAWS (last visited Feb. 3, 2018), <https://www.paws.org/get-involved/take-action/explore-the-issues/puppy-mills> (stating that a “red flag” of a “Backyard Breeder” is a breeder who does not ask a lot of questions about the potential buyer).

103. See Lisa Spector, *8 Signs of a Backyard Dog Breeder*, CARE2 (August 12, 2015), <https://www.care2.com/greenliving/8-signs-of-a-backyard-dog-breeder.html> (noting that the contract for sale from responsible breeders will “state that the breeder will take back the pup at any time during its life”).

oftentimes fail to collect sales tax. The Internal Revenue Service estimates that 63% of “low visibility” income—that not reported independently by an employer, for example—is improperly excluded from federal tax returns.¹⁰⁴ Because small-volume breeders may not even be organized as formal businesses, instead operating completely under the legal radar, it is likely the compliance rates are even lower.¹⁰⁵ Local business licensing requirements and sales tax provisions are similarly likely to be ignored by most, if not all, backyard breeders.

For many hobby breeders, this harm is mostly a theoretical one as it is insignificant in total value: breeding is not a low-cost enterprise if genetic testing is performed and veterinary care and specialized nutrition are provided as needed,¹⁰⁶ so the taxable income after appropriate deductions for business expenses would be low. Moreover, the inadvertent breeder is, in theory at least, not a repeat offender and does not price his puppies for profit. However, for intentional backyard breeders, known for selling puppies that have received no care other than nursing on their mother, the gap between net income and reported income on the sales can be significant. If we assume, for example, that the litter of twelve German shepherd puppies being sold on Craigslist for \$400 each,¹⁰⁷ in fact, sells for that amount, and the mother is bred twice each year, the gross income from sales is nearly \$10,000.¹⁰⁸ Add a second or third dog, and the tax gap—the difference between what is owed in taxes and what is paid—can be several thousand dollars for a single low-level backyard

104. *Federal Compliance Research: Tax Gap Estimates for Tax Years 2008-2010*, INTERNAL REVENUE SERVICE 11 (May 2016), <https://www.irs.gov/pub/irs-soi/p1415.pdf>.

105. In an interview, author Jana Kohl noted the ease with which dog breeding profits can be hidden from the I.R.S. See Wayne Pacelle, *Stop Puppy Mills or Bust: Q&A with Jana Kohl*, A HUMANE NATION (July 18, 2008), <http://blog.humanesociety.org/wayne/2008/07/jana-kohl-baby.html>.

106. See *How Much Does it Cost to Be A Dog Breeder?*, BREEDING BUSINESS (last visited on Feb. 3, 2017), <https://breedingbusiness.com/cost-of-dog-breeding/> (providing a break down the yearly expenses, breeding-related expenses, and litter-related expenses).

107. See *supra* text accompanying note 20, for the text of the advertisement.

108. For the backyard breeders selling dogs for criminal purposes, the profits are even higher. An investigator for The Humane Society of the United States quoted one dog warden as recalling that, “Peddling puppies can prove as lucrative as dealing drugs; one Ohio dogfighter traded selling cocaine for breeding pit bulls . . . because the profits were higher.” Nancy Lawson, *A Nation in the Ring (Part 3: Pit Bulls as Currency)*, GEVHA (Sept. 7, 2007), <http://www.gevha.com/analysis/articles/602-dogfighting-in-america>.

breeder. In the more extreme cases, backyard breeders producing dogs for criminal ventures can easily clear thousands of dollars a month; a proven champion fighter can bring anywhere from thousands to tens of thousands of dollars in stud fees.¹⁰⁹ Moreover, even where there is no actual profit as with the hobby and inadvertent breeders described above, the failure to file required tax returns (even if no amount of tax is due) and obtain business licenses erodes the rule of law.

Finally, just as small-volume breeders are exempt from state and federal licensing requirements, they are also exempt from the “puppy lemon laws” almost half of the states have passed.¹¹⁰ Such laws generally allow purchasers of puppies who exhibit an illness or hereditary defects within a short time of the sale to exchange the puppy (even if deceased) for a replacement or require the seller to pay damages.¹¹¹ While criticized at times for treating puppies like fungible objects, to be returned or discarded,¹¹² and because the time period for bringing claims is too short to protect against defects that do not surface in short order,¹¹³ such laws provide some incentive for sellers to take precautionary measures with the animals they purchase. However, these laws only apply to sellers who qualify as pet dealers under state law; breeders exempt from breeding regulations are also exempt from these laws.¹¹⁴ Thus, purchasers of sick or injured puppies from small-volume breeders receive no health guarantees under existing consumer protection laws and have no statutory recourse for illnesses or defects.

109. See Hanna Gibson, *Detailed Discussion of Dog Fighting*, ANIMAL LEGAL & HISTORICAL CENTER (2005), <https://www.animallaw.info/article/detailed-discussion-dog-fighting>.

110. See *Pet Purchase Protection Laws*, AMERICAN VETERINARY MEDICAL FOUNDATION (June 2014), <https://www.avma.org/Advocacy/StateAndLocal/Pages/pet-lemon-laws.aspx> (reporting that as of June 2014, 21 states had passed such laws).

111. See *id.*

112. See, e.g., Stephanie K. Savino, *Comment: Puppy Lemon Laws: Think Twice Before Buying that Doggy in the Window*, 114 PENN ST. L. REV. 643, 645 (2009) (stating that “many people are disappointed because puppy lemon laws treat pets like objects that can be easily returned”).

113. See, e.g., Adam J. Fumarola, *With Best Friends Like Us Who Needs Enemies? The Phenomenon of the Puppy Mill, the Failure of Legal Regimes to Manage It, and the Positive Prospects of Animal Rights*, 6 BUFF. ENVTL. L.J. 253, 281 (1999) (stating that “[t]he statutory time limitation in these laws is too short to help a consumer with a puppy that has anything by an immediate ailment”).

114. See Charlotte Walden, *Table of Pet Purchaser Protection Acts*, ANIMAL HISTORICAL CENTER (2017), <https://www.animallaw.info/topic/table-pet-purchaser-protection-acts> (listing the states where Puppy Lemon Laws apply only to pet dealers and exempt breeders).

These direct harms from backyard breeding should cut in favor of requiring at least minimal oversight of small-volume dog breeders.

C. *Backyard Breeding as a Precursor to Criminal Activity*

In addition to its direct harms, backyard breeding produces an indirect harm that differentiates it from puppy mills. Free of licensing, inspection, and record-keeping constraints, backyard breeders are an attractive source of used as guard dogs, attack dogs, and fighting dogs. Thus, it acts as a precursor to criminal activity by producing the dogs that are an important part of some of the more violent criminal enterprises.

This is a boutique production model. Whereas puppy mills mass-produce popular dogs to sell in volume, which requires that the dogs produced have wide appeal, small-volume breeders take different approaches. In some cases, as with inadvertent breeders, there is no business plan.¹¹⁵ In others, it is simply puppies, recognizing that the buyers will not be concerned with the dog's traits later on; that as long as the puppy is young enough at the time of sale, there will be someone to buy.¹¹⁶ In still others, the puppies are produced for a boutique market: working dogs to be trained and sold as guide dogs, show dogs, or dogs to exemplify their breed characteristics.¹¹⁷

In this boutique model, a small number of breeding stock are maintained with mates chosen to perfect desired traits, with buyers

115. See *What is a Backyard Breeder?*, RSPCA (last visited Feb. 5, 2018), http://kb.rspca.org.au/What-is-a-backyard-breeder_331.html (stating that “[b]ackyard breeding is a term used to describe irresponsible breeding of animals. Often this is due to ignorance or neglect”).

116. Many of the puppies for sale from unregulated breeders are offered at 4- or 5-weeks old, ages that would be too young if being sold by a licensed dealer. See e.g., *Responsible Breeding*, *supra* note 92 (noting a red flag of a backyard breeder to be “[t]he seller has many types of purebreds or ‘designer’ hybrids being sold at less than six weeks old”). To allow the puppies to learn proper social skills from their mother and littermates, responsible breeders do not sell them until at least 3-months of age. See *Thinking of Buying a Puppy? Find a Responsible Breeder*, AMERICAN KENNEL CLUB (last visited Feb. 3, 2018), <http://www.akc.org/press-center/facts-stats/responsible-breeders/> (stating that a buyer should not expect to bring home a puppy from a responsible breeder until the puppy is “eight to 12 weeks of age”).

117. See *Dogfighting FAQ*, ASPCAPRO (last visited Feb. 3, 2018), <https://www.aspcapro.org/resource/disaster-cruelty-animal-cruelty-animal-fighting/dogfighting-faq> (stating that “[f]or ‘professional’ and ‘hobbyist’ dogfighters, the sale of pups from parents who have won several rights is a major part of their activity. Underground dogfighting publications and websites are commonly used to advertise pups or the availability of breeding stock.”).

located through word of mouth or through superficially innocuous websites.¹¹⁸ The production of dogs for criminal enterprises is a perverted twist on the idea of hobby breeding: these breeders seek to refine traits like gameness, strength, and territoriality.¹¹⁹ To this end, they breed the more common bullies to be larger and more aggressive.¹²⁰ This is curated bloodline refining to produce specialized dogs as a precursor to criminal enterprises that epitomize a violent ideal: “Gang bangers and white supremacists keep them to intimidate and control. They want their pitbulls aggressive, and backyard breeders . . . have sprung up to service them.”¹²¹ These dogs are sold direct to consumers in face-to-face transactions from the back of a pick-up truck or other anonymized location.¹²² Federal law justifies excluding such transactions from their regulatory schemes since consumers interact directly with both the seller and the puppy prior

118. See e.g., *Our Breeding Program*, GUIDE DOG FOUNDATION (last visited Feb. 5, 2018), <https://www.guidedog.org/GD/DogPrograms/BreedingProgram.aspx> (describing the process of selecting dogs to breed on account of their “excellent temperament, behavior, and desire to work.”); *Traits and Inheritance*, THE KENNEL CLUB (last visited Feb. 5, 2018), <https://www.thekennelclub.org.uk/health/for-breeders/understanding-canine-genetics/traits-and-inheritance> (describing how “[show] [d]og breeders carefully choose which dogs to breed from based on a number of different characteristics, such as the way it looks, its general health, its temperament, ect.” and that the “breeder’s aim will be to produce puppies that have similar desirable characteristics to their parents.”); *What Does Selective Breeding Mean?*, BREEDING BUSINESS (last visited Feb. 5, 2018), <https://breedingbusiness.com/selective-dog-breeding> (describing the process of breeding for specific characteristics such as “speed, reflex, explosivity, lean body”).

119. See e.g., Michael D’Abruzzo, *Game, Gameness, or “Game-bred,”* DOG TRAINING WORLD (Oct. 1, 2016), <https://www.dogtraining.world/knowledge-base/game-gameness-game-bre> (“the term ‘game bred’ is used when a breeder is making an effort to maintain the trait through carefully breeding ‘game’ parents.”); *Pit Bulls – The Most Feared and Misunderstood Dog Breed*, BULLY MAX (last visited Feb. 5, 2018), <https://vitaminsforpitbulls.com/american-pit-bull-terrier-dogs/> (stating that, historically, “[m]any owners would breed the dogs, with their combination of gameness (terrier) and power (bulldog), to participate in pit matches and fighting rings”).

120. See, e.g., Meagan Dzuira, Comment, *Should We Beware of Dog or Beware of Breed? An Economic Comparison*, 10 J.L. ECON. & POL’Y 463, 485 (2014) (“The most worrisome outcome of underground dog fighting is the profitability of ‘backyard’ breeders, who are unregistered and unskilled, and breed dogs that are aggressive towards humans.”).

121. Richard, *supra* note 18, at 12.

122. See, e.g., Cheyenne Fraser, *Pit Bull Mills Out of Control in Las Vegas*, CATCH FRED (Mar. 17, 2014) <http://catchfred.com/freds-news/pit-bull-mills-out-of-control-in-las-vegas/> (“[T]he many unlicensed Las Vegas pit bull breeders who sell these animals treat the dogs like contraband. They sell them in parking lots out of the back of pickup trucks and refuse to meet customers at their place of residence.”).

to purchase.¹²³ However, these transactions, with no email or other incriminating record, are also highly attractive to criminal enterprises, allowing an anonymity mediated transactions lack.

Because the breeding and sales are exempt from federal and state licensing laws, these breeders at times openly advertise the traits for which they are selecting on the internet. “Gameness,” defined as “a dog’s willingness or desire to fight and continue despite injury or fatigue” is the trait most sought after in fighting dogs.¹²⁴ As such, the more specialized backyard breeders advertise their breeding stock’s gameness¹²⁵ and ability to pass the trait on to offspring,¹²⁶ often referencing fighting bloodlines¹²⁷ and championships that, in context, imply dogfighting championships.¹²⁸ Search online for “game bred pit bull for sale,” and millions of hits are returned instantly,¹²⁹ despite the fact that dogfighting is a felony in every state.¹³⁰ These are not dogs being bred as pets. But even if a state agricultural inspector or

123. See *Questions and Answers: Regulations of Dog/Cat Breeders and Dealers*, APHIS (Feb. 2014), https://www.aphis.usda.gov/publications/animal_welfare/content/printable_version/faq_animal_dealers.pdf (stating that “The AWA does not cover . . . [animals] sold fact-to-face at retail, pets owned by individuals” and the “USDA’s jurisdiction is limited to the authority granted by the AWA.”).

124. RANDALL LOCKWOOD, *Animal Fighting, in SHELTER MEDICINE FOR VETERINARIANS AND STAFF* 441, 444-45 (Lila Miller & Stephen Zawistowski eds., 2d ed. 2013).

125. See, e.g., Cheyenne Fraser, *Pit Bull Mills Out of Control in Las Vegas*, CATCH FRED (Mar. 17, 2014) <http://catchfred.com/freds-news/pit-bull-mills-out-of-control-in-las-vega> (“breeders even advertise dogs who were ‘bred to fight’ or tout them in ads as ‘the meanest pit bulls in the city’ as if these are somehow positive characteristics.”).

126. Lockwood, *supra* note 124, at 445. See also, Orhan Yilmaz, et al., *Dog Fighting: A Nasty Work*, RES. OPINIONS IN ANIMAL & VETERINARY SCIENCES 219, 221 (2015) (“Professionals breed generations of skilled ‘game dogs’ and take great pride in their dogs’ lineage. Those fighters make a tremendous amount of money charging stud fees to breed their champions.”).

127. For example, a kennel that advertises that its dogs are bred from some of the finest Chinaman, Jeep, Redboy, and Jocko blood. (Screen shots of this language with its source website from Sept. 18, 2017 are on file with the author; in order not to provide publicity to these breeders, the ads are not quoted in their entirety or referenced in this Article.) Each of the bloodlines mentioned is a well-known fighting bloodline. See GAME DOG HISTORY, <http://www.gamedogshistory.com/> (last visited Sept. 17, 2017) (containing laudatory stories about each of these dogs or their progeny in dog fights).

128. See Gibson, *supra* note 109 (“Some websites have photos of their champion dogs posing with their trophies, though these trophies were not earned at dog-shows”).

129. A screen shot of this search dated Sept. 18, 2017 is on file with the author.

130. See Francesca Ortiz, *Making the Dogman Heel: Recommendations for Improving the Effectiveness of Dogfighting Laws*, 3 STAN. J. ANIMAL L. & POL’Y 1, 24 (“Currently, all fifty states have elevated dogfighting to the felony level.”).

animal control officer notices such advertisements, the laws currently in place mean there is no basis to investigate.

Breeding game dogs is not itself illegal, and the breeders are careful to post disclaimers such as those asserting that the dogs are not being bred or sold for illegal or inhumane activities, and anyone wishing to do anything illegal with the dogs should leave the website.¹³¹ Many even specify that no dogs are being sold in violation of the anti-dogfighting provisions of the AWA.¹³² Moreover, in each case, the dogs pictured on the site or the description of the volume of puppies sold falls below the limit for registration under applicable state law.¹³³ South Carolina, which exempts “occasional” breeding or litter production,¹³⁴ has a large number of kennels advertising game-bred dogs, while those advertising from North Carolina are careful to show only five or fewer breeding females on a single site.¹³⁵ This is in contrast to kennels that advertise traits such as “family friendly” and “well socialized with people and dogs” which routinely feature more than the exempted number of female dogs on their websites.¹³⁶ Nevada—with its open-ended “hobby breeder” exception—has reportedly seen “[t]he number of black-market pit bull breeders . . . skyrocket[] over the past ten years.”¹³⁷

The absence of applicable dog breeding regulations allows the more pernicious small-volume breeders to produce dogs used in criminal enterprises including dogfighting¹³⁸ with little fear of interference or of the dogs being traced back to them to implicate them in the later uses. Breeders are careful to have all public material show

131. See *e.g.*, GAME DOG HISTORY, <http://www.gamedogshistory.com/> (last visited Sept. 17, 2017) (containing a disclaimer that “[n]othing on this site is sold to be used for any illegal purposes. We do not in any way encourage, promote, or sanction any illegal activities”).

132. Screen shots of such disclaimers with source websites from Sept. 18, 2017 are on file with the author.

133. *Id.*

134. S.C. CODE ANN. § 47-13-160(G)(3) (2017).

135. For example, one kennel advertises only one “current bitch” and another has only three “dams” pictured. North Carolina law exempts “an individual who breeds and raises on his own premises no more than the offspring of five canine or feline females per year, unless bred and raised specifically for research purposes”. N.C. GEN. STAT. § 19A-23(7) (2017).

136. For example, a website that proclaims that its kennel’s dogs are “hand raised” from the time they are born and “extremely well socialized with. . . dogs of all ages,” making them perfect family dogs. Screen shot from source website from Sept. 17, 2017 is on file with the author.

137. See Fraser, *supra* note 122.

138. See *e.g.*, Richard, *supra* note 18 (describing the ease with which a teenager looking for a dog for street fighting could obtain one from a backyard breeder).

that they comply with *de minimis* exemptions so that inspectors have no right to come on the property to see the dogs bearing scars and wounds from fights or the presence of rape stands and other equipment needed to safely breed aggressive dogs.¹³⁹ Moreover, breeders exempt from regulation are attractive to the purchasers in part because they are not subject to licensing—and particularly, record-keeping—requirements.

Dogfighting, in addition to being a felony itself, is intertwined with a number of other criminal activities, providing both a forum and a means to engage in illegal gambling and drug trafficking. When there is a dogfighting bust, drug, alcohol, and weapons violations are often found, as well as probation violations.¹⁴⁰ As one reporter has noted, “[d]og fighters are violent criminals that engage in a whole host of peripheral criminal activities. Many are heavily involved in organized crime, racketeering, drug distribution, or gangs, and they arrange and attend the fights as a forum for gambling and drug trafficking.”¹⁴¹

Dogs procured from small-volume breeders are also reported to have another role in gang activity: indoctrination of new recruits by desensitizing them to violence.¹⁴² This can be through participation in dogfighting but, even more disturbingly, then-president of the Chicago-based Anti-Cruelty Society Dr. Gene Mueller explained in a 2004 interview that, “You want to find the perfect way to desensitize a kid so he’ll kill that anonymous gangbanger from three blocks over? Give him a puppy and let him raise it. Then let him kill it. I guarantee that will desensitize that kid.”¹⁴³ These are not expensive pet store puppies; they are puppies otherwise being discarded by backyard breeders for which a use is found prior to disposal.

139. See, e.g., Cheryl Wittenauer, *Fighting scars linger for dogs seized in raids*, THE SAN DIEGO UNION-TRIBUNE, Sept. 15, 2009, <http://www.sandiegouniontribune.com/sdut-us-dogfighting-raids-first-look-091509-2009sep15-story.html> (providing a description of the conditions present on the property of fighting dog breeders).

140. Yilmaz, *supra* note 126, at 222.

141. Richard, *supra* note 18, at 12; see also Yilmaz, *supra* note 126, at 221 (noting the clear association between dogfighting and gang activity).

142. Tom McCann, *Police Take Aim at Dogfighting*, CHICAGO TRIBUNE (July 19, 2002), http://articles.chicagotribune.com/2002-07-19/news/0207190145_1_animal-cruelty-dogfighting-operation-department-of-animal-care.

143. William Hageman, *Chicago’s Dogfight Dilemma*, CHICAGO TRIBUNE (July 11, 2004), https://www.washingtonpost.com/archive/politics/2004/07/11/chicagos-dogfight-dilemma/734af55a-a870-45e7-94a4-a01d676f0542/?utm_term=.f3d35e4d9a2c.

Moreover, the dogs produced by these breeders also serve as “clandestine security devices for drug traffickers.”¹⁴⁴ Police and animal control officers are trained to look carefully inside dog houses for stashes at any suspected drug trafficking sites.¹⁴⁵ The dogs are also used for security at drug houses, because they pose a significant threat to law enforcement personnel¹⁴⁶ and are an effective deterrent to searches, or at least slow the process sufficiently to allow disposal of contraband. One journalist relates that, “Ask any probation or police officer who has to go to a parolee’s home how many times they’ve had to wait outside because a dog is barking and had to be contained in another room. It gives the parolee time to flush their drugs. That’s why they have the dogs in the first place.”¹⁴⁷

The family producing a personal litter, the breeder producing working dogs, and the inadvertent breeder conjured by state legislators when debating proposed breeding legislation represent only a fraction of the small-volume dog breeding that occurs. By far the most numerous examples are small-scale commercial breeders, including those producing dogs as a precursor to criminal acts. This breeding flourishes without any oversight because of the *de minimis* and face-to-face sale exemptions written into existing federal and state legislation.

D. Harms of the Small-Volume Dog Breeding, Conclusions

The current dog breeding regulatory scheme is predicated on a model of responsible, hobby breeders and occasional, inadvertent breeders. Closer analysis, though, shows that these breeders are but a subset of the world of small-volume breeding, and that small-volume breeding both produces direct harms as well as serves as a precursor to significant criminal acts.

The exemptions written into all state legislation and the federal government’s licensing laws mean that these backyard breeders can operate without oversight, at times playing a significant role in dogfighting, gang activity, and drug trafficking. Moreover, the prevalence of unlicensed low-level breeding activity more generally provides a smokescreen that prevents enforcement even of the laws that do exist. The harms produced by this segment of the economy far

144. See Gibson, *supra* note 109.

145. See *id.* (“Drugs are often stashed in containers to which the dogs are chained in yards or vacant fields.”).

146. Richard, *supra* note 18, at 12.

147. Richard, *supra* note 18, at 12.

outweigh any benefit to the legitimate small-volume breeders from being free of the minor inconveniences of occasional inspections and required record-keeping.

III. FIXING THE LAWS, FIXING THE DOGS, FIXING THE PROBLEM

The existing state and federal laws regulating dog breeding uniformly exempt small-volume breeders from coverage. However, no registration or other affirmative act by such breeders is required to obtain the exemption and the facts giving rise to existing licensing requirements are diffuse and difficult to monitor when the breeder is also the seller, making it nearly impossible to police breaches of these laws until the violations are extreme.¹⁴⁸ As a result, the many small-volume breeders who are in compliance with these exceptions provide cover for those that are not. Moreover, even when in compliance with existing licensing laws, small-volume dog breeding is a societal problem both because of its direct effects of contributing to pet overpopulation, noncompliance with other regulations, and lack of consumer protections and its indirect role in larger criminal enterprises. In combination, these factors—extremely high costs of enforcement paired with substantial harms—point to a need for better regulation of this activity.

A. Regulation of Low Risk Activities

Literature on regulating “low risk” activities suggests a framework for approaching the problem of backyard breeding. In regimes using risk-based regulations,¹⁴⁹ like those governing inspections of dog breeders, risks are categorized based on the probability of harm and the impact of that harm on the regulator’s goals should it come to pass.¹⁵⁰ Low risk activities are ones that are

148. *Cf.*, Julia Black & Robert Baldwin, *When Risk-Based Regulation Aims Low: A Strategic Framework*, 6 REG. & GOVERNANCE 131, 134 (2012) (hereinafter *Strategic Framework*) (noting that “exemptions without registration are difficult to use in combination with systems of self-monitoring and self-certification”).

149. For a more general description of risk-based regulation and its increasing prevalence across industries, see Julia Black & Robert Baldwin, *When Risk-Based Regulation Aims Low: Approaches and Challenges*, 6 REG. & GOVERNANCE 2 (2012) (hereinafter *Approaches and Challenges*).

150. *Id.* at 4.

either unlikely to cause significant harm or where the harm that is likely to occur is of limited importance to the regulator's mission.¹⁵¹

Such risk may be "stable" (likely to remain at a relatively constant level over time) or "volatile" (tending to change between regulatory reviews or with the potential for individual low risks to accumulate into much larger risks), and may be "intrinsic" (present regardless of regulatory activity) or "net" (control measures can reduce the risk).¹⁵² Because the allocation of resources is a zero sum game for regulators—monitoring, shaping compliance, and enforcement actions in one industry sector inevitably come at the cost of similar activities in another sector—efficiently identifying the tools and strategies that will effectively induce compliance is particularly important with respect to low risk activities if any resource allocation is to be made to them.

The commercial sea fishing studied by legal scholars Julia Black and Robert Baldwin is one example of a stable, intrinsically low-risk activity.¹⁵³ Because the activity is geographically dispersed and resource intensive to investigate, detection is easily avoided and available funding only allows for inspection of a small number of the existing participants.¹⁵⁴ As a result, the existing regulatory scheme relies substantially on self-reporting and there are high levels of noncompliance.¹⁵⁵

Similarly, if viewed on an individual level, small-volume dog breeding is for the most part a stable, intrinsically low-risk activity. While there are externalities caused by the production of puppies (and ultimately dogs) for which there are not homes, the amount of harm caused by a single breeder producing a dozen or so puppies that don't have secure homes each year, for example, is not significant. Municipal shelters can absorb the dogs from a single or small handful of such breeders; in fact, that is part of the reason they exist.¹⁵⁶ If viewed on a community level, though, the risk becomes more volatile, as the accumulation of harm from the production of excess puppies

151. *Id.* at 2.

152. *Id.* at 5.

153. Black & Baldwin later analyzed the regulation of the environmental, food, financial services, and occupational health and safety sectors in Australia, Canada, the Netherlands, New Zealand, the United States, and the United Kingdom to develop the framework for regulating low-risk activities that they describe in their later works. *Id.*

154. Robert Baldwin & Julia Black, *Really Responsive Regulation*, 71 MOD. L. REV. 59 (2008).

155. *Id.* at 60.

156. Other reasons include acting as a "lost and found" for stray animals and providing a secure holding facility for animals being quarantined.

reaches a point where an animal control facility cannot successfully house, care for, and place the dogs that are impounded.

While the ventures that use dogs produced by backyard breeders to forward their criminal enterprises are high risk themselves, to date the production of the dogs used in these activities has not been high priority. Instead, because of the low probability that any given dog produced from the many backyard breeders in a community will be used for this purpose, when viewed in the context of backyard breeding as a whole even the breeding that acts a precursor to crime can be categorized as a low risk due to the diffusion of risk across many actors.

To choose tools and intervention strategies for successfully regulating and inducing compliance from actors engaging in such low risk activities, Black and Baldwin develop a framework in which they characterize the actors being regulated based upon their willingness to comply with regulations (“motivation”) and their ability to do so (“capacity”).¹⁵⁷ This characterization, then, helps determine the interventions needed to obtain compliance, with the individuals that are highly motivated and with high capacity to comply needing little regulatory attention and those characterized as less motivated and/or without the capacity to comply needing more.¹⁵⁸

With respect to backyard breeding, this suggests a framework for effective regulation. First, existing law must be fixed: the exemptions from registration provided under current law that allow some level of unregulated breeding to exist and that make the enforcement of existing licensing schemes impossible need to be revised. Second, the dogs must be fixed in a systematic way: communities and activist groups need to strategically redeploy existing spay/neuter resources to backyard breeding hot spots to increase residents’ capacity to comply with the laws. And, finally, the bigger problems can start to be fixed: once the breeders with high motivation but low capacity are removed from the pool and some formerly unmotivated actors receive the information or change in cultural norms needed to become motivated, regulatory and enforcement attention can be focused on the backyard breeders that continue to evidence low motivation for compliance.

157. Black & Baldwin, *Strategic Framework*, *supra* note 148, at 136–37.

158. *Id.* at 137.

B. Fixing the Laws

So long as state and federal laws governing dog breeding provide *de minimis* exemptions that require no registration or notification, violations of existing law will remain invisible and impossible to police. Moreover, the more pernicious forms of backyard breeding will flourish with almost no risk of detection. While local governments have at times provided regulations in the absence of state legislation on point, the resulting scheme is too inconsistent to provide actual oversight as breeders easily move to a neighboring jurisdiction for their activities.

Each state should adopt legislation requiring that all individuals with a pregnant dog provide notice and receive a unique identifier prior to whelping, advertising, or transferring rights to any puppies. These statutes could be modeled on those described above,¹⁵⁹ which require that all litters or individual puppies have a unique identifier that must be included in all sales records and advertisements. Such registration can be free or at a minimal cost for the first litter or a few puppies; the point is not revenue raising but enhancing public safety and the welfare of community and the dogs, while providing an environment in which the breeding can be effectively policed. To minimize enforcement costs, the registration information for each litter or puppy should be available for review by potential purchasers in an online database so that consumers can ensure they are buying legally and provide relevant information to assist enforcement in the case of infractions.

In jurisdictions that have local animal control departments, enforcement should be shared between the animal control officers and applicable state inspectors. In this way, the officials on the ground and with the best information about local breeding activity can become involved in the enforcement of the regulations. However, in jurisdictions without such a department, state-level inspectors need to prioritize identification of noncomplying breeders.

Moreover, more states should follow the example of Florida and New Hampshire in requiring that all puppies sold in the state be provided a minimum level of veterinary care and that a health certificate issued by a veterinarian accompany each sale.¹⁶⁰ This

159. See *supra* notes 67–72 and accompanying text (explaining the ordinances).

160. FLA. STAT. ANN. § 828.29(1)(b) (West 2017); N.H. REV. STAT. ANN. § 437:13-a (2017).

requirement is an attempt to address the “risk-shifting” concern that led to the inclusion of the physical presence requirement for the AWA’s retail pet store exemption. Recognizing both that consumers are not veterinary experts and that many diseases and ailments are not immediately visible because of incubation periods or delayed effects, this approach provides even better assurance to consumers that the animals they are purchasing are minimally healthy than many existing “puppy lemon laws.”

While intuitively attractive at first blush, one legislative effort that would be unlikely to have a positive effect either on pet overpopulation or the use of dogs in criminal activities is the enactment legislation banning breeding or ownership of the dog breeds commonly seen in shelters and in criminal activities. In an effort to eliminate the pet overpopulation and public safety risks that currently are associated with bully breed dogs, some jurisdictions have adopted such “breed specific legislation,” generally covering bully breeds.¹⁶¹ However, there is no evidence that this in fact accomplishes its goal.¹⁶² Instead, this seems likely to simply shift which dog breeds were being used illicitly; as one breed is banned, another could simply be substituted in without loss of the sought characteristics.¹⁶³ Close analysis bears this approach out: Boston terriers were once the fighting dog of choice and currently mastiff-type dogs are often used instead of the better-known, but smaller,

161. See, e.g., DENVER, COLO. ORDINANCE § 8-55(a)–(b) (“Pit bulls prohibited.” In relevant part this ordinance provides “It shall be unlawful for any person to own, possess, keep, exercise control over, maintain, harbor, transport, or sell within the city any pit bull. . . . defined as any dog that is an American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or any dog displaying the majority of physical traits of any one (1) or more of the above breeds, or any dog exhibiting those distinguishing characteristics which substantially conform to the standards established by the American Kennel Club or United Kennel Club for any of the above breeds.”).

162. See, e.g., City of Topeka City Attorney’s Office, *Proposed Ordinance on Animal Cruelty and Dangerous Dogs* at FAQs 5–7, https://www.pitbullinfo.org/uploads/7/8/9/7/7897520/topeka_kansas_against_bsl.pdf (providing an analysis of the efficacy of Topeka’s breed-specific legislation and danger from pit bulls more generally).

163. For example, research shows that the type of bites and need for medical treatment post-bite are the same between legislated-breed dogs and non-legislated-breed dogs. Nanci Creedon & Páraic S. Ó Súilleabháin, *Dog Bite Injuries to Humans and the Use of Breed-Specific Legislation: A Comparison of Bites from Legislated and Non-Legislated Dog Breeds*, 70:23 IRISH VETERINARY J. (2017).

bullies,¹⁶⁴ yet frequently not included in such bans.¹⁶⁵ Banning a breed of dog does not affect the human behavior around dogs, just potentially the use of one subcategory of dog that is easily substituted with another.

By requiring notification by breeders anticipating taking advantage of exceptions provided under state and federal law for *de minimis* rates of breeding, states would gain the ability to monitor the breeding that occurs within their boundaries and reduce the careless overproduction of dogs. Providing a minimum level of verifiable health care before any sales ensures the puppies in fact receive necessary care; breeders can simply pass the cost of the care on to the consumers as a higher price as these are costs that would otherwise be expended in care of the puppy after purchase. Hobby breeders will, at the most, be inconvenienced by occasional inspections, animal care, and record-keeping requirements, while state and local law enforcement officers will gain valuable tools in fighting the larger crimes aided by the most pernicious backyard breeding.

C. *Fixing the Dogs*

Fixing state laws so that enforcement is possible is only the first step, though, in curtailing excess and pernicious backyard breeding. It is unlikely that the breeders producing dogs as part of a criminal enterprise will freely comply, and those selling through personal networks will still be invisible to law enforcement if the level of informal breeding currently in existence remains constant. Moreover, many pet owners simply do not have the funds to spay or neuter their dogs or the knowledge or ability to prevent intact dogs from reproducing: even if they would be motivated to comply with the laws and the purpose of preventing excess puppies from being born, they would not have the capacity to do so.

Instead, careful coordination with local communities to eliminate small-volume dog breeding would both remove the smokescreen that conceals illicit breeding and provide dog owners veterinary care for their pets they might otherwise not be able to afford. While the sterilization rate for owned pets in the United States generally is close

164. Katie Barnett, *The Post-Conviction Remedy for Pit Bulls: What Today's Science Tells Us About Breed-Specific Legislation*, 67 SYRACUSE L. REV. 241, 262 (2017).

165. See, e.g., DENVER, COLO. CODE OF ORDINANCES § 8-55 (2017), *supra* note 161 (including only American Pit Bull Terriers, American Staffordshire Terriers, Staffordshire Bull Terriers, and dogs that look like one of these breeds in its ban).

to 80%,¹⁶⁶ in disadvantaged communities it is closer to 20%.¹⁶⁷ In other words, nearly 4/5 of owned dogs in these communities are potentially reproducing. Even if state laws were revised to require registration of all litters, the sheer volume being produced would prevent effective enforcement against breeders not complying with the requirements.

However, in many instances, all it takes is availability of low cost spay/neuter options for these individuals to stop breeding dogs. In a 2004 study identifying the policy options that would best help reduce pet overpopulation in the United States, ecological economist Joshua Frank found that 27% of owners that did not currently opt to sterilize their dogs would do so if the price were reduced.¹⁶⁸ Even more could be expected to do so if it were free, or if an additional incentive—such as provision of a legally-required rabies vaccination, application of flea preventative, and/or microchipping—were included to increase motivation. Combined with education, programs that work with community members willing to have their pets spayed or neutered at an affordable price can be expected to raise the alteration rate—and thus decrease the community’s breeding rate—even more.

Closing the gap between the sterilization rate in underprivileged communities and in the U.S. generally means providing the capacity, information, and motivation necessary to prevent pet overpopulation. Simply providing funds would enable many of these owners to have their dogs sterilized, removing them immediately from the pool of backyard breeders. Registration of a litter would provide an opportunity for a dog owner to receive information about the benefits of spaying or neutering his pet and an offer of help for the expense.

166. *U.S. Community Pet Program Grants*, PETSMART CHARITIES, available at <https://web.archive.org/web/20170317135155/https://www.petsmartcharities.org/pro/grants/spayneuter-grants/community-pet-program> (last archived Mar. 17, 2017).

167. *2014 U.S. Shelter Pet Report*, PETSMART CHARITIES, referenced at <https://www.petsmartcharities.org/pro/grants/spayneuter-grants/community-pet-program> (last visited Sept. 18, 2017). This is consistent with dog intake data from Athens-Clarke County (GA) Animal Control for the period 2013-2016, during which 4941 dogs were impounded. Of these, 14 did not have a sex recorded on impound and so have been excluded from the calculations. During this time period, 3943 (80%) of the impounded dogs were sexually intact and 984 were previously altered (20%). Data on file with author.

168. Joshua Frank, *An Interactive Model of Human and Companion Animal Dynamics: The Ecology and Economics of Dog Overpopulation and the Human Costs of Addressing the Problem*, 32 HUMAN ECOLOGY 107, 115 (2004); see also 2014 U.S. Shelter Pet Report, *supra* note 167, at 25 (reporting that 30% of pet owners not spaying or neutering a pet state that it is “too expensive” to do so).

In addition to the possibility of information and funding to increase owners' motivation and capacity to alter their dogs, there is a cultural effect to spaying and neutering. In communities with low spay/neuter rates, intact dogs and the prevalence of litters is assumed and accepted. However, once sterilizing pets becomes the accepted norm, ambient alteration rates are likely to continue to climb even absent continued educational programs or widespread financial efforts. This cultural change can effect a change in motivation by individuals with the capacity to alter their pets but who previously saw no reason to do so.

Of course, resources are always an issue, especially for activities that are seen as low risk by regulators in charge of establishing funding priorities.¹⁶⁹ However, programs providing funds for sterilization surgeries and education about the benefits of spay/neuter are available in many communities currently. For example, a number of states have established funds to provide free and low cost spay/neuter services. Moreover, charitable foundations and local rescue groups have prioritized low cost spay/neuter surgeries in recent years. Yet in each case, the available resources are not currently allocated in a way designed to curtail backyard breeding.

Take, for example, Georgia's statutorily-established "Dog and Cat Sterilization Fund."¹⁷⁰ Funded by sales of specialty license plates and voluntary donations,¹⁷¹ the Georgia Department of Agriculture administers the program. It has paid out nearly \$1 million in grants since 2013;¹⁷² the 2016 allocation was distributed among sixty-six municipal shelters, veterinary organizations, and 501(c)(3) organizations operating as Georgia-licensed animal rescue groups¹⁷³ and includes coverage for sterilization surgeries for dogs and cats

169. This general statement may not be true in instances where political pressure is brought to bear. Black & Baldwin, *Approaches and Challenges*, *supra* note 149, at 7–8. That is a different route for receiving the funds necessary to eliminate constraints based upon capacity.

170. GA. CODE ANN. § 4-15-1 (2017).

171. Colorado and North Carolina similarly fund programs through sales of license plates. *See* COLO. REV. STAT. § 35-80-116.5(5) (2017); N.C. GEN. STAT. § 19A-62 (2017).

172. http://www.agr.georgia.gov/Data/Sites/1/media/ag_animalindustry/animal_health/files/dcsp/dcspinformationbrochure-2016.pdf

173. <http://agr.georgia.gov/2016-dog-and-cat-sterilization-program-grant-recipients.aspx> (last visited May 21, 2018); *List of 2016 Dog and Cat Sterilization Program Grant Recipients*, GEORGIA DEPT OF AGRIC., http://www.agr.georgia.gov/Data/Sites/1/media/ag_animalindustry/animal_protection/files/List-of-2016-Dog-and-Cat-Sterilization-Program-Grant-Recipients.pdf (last visited Sept. 18, 2017).

owned by private individuals, rescue groups, and shelters.¹⁷⁴ Other states provide similar grant funding through a rabies vaccination surcharge,¹⁷⁵ dog licensing fees generally,¹⁷⁶ a surcharge on licenses for intact dogs,¹⁷⁷ or solely through donations.¹⁷⁸

In each case, the creation of the fund was motivated by state legislative concern with pet overpopulation. Most of the jurisdictions providing for one of these funds, though, require that all dogs owned by a municipal shelter or rescue group be spayed or neutered before transfer to a private owner.¹⁷⁹ Because of this requirement, shelter animals and those in rescue groups in these jurisdictions will not be adding to pet overpopulation; they will either be adopted from the shelter, transferred to a rescue group also subject to the spay/neuter requirement, or held until death. Thus, the funds that are currently distributed for use on shelter or rescue dogs are more efficiently spent on owned animals if curbing pet overpopulation is the goal. Private foundations similarly provide substantial spay/neuter grants: for example, PetSmart Charities Foundation provided several million dollars in 2016,¹⁸⁰ The Duffield Family Foundation (Maddie's Fund) provided approximately \$100,000 in 2015,¹⁸¹ and Bissell Pet

174. *How Does the New Dog and Cat Sterilization Program Work?*, GEORGIA DEP'T OF AGRIC., http://www.agr.georgia.gov/Data/Sites/1/media/ag_animalindustry/animal_health/files/dcsp/dcspinformationbrochure-2016.pdf (last visited Sept. 18, 2017).

175. See, e.g., DEL. CODE ANN. tit. 16, § 3014F (2017) (adding a surcharge for rabies vaccinations).

176. See N.H. REV. STAT. ANN. § 437-a:4-a (2017) (appropriating licensing funds generated by N.H. REV. STAT. ANN. § 466:4 (2017) and N.H. REV. STAT. ANN. § 466:6 (2017)).

177. See M.E. REV. STAT. ANN. tit. 7 § 3923-A (2017) (charging higher fees for licenses for intact dogs than for licenses for altered dogs).

178. See UTAH CODE ANN. § 4-40-102 (West 2017) (providing for funding of sterilization via contributions to a spay and neuter program account); ME. REV. STAT. ANN. tit. 7 § 3910-B (2017) (providing for funding of sterilization via voluntary contributions).

179. GA. CODE ANN. § 4-14-3 (2017); COLO. REV. STAT. § **35-80-106.4 (2017)**; DEL. CODE ANN. tit. 16, § 3016F (2017); N.J. STAT. ANN. § 4:19-15.30 (2017); UTAH CODE ANN. § 11-46-203 (2017); ME. STAT. tit. 7, § 3939-A(1) (2017).

180. 2016 Form 990, GUIDESTAR, <http://www.guidestar.org/FinDocuments/2016/931/140/2016-931140967-0d28e121-9.pdf> (last visited Sept. 18, 2017).

181. 2015 Form 990-PF, GUIDESTAR, <http://www.guidestar.org/FinDocuments/2015/943/362/2015-943362163-0c81ab75-F.pdf> (last visited Sept. 18, 2017) (this is the latest year publicly available at the time of writing).

Foundation provided approximately \$450,000 in 2016.¹⁸² Each of these organizations could instead choose to allocate its funds for use in communities with high rates of backyard breeding, low existing rates of pet sterilization, and existing infrastructure¹⁸³ to effectively deploy the resources. If used systematically in such areas, these funds can help in the direct purpose of the programs of reducing pet overpopulation while simultaneously making illicit breeding visible.

Research shows that much of the backyard breeding that currently exists could be curtailed through the efficient allocation of existing resources and active educational programs designed to highlight the benefits of spaying and neutering companion animals. The resources to provide discounted or free surgeries currently exist but are not deployed in an effective way. In focusing efforts as suggested in this Article, local animal control departments, state agencies, animal welfare groups, and community members would be working together to resolve what is currently a widespread and seemingly-intractable problem.

D. Beginning to Fix the Problem

The goal of the spay/neuter resource allocation this Article proposes is encouraging voluntary compliance with regulations by providing community members with a needed—and often wanted—resource. In addition to helping some of the neediest pets obtain often-lifesaving veterinary care, a program targeting members of communities where backyard breeding, and particularly the most pernicious forms of backyard breeding, is prevalent would remove many of the casual or inadvertent backyard breeders, making the remaining pernicious breeders more visible.

By way of illustration, imagine a community in which perhaps 5% of dog owners are pernicious breeders, either breeding for criminal activity or intentionally breeding despite violation of applicable regulations.¹⁸⁴ Overall the community has a dog sterilization rate of

182. 2016 Form 990-PF, GUIDESTAR, <http://www.guidestar.org/FinDocuments/2016/383/853/2016-383853264-0ddac66f-F.pdf> (last visited Sept. 18, 2017).

183. Such infrastructure might include, for example, a high volume spay/neuter clinic, animal control presence, and active community involvement in animal welfare.

184. Gathering information about the actual participation rate in illegal activity is, of course, difficult. However, one survey concerning pet demographics found that in a community with a 75% sterilization rate for owned dogs, one-third of households reporting that they did not spay or neuter their dogs (8.3% of dog owners overall) did so because they intended to breed them. See Phillip H. Kass, Karen L. Johnson, & Hsin-Yi Weng, *Evaluation of Animal Control Measures on Pet Demographics in Santa*

20%.¹⁸⁵ The remaining 75% of dog owners are inadvertent or hobby breeders, have dogs that are naturally sterile or not yet of reproductive age, or manage their dogs in a way that they do not reproduce.¹⁸⁶

Using the financial and educational tools outlined above, we can expect the ambient sterilization rate to climb to 75–80% over the period of time when the financial and educational incentives are offered, so long as the resources are sufficient to satisfy demand. While the number of pernicious breeders can be expected to remain constant in the community, as they are unlikely to voluntarily sterilize their dogs, the number of other potential breeders would be greatly reduced, and some of those—perhaps 5% of the dog owners—will have provided the necessary notice or registered for a license to lawfully breed. The concentration of pernicious breeders in the population of unlicensed breeders will have gone from 5/80 prior to intervention, to 5/15 afterwards, dramatically increasing the visibility of the noncompliant breeders; one-third of the litters produced outside of licensed breeding programs would represent breeding for criminal ventures or intentional noncompliance with the law. With this increased visibility, monitoring and enforcement efforts could be undertaken to target offenders without imposing costs on the community more generally.

E. Fixing Backyard Breeding: Conclusions

The first step in changing the reality of small-volume breeding today is changing the laws to require notification or other registration for a breeder to receive an exemption for *de minimis* breeding activity from state licensing requirements. In addition, available resources for low cost and free spay/neuter efforts need to be directed at breeding “hot spots”—communities with high rates of backyard breeding and low ambient alteration rates—to increase residents’

Clara County, CA 1993-2006, PEER J (Feb. 19, 2013), <https://peerj.com/articles/18/>. Thus, estimating the number of individuals breeding dogs who operate outside of applicable regulatory regimes at 5% in a community seems reasonable, especially given the low likelihood that many pernicious breeders responded to the survey. In any event, this number is simply one for illustration; an actual rate of 1% or 10% would simply change the exact percentages illustrated, not the underlying concept.

185. This is the typical ambient alteration rate for owned pets in underprivileged communities. See *supra* note 167.

186. For simplicity’s sake, in this hypothetical there are no licensed breeders, but their existence would not change the point, just the numbers used.

capacity to help reduce pet overpopulation. This can help change the norms in these communities so that otherwise indifferent residents become motivated to sterilize their dogs and can eliminate much of the nuisance breeding that currently exists and serves to conceal pernicious backyard breeding. In this way, the remaining backyard breeding can become visible and capable of intervention.

CONCLUSION

Oversight of small-volume dog breeding is currently a low priority for states and the federal government; in fact, none of them does it. Instead, all currently exempt some level of breeding without requiring any registration or notification that the exemption is being used. Unlike puppy mills, which provide an immediately visible and visceral level of harm to a great number of dogs, the harms of backyard breeding are more diffuse.

While state legislatures and researchers acknowledge the harms to both people and dogs from pet overpopulation, it can be difficult to see the connection between one inadvertent litter produced each year and the death or hundreds of thousands of dogs. But, collectively, that is what results. Moreover, the prevalence of nuisance breeding activity in many jurisdictions serves as a smokescreen for breeding that is illegal or a precursor to criminal activities. Without a significant expenditure of resources, identifying these pernicious breeders is currently impossible.

Through the application of frameworks developed to allow effective and resource-efficient regulation of low-risk activities in a variety of industries, this Article provides a clear and practical set of steps for legislators interested in both advancing the welfare of unprivileged citizens and their canine family members, as well as reducing the direct and indirect harms resulting from backyard breeding.

APPENDIX

State Regulation of Small-Volume Breeders

	Authority	Annual <i>de minimis</i> exclusion
Alabama	N/A	N/A
Alaska	N/A	N/A
Arizona	N/A	N/A
Arkansas	N/A	N/A
California	CAL. HEALTH & SAFETY CODE § 122045(b) (West 2017)	transfers < 3 litters & < 20 dogs
Colorado	COLO. REV. STAT. ANN. § 35-80-102(2) & § 35-80-103(2)(c) (West 2017)	transfers ≤ 24 dogs or breeds ≤ 2 litters, whichever is less
Connecticut	CONN. GEN. STAT. § 22-342 (2012)	breeds ≤ 2 litters
Delaware	DEL. CODE ANN. tit. 16, § 3041F(8) & §§ 3042F(2) & (3) (2016)	sells ≤ 1 litter or keeps <4 dogs for breeding (in which case all sales exempt)
Florida	FLA. STAT. ANN. § 828.29(13) & § 828.29(1)(b) (West 2017)	sells ≤ 2 litters & < 20 dogs, whichever is less Vet certificate reqs for sale apply to all
Georgia	GA. CODE ANN. § 4-11-2(7) (2016) & GA. COMP. R. & REGS. § 40-13-13-.07(2)(d) (2017)	sells ≤ 1 litter or ≤ 30 adult dogs
Hawaii	N/A	N/A
Idaho	N/A	N/A
Illinois	225 ILL. COMP. STAT. ANN. 605/2 (West 2017)	Harbors ≤ 5 females capable of reproduction
Indiana	IND. CODE ANN. § 15-21-1-4 (West 2017)	keeps ≤ 20 unaltered female dogs 12 m.o. or older
Iowa	IOWA CODE ANN. § 162.2(8) & § 162.2(19) (West 2017)	keeps ≤ 3 breeding males or females; has <\$500 in sales; sells < 6 animals

Kansas	KAN. STAT. ANN. §§ 47-1701(f) & (m) (West 2017)	sale of < 3 litters & < 30 dogs
Kentucky	N/A	N/A
Louisiana	LA. STAT. ANN. § 3:2772(G) (2015)	has < 5 dogs
Maine	ME. REV. STAT. ANN. tit 7, § 3931-A(1) (2017)	has <5 female dogs capable of breeding
Maryland	N/A	N/A
Massachusetts	MASS. GEN. LAWS ANN. ch. 140, § 136A (West 2017)	unlimited “personal kennel” breeding (private sale only)
Michigan	MICH. COMP. LAWS ANN. § 287.270 (West 2017)	keeps < 3 dogs for breeding for sale
Minnesota	MINN. STAT. ANN. § 347.57(5) (West 2017)	has <10 intact adults produces ≤ 5 litters
Mississippi	N/A	N/A
Missouri	MO. ANN. STAT. §§ 273.325(8) & (13) (West 2017)	keeps ≤ 3 intact females (≤ 10 if private sales)
Montana	N/A	N/A
Nebraska	NEB. REV. STAT. ANN. § 54-626(8) (West 2017)	sells < 31 dogs & < 4 litters & private sales
Nevada	NEV. REV. STAT. ANN. § 574.245 (West 2017)	unlimited “hobby” breeding
New Hampshire	N.H. REV. STAT. ANN. § 437:2 & § 437:13-a (2017)	transfers < 10 litters & < 50 puppies health certificate reqs for sale apply to all
New Jersey	N.J. STAT. ANN. § 4:19-15.1 (West 2017) & N.J. ADMIN. CODE § 13:45A-12.1 (2017)	no exception to kennel licensing if “business of . . . breeding dogs for same is carried on”; sale of < 5 dogs for record-keeping and health certificate purposes
New Mexico	N/A	N/A
New York	N.Y. GEN. BUS. LAW § 752(3) (eff. until Nov. 12, 2017); N.Y. COMP.	sale of ≤ 9 dogs for profit or breeding on residential premises & selling < 25 dogs in sales

	CODES R. & REGS. tit. 1, § 81.1 (2017)	to consumers; sells ≤ 1 litter
North Carolina	N.C. GEN. STAT. § 19A-23(7) (2017)	sells the offspring of ≤ 5 females
North Dakota	N/A	N/A
Ohio	OHIO REV. CODE ANN. § 956.01 (West 2017)	produces < 9 litters & sells < 60 dogs
Oklahoma	OKLA. STAT. ANN. tit 4, §§ 30.2(7) & (20) (West 2017)	keeps < 11 intact female dogs
Oregon	OR. REV. STAT. ANN. § 167.376(2) (West 2017)	keeps < 10 intact dogs
Pennsylvania	3 PA. STAT. AND CONS. STAT. ANN. § 459-102 (West 2017)	transfers ≤ 60 dogs to consumers
Rhode Island	4 R.I. GEN. LAWS § 4-19-2(17) & § 4-25-1(4) (2017)	selling < 20 dogs & < 3 litters
South Carolina	S.C. CODE ANN. § 47-13-160(G)(3) (2017)	pet breeder does not include “occasional” breeding or litter production
South Dakota	N/A	N/A
Tennessee	TENN. CODE ANN. § 44-17-102(4) (2017)	sells < 25 dogs however no exemption if sold at a flea market
Texas	TEX. OCC. CODE ANN. § 802.002(8) (West 2017)	keeps < 11 intact adult female dogs and/or sells < 20 dogs
Utah	N/A	N/A
Vermont	VT. STAT. ANN. tit 20, § 3541(10) (2017)	sells dogs from < 3 litters
Virginia	VA. CODE ANN. § 3.2-6500	< 30 adult female dogs (breeder) < 5 dogs (kennel)
Washington	WASH. REV. CODE ANN. § 16.52.310(2) (West 2017)	keeps ≤ 10 intact dogs
West Virginia	W. VA. CODE ANN. § 19-20-26(2) (West 2017)	keeps < 11 intact dogs over the age of 1 yr

Wisconsin	WIS. STAT. ANN. § 173.41(c) (West 2017)	sells < 25 dogs bred & raised and/or ≤3 litters
Wyoming	N/A	N/A