

# ESSAY

## CALIFORNIA PROPOSITION 2: A WATERSHED MOMENT FOR ANIMAL LAW

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*This essay explores the legislative and legal campaign to enact California Proposition 2: The Prevention of Farm Animal Cruelty Act, approved by California voters on November 4, 2008. The authors direct the legislation and litigation programs for The Humane Society of the United States, and, along with many other individuals and organizations, were centrally involved in the drafting, campaigning, and litigation efforts in support of the measure.*

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## I. INTRODUCTION

For decades, to even speak of farm animal law was a bit of a misnomer. With virtually no state or federal humane legal protections, and prosecutors and regulators extremely reluctant to administer the few laws that do apply, factory farmers have long had a virtual free hand to systematically abuse animals with impunity.<sup>1</sup> But 2008 was a remarkable year for farm animals, which culminated in the enactment of a far-reaching citizen initiative that secured important legal protections for more than 20 million animals who have been denied all consideration by the legal system for far, far too long.<sup>2</sup>

This essay explores the events and circumstances leading up to the enactment of Proposition 2, the Prevention of Farm Animal Cruelty Act,<sup>3</sup> which was principally sponsored by The Humane Society of the United States (HSUS) and Farm Sanctuary, and overwhelmingly enacted by California voters on November 4, 2008.<sup>4</sup> The measure, although not without its critics,<sup>5</sup> can fairly be described as the most important animal law reform in the last decade. Indeed, one of the largest agribusiness newspapers in the country, *Feedstuffs*, described it as “an initiative that will affect all of livestock and poultry production across the entire U.S., if not North America. All segments of production, including packer/processors, grain producers, suppliers and those in the business of selling food, must recognize this . . . .”<sup>6</sup>

Proposition 2’s approval marks a watershed moment in a decades long fight to secure some minimal humane legal standards for farm animals, and a major turning point in HSUS’s more recent campaign focused on the worst abuses of intensive animal agriculture. The measure’s enactment marks a seismic shift in public attitudes toward ani-

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<sup>1</sup> David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House—Animals, Agribusiness, and the Law: A Modern American Fable*, in *Animal Rights: Current Debates and New Directions* 205–07 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004).

<sup>2</sup> Carla Hall, *Measure to Provide Better Treatment of Farm Animals Passes*, <http://articles.latimes.com/2008/nov/05/local/me-farm5> (Nov. 5, 2008) (last accessed Apr. 11, 2009).

<sup>3</sup> California General Election, *Official Voter Information Guide*, <http://www.voter.guide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposedlaws.pdf#prop2> (last accessed April 11, 2009).

<sup>4</sup> Hall, *supra* n. 2.

<sup>5</sup> See e.g. George Skelton, *Prop. 2: Good for Chickens, Bad for Chicken Farmers*, <http://articles.latimes.com/2008/oct/20/local/me-cap20> (Oct. 20, 2008) (last accessed Apr. 11, 2009) (arguing that the market is the appropriate venue to sort out living conditions for laying hens).

<sup>6</sup> *Feedstuffs, California Dam Must Not Be Breached—Editorial*, <http://www.feedstuffsfoodlink.com/ME2/dirmod.asp?sid=124ECF05FDF84451B3E79A337664CA3C&nm=Blog&type=Blog&mod=View+Topic&mid=67D6564029914AD3B204AD35D8F5F780&tier=7&id=989B12663A454D5A8EC351B760324973> (June 29, 2008) (last accessed Apr. 11, 2009).

mals raised for food—animals whose interests have long been ignored or overlooked while the public's concern has been overwhelmingly focused on dogs and cats, and on charismatic wildlife like whales, elephants, and pandas. Moreover, as discussed herein, the legislative and legal efforts leading up to its enactment rewrote the book on legal advocacy for animals and tested a model for animal legal reform that can, and should, be replicated at both the state and federal level.

## II. CONSIDER THE HEN

Although the campaign to enact Proposition 2 played out publicly during the fall of 2008, the story actually began earlier, much earlier. Since the early 1950s, animal agriculture has undergone a remarkable technological transformation from the pastoral ideal often depicted in pictures and movies into a massive complex of factory farms that would hardly be recognizable to the "citizen farmers" who founded this country.<sup>7</sup> Farmers, faced with pressures to produce in greater quantities and at lower prices, succumbed to increasingly harsh and industrial techniques that treat animals as machines, rather than living, breathing individuals with natures, instincts, and needs.

The statistics are staggering. Each year in the United States, approximately 10 billion land animals are raised and killed for meat, eggs, and milk.<sup>8</sup> Farm animals comprise 98% of all animals in the country with whom we interact directly,<sup>9</sup> and that sobering percentage does not even include the billions of aquatic animals killed each year for human consumption.<sup>10</sup> Indeed, the number of animals killed in hunting, trapping, research, on fur farms, and in animal shelters, combined with those animals raised as companions or used for entertainment by circuses and zoos, collectively make up only 2% of the animals utilized by our society.<sup>11</sup>

These farm animals—sentient, complex, and capable of feeling pain, frustration, joy, and excitement—are viewed by industrialized agriculture as mere meat, egg, and milk producing machines. Their welfare suffers immensely because factory farm profits outweigh their well-being. Yet, despite the routine abuses they endure, no federal law

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<sup>7</sup> Robert V. Percival, "Greening" the Constitution—Harmonizing Environmental and Constitutional Values, 32 *Env'tl. L. Rev.* 809, 814 (2002) (noting the founding fathers idyllic view of agricultural society).

<sup>8</sup> U.S. Dept. Agric. Nat'l. Agric. Statistics Serv., *Agricultural Statistics 2008*, VIII-34 tbl. 8-50 (2008), [http://nass.usda.gov/Publications/Ag\\_Statistics/2008/Chap08.pdf](http://nass.usda.gov/Publications/Ag_Statistics/2008/Chap08.pdf) (last accessed Mar. 2, 2009) (site no longer available); U.S. Dept. Agric. Nat'l. Agric. Statistics Serv., *Agricultural Statistics 2008*, VII-58 tbl. 7-80 (2008) [http://www.nass.usda.gov/Publications/Ag\\_Statistics/2008/Chap09.pdf](http://www.nass.usda.gov/Publications/Ag_Statistics/2008/Chap09.pdf) (last accessed Mar. 2, 2009) (site no longer available).

<sup>9</sup> Wolfson & Sullivan, *supra* n. 1, at 206-07.

<sup>10</sup> *Id.* at 226 n. 2.

<sup>11</sup> *Id.* at 207.

protects animals from cruelty on the farm,<sup>12</sup> and the majority of states exempt customary agricultural practices—no matter how abusive—from the scope of their animal cruelty statutes.<sup>13</sup> As a result, the welfare of farm animals often loses out to the economic interests of factory farmers who can make larger profits by intensively confining animals and breeding them for rapid growth with little regard for the amount of suffering the animals endure.<sup>14</sup>

The situation for laying hens is particularly egregious. Throughout the years, most egg producers have promoted the extreme, lifelong confinement of animals in cages so small that they can barely move. Approximately 95% of hens in U.S. factory farms are intensively confined in small, wire “battery cages,” stacked several tiers high and extending down long warehouses.<sup>15</sup> Industrial producers usually give hens less space than the area of a letter-sized sheet of paper in which to eat, sleep, lay eggs, and defecate.<sup>16</sup> The intensive confinement makes it impossible for them to engage in nearly all of their natural behavior, including dustbathing, foraging, or nesting, the most significant source of frustration for battery caged hens.<sup>17</sup> While many countries are phasing out the abusive battery cage system, U.S. egg producers still overcrowd hens in barren cages so small the birds cannot even spread their wings.<sup>18</sup> It is hard to imagine a more miserable existence.

Confining animals in crowded, stressful, and unhygienic conditions can also increase the risk of foodborne diseases.<sup>19</sup> For example, intensively confining egg-laying hens into cages can significantly increase the risk of Salmonella infection.<sup>20</sup> There are five recent studies

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*; see also Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 *Animal L.* 69, 77 (1999) (discussing exempted commonly accepted practices).

<sup>14</sup> Peter R. Cheeke, *Contemporary Issues in Animal Agriculture* 255 (3d ed., Pearson Educ., Inc. 2004).

<sup>15</sup> United Egg Producers Certified, *United Egg Producers Animal Husbandry Guidelines For U.S. Egg Laying Flocks* 1, <http://www.uepcertified.com/media/pdf/UEP-Animal-Welfare-Guidelines.pdf> (last accessed Apr. 11, 2009); Humane Socy. U.S., *An HSUS Report: The Welfare of Animals in the Meat, Egg, and Dairy Industries*, [http://www.hsus.org/farm/resources/research/welfare/welfare\\_overview.html](http://www.hsus.org/farm/resources/research/welfare/welfare_overview.html) (last accessed Apr. 11, 2009);

<sup>16</sup> United Egg Producers Certified, *supra* n. 15.

<sup>17</sup> I.J.H. Duncan, *The Pros and Cons of Cages*, 57 *World's Poultry Sci. J.* 381, 385 (2001).

<sup>18</sup> *Id.* at 381; Marian Stamp Dawkins & Sylvia Hardie, *Space Needs of Laying Hens*, 30 *Brit. Poultry Sci.* 413, 413–16 (examining the space requirements of hens); J.A. Mench & J.C. Swanson, *Developing Science-based Animal Welfare Guidelines*, <http://animalscience.ucdavis.edu/Avian/mench.pdf> (last accessed Apr. 11, 2009) (discussing the scientific study of space requirements of hens and its use in animal welfare guidelines).

<sup>19</sup> R.V. Tauxe, *Emerging Foodborne Pathogens*, 78 *Intl. J. of Food Microbiology* 31, 37 (2002).

<sup>20</sup> European Food Safety Auth., *Report of the Task Force on Zoonoses Data Collection on the Analysis of the Baseline Study on the Prevalence of Salmonella in Holdings of Laying Hen Flocks of Gallus gallus*, *The EFSA Journal* 97 (2007) (available at <http://>

comparing Salmonella risk between caged and cage-free flocks.<sup>21</sup> Without exception, each found a significantly higher risk of Salmonella in factory farms that confine thousands of hens into tiny cages.<sup>22</sup> The latest study found that battery cage operations were more likely to be contaminated with Salmonella than cage-free facilities.<sup>23</sup> Salmonella-infected eggs sicken 50,000 to 110,000 Americans every year,<sup>24</sup> including infants and small children who are at especially high risk.<sup>25</sup>

As has been noted elsewhere, the treatment of animals in modern industrial agriculture remains fundamentally out of step with the views of the American public.<sup>26</sup> More than two-thirds of Americans find it unacceptable that there are no federal laws protecting the welfare of animals on farms.<sup>27</sup> Furthermore, more than four-fifths of Americans believe there should be effective laws that protect farm animals against cruelty, and nearly three-quarters believe there ought to be federal inspections of farms to ensure humane treatment.<sup>28</sup>

### III. ANIMALS AT THE BALLOT BOX

Consumers have begun to awaken to the hidden cost of the food on their plate, not only in regard to animal welfare, but also with respect to human health and the environment.<sup>29</sup> Trends in favor of cage-free eggs and other more humane production standards have been on the rise. Schools, universities, communities, and well-known businesses—

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[www.efsa.europa.eu/EFSA/efsa\\_locale-1178620753812\\_1178620761896.htm](http://www.efsa.europa.eu/EFSA/efsa_locale-1178620753812_1178620761896.htm)) (last accessed Apr. 11, 2009).

<sup>21</sup> *Id.*; Harriet Namata et al., *Salmonella in Belgian Laying Hens: An Identification of Risk Factors*, 83 *Preventive Veterinary Med.*, 323, 323–24 (2008); A. Mahé et al., *Bayesian Estimation of Flock-level Sensitivity of Detection of Salmonella spp., Enteritidis and Typhimurium According to the Sampling Procedure in French Laying-hen Houses*, 84(1–2) *Preventative Veterinary Med.*, 11, 20–21 (2008); L.C. Snow, R.H. Davies, et al., *Survey of the Prevalence of Salmonella Species on Commercial Laying Farms in the United Kingdom*, 161 *The Veterinary Rec.* 471, 473 (2007); U. Methner et al., *Berliner und Münchener Tierärztliche Wochenschrift* 119 (11–12) *Preventative Veterinary Med.*, 467–73 (2006) (occurrence of Salmonella in laying hens in different housing systems and inferences for control).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Yes! On Proposition 2, *Food Safety & Public Health Issues*, <http://www.yesonprop2.com/files/FoodSafetyandPublicHealthFactSheetAug25.pdf> (last accessed Mar. 3, 2009).

<sup>25</sup> *Id.*

<sup>26</sup> Jonathan Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 *Animal L.* 133 (2006).

<sup>27</sup> 2003 National Zogby Poll sponsored by the Animal Welfare Trust (on file with the authors).

<sup>28</sup> *Id.*

<sup>29</sup> Jerry Hirsch, *FOOD—Animal Welfare Issue Boiling—Many Firms in the Industry Have Moved to Undertake a Number of Changes in Response to Customer Concerns*, <http://articles.latimes.com/2007/jul/02/business/fi-humane2> (July 2, 2007) (last accessed Apr. 11, 2009); Kim Severson, *Suddenly, the Hunt Is On for Cage-Free Eggs*, [http://www.nytimes.com/2007/08/12/us/12eggs.html?\\_r=1&scp=6&sq=consumer%20animal%20welfare&st=cse](http://www.nytimes.com/2007/08/12/us/12eggs.html?_r=1&scp=6&sq=consumer%20animal%20welfare&st=cse) (Aug. 12, 2007) (last accessed Apr. 11, 2009).

such as Ben & Jerry's Ice Cream and Wolfgang Puck Companies—have adopted higher animal welfare policies for their operations.<sup>30</sup> In 2002, Florida voters passed a ballot measure banning the use of gestation crates (a confinement practice for breeding pigs that immobilizes sows for the majority of their pregnancies).<sup>31</sup> In 2006, Arizona voters passed a similar measure banning both gestation and veal crates.<sup>32</sup> Shortly thereafter, Smithfield Foods, Inc., the world's largest pork producer, announced a phase-out of its use of gestation crates, citing concerns regarding animal welfare.<sup>33</sup> Consumer demand, as well as legislative trends, all point to a continued elimination of some of the most egregious confinement and intensive production practices that came into vogue in the last several decades.

The use of citizen initiatives will continue to play a major role in these reforms, as they have been perhaps the most successful tool in animal advocates' toolbox throughout the last two decades to achieve humane reforms. Since 1990, animal advocates have enacted twenty-eight ballot initiatives,<sup>34</sup> including measures to outlaw cockfighting in Arizona,<sup>35</sup> Missouri,<sup>36</sup> and Oklahoma;<sup>37</sup> to stop hound-hunting and baiting of bears in Colorado,<sup>38</sup> Massachusetts,<sup>39</sup> Oregon,<sup>40</sup> and Washington;<sup>41</sup> to halt mountain lion hunting in California;<sup>42</sup> to restrict the use of steel-jawed leghold traps and other body-gripping traps in Arizona,<sup>43</sup> California,<sup>44</sup> Colorado,<sup>45</sup> Massachusetts,<sup>46</sup> and

<sup>30</sup> Humane Socy. U.S., *Campaign Victory! Ben and Jerry's Adopts A Cage-Free Egg Policy*, [http://www.hsus.org/farm/news/ournews/ben\\_jerrys\\_victory.html](http://www.hsus.org/farm/news/ournews/ben_jerrys_victory.html) (Sept. 26, 2006) (last accessed Apr. 11, 2009); Humane Socy. U.S., *Animal Welfare Has a Place at Wolfgang Puck's Table*, [http://www.hsus.org/farm/news/pressrel/animal\\_welfare\\_wolfgang\\_puck.html](http://www.hsus.org/farm/news/pressrel/animal_welfare_wolfgang_puck.html) (Mar. 22, 2007) (last accessed Apr. 11, 2009).

<sup>31</sup> Humane Socy. U.S., *Voters Protect Pigs in Florida, Ban Cockfighting in Oklahoma*, [http://www.hsus.org/press\\_and\\_publications/press\\_releases/voters\\_protect\\_pigs\\_in\\_florida\\_ban\\_cockfighting\\_in\\_oklahoma.html](http://www.hsus.org/press_and_publications/press_releases/voters_protect_pigs_in_florida_ban_cockfighting_in_oklahoma.html) (Nov. 6, 2002) (last accessed Apr. 11, 2009).

<sup>32</sup> Humane Socy. U.S., *Animals Win Big at Ballot Box*, [http://www.hsus.org/press\\_and\\_publications/press\\_releases/animals\\_win\\_big\\_at\\_ballot\\_box.html](http://www.hsus.org/press_and_publications/press_releases/animals_win_big_at_ballot_box.html) (Nov. 7, 2006) (last accessed Apr. 11, 2009).

<sup>33</sup> MSNBC.com, *Pork Giant to Phase Out Gestation Crates*, <http://www.msnbc.msn.com/id/16812499/> (Jan. 25, 2007) (last accessed Apr. 11, 2009).

<sup>34</sup> Humane Socy. U.S., *Overview of Animal Protection Ballot Initiatives*, [http://www.hsus.org/legislation\\_laws/ballot\\_initiatives/past\\_ballot\\_initiatives/](http://www.hsus.org/legislation_laws/ballot_initiatives/past_ballot_initiatives/) (last accessed Apr. 11, 2009).

<sup>35</sup> Ariz. Rev. Stat. Ann. § 13-2910.03 (West 2001) (passed 1998).

<sup>36</sup> See Mo. Rev. Stat. Ann. § 578.173 (West 2003) (passed 1998) (providing that "animal fighting" is illegal).

<sup>37</sup> Okla. Stat. Ann. tit. 21, § 1692.2 (West 2006) (passed 2002).

<sup>38</sup> Colo. Rev. Stat. § 33-4-101.3 (Lexis 2005) (passed 1992).

<sup>39</sup> Mass. Gen. Laws Ann. ch. 131, § 21A (West 2002) (passed 1996).

<sup>40</sup> Or. Rev. Stat. Ann. § 498.164 (West 2003) (passed 1994).

<sup>41</sup> Wash. Rev. Code § 77.15.245 (2001) (passed 1996).

<sup>42</sup> Cal. Fish & Game Code Ann. § 3950.1(a) (West 1998) (passed 1990).

<sup>43</sup> Ariz. Rev. Stat. Ann. § 17-301(D) (West 2006) (passed 1994).

<sup>44</sup> Cal. Fish & Game Code Ann. § 3003.1(a) (West 1998 & Supp. 2009) (passed 1998).

<sup>45</sup> Colo. Const. art. XVIII, § 12b(1) (passed 1996).

<sup>46</sup> Mass. Gen. Laws Ann. ch. 131, § 80A (West 2002) (passed 1996).

Washington;<sup>47</sup> and to halt the use of gestation crates in Florida and Arizona.<sup>48</sup>

This solid record of success is in contrast to the slower-moving reforms from state legislatures and Congress. Traditional legislative bodies are particularly vulnerable to influence by industries with resources and political power. Animals are exploited for financial gain in immeasurable ways, and any interference with their unfettered use can be easily blocked by the longstanding political influences of the hunting lobby, agriculture lobby, and other animal-use industries.<sup>49</sup> Legislative bodies, governed by committee chairs who are frequently beholden to those interests they oversee, do not offer the same opportunities for animal advocates found in the twenty-four states with some form of citizen initiatives.<sup>50</sup>

If a proposed reform is simple, moderate, and resonates with the average citizen, adoption through the ballot measure allows animal protection measures to escape the vice-like grip opponents of reform often have on regular legislative bodies. The people become the decision-makers. The airwaves—whether television, radio, or Internet—become the means by which citizens learn about and see for themselves which practices should be forbidden, and why. If undertaken with adequate resources and proper polling, animal protection measures are predictably met with success when they are brought to the public directly.<sup>51</sup>

The level of commitment and desire animal advocates feel for their cause is another factor that weighs in favor of the ballot box over the standard legislative system. Those engaged in pressing for reforms can feel overwhelming futility and frustration when working through more standard governmental channels, particularly for a cause as nascent and sometimes ridiculed as animal protection. However, when the citizenry is armed with a clear pathway to place on the ballot a reasonable yet meaningful reform that will diminish the suffering these advocates abhor, thousands of animal activists are more than willing to contribute the time and effort required to succeed. Many modern social movements that turn to the ballot box utilize the legal option of hiring

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<sup>47</sup> Wash. Rev. Code § 77.15.194 (2001) (passed 2000).

<sup>48</sup> Fla. Const. art. X, § 21 (passed 2002).

<sup>49</sup> See John Mark Hansen, *Gaining Access: Congress and the Farm Lobby, 1919–1981* (U. Chi. Press 1991) (examining the impacts of the farm lobby on federal legislation).

<sup>50</sup> See Initiative and Referendum Inst., *Signature, Geographic Distribution and Single Subject (SS) Requirements for Initiative Petitions*, <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/Drop%20Down%20Boxes/Requirements/Almanac%20-%20Signature%20and%20SS%20and%20GD%20Requirements.pdf> (last accessed Apr. 11, 2009); Natl. Conf. of St. Legis., *Initiative, Referendum and Recall*, <http://www.ncsl.org/programs/legismgt/elect/initiat.htm> (last accessed Apr. 11, 2009) (describing the citizen initiative process).

<sup>51</sup> Humane Socy. U.S., *Post-1990 Initiative and Referendum Summary — Animal Issues* (available at <http://files.hsus.org/web-files/PDF/Initiativechart.pdf>) (last accessed Apr. 11, 2009).

signature gatherers, but most animal protection measures are certified for the ballot using primarily or solely signatures gathered by volunteer forces.

Proposition 2 represents a new and historic benchmark for these efforts. It ends the practice of confining certain animals raised for food in crates and cages so small the animals can barely move. It is historic because it addresses battery cages for the first time and does so in one of the nation's largest agriculture states. Proposition 2 requires that factory farms provide enough space for animals, including laying hens, to stand up, turn around, and extend their limbs. The measure's operative provision is as simple as it is unassailable, providing that "[a] person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) Lying down, standing up, and fully extending his or her limbs; and (b) Turning around freely."<sup>52</sup>

The measure applies to breeding pigs, egg laying hens, and veal calves, and goes into effect in January of 2015, giving factory farms six years to shift to different housing systems. Part of the measure's strength lies in its modest but powerful goals. Proposition 2 does not eliminate all animal cruelty, nor does it require idyllic living conditions. It simply moves factory farms away from some of their worst abuses.

#### IV. THE HALLMARK DOWNER SCANDAL

It is impossible to understand the circumstances surrounding the enactment of Proposition 2 without first exploring the Hallmark/Westland animal abuse scandal and meat recall of 2008. The events that occurred in Chino, California, last spring set the stage for the showdown over Proposition 2 later in the year, and awakened many Californians to the reality that the systematic mistreatment of animals in the agricultural industry is not a distant or abstract concern, but an ongoing crisis unfolding in Californians' own backyards, with wide-ranging moral, environmental, and public safety impacts.

The investigation took place in the fall of 2007 at the federally-inspected slaughter and processing establishment of Hallmark Meat Packing Company and Westland Meat Company, Inc., located in Chino, California. In 2007, the facility was the second-largest supplier of beef to the National School Lunch Program.<sup>53</sup> An HSUS investigator documented employees using cruel practices to force to slaughter animals who were too sick or injured to stand and walk on their own (commonly referred to as "downed" or "downer"). These practices included "ramming [cows] with the blades of a forklift, jabbing them in the eyes, applying painful electrical shocks[,] and even torturing them with a

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<sup>52</sup> Cal. Health & Safety Code § 25990 (West 1999 & Supp. 2009).

<sup>53</sup> The United States Department of Agriculture designated Westland Meat Company its "Supplier of the Year" for 2004–2005. Westland Meat Co., *Awards*, <http://westlandmeat.com/westland%20awards.htm> (last accessed Apr. 11, 2009).

high-pressure water hose in attempts to force sick or injured animals to walk to slaughter."<sup>54</sup>

After compiling the video evidence of the abuses inflicted on cattle at Hallmark/Westland, HSUS lawyers contacted the District Attorney's office in San Bernardino County, California, to request prosecution under section 597 of California's penal code, which prohibits torturing, tormenting, and "cruelly" beating, mutilating, or killing any animal.<sup>55</sup> HSUS lawyers also pushed for prosecution under California Penal Code section 599(f), which requires that slaughter plant personnel take "immediate action to humanely euthanize" non-ambulatory animals "or remove the animal from the premises," and provides that "a non-ambulatory animal may not be dragged at any time, or pushed with equipment at any time."<sup>56</sup> After providing law enforcement as much time as possible to complete their own investigation, HSUS released the footage to inform the public of the problems at Hallmark, and with the National School Lunch Program.<sup>57</sup>

The release of the investigation triggered strong responses from the U.S. Department of Agriculture (USDA) and members of Congress. Within forty-eight hours of the USDA's interview with the HSUS investigator, the agency held a press conference to announce a massive meat recall from the facility.<sup>58</sup> This prompted an intense wave of additional activity.<sup>59</sup> More than 150 school districts across the nation and two major restaurant chains announced that they would stop buying ground beef from Westland, the company that distributed Hallmark meat products.<sup>60</sup>

After receiving the results of the undercover investigation, San Bernardino County District Attorney Michael A. Ramos charged

<sup>54</sup> Humane Socy. U.S., *Undercover Investigation Reveals Rampant Animal Cruelty at California Slaughter Plant—A Major Beef Supplier to America's School Lunch Program*, [http://www.hsus.org/farm/news/ournews/undercover\\_investigation.html](http://www.hsus.org/farm/news/ournews/undercover_investigation.html) (Jan. 30, 2008) (last accessed Apr. 11, 2009).

<sup>55</sup> Humane Socy. U.S., *California Prosecutor Files Cruelty Charges Against Slaughter Plant Employees*, [http://www.hsus.org/acf/news/pressrel/cruelty\\_charges\\_hallmark\\_employees\\_021508.html](http://www.hsus.org/acf/news/pressrel/cruelty_charges_hallmark_employees_021508.html) (Feb. 15, 2008) (last accessed Apr. 11, 2009); Cal. Penal Code § 597 (West 1999).

<sup>56</sup> Cal. Penal Code § 599f; Nancy Perry & Peter Brandt, *Commentary, A Case Study on Cruelty to Farm Animals: Lessons Learned From the Hallmark Meat Packing Case*, 106 Mich. L. Rev. First Impressions 117 (2008) (available at <http://www.michiganlawreview.org/firstimpressions/vol106/perrybrandt.pdf>) (last accessed Apr. 11, 2009); Humane Socy. U.S., *California Prosecutor Files Cruelty Charges Against Slaughter Plant Employees*, *supra* n. 55.

<sup>57</sup> Perry & Brandt, *supra* n. 56, at 119.

<sup>58</sup> U.S. Dept. of Agric., Release No. 0047.08, *Transcript of Technical Briefing Regarding Hallmark/Westland Meat Packing Company Two Year Product Recall*, [http://www.usda.gov/wps/portal/!ut/p/\\_s.7\\_0\\_A/7\\_0\\_1OB?contentidonly=true&contentid=2008/02/0047.xml](http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?contentidonly=true&contentid=2008/02/0047.xml) (Feb. 17, 2008) (last accessed Apr. 11, 2009).

<sup>59</sup> *Id.*

<sup>60</sup> David Brown, *USDA Orders Largest Meat Recall in U.S. History*, Wash. Post A1 (Feb. 18, 2008) (available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/17/AR2008021701530.html>) (last accessed Apr. 11, 2009).

Daniel Ugarte Navarro with five felony counts under California's anti-cruelty statute and three misdemeanor counts alleging the use of a mechanical device to move "downer" cows.<sup>61</sup> A second worker, Jose Luis Sanchez, was charged with three misdemeanors involving downers.<sup>62</sup> A few months later, the district attorney secured the conviction of both defendants. In announcing the charges, District Attorney Ramos said:

I need the public to understand that my office takes all cases involving animal cruelty very seriously. It doesn't matter whether the mistreated animal is a beloved family pet or a cow at a slaughterhouse. Unnecessary cruelty will not be tolerated and will be prosecuted to the fullest extent allowed by law.<sup>63</sup>

The district attorney's decision to prosecute the case, and to make such a strong statement against farm animal cruelty, was stunning and significant. As discussed above, farm animals are normally denied—either on account of legal loopholes, cultural disregard, or by virtue of being kept out of public sight—the most basic protections afforded other animals, and the district attorney's strong action was sure to reverberate throughout the entire animal agriculture community.<sup>64</sup>

In the wake of the Hallmark scandal, HSUS filed suit against the owners of the facility under the federal False Claims Act.<sup>65</sup> The suit, which remained under seal until May 2009, alleges that Hallmark defrauded the federal government by violating the terms of its school lunch program contracts, which explicitly require the humane handling of animals.<sup>66</sup> The False Claims Act empowers private citizens with knowledge of fraud against the U.S. government to bring a lawsuit, called a "qui tam" suit, on behalf of the United States to recover significant civil penalties and treble damages.<sup>67</sup> Such whistleblowers

<sup>61</sup> Humane Socy. U.S., *California Prosecutor Files Cruelty Charges Against Slaughter Plant Employees*, *supra* n. 55.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *United States of America ex rel. Humane Socy. U.S. v. Hallmark Meat Packing Company*; *Westland Meat Company, Inc.*, Civ. No. 08-0221 (C.D. Cal., seal lifted Apr. 28, 2009).

<sup>66</sup> *Id.* Ironically, the FCA was originally enacted during the Civil War to crack down on the sale of sick and injured horses and mules to the Army by unscrupulous defense contractors. Paul D. Carrington, *Law and Transnational Corruption: The Need for Lincoln's Law Abroad*, 70 *Law & Contemp. Probs.* 109, 123 (2007) (stating:

But because military expenditures in time of war are especially vulnerable to corruption, the Civil War appeared to bring an epidemic of public scandals rising to the cabinet level. Secretary of War Simon Cameron was dismissed by President Lincoln for paying his friends twice the going rate for 1,000 cavalry horses that turned out to be afflicted with 'every disease horse flesh is heir to.' Such scandals led to the enactment in 1862 of the False Claims Act, then known as 'Lincoln's Law.')

<sup>67</sup> 31 U.S.C. § 3729.

are statutorily entitled to a percentage of the total recovery—a powerful incentive for workers to blow the whistle on government fraud.<sup>68</sup> In this case, the complaint alleges that the owners of Hallmark/Westland falsely certified that the meat they were selling to the U.S. government was produced using humane methods.<sup>69</sup>

After reviewing the complaint, the U.S. Department of Justice elected to intervene in the case and join HSUS in seeking to recover approximately \$150 million in taxpayer money spent on potentially tainted ground beef during the period covered by the recall.<sup>70</sup> The Department of Justice intervenes in less than 25% of all *qui tam* actions,<sup>71</sup> and this is the first time the powerful statute has ever been deployed against the mistreatment of farm animals. Given that hundreds of slaughter plants operate under similar federal contracts requiring suppliers to ensure the humane treatment of animals at their facilities, the precedent set by this case—i.e., the risk of personal liability for treble damages, coupled with the promise of multi-million dollar bounties for workers that blow the whistle on animal abuse—could serve as a powerful deterrent for slaughterhouse owners operating in an area with woefully insufficient federal humane law enforcement.

HSUS also filed suit against the USDA to close the legal loophole for downers that encouraged the shocking abuse uncovered at Hallmark/Westland.<sup>72</sup> Downer cattle have an increased risk of contracting bovine spongiform encephalopathy (BSE or “mad cow disease”) and other foodborne pathogens.<sup>73</sup> When BSE was first detected in North America in 2004, USDA issued an emergency rule banning the slaughter of downer cattle for human consumption.<sup>74</sup> However, shortly after the regulation was issued, the agency relaxed its rules to permit some crippled cattle to enter the food supply.<sup>75</sup> This loophole precipitated some of the most disturbing incidents documented at the Hallmark slaughter plant, including workers violently forcing disabled cattle onto their feet long enough to pass inspection.<sup>76</sup>

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<sup>68</sup> 31 U.S.C. § 3730.

<sup>69</sup> *U.S.A. v. Hallmark*, Civ. No. 08-0221.

<sup>70</sup> Order re United States Election to Intervene and Proceed with Action, *U.S.A. v. Hallmark* (Apr. 28, 2009).

<sup>71</sup> U.S. Department of Justice, *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits*, <http://www.usdoj.gov/usa/pae/Documents/fcaprocess2.pdf> (last accessed May 10, 2009).

<sup>72</sup> *Humane Socy. U.S. v. Schafer*, No. 08-337 (D.D.C., filed Feb. 27, 2008); *The Humane Society of the United States Sues to Keep Sick and Injured Cows Out of Food Supply*, [http://www.hsus.org/press\\_and\\_publications/press\\_releases/hsus\\_files\\_suit\\_against\\_usda\\_022708.html](http://www.hsus.org/press_and_publications/press_releases/hsus_files_suit_against_usda_022708.html) (Feb. 27, 2008) (last accessed Apr. 11, 2009).

<sup>73</sup> *Id.*

<sup>74</sup> 69 Fed. Reg. 1862, 1870 (Jan. 12, 2004).

<sup>75</sup> 72 Fed. Reg. 38700 (July 13, 2007).

<sup>76</sup> *Humane Socy. U.S. Undercover Investigation Reveals Rampant Animal Cruelty at California Slaughter Plant*, *supra* n. 54.

The lawsuit alleged that the downer loophole was arbitrary and capricious, as well as contrary to the humane handling and food safety provisions of the Humane Methods of Slaughter Act and the Federal Meat Inspection Act.<sup>77</sup> The suit also alleged that the loophole was promulgated in 2007 without adequate public notice and comment under the federal Administrative Procedure Act.<sup>78</sup> Shortly after the lawsuit was filed, the USDA issued proposed rules to close the loophole, and the final regulations were issued in March 2009.<sup>79</sup>

## V. THE BATTLE FOR PROPOSITION 2

All eyes remained fixed on California after the Hallmark scandal, which woke a sleeping giant of public consciousness concerning farm animals and filled the people with a terrible resolve to take action. The level of public outrage over Hallmark, and its effect on Proposition 2, is difficult to overstate. However, more than a year earlier, a broad coalition of lawyers, activists, investigators, and ordinary citizens were already hard at work drafting initiative language, organizing volunteers, and preparing to expose the industry's shocking double-speak about what would become Proposition 2. Even riding on the coattails of Hallmark, every ounce of these efforts was necessary for the coming battle.

### A. *Mobilization and Action*

The effort to enact Proposition 2 was massive—perhaps the largest mobilization of animal advocates in the history of the humane movement. The YES! on Prop 2 campaign received 25,000 individual donations from contributors across the nation.<sup>80</sup> Thousands of volunteers worked countless hours to collect signatures, distribute literature, and get out the vote for Proposition 2.<sup>81</sup> Taking a page from President Barack Obama's election campaign, proponents of Proposition 2 also relied heavily on social networking sites like Facebook and Twitter to communicate their message and organize supporters.<sup>82</sup> The sites also helped proponents raise the massive funding needed to take on the agriculture industry at the ballot box.

The Proposition 2 coalition may have been the most diverse and broad-based of any ballot measure coalition in California. Proposition 2 was backed by HSUS, the Center for Food Safety, the California Veterinary Medical Association, the United Farm Workers, the Cesar

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<sup>77</sup> *Humane Socy. U.S. v. Schafer*, No. 08-337 at 16.

<sup>78</sup> *Id.*

<sup>79</sup> 74 Fed. Reg. 11463, 11466 (Mar. 18, 2009).

<sup>80</sup> Yes! On Prop 2, *California Voters Say Yes! On Prop 2*, [http://yesonprop2.hsus.org/index.php?option=com\\_content&view=article&id=219:we-win&catid=36:front&Itemid=147](http://yesonprop2.hsus.org/index.php?option=com_content&view=article&id=219:we-win&catid=36:front&Itemid=147) (Nov. 4, 2008) (last accessed Apr. 11, 2009).

<sup>81</sup> *Id.*

<sup>82</sup> Facebook, *Vote Yes on Prop 2—Support Humane Farms*, <http://www.facebook.com/group.php?sid=2a24d6d0b1ff777089d6cf7cecd0c9b6&gid=65942205371> (last accessed Apr. 11, 2009).

Chavez Foundation, the National Black Farmers Association, the Sierra Club, the California Council of Churches, the California Democratic Party, and the Consumer Federation of America.<sup>83</sup> Hundreds of other prominent individuals and organizations spanning the political and economic spectrum also supported the initiative.<sup>84</sup>

But even this army of the kind<sup>85</sup> faced a serious fight against the combined might of the U.S. industrial agricultural lobby, which poured millions of dollars into the campaign to defeat the measure.<sup>86</sup> Most of these funds came from out-of-state agribusiness giants like Moark, Cal-Maine Foods, and other egg corporations that have a long track record of violating cruelty, environmental, and labor laws.<sup>87</sup> But unlike many other legal reform battles in the past, this time the advocates were ready and one step ahead of the industry lobbyists and public relations flaks at every turn.

### B. *Healthy and Happy Farm Animals*

When the industry claimed that it is in their own interest to treat animals well—a common defense of factory farming is that “only happy animals produce”—the proponents of Proposition 2 responded with an undercover investigation of one of California’s largest egg factory farms.<sup>88</sup> Shot at Norco Ranch in August and September 2008, the investigation conducted by the group Mercy For Animals showed four to six hens crowded into cages the size of a file drawer.<sup>89</sup> Some hens were bleeding or had open wounds; a few were trapped in the opening to the egg conveyor.<sup>90</sup> The video also showed workers swinging chick-

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<sup>83</sup> Yes! On Prop 2, *Endorsements*, [http://yesonprop2.hsus.org/index.php?option=com\\_content&view=article&id=52&Itemid=76](http://yesonprop2.hsus.org/index.php?option=com_content&view=article&id=52&Itemid=76) (last accessed Apr. 11, 2009).

<sup>84</sup> *Id.*

<sup>85</sup> Yes! On Prop 2, *Election Night Thoughts from the Campaign Manager*, [http://yesonprop2.hsus.org/index.php?option=com\\_content&view=article&id=220:jen-f-thoughts&catid=36:front&Itemid=147](http://yesonprop2.hsus.org/index.php?option=com_content&view=article&id=220:jen-f-thoughts&catid=36:front&Itemid=147) (last accessed Apr. 3, 2009).

<sup>86</sup> Yes! On Prop 2, *Top Rotten Eggs*, [http://yesonprop2.hsus.org/index.php?option=com\\_content&view=article&id=111&Itemid=88](http://yesonprop2.hsus.org/index.php?option=com_content&view=article&id=111&Itemid=88) (last accessed Apr. 11, 2009).

<sup>87</sup> *Id.*; Moark, which donated more than half a million dollars to oppose Proposition 2, paid \$100,000 to settle criminal animal cruelty charges in Missouri in 2005 arising from the suffocation of spent hens by dumping hundreds of hens on top of each other in a dumpster. Press Release, Humane Socy. U.S. *MOARK Must Pay \$100,000 and Overhaul Its Spent Hen Procedures to Settle Animal Cruelty Charges*, [http://www.hsus.org/farm/news/ournews/moark\\_settles\\_case.html](http://www.hsus.org/farm/news/ournews/moark_settles_case.html) (Oct. 25, 2005) (last accessed Apr. 11, 2009). Cal-Maine Foods also spent more than \$500,000, and has been cited numerous times for spilling chicken manure and parts into rivers and streams, including an Ohio incident that killed 49,000 fish in the Stillwater River. Yes! On Prop 2, *Top Rotten Eggs*, [http://www.yesonprop2.hsus.org/index.php?option=com\\_content&view=article&id=111&Itemid=88](http://www.yesonprop2.hsus.org/index.php?option=com_content&view=article&id=111&Itemid=88) (last accessed Apr. 11, 2009).

<sup>88</sup> Dan Noyes, *New Ammunition for Prop. 2 Supporters*, <http://abclocal.go.com/kgof/story?section=news/iteam&id=6447851> (last accessed Apr. 11, 2009).

<sup>89</sup> Howard Blume, *Footage of Mistreated Hens Released in Support of Proposition 2*, <http://articles.latimes.com/2008/oct/14/local/me-chickens14> (Oct. 14, 2008) (last accessed Mar. 3, 2009); Mercy For Animals, *Undercover at a California Factory Egg Farm*, <http://www.mercyforanimals.org/norco/> (last accessed Apr. 11, 2009).

<sup>90</sup> *Id.*

ens violently to break their necks, then discarding them, still alive, on the ground.<sup>91</sup> Dying chickens were also seen struggling among piles of dead birds.<sup>92</sup>

The results of this investigation were not at all surprising to animal advocates. While there are some instances where improving animal welfare will also improve the economic bottom line, unfortunately, this is often not the case. According to poultry welfare expert Dr. Joy Mench:

It is now generally agreed that good productivity and health are not necessarily indicators of good welfare . . . . Productivity . . . is often measured at the level of the unit (e.g. number of eggs or egg mass per hen-housed), and individual animals may be in a comparatively poor state of welfare even though productivity within the unit may be high.<sup>93</sup>

Likewise, farm animal welfare expert Dr. Donald Broom has stated: “[Efforts] to achieve earlier and faster growth, greater production per individual, efficient feed conversion and partitioning, and increased prolificacy are the causes of some of the worst animal welfare problems.”<sup>94</sup> And agricultural ethicist Dr. Bernard Rollin asserts: “[In] industrial agriculture, this link between productivity and well-being is severed. When productivity as an economic metric is applied to the whole operation, the welfare of the individual animal is ignored.”<sup>95</sup>

### C. Family Factory Farmers

The “happy farm animals” story was not the only line of attack the opponents of Proposition 2 were ready to deploy. However, in each instance, the proponent’s legal, economic, scientific, and investigative teams were *already* prepared with swift, effective, and overwhelming responses. Thus, when the opponents of Proposition 2 claimed to represent family farmers, the legal team was ready with multiple complaints to the California Fair Political Practices Commission showing that the opponents were illegally laundering more than \$4.5 million in tainted out-of-state agribusiness money through an unregistered ballot committee—the largest campaign finance violation in California history.<sup>96</sup> One of the remaining postscripts of the Proposition 2 battle

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Humane Socy. U.S., *An HSUS Report: The Welfare of Animals in the Meat, Egg, and Dairy Industries*, [http://www.hsus.org/farm/resources/research/welfare/welfare\\_overview.html](http://www.hsus.org/farm/resources/research/welfare/welfare_overview.html) (Feb. 27, 2006) (last accessed Apr. 11, 2009).

<sup>94</sup> Donald M. Broom, *Does Present Legislation Help Animal Welfare?*, [www.agriculture.de/acms1/conf6/ws5alegisl.htm](http://www.agriculture.de/acms1/conf6/ws5alegisl.htm) (last accessed Apr. 11, 2009).

<sup>95</sup> Bernard E. Rollin, *Farm Factories*, <http://www.religion-online.org/showarticle.asp?title=2194> (last accessed Apr. 11, 2009).

<sup>96</sup> *Complaint Against the United Egg Producers, Inc., California for SAFE Food, a Coalition of Family Farmers, Veterinarians, and Consumers, No on Proposition 2, and the U.S. Poultry & Egg Association, Cal. Fair Political Pract. Commn. (Sept. 3, 2008); Complaint Against the United Egg Producers, Inc., California for SAFE Food, a Coalition of Family Farmers, Veterinarians, and Consumers, No on Proposition 2, and the*

is what is likely to be a multi-million dollar fine issued by the Commission against major egg producers and their trade group—the United Egg Producers.

The advocates of Proposition 2 also filed suit in federal court exposing an illegal federal agency plan to misappropriate \$3 million of federal funds to the opposition.<sup>97</sup> Acting in fear of the coming ballot initiative, the American Egg Board (AEB)—the advertising wing of the U.S. Department of Agriculture—“unanimously passed a motion at its 2007 fall meeting in California that \$3 million be held in reserve to assist the state if necessary in the industry’s current battle with animal activists [concerning] a referendum on the November 2008 ballot that would eliminate cage production in California.”<sup>98</sup> The problem for USDA was that the scheme was patently illegal because AEB is a federal commodity promotion program, and thus prohibited from spending any funds “for the purpose of influencing governmental policy or action.”<sup>99</sup> Because the USDA is required to approve all AEB expenditures and ensure that AEB’s activities are limited to non-political advertising, education, research, and marketing, the agency was legally responsible for the AEB’s unlawful activities.<sup>100</sup>

In addition, HSUS lawyers obtained documents under the Freedom of Information Act showing that USDA officials *knew* that AEB set aside the \$3 million for an unlawful purpose, and that AEB intended to give federal funds to private individuals or trade industry groups to spend in opposition to the ballot initiative. For example, an e-mail between officials of the USDA’s Poultry Programs office stated that “California egg producers are undertaking a campaign to defeat the measure.”<sup>101</sup> The e-mail also stated that “the American Egg Board voted . . . to set aside \$3 million” to support these efforts. These statements were repeated in a Weekly Activity Report of the USDA Poultry Programs.<sup>102</sup>

The entire scheme was simply bizarre, and an obvious attempt by federal officials to illegally interfere with a state election process. HSUS’s lawyers were less than fifteen minutes into their arguments

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*U.S. Poultry & Egg Association*, Cal. Fair Pract. Commn. (Sept. 11, 2008); *Complaint Against the United Egg Producers, Inc., California for SAFE Food, a Coalition of Family Farmers, Veterinarians, and Consumers, No on Proposition 2, and the U.S. Poultry & Egg Association*, Cal. Fair Pract. Commn. (Oct 1, 2008).

<sup>97</sup> *Humane Socy. U.S. v. Schafer*, No. 08-3843 (N.D. Cal., filed Aug. 12, 2008); *Humane Socy. U.S., Federal Officials Sued For Misappropriating Millions of Dollars to Illegally Campaign Against California Anti-Cruelty Initiative*, [http://www.hsus.org/farm/news/pressrel/aeb\\_lawsuit\\_08132008.html](http://www.hsus.org/farm/news/pressrel/aeb_lawsuit_08132008.html) (last accessed Apr. 11, 2009).

<sup>98</sup> *Humane Socy. U.S., Federal Officials Sued*, *supra* n. 97; Memo. & Or. Re: Pl.’s Mot. for a Prelim. Inj. at 4, *Humane Socy. U.S. v. Schafer*, No. 08-3843 (N.D. Cal., filed Sept. 29, 2009).

<sup>99</sup> Memo. & Or., *supra* n. 98 at 8; *Humane Socy. U.S., Federal Officials Sued*, *supra* n. 97.

<sup>100</sup> Memo. & Or., *supra* n. 98 at 2–3.

<sup>101</sup> *Id.* at 10–11.

<sup>102</sup> *Id.*

against USDA's actions when Federal District Judge Marilyn Hall Patel enjoined the entire scheme from the bench—thus depriving the opponents of millions in illegally funded television advertising.<sup>103</sup>

#### D. *Environmental Factory Farms*

When opponents of Proposition 2 switched tactics and argued that cramming animals in tiny wire cages is actually good for the environment and public health,<sup>104</sup> HSUS responded quickly with investigations and legal actions revealing massive ammonia emissions and waste water pollution emanating from the egg factory farms operated by the opponents' own supporters and spokespersons. The first case, against Olivera Egg Ranch in California's Central Valley, concerned toxic air pollution coming from a giant factory farm that confines up to 750,000 hens in cramped, barren, wire cages, and dumps their manure into multi-acre cesspools that release hazardous amounts of ammonia every day.<sup>105</sup>

In contrast to the opponents' claim that packing hens into battery cages was somehow good for the environment, the suit against Olivera alleged that the egg factory farm was having a devastating impact on the local community.<sup>106</sup> One of Olivera's neighbors, a self-employed plumber, testified that he had to seal his home and use air filters to try to keep out the horrible odor.<sup>107</sup> The same neighbor reported, "Two to four times a year I've gone to Urgent Care for upper respiratory infections and I can't breathe."<sup>108</sup> The suit explained that, because of the powerful odor and its sickening effects, neighbors of the factory farm are essentially prisoners in their own homes, seldom visited by friends and family.<sup>109</sup>

The second case, against Armstrong Farms in San Diego, challenged this major egg factory farm's repeated discharges of manure-tainted water in violation of state law.<sup>110</sup> Armstrong was a prominent

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<sup>103</sup> *Id.* at 12–14.

<sup>104</sup> Craig Reed et al., *California General Election, Official Voter Information Guide, Argument Against Proposition 2*, <http://www.voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt2.htm> (last accessed Apr. 11, 2009).

<sup>105</sup> *Aliva v. Olivera Egg Ranch*, No. 08-1220 (E.D. Cal., filed Oct. 20, 2008); Humane Socy. U.S., *Central Valley Residents File Suit Alleging Toxic Air Violations at California Industrial Egg Farm*, [http://www.hsus.org/press\\_and\\_publications/press\\_releases/central\\_valley\\_residents\\_file\\_suit\\_on\\_air\\_pollution\\_102008.html](http://www.hsus.org/press_and_publications/press_releases/central_valley_residents_file_suit_on_air_pollution_102008.html) (Oct. 20, 2008) (last accessed Apr. 11, 2009).

<sup>106</sup> Humane Socy. U.S., *Central Valley Residents Announce Legal Action Concerning Toxic Air Violations at California Industrial Egg Farm*, [http://www.hsus.org/press\\_and\\_publications/press\\_releases/olivera072408.html](http://www.hsus.org/press_and_publications/press_releases/olivera072408.html) (July 24, 2008) (last accessed Apr. 11, 2009).

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* Residents describe the smells from Olivera as "suffocating" and experience coughing and gagging attacks when they leave their homes. Origer described the air as making him "feel . . . like I just came out of one of those mace training facilities." *Id.*

<sup>110</sup> *In re The Humane Socy. U.S.*, Cal. Regl. Water Quality Control Board (filed Oct. 7, 2008); Humane Socy. U.S., *Legal Petition Filed to Stop San Diego Area Egg Farm*

talking head for the opponents of Proposition 2. During the campaign, Armstrong told state legislators that “we don’t have anything to hide” during a hearing of the Senate and Assembly Committees on Agriculture of the California Legislature about Proposition 2.<sup>111</sup> However, he left out the fact that San Diego County had issued Armstrong seventeen violations in the past two years for contaminated waste water discharge, in addition to two cease and desist orders as recently as 2007.<sup>112</sup>

Armstrong’s violations included illegally flooding neighboring properties with contaminated water and connecting pipes on his property to discharge waste water directly into county storm water drains.<sup>113</sup> One of Armstrong’s neighbors who joined HSUS in the case but elected to remain anonymous said that nearly every day in the summer and periodically in the winter for the past several years his property is inundated with manure-smelling gray water carrying chicken feathers and, on occasion, even dead hens.<sup>114</sup>

### E. *The Price of Eggs*

Although the campaign easily debunked the opposition’s animal welfare and environmental claims, perhaps the biggest false claim by the opposition—and one that would turn out to be one of their biggest mistakes—was the assertion that providing more humane care for farm animals would dramatically increase consumer egg prices.<sup>115</sup> The argument was one of simple economics: Providing humane care for hens would increase the costs of eggs and hurt consumers at a time when regular Americans were struggling financially.<sup>116</sup>

The problem for the industry was that when the Proposition 2 campaign’s lawyers and economists investigated this claim, they were shocked to discover a massive price-fixing scheme by the country’s major egg producers.<sup>117</sup> The price-fixing conspiracy centered around a bogus animal welfare certification program that condemns hundreds of millions of egg-laying hens to suffer in tiny cages while egg producers reaped record profits.<sup>118</sup> Egg prices for U.S. consumers have skyrocketed as a result of this scheme. Between August 2007 and March 2008

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*From Releasing Tainted Water*, [http://www.hsus.org/press\\_and\\_publications/press\\_releases/olivera072408.html](http://www.hsus.org/press_and_publications/press_releases/olivera072408.html) (Oct. 7, 2008) (last accessed Apr. 11, 2009).

<sup>111</sup> Humane Socy. U.S., *Legal Petition Filed*, *supra* n. 103.

<sup>112</sup> Humane Socy. U.S., *California Water Quality Control Board Finds Numerous Environmental Violations at San Diego Egg Factory Farm*, [http://www.hsus.org/press\\_and\\_publications/press\\_releases/armstrong\\_pollution\\_12032008.html](http://www.hsus.org/press_and_publications/press_releases/armstrong_pollution_12032008.html) (Dec. 3, 2008) (last accessed Apr. 11, 2009).

<sup>113</sup> *Id.*

<sup>114</sup> Humane Socy. U.S., *Legal Petition Filed*, *supra* n. 110.

<sup>115</sup> Craig Reed et al., *supra* n. 104.

<sup>116</sup> *Id.*

<sup>117</sup> Humane Socy. U.S., *Federal Trade Commission Complaint Accuses Egg Industry of Price Fixing*, [http://www.hsus.org/farm/news/pressrel/ftc\\_complaint\\_accuses\\_egg\\_price\\_fixing\\_092408.html](http://www.hsus.org/farm/news/pressrel/ftc_complaint_accuses_egg_price_fixing_092408.html) (Sept. 24, 2008) (last accessed Apr. 11, 2009).

<sup>118</sup> *Id.*

nationwide egg prices rose by as much as 45% and at the fastest rates in thirty years.<sup>119</sup> The opponents were claiming Proposition 2 would bilk consumers, when the industry had been bilking them all along.

In August, the legal team filed petitions with the Department of Justice (DOJ) and the Federal Trade Commission, only to discover that DOJ had already launched a criminal investigation.<sup>120</sup> The petitions allege that the egg trade group United Egg Producers (UEP) developed and promoted the "UEP Certified" logo and misleadingly-named "animal husbandry guidelines" primarily to monitor and cover up its price-fixing scheme and to deceive consumers about the unavoidable and profound suffering that egg-laying hens endure while crammed into tiny cages.<sup>121</sup> The petitions also asserted that the industry's effort to limit supply in order to artificially inflate prices, eliminate competition, and defraud consumers constituted a criminal price-fixing scheme, in violation of the Sherman Antitrust Act, 15 U.S.C. sections 1 and 2, and the Federal Trade Commission Act, 15 U.S.C. sections 45 and 52.<sup>122</sup>

Perhaps most remarkably, the petitions were based almost entirely on the egg industry's *own statements*. For example, Cal-Maine Foods, Inc., President Fred Adams stated in 2008, "If the supply of eggs remains in check, or favorable to the demand side, I think we will have minimum problems in raising prices. We have had no reaction from the consumer or the chain store operators as to price."<sup>123</sup>

Likewise, the industry's key economist, Don Bell, candidly admitted in 2004:

[The industry has] successfully held hen numbers down. No increases in [egg] production were made to compensate for a larger human population. Demand was especially strong as evidenced by the consumer's willingness to buy the same amount of product for significantly higher prices . . . [The] industry would be wise to attempt to duplicate these conditions in the future. The result was: a huge improvement in industry revenue of ONE BILLION DOLLARS (or more)!!<sup>124</sup>

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119 *Id.*

120 Humane Socy. U.S., *The HSUS v. United Egg Producers, et al. (Egg Price Fixing)*, [http://www.hsus.org/in\\_the\\_courts/docket/hsus\\_v\\_united\\_egg\\_producers.html](http://www.hsus.org/in_the_courts/docket/hsus_v_united_egg_producers.html) (last accessed Apr. 11, 2009); John R. Wilke, *Federal Prosecutors Probe Food-Price Collusion*, Wall St. J. (Sept. 23, 2008) (available at [http://online.wsj.com/article/SB122213370781365931.html?mod=googlenews\\_wsj](http://online.wsj.com/article/SB122213370781365931.html?mod=googlenews_wsj)) (last accessed Apr. 11, 2009).

121 Humane Socy. U.S., *Federal Trade Commission Complaint*, *supra* n. 117.

122 *Id.*

123 *Id.*; Fred Adams, President Cal-Maine Foods, Inc., *Presentation for Cal-Maine Foods, Inc.* (Stephens Spring Investment Conference, June 4, 2008) (copy on file with authors); Brian Burnsed, *Legal Scramble Over Egg Prices*, Bus. Week (Oct. 20, 2008) (available at [http://www.businessweek.com/bwdaily/dnflash/content/oct2008/db20081017\\_269367.htm](http://www.businessweek.com/bwdaily/dnflash/content/oct2008/db20081017_269367.htm) (last accessed Apr. 4, 2009)).

124 Humane Socy. U.S., *Federal Trade Commission Complaint*, *supra* n. 117; U. Cal. Davis, *Don Bell's Table Egg Layer Flock Projections and Economic Commentary—2004*, <http://animalscience.ucdavis.edu/Avian/uepeconmemo303.pdf> (Mar. 3, 2003) (last accessed Apr. 11, 2009) (emphasis in original).

UEP President Gene Gregory really drove the point home, gushing in 2003 that, “Never in my more than 40 years in the egg industry have I ever seen egg prices at the current levels. Consumers are still buying eggs and we have seen no resistance to price.”<sup>125</sup>

The class action antitrust bar took notice of these revelations almost immediately. With the help of HSUS’s lawyers, the first of two dozen class action price-fixing cases against the egg industry was filed in federal court a month before the election.<sup>126</sup> The suits have since been consolidated and seek hundreds of millions of dollars in damages from the nation’s top egg producers.<sup>127</sup> In the weeks before the fall election, the campaign’s work uncovering the price fixing scandal and the resulting litigation and DOJ criminal investigation were featured on the front page of the *Wall Street Journal*, in *Business Week* magazine, and hundreds of other media outlets.<sup>128</sup>

The opposition never recovered from these and other setbacks, nor could it counteract the basic decency and unassailable message of the campaign—all animals, including those raised for food, should at least be able to move. Proposition 2 passed on November 4 by a landslide.<sup>129</sup>

## VI. LESSONS LEARNED, AND IGNORED

Despite a nearly \$9 million agribusiness campaign,<sup>130</sup> more than 8.2 million citizens of the nation’s largest agricultural state<sup>131</sup> voted to ban the confinement of certain farm animals in cages barely larger than their own bodies for nearly their whole lives.<sup>132</sup> More Californians voted “yes” on Proposition 2 than on any of the other eleven measures on the statewide ballot.<sup>133</sup> The victory came across party, ethnic, religious, socio-economic, and even rural/urban lines. African-Ameri-

<sup>125</sup> Humane Socy. U.S., *Federal Trade Commission Complaint*, *supra* n. 117.

<sup>126</sup> Class Action Compl. at 139, *In Re: United Egg Products Antitrust Litigation*, MDL No. 2002, 08-md-02002 (E.D. Pa).

<sup>127</sup> *Id.*

<sup>128</sup> See e.g. John R. Wilke, *supra* n. 120; John R. Wilke, *Egg Industry Probe is Urged*, *Wall St. J.* A9 (Sept. 27, 2008) (available at <http://online.wsj.com/article/SB122247846177681429.html> (last accessed Apr. 4, 2009)); Burns, *supra* n. 123; Martha Graybow, *U.S. Egg Producers Sued for Alleged Price Fixing*, <http://www.reuters.com/article/domesticNews/idUSTRE48P80D20080926> (Sept. 26, 2008) (last accessed Apr. 4, 2009) (covering the price fixing litigation).

<sup>129</sup> Cal. Sec. St. State. Vote 2008, *Votes For and Against Ballot Measures* [http://www.sos.ca.gov/elections/sov/2008\\_general/7\\_votes\\_for\\_against.pdf](http://www.sos.ca.gov/elections/sov/2008_general/7_votes_for_against.pdf) (last accessed Apr. 11, 2009).

<sup>130</sup> Associated Press, *Calif. Initiative Spending at a Glance*, <http://www.forbes.com/feeds/ap/2009/02/04/ap6007457.html> (Feb. 3, 2009) (site no longer available).

<sup>131</sup> U.S. Dept. Agric., *Trade and Agriculture: What’s at Stake for California?*, [www.fas.usda.gov/info/factsheets/WTO/states/ca.pdf](http://www.fas.usda.gov/info/factsheets/WTO/states/ca.pdf) (last accessed Apr. 11, 2009).

<sup>132</sup> Cal. Sec. St. Debra Brown, *Proposition 2—Standards for Confining Farm Animals*, [http://www.sos.ca.gov/elections/sov/2008\\_general/maps/returns/props/prop-2.htm](http://www.sos.ca.gov/elections/sov/2008_general/maps/returns/props/prop-2.htm) (last accessed Apr. 11, 2009).

<sup>133</sup> Cal. Sec. St. Debra Brown, *All Propositions by County*, [http://www.sos.ca.gov/elections/sov/2008\\_general/maps/returns/props/all-props.htm](http://www.sos.ca.gov/elections/sov/2008_general/maps/returns/props/all-props.htm) (last accessed Apr. 11, 2009).

cans and Latinos strongly favored the measure, as did a majority of Republicans and people of faith.<sup>134</sup>

Proposition 2 prevailed in some of California's largest agricultural and egg-producing counties, including San Diego, San Bernardino, Riverside, Sonoma, Kern, and San Joaquin counties.<sup>135</sup> In a clear and unequivocal voice, 63.5% of California voters<sup>136</sup>—just shy of two-thirds of the electorate—sent the strongest message yet to animal agribusiness: The time for change has come.

In retrospect, industry leaders may conclude that their money could have been better spent preparing for the future rather than continuing to defend a status quo that most Americans consider indefensible. Past ballot measures in states like Florida and Arizona set the stage for national reform in the pork and veal industries, helping to prompt some of the largest companies in both sectors to announce they would phase out such extreme confinement.<sup>137</sup> In both cases, campaign rhetoric gave way to reason, with the measures passing overwhelmingly.

After millions of dollars' worth of scaremongering from the industry, voters still sided with the animal welfare and food safety groups, backing Proposition 2 because they knew that better farming practices improve both animal welfare and food safety. The Pew Commission on Industrial Farm Animal Production—an independent panel chaired by former Kansas Governor John Carlin that included former U.S. Secretary of Agriculture Dan Glickman—identified the reforms embodied in Proposition 2 as “the types of modest animal welfare public policy improvements that the Commissioners recommend implementing.”<sup>138</sup>

When it came down to it, voters decided that they trusted these respected voices on the issues more than they did big agribusiness corporations with a pecuniary interest in preserving the status quo. Voters knew they would not force their pets to live in filthy, cramped cages for their whole lives, and they did not believe that farm animals should be forced to endure such suffering and misery either.

Proposition 2's success should encourage the industry to transition toward raising animals in a manner that is healthier for animals, people, and the environment. With each campaign, each release of video from whistle-blowing employees, each study showing the inherently higher food safety risks associated with extreme confinement, each split between future-looking farmers and those who cling to the

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<sup>134</sup> Humane Socy. U.S., *Confidential Exit Polling Report* (Nov. 2008) (on file with authors).

<sup>135</sup> Cal. Sec. St. State. Vote 2008, *State Ballot Measures (Proposition Numbers 1A–12) by County*, [http://www.sos.ca.gov/elections/sov/2008\\_general/57\\_65\\_ballot\\_measures.pdf](http://www.sos.ca.gov/elections/sov/2008_general/57_65_ballot_measures.pdf) (last accessed Apr. 11, 2009).

<sup>136</sup> Cal. Sec. St. State., *supra* n.129.

<sup>137</sup> Maryls Miller, *Proposition 2: One More State Falls*, [http://www.porkmag.com/directories.asp?pgID=720&ed\\_id=6741](http://www.porkmag.com/directories.asp?pgID=720&ed_id=6741) (Nov. 16, 2008) (last accessed Apr. 11, 2009).

<sup>138</sup> Vote Yes! On Prop 2, [http://www.yesonprop2.hsus.org/index.php?option=com\\_content&view=article&id=100&Itemid=103](http://www.yesonprop2.hsus.org/index.php?option=com_content&view=article&id=100&Itemid=103) (last accessed Feb. 26, 2009).

status quo, consumers gain real understanding of the routine suffering too many farm animals endure and the nexus between that suffering and our own health.

The egg industry can continue to defend cruelty that the vast majority of Americans consider indefensible, or it can be proactive and begin phasing in science-based cage-free systems that allow the animals more freedom of movement and increased capacity to engage in natural behavior. The passage of Proposition 2 gives the industry a chance to reflect, take note, and change course. None other than the United Egg Producers—the leading opponent to Prop 2—has promulgated cage-free egg production standards that producers can adopt.<sup>139</sup>

No doubt some of the more shrill and entrenched defenders of agribusiness' status quo will argue that producers should dig their heels in and hope to do a better job of "educating consumers" about standard industry practices. These voices have already been heard. Such holdouts should bear in mind that the agricultural industry has just waged its most expensive consumer education campaign ever, and lost in a landslide vote. What Proposition 2 and experience over the past decade has shown is that the more consumers learn about the ways in which many farm animals—especially caged laying hens—are treated, the more disturbed they are.

Surely there must be some wiser voices within this community that are innovative enough to realize that agriculture, like all sectors, is dynamic, and change is not always to be feared. Such voices should be emboldened by what Californians have pronounced. Passage of Proposition 2 clarifies that extreme confinement of farm animals is not the way forward and that the successful tactics pioneered during the legislative and legal campaign to enact Proposition 2 can, and will, be applied in the future. Instead of spending millions of dollars in losing campaigns to fight change, there has never been a better time for the industry to implement common sense reforms, such as a nationwide phase-out of battery cages. The only other alternative is to waste massive amounts of time, money, and public goodwill fighting a now battle-hardened army of citizens, consumer advocates, environmentalists, and animal advocates in a series of state-by-state battles the industry simply cannot win.

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<sup>139</sup> United Egg Producers, *Animal Husbandry Guidelines for U.S. Egg Laying Flocks*, 15–25 <http://www.uepcertified.com/media/pdf/UEP-Animal-Welfare-Guidelines.pdf> (last accessed Apr. 11, 2009).

