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The Solari Report

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Solari Special Report: Jury Nullification with Elizabeth Rich

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**Jury Nullification
with
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Pete Kennedy: Welcome to the Solari Special Report audiocast. This is your host, Pete Kennedy. Today's audiocast is on jury nullification, a very important legal doctrine that protects against the government's abuse of power.

The exercise of the right to nullify by a jury can be notice to a government agency to exercise its discretion not to enforce a particular law. It can also be a message to the legislature that it is time to change the law.

There is a right to jury nullification in both criminal trials through the 6th Amendment to the Bill of Rights and civil trials through the 7th Amendment. This audiocast will focus on nullification only in criminal trials.

Taking us through this legal doctrine is Wisconsin attorney Elizabeth Rich, a litigator with over 30 years of experience in the courts. Elizabeth has her own law practice in Plymouth Wisconsin and also serves as president of both Andrew's VOICE, a nonprofit dedicated to rectifying injustices in the area of involuntary civil commitment, and the Food Freedom Foundation, another nonprofit that supports the work of the Farm-to-Consumer Legal Defense Fund (FTCLDF) and other like-minded organizations. FTCLDF is a grateful beneficiary of Solari's 'Take Action' crowdfund campaign.

A head's up to our listeners: We are focusing on jury nullification as it applies to Wisconsin law. The law and jury nullification is similar, but not always the same, in other states as it is in Wisconsin. So, those interested in pursuing this topic further should find out what the constitutional, statutory or case law is on jury nullification in your state.

Let's get started. Elizabeth, welcome to the Solari audiocast.

Elizabeth Rich: Thanks, Pete. Thanks for having me.

Kennedy: This is the second time you are on. Previously you were on a Food Series podcast. We will kick off this one with a general question for you: How would you define jury nullification?

Rich: Jury nullification means that the jury has the right to refuse to convict if the jury believes the conviction would be unjust. While we're addressing the

definition, I think it is also appropriate to say that jury nullification has, to me, a pejorative connotation that I think is inappropriate. I think a better term is ‘jury independence’ because a jury that considers whether a law is just or a punishment is too severe is acting as the 6th Amendment of the U.S. Constitution intends. So, it’s not nullifying the jury function, but rather carrying out the jury function.

Kennedy: If you could, give us a quick description of the 6th Amendment to the Constitution.

Rich: The 6th Amendment does not specifically say that juries have a right to nullify or juries have a right to decide the fact and the law; it just says that a person accused of a crime has a right to a jury trial. So, scholars who have looked at this issue have gone back to the writings from the late 1700’s when the Bill of Rights was authored and ratified, and they have looked at cases from that era and scholarly writings from that era. That is where they have derived that the jury clearly had the right the framers had intended in drafting the 6th Amendment to provide juries with the right to independence and to independently decide the facts and the law.

Kennedy: There are really three reasons given for nullifying a jury verdict for the most part. One would be that the law itself was unjust. Another would be that the law was unjust as applied to the facts of the case. A third would be that the punishment was excessive to the crime. In this audiocast we are mainly going to go over the first two. Maybe you could talk a little bit about the third one and just give us the history and reason that has been used as a reason to nullify.

Rich: Sure. Back in the early days of colonial independence, at the time the Constitution was written, this notion of ‘freedom from arbitrary power’ was very fresh in the minds of the framers because wealthy English governors would put into place laws to protect their property interests and impose unduly harsh punishments like death for stealing. This was clearly intended to protect the wealthy and discourage any kind of challenge to that status quo.

In those early days when someone was going to be tried and convicted for stealing from a wealthy landowner and the penalty would be death, juries –

more and more –started to stand up and say, “No, we are not going to convict because we know that the penalty is going to be too harsh.”

We had actually recently – in 2019 – seen a highly publicized case. If you remember Scott Warren, he is the one who provided food and water to undocumented aliens in the Arizona desert. He was charged with harboring an alien, and that carries prison time of 20 years. So in that case, it was a hung jury and the government wound up not pursuing the second trial. Those jurors said, “No, the punishment does not fit the crime, and we are not going to convict.” At least half of them did.

Kennedy: Let’s get a little bit more into the origins and the rationale behind the doctrine. If you could, explain to the listeners how this has been a debate going on for hundreds and hundreds of years and what really led to the doctrine of jury nullification in this country.

Rich: In the early days it was fairly common. First of all, judges routinely instructed juries that they had the power to decide both the law and the facts. Sometimes they would discourage it. There has always been a little bit of a paternalistic or elitist attitude – I guess I am putting my own opinion out there on that – that judges are smarter and more well-versed in the law and better able to determine which law is applicable in a particular case. That has always been an attitude that’s out there.

But in the early days, in the 1700’s and 1800’s, courts would routinely instruct juries that they had the ability to decide both the facts and the law. We know this from old cases, the courts, and scholarly writings that document this.

Gradually during the 1800’s the doctrine fell from favor, and courts started to not provide the instruction. That led to the *Sparf* case in 1895 [*Sparf and Hansen v. United States*, 156 U.S. 51 (1895)]. In that case, the U.S. Supreme Court said that it was going too far to say that a defendant had a right to instruct the jury that it had the power to nullify. Justice Harlan’s opinion said that public and private safety alike would be in peril if the principle we had established that juries in criminal cases may, of right, disregard the law as expounded to them by the court and become a law unto themselves.

Kennedy: So, basically it was saying that the judge had the option to instruct the jury about their right to judge both the law and the facts, but there was no obligation on him to do so.

Rich: That's right.

Kennedy: What is the Wisconsin law on jury nullification?

Rich: In Wisconsin, the first case was the *Mercord* case, and that was an old case that was more favorable. The court said that by convicting the defendant "of one rather than both charges, the jury may have acted out of sympathy, or exercised a form of jury nullification based upon their sense of fairness and justice. Whatever reasoning the jury employed, their determination must be respected by this court."

[*State v. Mercord*, 134 Wis. 2d 454, 397 N.W.2d 157 (Ct. App. 1986) – see [Note 37](#)]

That was consistent with rulings of the time that respected the jury's right to decide both the law and the fact, even if they were motivated by what jurists might say were improper motives like sympathy.

Then in 1991 the leading case that is cited now is *State v. Bjerkaas*. I've seen citations to this case that say that it stands for the proposition that jury nullification may not be discussed at trial at all. I think that a lot of judges believe that. But that is an overly broad reading of the case. What the court said in *Bjerkaas* was that the trial court did not abuse its discretion in disallowing defense counsel to argue that the jury could decline to follow the law. That is very different from saying that you can't discuss it.

The court just said that the defense counsel said, "We want to raise it," in closing arguments, and the court said, "No." Then the appeal said that, by making that ruling, the court denied the defendant the right to have the jury instructed on jury nullification, and the appellate court said, "No, that's okay. That is within the discretion of the trial court."

So essentially, it's the same as the federal court ruling in *Sparf*.

Kennedy: Would a juror in Wisconsin be punished for exercising jury nullification? Would they be punished for informing other jurors about the right of nullification during deliberation?

Rich: Generally, no. I did come across an article that said that, in more than one recent case, jurors during deliberations reported to the judge that one of their own – another juror – was discussing nullification and expressing an intent to nullify. In both of those cases, apparently, during deliberations but before verdict, the judge substituted that juror with an alternate.

I was very surprised by that. The article didn't give a citation to the cases. That is something that I would like to follow up on to see what justification was given for that.

Kennedy: So even though the judge can't punish the juror usually, it's when that a juror favors jury nullification that they can replace that juror before the final deliberation by the jury, correct?

Rich: Apparently they can. Like I said, I'm interested in doing more research on that because it seems to me that that is inappropriate.

Kennedy: Unlike the case you just mentioned, say that the jurors don't say anything to the judge about one of the jurors wanting to nullify during deliberation, but the judge still suspects that maybe one of the jurors has exercised that right. Say it's a hung jury. What is the law in Wisconsin about the secrecy of a jury? On what grounds can the judge actually compel the members of the jury to say whether the verdict was based on jury nullification?

Rich: My opinion is that the jury has the power to exercise its independence, and the judge has no power to stop it.

Kennedy: What about from the defense attorney standpoint? Suppose he tells the jury during the trial that you do have the right to judge the law of the case. What kind of penalty or what could the punishment be for doing that?

Rich: There is no penalty for doing that unless the statement is contrary to a prior ruling of the court. So, all of this case law says that there is no right to

have an instruction from the judge about nullification. Most prosecutors in every criminal case I've encountered will file a motion *in limine*, which is a motion made before the trial begins, out of the hearing of the jury. That motion *in limine* will request an order from the judge prohibiting defense counsel from mentioning jury nullification during the trial or during opening or closing arguments.

That is the way that it is most commonly done. If the defense counsel were to defy that order, he could be held in contempt; so, that would be the sanction. Contempt carries jail time or fines or both.

Kennedy: Getting back to the jurors, there is no requirement – just to be sure – from them having to state why they voted the way that they did, right?

Rich: No. Many times counsel on both times will want to hear – for educational purposes or curiosity – what the rationale was for the decision the jury made, but [the jurors] are never obligated to discuss that.

Kennedy: And you will get these criminal cases where one juror is holding out. Eventually the judge might declare a hung jury. What happens next? What is the law with hung juries in what the prosecution can do after a hung jury in Wisconsin?

Rich: Generally speaking, the hung jury is not the same as an acquittal; so, it's not double jeopardy if the government decides to retry the case. They have to just make that decision whether the witnesses will still be around, whether strategically it's advisable. So they can retry the case.

Kennedy: At this point, I think we are going to go into a jury nullification case that you litigated. I guess it was about seven years ago, *Wisconsin v. Vernon Hershberger*. We are going to look at the jury nullification strategy during that case from the standpoint of what the jurors could do, what you and your co-counsel, Glen Reynolds, did during the case, as well as how people who weren't a part of the case but supporters of Vernon helped in what I would call the 'court of public opinion.'

First off, could you give us the background of the case? Tell us the charges that

were brought against Vernon.

Rich: Vernon Hershberger is a formerly Amish farmer who at the time ran a buyers club. It was a private club where he distributed food products produced at his farm and elsewhere to members of the club. The products included unpasteurized milk--the sale or distribution of which is generally prohibited in Wisconsin; there are some exceptions. One of the exceptions is owners; owners of the animals are entitled to purchase or take the milk from the animals they own.

The state's primary motivation in pursuing Vernon, I believe, was the raw milk issue. That is the primary motivation. They didn't really care that he was selling goji berries to members of the public. That wasn't the issue. But he was running what they called a store, there were products in the store with price tags on them, and he was distributing or selling dairy products from the unpasteurized milk, including the milk itself, yogurt, kefir, butter, and all of those things.

He was charged with four misdemeanors. The three that we are focusing on are the licensing charges. He was charged with operating a food establishment without a license, operating a dairy plant without a license, and producing milk without a license. Those were three licenses that the state said he needed and didn't have. It was somewhat disingenuous because, as I said, I believe that the real motivator was the raw milk sales, and there is no license in Wisconsin for selling raw milk. So he couldn't get a license to do what he was doing, but the state tried to portray it as, "This is a scofflaw who just doesn't want to pay \$125 for a license. He doesn't think that the rules apply to him." That is the way that the state presented their case.

Kennedy: Just to describe how difficult a case it was, [let's look at] a literal interpretation of the law. Basically the law in Wisconsin says that if you sell or distribute food at all, you are a retail food establishment. In other words, if you sell an apple pie to your neighbor for \$5, you are technically a retail food establishment the way that the law reads.

Rich: That's right. It's very broad.

Kennedy: If you are a milk producer, if you have one or more dairy animals

and sell or distribute that milk, you need a milk producer license. So technically if you give a gallon of milk to your neighbor across the street, you have violated the law.

Rich: That's right.

Kennedy: With regards to the dairy plant, if you manufacture any dairy product – which would include bottling milk – that would be under the dairy plant permit. If you even give that dairy product to someone, you are violating the law again.

Rich: That's right. So, yes, it was a tough case because arguably Vernon's actions did violate those laws. We tried making a public/private distinction, and the pretrial rulings did not go our way on that because the Wisconsin Food Code talks about distributing to members of the public. So, we tried to make a public/private distinction that this is a private buying club so the actions didn't violate it, and there were pretrial rulings that just didn't let us go there.

Kennedy: I wanted to get into that. Before the trial, what was happening? My memory is that the judge ruled for the state again and again on any motions you made to establish a public/private distinction. If you could give people an idea on this and how they even prohibited certain words or terms from being introduced during the trial, that would be great.

Rich: We weren't allowed to say 'freedom', 'independence' or 'raw milk'. I do think that these rulings wound up hurting the state because even though we tried to instruct our witness – we prepared our witnesses and told them that there were certain words that are not allowed to be used – these are just normal laypeople. They were talking about something that they are very passionate about, so they would drop one of the words like 'freedom', and the state would say, "Objection!"

Then the jury had to file out. They all had to get up and leave. Then we had to argue the objection out of their presence. That must have happened 15 times. Someone says, "raw milk," and it's, "Objection!"

I think at that point the jury started to figure that something was up here, that

something was being kept from them – information that might be helpful in making a decision. I don't think that helped the state's case.

Kennedy: When it came to the issue of jury nullification, you said that they introduced a motion in the pretrial to make sure that you could not bring that up, correct?

Rich: That is correct. Just like almost every motion they made, the court upheld it.

Kennedy: So what was the legal term for that motion?

Rich: A motion *in limine*.

Kennedy: By this time, this case had already received a lot of publicity, even though it was still a ways away from the actual trial date. There was a lot going on in the court of public opinion, specifically as it pertains to jury nullification. Could you just describe what was going on in Sauk County at the time that you were winding your way through all of these endless pretrial hearings as far as the handing out of leaflets and that type of thing?

Rich: Vernon had incredibly strong public support. I don't recall how many members he had in his buying club, but it was a high number, and it was people across the country. Residents of Sauk County led the charge, and the primary purpose of what they were doing was to raise awareness of the case. They wanted people to know that this is what was happening, the state is criminally charging a farmer for providing food to members of this community, and there was quite a bit of public outcry over it.

As an aside, during the trial many local businesses had big signs put up in their picture windows in support of Vernon, and they donated food to the people at the trial and to the lawyers. There was widespread support.

Before the trial, there were leaflets handed out. I believe there were 40,000 residents of Sauk County, and there were donations to cover the cost of producing 40,000 leaflets with the goal of going to every single door in the county. I am sure that they didn't connect with everybody, but they made a

pretty impressive effort.

The leaflets described jury nullification and what the power was. This was permissible because the jury had not yet been impaneled.

We have to be careful about taking action like that once the jury is impaneled and there are specific jurors identified. You can't wait for a lunchbreak and hand out leaflets as they exit the courtroom. You could be charged with tampering with the jury if you took that action.

What these residents did was they just tried to raise awareness. There were letters to the editor, there were articles in the newspaper, and you authored one for the Farm-to-Consumer Legal Defense Fund. Generally speaking, there was a lot of publicity. I was interviewed by *The New York Times*, *The London Times*, and *The Washington Post*. It was a big story.

Kennedy: This was all before the trial, correct?

Rich: There was some before, and some after. I had to be very careful about what I said before.

Kennedy: Right. So basically what did you say when you were interviewed before the trial?

Rich: That was an effort really just to talk about what Vernon was doing, to humanize him to the audience. Then I talked about the charges. I'm allowed to talk about the charges and the law. But what I could not do was mention jury nullification, even before the motion *in limine*, and certainly not after.

Also you can't use your interview with the press to get out in the public something that you would not be able to introduce in court; so, I had to be very careful. But I talked generally about raw milk laws across the nation. We hadn't been prohibited from saying 'raw milk' at that point.

Kennedy: You weren't in court anyway.

I think especially what his club members or other supporters did, passing

around all of these leaflets, is just a good example of how successful jury nullification is often about a lot more than just the attorneys, the defendant, and the jurors; it's about getting the word out however you can.

Now we are going to go to the trial itself and just what the impact of passing all of these leaflets had, especially on one aspect of the trial, which is the jury selection [termed *voir dire*]. I think from what we've talked about before, they went through a minimum of 90 prospective jurors. It may have even been over 100. I think that a lot of that was because the word was out about jury nullification.

Maybe you could talk about that process, what happened during the jury nullification in the case, and list what a juror who is aware and knowledgeable about jury nullification – and thinks a trial he has a chance to hear involves an unjust treatment of the defendant – can do to increase their chances of being impaneled in that jury.

Rich: Well, they have to answer the questions truthfully. There is just no getting around that. So the strategy from the defense lawyers' point of view during voir dire on this issue is generally that less is more. We felt that we probably had the sympathy of the majority of the people in the community, but the judge is going to say, "Can you be impartial?" That is his question.

A lot of people said, "No. My mind is made up."

We were like, "Darn it!"

So those are questions that the prosecutor and the judge are going to ask to try to determine whether there are jurors out there who might attempt to nullify. All the defense counsel can really do is sit tight because the juror has got to tell the truth.

We lost a lot of jurors who would have been good for us through that process.

Kennedy: One of the character traits you are looking for is someone who is independent-minded. Is there a way that you can ask general questions, trying to flush out a prospective juror's independence?

Rich: In another case I had, we were picking the jury for a guy who was accused of having too much junk in his garden. He had a couple of acres, and he liked to fix lawn mowers and fix cars. So his two acres were fenced in and not visible to the public, but they were calling it a nuisance because he had all of this stuff lying around in the yard.

I was asking questions about government control and government authority and how they felt about private property rights. Is it ever okay for someone to challenge the government's ability to regulate their property?

There were a few responses to that. So then the government guy followed up and he said, "Raise your hand if you agree with this: I can do whatever I want on my own property as long as I'm not hurting anyone."

One guy who was all tattooed and pierced slowly raised his hand. Of course he got struck first. So maybe I shouldn't have asked that question. Maybe I should have just left it because that opened the door to the government then following up and then striking what probably would have been the best juror for me in that case.

I think it's hard to find a good question because you are just going to open the door to the government worming out the ones they don't want on the panel.

Kennedy: Let's go to the trial itself now. Start off with the first opportunity you had to at least try to plant the idea of jury nullification in the jurors' minds--the opening statement. Glen Reynolds made the opening statement in the Hershberger case. What do you remember about that? What general guidelines did he follow in trying to plant that thought into the jurors' minds?

Rich: We worked and prepared for that for months. I think that the most important part of that opening statement was the video that we put together showing Vernon and members of his buying club making hay using draft horses, Vernon in the milking parlor, and his children helping with the chores. All of these things were intended to tell a story of somebody who loves his animals and cares for the farm and provides good, clean food for people who need it and can't get access to it otherwise. That is the story that we were

presenting.

We also staged the courtroom. Most people couldn't get seats in the courtroom, and we picked the ones that did. Right in the front row were Vernon's ten children with their little bib overalls and bonnets. I think that is important. "Is this somebody who needs to be sent to jail," is the unspoken message.

Then in the statement itself that Glen gave, we were setting the stage for the evidence we were going to present and the story that we wanted to tell, and that is basically that these are not people who are just the same as Sam's Club members. These are people who live and breathe and work on this farm and help with food production; they are owners. There is a lease document that creates an owner interest under Wisconsin law; that was our story.

Kennedy: One thing that happened in the case I would like you to bring up now before continuing on with the strategy during the trial. One thing that you can focus on is basically 'effective or just law enforcement'. Is what the department did promoting 'just and fair law enforcement'?

There was actually an incident where they raided his farm and went into the room where his dairy bulk tank was. Could you talk about what happened there and how you brought that up and in what context during the trial?

Rich: That was another time when video was effective. Vernon and his sons and friends filmed almost every government encounter. So in this case the inspector came in and determined that the bulk tank – the milk in the big tank where it is stored – had to be destroyed because raw milk was being distributed. The video showed Vernon standing on one side watching her and, on the other side two of his sons were just wide-eyed, looking scared and confused. They were silent and well-behaved, like they always are.

The state inspector just had this really unpleasant expression. They looked very threatening and unkind. The video shows her taking dye and dumping it into this beautiful milk and destroying it. The kids were just wide-eyed watching her do it. You can just see that they are thinking, "Why would you destroy this food that we worked so hard to produce?"

I think that had a big impact on the jury, more so than the cross-examination. We did the cross-examine on technical stuff and legal issues, but I think that video is what really brought the jury around to seeing that this is government excess.

Kennedy: Another thing that you and Glen tried to stress through the trial was that Vernon isn't any conscious lawbreaker; his motives and intent were good. I think that this has a little bit of the Amish tradition as well. Maybe you could discuss that a bit and how that played out.

Rich: Any chance that we had to humanize Vernon and counter the government's theory that he was just someone who thought he was above the law we took. The government also tried to portray him as making a huge profit off of illegal activities.

I remember his testimony on that vividly. That is when Vernon was testifying. He had a cash register summary each day, and he would handwrite that this was "net revenue." It was a big number but, in fact, his actual income was quite low – well below the poverty level. In fact, those numbers were gross receipts, not net receipts. So the government made the mistake of hammering on that and trying to show the jury, "Look how much money this guy is raking in."

When we talked to Vernon, we realized that he just didn't understand the difference between net and gross. He didn't know what that meant. So Glen asked him, "These numbers reflect each day's worth of cash register receipts. Is that correct?"

Vernon said, "Yes."

Then Glen asked, "Does this number reflect your receipts before or after expenses?"

Vernon said, "Before expenses."

Glen said, "Then why did you write 'net' on the receipt?"

Vernon said, "I guess that's just my 8th grade education."

That really won over the jury. I mean, Vernon is pretty charming anyway, but he was very self-deprecating, not at all arrogant. He was very respectful, and I think that the jury just really loved him by the end of the trial.

Kennedy: Let's get more into the presenting of the evidence during the trial. One of the things that I remember about the case was that in the store he had all of these prices on just about every item, but Glen explained the prices by saying that people didn't necessarily pay what was on the price. This got out the idea that it wasn't a regular commercial store. Could you explain the argument there?

Rich: We did a lot of witness preparation in this case. We interviewed probably 30 to 40 of Vernon's club members to determine which ones would make the best witnesses. One was a single mother of four who was very low income. She didn't pay anything for her food because she couldn't afford it. The other members agreed to that. People paid what they could afford.

Our witnesses explained that the prices were guidelines. If you couldn't pay that much, then you didn't. If you could pay more to support the other members, then you did. We had one of the wealthier couples testify that they always paid more. That was just the philosophy of the community.

Kennedy: This gets into what is called the 'shadow defense'. It's a way to get the jury thinking about nullification even though the law and the facts might not be in the defendant's favor. It happens in instances where they are not really comfortable convicting someone like Vernon who was, as you said, just providing all of this healthy food to hundreds of people, but you have to give the jury something to hang their hat on. You can't just say, "No, he didn't have a retail food establishment," or, "He wasn't a milk producer under the law."

You've already addressed this somewhat, but could you get into the different ways that you did give the jury something to hang their hat on when it was apparent that they weren't comfortable convicting him?

Rich: Studies have shown that most people are not comfortable defying a judge's instructions. It just takes them out of their comfort zone. So what you

are referring to is the ‘shadow defense’ or what I call the ‘strawman defense’. That is a technique of saying to the jury, in effect, “Look, here is a reason why an acquittal would still fall within the instructions that you have received from the judge. You are not defying the law.”

We first tried to humanize Vernon and make him a sympathetic character so that the jury wants to acquit. Then the next step is we have to give them a legal basis for making that determination that falls within what the judge has instructed. That is why the jury instructions are so crucial.

As an aside, we lost almost everything we tried to get in those instructions, but we were able to call to the witness stand the non-lawyer who drafted the lease document that all of Vernon’s private club members signed. So we had his testimony.

I have to say that it was not a well-drafted document. We had to work around that. But it was intended to create an ownership interest in the farm; so, we presented that. We presented the person who drafted it to express the intent of the drafting. Then in closing we were able to make a legal argument that the members of the buying club were, in fact, owners of the farm. Therefore, there was no license required for them to acquire the food products from the farm.

It was not a particularly strong legal argument, but it was a hook to hang a hat on, and that was the intent. And it worked.

Kennedy: From what I remember, you also called Vernon as a witness during the trial. Is this correct?

Rich: Yes, we did.

Kennedy: A lot of criminal defense lawyers would not call the defendant to the stand, at least in most cases. So what was your thinking behind putting Vernon on the stand?

Rich: It varies by the case. Sometimes you have to call the defendant as a witness. For example, in a self-defense case you have to call them. So there are numerous exceptions to the general rule of not calling the defendant to the

stand. The risk you take is that he has got to tell the truth, so then you open up to the prosecution asking questions that put him at risk.

In this case, we didn't really have anything to hide. Everything that he was doing was out there in the public domain. He had given interviews and laid everything out. He had been on television several times. So we didn't really have anything to hide; everything was already out in the public domain, and we thought that we could do a lot of good because of his charm and character.

Kennedy: I want to get back to this 'court of public opinion' aspect again. This was a five-day trial, believe it or not. It was three misdemeanors and one felony if I remember right.

Rich: They were all misdemeanors.

Kennedy: So there were four misdemeanors. It was a five-day trial. You mentioned one thing that happened – just the local merchants helping out during the trial. What I remember about that trial is just that he had his community in Sauk County, but he also had a national community come in – other farmers who had faced enforcement actions like Joel Salatin and Mark Baker and Alvin Schlangen.

Do you think that somehow the jury got wind of that? Do you think that had an impact at all on the jury? Was that at least somewhat of a factor in convincing them to nullify? What do you think the benefits of that happening are during the case?

Rich: I tell my clients that it is always beneficial to pack a courtroom and to have strong community support. I don't know how aware the jury was of the national implications, but they certainly were aware that there were hundreds of people on the courthouse steps listening to speeches and holding signs and supporting Vernon. So that has to be impactful.

I think that some of the jurors who spoke out after the trial did say that that just made them curious. They are not allowed to Google anything or look anything up, but they can see that this is not a typical license violation case.

Kennedy: We are at the closing argument right now. One of the important things about the jury is they are supposed to be the conscience of the community. They are supposed to judge the evidence, but they are also supposed to vote their conscience when they make their decision.

How did Glen Reynolds appeal to that aspect when he made his final argument?

Rich: He started, again, with humanizing Vernon and without using the words to somewhat vilify the government, he communicated that they were too harsh in the way that they were treating Vernon and that they were unfair. Then he summarized the evidence of destroying the milk and that sort of thing.

Then I think that his last line was one of the most powerful. He was setting it up so that, first of all, there was no violation here because these are owners. Secondly, the government is overstepping. Thirdly, Vernon is just a hardworking farmer trying to feed his community. Finally, in trying to invoke the conscience arguments, he said, “Do the right thing. Send this man home to his family.”

I think that was very powerful.

Kennedy: Right. He also had a very interesting comparison to the Wisconsin Department of Agriculture, too. I think he compared them to Elliot Ness in *The Untouchables*, but instead of confiscating and dumping whiskey, they were dumping raw milk. There is testimony that they actually put a toxic dye in 2,000 pounds of raw milk.

What is your memory of that?

Rich: I think that you described it pretty accurately, and that is another effective technique when you can invoke an image like that. Of course, Prohibition was a time when there was a great deal of jury nullification going on. As you and I have discussed, a sure sign of an unjust law is one that is routinely violated by generally law-abiding people. That is what happened in Prohibition, and that is what was happening in Wisconsin at the time of Vernon’s trial and continuing today. You have thousands of law-abiding people who aren’t violating the law by drinking the milk, but it’s not lawful for their farmers to sell

it. So I think it was an effective image to invoke the prohibition era dumping.

Kennedy: Another effective image that I thought Glen had was portraying all of the farm owners – the people who signed this lease agreement – as members of a family. It was all a family.

Like you were saying earlier, the jury instructions that you had were extremely unfavorable. This law on operating without a retail food establishment permit, if you actually look at the regulation, it says, “If you sell to consumers, you need a permit,” but ‘consumers’ is defined as ‘members of the public’. So you think that would maybe give Vernon some kind of out, but in the actual instructions, it didn’t at all. The judge just basically said, “You are a member of the public if you are not a member of Vernon’s family.”

Glen Reynolds was able to expand family member into extended family, and he said, “These people do chores on the farm just like the family members do.”

Rich: Yes. We fought long and hard over that instruction and lost, but he did a good job of pulling that rabbit out of the hat.

Kennedy: There was another thing that was constantly an issue. The state was constantly trying to get the contract disqualified as evidence any time Glen brought it up. The relationship between Vernon and his club members, like I said, that was a legal conclusion or something like that. [The state was claiming that the contract was inadmissible.] So maybe you could speak to that.

Rich: That was one of the few things that we won on. We were allowed to introduce it, and we were allowed to take testimony from the person who drafted it. We were allowed to question Vernon about it, and we were allowed to question the members about their understanding of the meaning of it. All of those things were allowed in over the state’s objections. We didn’t win on a lot, but we won on that, and that was probably the most important thing.

During deliberations when the jury asked for a copy of the lease, I knew that there was a good chance that we won and that they were going for the strawman.

Kennedy: The postscript into this, which I mentioned in the other podcast, was that three of the jurors actually joined Vernon's food buyers club after the trial.

Rich: Yes, in the state's efforts to curtail raw milk sales, the state actually created three new followers. All of them said that they had never even heard of raw milk before this case. They didn't know what it was; they didn't know it was a thing. But after going through the trial, they did some research, and they decided that was something that they wanted to participate in.

Kennedy: I think that we agree that increasing government power these days leads to a decline in the rule of law, and that jury nullification is one of the important civic duties that Americans can exercise right now. If you could, please put in your own words how [important it is] if someone gets a summons to serve on a jury. Describe what you think the importance of it is.

Rich: As I said earlier, the framers of the Constitution intended that the purpose of the jury would be to guard against the exercise of arbitrary power. [Regarding] the jury: back in colonial times there was a small circle of wealthy, powerful people (not unlike the situation we have today) sometimes, oftentimes, laws tend to favor that small group – so, it's the province and the purpose of the jury to keep that at bay.

It is very important as a juror to know your power and to exercise it. That is the only way that we can curtail the power of government to institute and maintain unjust laws.

Kennedy: Any final comments? I guess that one thing that we both agree on is that states have the right [and should] pass laws requiring the judge to tell the jury that they can judge not only the facts but the law of the case. It seems [that] work on [advancing] jury nullification is not only for the courts [to do] but also for the legislature right now [to pass favorable laws restoring jury nullification rights].

Rich: Perhaps. I think it is especially important for the courts. What we have in Wisconsin and in the U.S. Supreme Court is a distinct majority of justices who proclaim that they are originalists in terms of constitutional construction. If

in fact they are originalists, they should favor jury nullification (or jury independence), and they should institute a rule that doesn't keep that power a secret and that doesn't permit a court to keep it a secret.

I would like to see some cases go up to the Supreme Court – the Wisconsin Supreme Court and the U.S. Supreme Court – and I would like to see the issue addressed. I personally favor jury independence, and I think it is the cornerstone of our republic. So I would like to see it taken up by these justices who proclaim that they are originalists. If they are in fact originalists, I don't see how they can decline to promote jury independence.

Kennedy: One last comment from you on the Hershberger case: you've litigated dozens of cases over the years, but it just seems that Vernon was actually convicted on one of the four charges that we didn't bring up, which is violating this holding order not to remove product from refrigerators or freezers which had been taped [to prevent removal but food club members claimed their foods despite the hold order]. The key was because he was innocent on the other three charges, he was able to continue to provide food for his [club members after the trial].

What was it like when you actually got the verdict? When you have reflected on the case since then, what comes to your mind?

Rich: When the verdict was received, it was a pretty triumphant moment. There was a lot of emotion because Vernon put himself out there for the greater cause of food freedom. He did so at great risk of being imprisoned. He is the sole supporter of his family of 12; so, it was pretty courageous of him to do it. It was also a lot of stress and pressure on the entire family.

It was a beautiful thing to see – that family relief when he was told that he wasn't going to go to jail. They did impose a fine for the one guilty verdict of \$1,500, which the buyers club members put up immediately. So that was also gratifying.

The bigger picture is that – even though this was a trial court level decision that doesn't carry any precedential weight – I think that it certainly had a huge impact. I'm not aware of any raw milk enforcement action that has been

brought in Wisconsin since that case. Even nationally I think it was a big victory for food freedom.

Kennedy: I agree, and I think that – the way that things are now with the conventional food supply just deteriorating in quality – this is something of great importance. Basically, there was no permit for what Vernon wanted to do; so, more of these cases might come up. I think that more people are going to go buying directly from the farm. The industry will look at that as unwanted competition even though they brought a lot of it on themselves through the difficulties that they are having.

There might be more cases like this where the law doesn't exactly support what is going on, where people, in order to protect their food supply, could need jury nullification to keep the supply going in the community or region.

Hopefully, we have educated the viewers by going through this trial; you actually litigated on it. Before we go, could you give people your contact information for both the nonprofits that I mentioned earlier – Andrew's VOICE and also the Food Freedom Foundation?

Rich: Sure. Thanks, Pete.

The Food Freedom Foundation can be found at www.FoodFreedomFoundation.org. Andrew's VOICE is another nonprofit advocating for civil liberty. That can be found at www.AndrewsVoice.org.

Kennedy: Is there a phone number if people want to contact either of those organizations?

Rich: Andrew's VOICE is 920-838-2828. We are actually in the process of porting over the Food Freedom Foundation's number to a different one. In the interim, people can call that same number, 920-838-2828. Both of those go directly to me, and I am the president of both organizations.

Kennedy: You're wearing a lot of hats these days.

Elizabeth Rich, you've left quite a legacy in this area, and you're not done yet.

You are advancing the cause of food rights. Those who know you are very appreciative of the work that you have done.

Thank you for being on the audiocast. Take care.

Rich: Thanks, Pete.

MODIFICATION

Transcripts are not always verbatim. Modifications are sometimes made to improve clarity, usefulness and readability, while staying true to the original intent.

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