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The Solari Report

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**Solari Food Series:
Farm-to-Consumer
Legal Defense Fund
with
Elizabeth Rich**

Pete Kennedy

The Solari Report Food Series

In the Trenches with FTCLDF

with Elizabeth Rich

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Pete Kennedy: Welcome to the Solari Food Series podcast. This is your host, Pete Kennedy. On today's podcast we are going to look at the work of the Farm-to-Consumer Legal Defense Fund [FTCLDF] through the experience of Wisconsin Attorney, Elizabeth Rich.

Elizabeth has been a staff attorney and local counsel for the Legal Defense Fund for the past eleven years. She has also served as president and executive director of the organization during that time.

The mission of the Farm-to-Consumer Legal Defense Fund is to protect the right of farmers and consumers to engage in direct commerce, a mission that is more important than ever with the recent upheavals in the food system due to the COVID crisis and the accelerated deterioration of quality in the conventional food supply.

The Legal Defense Fund is a true grassroots organization that has never taken a dime from the government. Most of its revenues come from membership fees and individual donations.

In its day-to-day work the Legal Defense Fund aims to create as favorable a regulatory climate as possible for small farmers and local artisan producers. The long-term goal of the organization is to establish the right of all individuals to be able to obtain food of their choice from the source of their choice, regardless of whether that source is licensed or regulated by the government.

The best way to make that happen is to concentrate work at the state level. A key part of that strategy is having a skilled litigator in each state who is not afraid to take on difficult cases and stand up to regulators. No one better fits that description than Elizabeth Rich.

Since 2009 Elizabeth has successfully worked to extricate small farmers from what often seemed like hopeless situations, enabling them to make a better living, and sometimes enabling them just to make a living at all. A good goal for the Legal Defense Fund is to have an 'Elizabeth Rich' in every one of the 50 states – whether through cloning or otherwise.

Elizabeth, welcome to the Solari Food Series podcast.

Elizabeth Rich: Thanks, Pete.

Kennedy: Before we get into your work for the Legal Defense Fund, you had been a litigator a long time before you started working for FTCLDF. It was actually many years before Legal Defense Fund that you realized that there was something wrong with the food system. Could you inform our listeners on how you came to that realization?

Rich: Sure. I started at a large Milwaukee firm after graduating law school in 1984. I somewhat naively focused on environmental law. I did business law, real estate law, and environmental law, which was just getting started at that time. I thought that I would counsel my big corporate clients into compliance.

I quickly learned that that was not the way that it works. In fact, those corporate clients were very powerful and able to manipulate the regulatory agencies to grant them permission to do almost anything they wanted to do.

As a young lawyer, I was confused by that until I looked a little closer and realized that the executives for my big corporate clients were rotating in and out of the EPA, the FDA, and the USDA. So ultimately those agencies were all controlled by corporate interests.

I came home one day to my husband, who was also a suburban kid like me without any farm experience. I said, “I think that we have to start raising our own food because we can’t trust the commercial food supply system.”

That was 1995, and we decided to do that. That is when we bought our 40-acre farm and started raising our own vegetables, fruits, and ultimately pork, beef, and a family milk cow and goats for milk and chickens for eggs and meat. That is how that all started in 1995.

Kennedy: Let’s now fast-forward to 2009. What were the circumstances that led you to work for Farm-to-Consumer Legal Defense Fund?

Rich: I had located a farmer who produced organic raw milk, and they also sold other organic products in a small on-farm store. I was shopping in the store one day, and I overheard Kay Craig, one of the owners, talking to a customer

about legal problems they were having with the state Ag department. She said that they had been licensed through the state and were working with a pilot program, and now the state was giving them a hard time and talking about closing down their raw milk operation.

I piped into the conversation and said, “Hey, I’ll work for milk,” and that was how it started.

I think also at the time, Pete, you were working for them. You were negotiating with the state, and I think that one of the roadblocks that they were throwing up was that you weren’t licensed in Wisconsin, so they were pushing back on that.

Kennedy: Yes, I did get a ding letter from them around that time.

We have a saying, “Progress is made one retirement at a time.” Sometimes it’s just a matter of one unfriendly regulator stepping down. But at that time, just the opposite had happened. We had had a couple of unfriendly regulators take over key positions within DATCP, also referred to as the Wisconsin Department of Agriculture, Trade, and Consumer Protection.

I worked in Wisconsin for a number of years and was able to be an advocate and keep things going for the producers there, but once these new regulators came on board, a new attorney was badly needed and a litigator was needed. You stepped in, and this case eventually went to litigation. Could you describe more of the background to the Wayne and Kay Craig case?

Rich: After going back and forth with DATCP, we were not able to negotiate a resolution. Nothing was going to be acceptable to them; so, we filed a declaratory judgment action, seeking a ruling that one of several different scenarios was acceptable to sell raw milk to owners of a cow. Under Wisconsin law, there is a general prohibition against sale and distribution of raw milk, but owners are allowed to acquire the milk from the animal that they own.

So the case initially involved the Craigs, and then ultimately another raw milk farmer’s case was consolidated with the Craigs; so, we had three different models that we were seeking a ruling on, to say that one or all of these models of sale and distribution of raw milk would be acceptable.

The Craigs' model was a private association which they had operated for several years, and so they had an association. You had to pay membership dues to join the association, and you also had to sign an agreement to be a member of this private group; so, it was not a sale to the general public, and the Wisconsin food code describes a consumer as a member of the public. So we argued that these members of the private association didn't fall under that group of regulated consumers.

The other model that we set up was a lease arrangement; so, there was a herd of cows, and many owners then signed this lease agreement to lease the cows from the owner and to pay the owner of the herd a fee to manage the herd and then provide milk. We argued that a lease interest was an ownership interest under the law; so, these lessees should be allowed to take the milk.

The third arrangement we thought was a slam dunk win. We had two individuals who purchased a cow for fair market value. We had an appraisal at hand from an independent appraiser saying, "This is the value of the cow." They paid that value so they each owned a 50% interest in the cow. Then they paid a raw milk farmer to milk the cow that they owned, and then they picked up the milk.

So what happened was the judge ultimately said that none of those arrangements were acceptable. We also made constitutional arguments about freedom of association and right to contract and things like that. The judge said, "No, you are operating a dairy farm in Wisconsin. If you operate a dairy farm, you have to follow Wisconsin law," not recognizing that the Constitution trumps that.

So we filed a motion for reconsideration, and the judge issued a decision on the motion. This was back in 2011, and it was a decision that sparked a lot of interest as well as some outrage. He basically said that he was denying our motion. He said, "Plaintiffs do not have a fundamental right to own and use a dairy cow or a dairy herd. Plaintiffs do not have a fundamental right to consume the milk from their own cow. Plaintiffs do not have a fundamental right to board their cow at the farm of a farmer."

Then he wound up with, "Plaintiffs do not have a fundamental right to produce

and consume the foods of their choice.”

So it was a pretty sweeping denial, and that went all the way around the world. I never got so much positive feedback from a case I lost as I did with this one.

Kennedy: In a way, you won the case. There are a couple of things that I would like to go back on because I always believe that there is more than one way to win a case. I know that you don't think that way because we kind-of took your batting average down a bit from what it was in private practice before you joined the Legal Defense Fund. I'm going to brag on you. Elizabeth, I think you had something like a 95% success rate in court actions against government agencies when you were in private practice, but we took that down a peg or two.

You can win by the court decision, you can win even if you lose in court by jumpstarting the legislative process and getting a favorable bill passed, and you can win by jumpstarting a rule-making process and getting a favorable regulation through. What happened with a lot of our members is you can *also* win by convincing the agency to change their enforcement policy. There were cases that the Legal Defense Fund would lose, but the agency knew that if they went after the member – even though the member was engaging in the same behavior that got them in trouble in the first place – that the Legal Defense Fund would be there to represent that member again. Not all the time, but sometimes that was enough to get them to back off.

With the Craig case, it was kind of a twist because you can talk about this race to the courthouse. Just before Christmas you were filing a complaint for the Craigs, and you got wind that DATCP was going to file what is called a 'summary special order'.

Could you explain that and how you basically saved the Craigs by a matter of days?

Rich: DATCP doesn't have the authority to follow through with an enforcement action through its in-house lawyers. To do that, they have to either go through the District Attorney's office, or they have to go through the Department of Justice. But they do have a tool in their toolbox called the 'summary special order', and that is a pretty big hammer that they can take out

on small farmers. They can issue a summary special order saying, “No raw milk sales. Otherwise we are shutting you down.”

They can use their administrative authority in that way quite effectively. Once that happens, we have an obligation to exhaust our administrative remedies, which means that we can't go directly to court; we have to first go through an informal hearing where DATCP presides – and we know how that is going to work out. From there you can go to a contested case hearing, which is presided over by an administrative law judge. It's the same people that the DATCP in-house lawyers used to be. They used to be administrative law judges--so these are their colleagues; so, you go before that administrative law judge, and you usually lose.

You can go online and see the records of how often someone prevails against the government in an administrative proceeding like that, and it's maybe 1-2%.

When you lose there, you can then go to circuit court or you can do a petition for review to circuit court, but that is really supposed to be a legal challenge, not a factual challenge. So, you would be challenging the legal interpretation, not the facts.

Those are your options in response to a summary special order. None of them are great options.

In the Craig case, we would much rather prefer to be in front of a judge so that we could levy out our Constitutional claims and the legal arguments that I went through.

I can't recall how we heard that – if that was you that found that out.

Kennedy: I think you found that out from DATCP's attorney later, but basically it was a fifth way to win a case, and that was to stave off enforcement by engaging in prolonged and protracted litigation. DATCP had this policy that they would not take an enforcement action during ongoing litigation. So my memory is that that case went on for five years, and by that time the Craigs were ready to retire. So mission accomplished.

Rich: That is exactly how it played out. We appealed it and ultimately went all the way to petition the Wisconsin Supreme Court for review. That whole process was about four years.

Kennedy: When you think of the judge's ruling, this is supposed to be about public safety, right? The laws are supposed to protect public safety. So what the judge was saying in that ruling was that if you have a cow, and you buy the cow because you want to get milk, and you've never milked a cow before, it's okay to keep that cow on your land and have you take your chances with something that you know nothing about. But if you want to transfer your cow to the land of an experienced dairy farmer and pay him to milk that cow for you, that is a violation of the law.

Explain to me what that has to do with public safety.

Rich: That I can't do, Pete. Of course, it doesn't have anything to do with food safety.

I will point out, though, that the judge's ruling went even further than that. What we expected in a loss or an adverse ruling was for him to say, "None of your ownership models work because these aren't true owners under the law, and you are really just trying to circumvent the law with your various set-ups."

But he said, "Plaintiffs do not have a fundamental right to consume the milk from their own cow." What? How can that be?

Under your scenario, he is saying that the government can say that you don't have a right to consume the milk from your own cow, which I find astounding. I don't think that is the law, but that was the ruling.

Kennedy: That was the second case *like that* in a year. The other time it was a *federal* agency – either with a lawsuit with the FDA when the Farm-to-Consumer challenged the interstate raw milk ban and the FDA said that you did not have a fundamental right to feed your children or yourself the foods of your choice. They basically *also* said that you did not have a fundamental right to your own bodily autonomy.

In other words, the government controls what they put in your body, not you.

One of the things that I don't think you got enough credit for was you just took a huge discount to work for the Legal Defense Fund. You were working for roughly one-third of what you charged in private practice.

Could you talk about what motivated you to do this and the rewards that you saw by engaging in this type of litigation and taking a huge financial loss for yourself?

Rich: Sure. The one consistent thing in my career, even when I was making money at a large law firm, is all of my legal work has been in opposition to the government. That is the common thread. So I represented people who have zoning disputes, I represented people who were disputing environmental authorities, and so in that respect one thing that I am passionate about is giving people meaningful representation in front of the government. What I've heard more times than I can count over the years from government regulators is, "You can't win against us because we have unlimited resources."

So those are fighting words to me. It motivates me to fight and win.

I think when I first encountered the food freedom movement, that was probably in 2007 or 2008, and that was when I realized that I had found a very important line of work that I was willing to make my life's work.

First of all, I had always consumed organic food, and I always thought that eating healthy food was important. But I didn't really realize until later – around the mid 2000's – how hard it was to acquire that food. Then when I ran into the Legal Defense Fund, I found an organization that would level the playing field and would make these foods that were important to me and so many other consumers accessible.

There is really almost nothing more important than that. To be able to produce and consume the foods of our choice over government opposition to that is really important. I saw it getting worse. I saw the overregulation in the government and the overreach getting worse over the years, and I felt that it was really important to dig in and fight back.

Kennedy: Food is the ultimate control. If you control somebody's food supply, you control them.

One thing that I wanted to ask you about is we have worked with different types of farmers over the years. You get some farmers, and you can't blame them because farming is a tough enough job as it is, *but* they won't do anything unless it's in black and white in the law and clearly says it in the law. That is what they are going to do.

Then you get some other farmers where if you can pass what we used to call the 'red face test' interpreting the law where you at least have a plausible argument that what they could be doing is legal, they would be willing to try that activity.

With the farmers who are willing to go to court, as you know, it is basically a second job for these farmers when they are in litigation. It's a tremendous amount of time and resources for them.

Rich: And stress. There is a huge amount of stress put on them.

Kennedy: There is huge stress, and there are these stories of people who have lost their marriages and have had health problems because of litigation.

In the people who you represented who were willing to go that extra mile and go into court, what did you see in their character and personality that separated them apart from some of the others who weren't as likely to go to court?

Rich: Certainly I think that they are looking beyond themselves. I think that they see themselves as part of a community that values what they are producing, and not only values it, but in some cases – as we saw in the Vernon Hershberger case we saw people testifying that the food that they were eating had resolved chronic health problems that they had had for years or that their children had had. Some people depend on this food for their very lives. The farmers appreciate that, and it's much more than just selling food; it's about promoting the health of a community that they value.

It is also about a bigger picture of food freedom and fighting for food freedom not only for themselves, but for other farmers and future generations.

Kennedy: I think that there is a realization amongst them that, “This is bigger than I am, and I am willing to take it on.”

Speaking of Vernon Hershberger, this is a case I want to get into now because this is just a great example of how Farm-to-Consumer Legal Defense Fund does level the playing field. We will get into the background on the case in a minute, but from a financial standpoint, this was a five-day trial that had multiple pre-trial hearings, and you can get into that. Thanks to your willingness and the willingness of your co-counsel on the case, Glen Reynolds, to work on the cheap, the Legal Defense Fund spent \$60,000 to \$65,000 through the trial in expenses.

By contrast, one of the attorneys who served as a volunteer with you said that if that a Milwaukee law firm had represented Vernon, it would be anywhere between \$500,000 to \$750,000 in fees for the time you and Glen Reynolds put in. And no one was ever able to figure out how much *DATCP spent* of the taxpayers’ money, but I think that if you were to guess around \$500,000, that would be in the ballpark.

If you could, go back and give us the background on the Vernon Hershberger case and what came about.

Rich: Vernon had participated in a DATCP pilot program for raw milk sales in the early 2000’s. He, at that time, was trying to work with the agency. He went and had an LLC set up, and DATCP said you had to go through the Wisconsin Department of Financial Institutions to get a securities exemption. So he jumped through that hoop. He tried everything he could to set up a legitimate raw milk operation around the same that DATCP was cracking down on the Craigs and other raw milk farmers. They said – as they have done over the years – “What we said was okay with the securities exemption, but it’s now not okay.”

So, Vernon was in touch with a non-lawyer from California who was setting up a *food club*, Aajonus Vonderplanitz. He was in contact with a lot of small farmers, and he had a theory based on sovereign citizenship that you could set up a lease arrangement that would equate to an ownership interest that would allow the farmers to sell and distribute raw milk. So Aajonus contracted with Vernon to

prepare these documents for him and did so. Vernon's members then participated in this arrangement.

Vernon's community is somewhat unique in that these people really did participate in the day-to-day activities on the farm. So they would wash jars, clean stalls, helped with the hay, and they really felt that it was their farm.

He also had a retail store, and there were prices on the goods. *In testimony* at the trial the state was trying to show that it was just like a Costco, but the customers said, "No, those are guidelines. So if you can pay more, you pay more. If you can pay less, you pay less, and we have some members who don't pay anything."

They gave the example of a single mom with four kids who just took her food for free, and they all were willing to participate in that community. So I think that as the government was trying to portray Vernon as a scofflaw who didn't care about following any rules, the pushback from the community was, "No, we really do believe that this is our farm. We work on it, we contribute to it, and we all as a community support it."

Kennedy: There were several raids of Vernon's farm. If you could go back to the first raid of the taping and then the untaping, that would be helpful.

Rich: I think we're going back to 2012, right?

Kennedy: It was June 2, 2010, and the nightly news happened to be there.

Rich: Some of these facts are coming back to me now. You might have to correct me on some of them, but as I recall, what the DATCP officials do is they issue a 'hold order' and they put tape around your coolers and where your food is located. You're not allowed to move that tape, and you can't touch the food. You can't touch it or move it or do anything to it. That tape has to just stay there during the tenancy of the hold order. Then they've typically taken samples. The hold order standard language says that they are going to test and examine the samples they take to determine if the food is adulterated or misbranded. If it is, then they are going to order its destruction.

So the tape was placed, and Vernon cut the tape on camera, saying that the food

belonged to the owners, so that state didn't have the right to issue the hold order and put the tape on. That wound up being one of the misdemeanor counts – that he violated the whole order.

Kennedy: In his defense, the other accounts were for not having a permit to produce milk, what they called a 'dairy plan permit' or a permit to process milk. The thing is that under those permits you could only process pasteurized milk; so, here in Wisconsin, like all states, it is legal to drink raw milk. So how do these people who don't have dairy animals on their farm access this milk?

It's like Vernon said, "They don't have a permit for what I'm doing anyway; why do the permits even come into the equation here?"

Rich: Right. That was one of the challenges at the trial because I think the judge was learning as he went. One of his early rulings on a motion in limine before the trial was that we could not utter the words 'raw milk'. So the state's theory of enforcement and theory of its case was, "Look at this guy! It's \$125. Why didn't he just get a license?" And we weren't allowed to respond by saying, "Because there is no license for what he is doing." We couldn't make that argument.

The jury, I think, figured it out as the trial progressed. A witness would say 'raw milk' and the judge would yell, "Objection!" and then the jury had to file out while we duked out the objection. So I think after five or six times they figured it out on their own what was going on.

Kennedy: What I saw, just going back over some of the old stories, was that you couldn't say 'liberty' in the case either. Wasn't that another word that the judge prohibited you from saying?

Rich: Yes, that was another one. I think that early on the state had convinced the judge that it was just a case of licensing, and this was all administrative stuff. I think that as the case progressed he saw otherwise, but those early rulings were really limiting.

Kennedy: My memory is that there may *have been* six, eight, or maybe even ten pre-trial hearings. I think that at one time you wanted to get testimony from an

expert witness on the safety of raw milk, and that got shot down. Another time you wanted to bring in Vernon's religious beliefs, and that was shot down.

Looking at some of the past stories, I didn't realize this, but for the jury selection this was a case that was either three misdemeanors and a felony or four misdemeanors. There were 130 jurors called for the selection.

Talk about the contentiousness leading up to the trial.

Rich: There was a lot of grassroots organization going on because Vernon had very broad-based community support, and other people came in from out of state as well. But I think that it was two local advocates who really coordinated the effort to make people aware of what was going on. And, of course, the local papers were covering it. The Milwaukee papers were covering it. So there were a lot of people in the community who knew what was going on.

Generally speaking, I think that there was national and international attention given to this story. I was interviewed by *The Washington Post*, *The New York Times*, *The London Times*, and it was a big deal. People were really captivated by the idea that this formerly Amish farmer was being criminally prosecuted for providing food to people.

It was certainly arguable that what Vernon was doing did violate these administrative regulations. So we wanted to really build up the potential for jury nullification.

One thing that disturbs me as an attorney is that pretty much nationwide judges will instruct jurors that there is no such thing as jury nullification, that the judge rules on the law, and the jury rules on the facts.

Kennedy: Could you just define jury nullification for the listeners? It's a very important legal concept.

Rich: It is, and it is in the Constitution. Jurors have the right not just to decide the facts, but to decide the law. Throughout our history, this is a tool that the founders put in the Constitution, knowing that there will always be unjust laws. That is just the way it works.

Jury nullification is a tool for addressing unjust laws, and we had an example in Wisconsin where there was a runaway slave, and the people who sheltered that runaway slave were prosecuted because that was against the law at the time. What happened then was the jury acquitted that defendant, which is the way it is supposed to work. Even though he clearly violated the law, the jury determined that that was an unjust law. So they were not going to allow him to be prosecuted.

It has happened throughout our history for Jim Crow laws, for slavery laws, for marijuana laws most recently when people have been prosecuted criminally for marijuana. We still have people sitting in prison for a violation of marijuana laws – selling small amounts of it. Many times jurors have said, “No, we are not going to find this person guilty.”

So [jury nullification] is an important tool, *but* our system has devolved, I think, to a place where judges instruct the jury that they cannot use it.

There are books out there. Glen Reynolds and I were evaluating how we could do this. We’re not allowed to speak those words either. You can’t say ‘jury nullification’. You can’t tell the jury what their rights are under the Constitution.

We were very cautious to not even speak the words to the press or in public. We wanted to remove ourselves from that because as an attorney it would be an ethical violation to say something to a news reporter or at a speech where a prospective juror might get wind of it when you know you can’t say it in court. So Glen and I had to be very careful about that.

What you can do, though, is set up a strawman. What that means is you give the jurors something to hang their hat on.

First of all, the judges told them that they can’t nullify. Second, a lot of jurors are just reluctant to go that far. For us, our strawman and our hook was Aajonus’ document. So what we were pitching to the jury was, “The law permits this activity [producing raw milk for human consumption] if an owner is engaging in it, and Vernon’s community are owners of the farm.” That was a pitch that we were making.

So when the jurors were deliberating, I think it was around five hours or something, during the deliberations they asked for a copy of that lease. When they did that, Glen and I kind of did a virtual high-five with our eyes because we knew that meant that we were probably going to win. They were buying the strawman defense.

Kennedy: We were just talking about the number of prospective jurors that just went before the court before *it* settled on the final [jury]. I think that one of the reasons for that was that one of Vernon's supporters led an effort to distribute thousands of leaflets on jury nullification in Sauk County, Wisconsin where the trial took place, and then in the neighboring counties.

I think your chances of winning in court are usually better--always better--when you win the battle in the court of public opinion. Like you were saying, your interviews with big-media were part of that. I think that jury nullification and passing out the leaflets on it was part of that.

Rich: It was many thousands. I thought I remembered they knocked on every door in Sauk County – this swarm of volunteers. The trial was a community happening with local businesses putting signs of support in their windows and Chipotle offering free dinners every night. Other businesses fed the crowds every night, and there were speakers every night. Glen and I couldn't participate in that, but there were other lawyers present who were giving a blow-by-blow analysis of the day in court. It was amazing.

Kennedy: It's the greatest unity I've ever seen in the local food movement. I mean all movements sometimes get torn apart by different agendas, like the Pogo cartoon, "You have met the enemy, and he is us." It was just the opposite during that time.

I remember there were at least half a dozen different farmers who had suffered some kind of enforcement action around the country who went to Vernon's defense. Joel Salatin came from Virginia. Mark McAfee came from California. Mark Baker came from Michigan. Alvin Schlangen came from Minnesota, and I think Max Kane and Arlin Bender came from Wisconsin. It was a slam dunk in the court of public opinion.

The jurors can say that they don't read the papers, the judge can say that he is not influenced, but don't you think that that kind of activity can have an influence on the judge and jurors, even though they're not supposed to be paying attention?

Rich: I do, and I think that it is really important. I've advised my Food Freedom clients over the years to bring their supporters to court. It definitely influences the judge when he sees every seat in the courtroom filled.

We had one of our Mennonite clients who was being harassed up in Northern Wisconsin have the entire Mennonite community turn out in their black clothes and their hats and the women's bonnets. They were Amish and Mennonite. They had about ten buggies lined up outside the courthouse. There was a newspaper photo with those buggies. It definitely makes the judge think, "Maybe there is more to this to this case than meets the eye."

Kennedy: It was that Friday night. From what I remember, they didn't announce the verdict until around midnight, but there were still a lot of people milling around the courtroom. What was your memory on hearing the *jury's* verdict?

Rich: That was really moving. Vernon and his wife were crying and hugging each other, and there were reporters there. I remember talking to one of the reporters briefly. It was just such a defining moment in the Food Freedom movement. It was wonderful.

Kennedy: What I remember after the trial was pretty unusual, too. Three of the jurors that found Vernon innocent on three of the four charges wound up joining his food buyer's club. He had an auction to raise money for the one count that he was convicted of, *which* the Legal Defense Fund appealed.

From what I remember, we had an auction to raise money for the appeal. One of the principal DATCP officials who was involved in prosecuting his case wound up bidding and actually contributing money through a winning bid on an item.

There were just a lot of unusual aspects to that case. Even though it was a

criminal case, the [trial court case] result would only apply to Vernon; it wouldn't set a precedent for everyone. It seems like in Wisconsin since that time there have been occasional enforcement acts, but it does seem as though the number has gone down since. So, in a way, it did set a precedent.

What is your opinion on that?

Rich: I'm not aware of any raw milk enforcement until recently. I never tried to access their internal memos on the subject, but I am guessing that there was an internal decision that they weren't going to pursue raw milk enforcement after that case. I really haven't seen it.

Kennedy: Right.

Rich: Legally you don't set precedent at the trial court level; DATCP would have had to appeal, and they chose not to – probably for that reason. I don't think that they wanted to risk setting a precedent. So it's only the appellate cases and Supreme Court cases that are precedent.

Kennedy: DATCP obviously wasn't happy with the decision. It sounded like they might have taken out their anger a little bit on you later when you were trying to get your cheese license. You can tell the listeners about that as an aside.

Rich: I built a cheese plant on my property. It's something that my late husband and I always wanted to do. We wanted to raise goats and make cheese. So I invested a large amount of money, and I went well above and beyond the regulations. My doors were \$750 apiece with stainless steel hinges. Everything was top of the line.

I had several people say, "Elizabeth, you don't really think that they are going to give you a license, do you?"

I said, "Of course they will. They are professionals. They are going to do their job."

Then I had the inspector out for what I thought was my final inspection, and what he said was, "Elizabeth, I'm sorry. I tried to keep this off her desk, but I

couldn't. So we've got a list of requirements.”

The big ticket item was a ‘toilet room’ as the regulations referred to it – a bathroom. I’ve observed over the years that that is what DATCP does when they don’t like you.

Certainly a big farmer who is running three shifts on your cheese plant with hundreds of employees, I get it. Of course you need a bathroom. But if it’s just me and my house is right there next to the plant and it’s a teeny, tiny operation that is limited by the size of the business, I couldn’t expand very much. I could in theory have an employee, but typically it’s up to the discretion of the inspector, according to the rules, whether your ‘toilet room’ in your residence can be used for the ‘toilet room’ required by the regulations. Most often, in my observation, a tiny little artisan producer like me would be allowed to do that.

But I wasn’t. It was actually a six-page letter of requirements and recommendations. I pointed out that a lot of them weren’t really required by the law. They said, “No, they’re not, but we recommend this. Your licensing is going to move a lot faster if you follow our recommendations.”

So they hold a pretty big stick. The bathroom was kind of a deal breaker for me because you’re not allowed to comingle residential and commercial waste, so I would have had to put in a separate septic system or holding tank, and it would have cost a lot of money.

Kennedy: So you were looking at \$10,000 to \$20,000 just to be in *compliance*.

Rich: Probably more than that. It would probably be more like \$30,000 to \$35,000. To implement the entire six-page list was going to be about \$55,000.

Kennedy: Which *brings us to* one of the goals of the Legal Defense Fund. They have always tried to create a legal distinction between public and private distribution of food. What you are saying [about the toilet room] is one of the better examples of why we need a [distinct] system like that.

You just get these non-scalable regulations that really serve to make it harder for the small farmers to make a living, which brings me to my next question.

If you could change the laws, what laws would be your main targets to have a more equitable food system or a two-tiered system where people can better access the food of their choice from the source of their choice?

Rich: Certainly the PRIME Act is high on the list. That would open up opportunities for meat processors, which is a big hurdle right now in the food distribution system. I'm not talking about what people say is a manufacturing crisis among the big guys for meat and poultry products back last March, but *rather* what is a very real crisis for the small producers.

I have a lot of farmer clients who have animals that they just can't get processed until late 2021. That is when they are booking now. It's illustrative of the huge problem in the food distribution system. So that would be one *change in the law to make*.

Wisconsin has a \$40 billion dairy industry which has a pretty tight rein on dairy regulation. We are also the only state that requires a license for cheese-making and butter-making.

We also have extremely burdensome record-keeping requirements. So I'm not suggesting that corners be cut in sanitation or anything like that. But I think what we are lacking is a recognition that if you are producing 7,000 pounds of cheese in a year as opposed to 7,000 pounds or more in a day, you are going to have different sanitation issues. There is no recognition of that.

It's the same with slaughtering. If you are a small butcher slaughtering one or two steers in a week versus hundreds of animals in a day, you have a different sanitation issue. If your only tool as a butcher is a knife, and that is your only piece of equipment, you still have to have a three-bay sink to wash, rinse, and sanitize your knife, and that has to be separate from the meat processing area. So you already have a three-bay sink in your meat processing area, but you're not allowed to walk from where you slaughtered the animal to the meat processing area to wash your knife; you have to set up a whole sanitation system for your knife. This doesn't make any sense.

Kennedy: You have actually worked on several slaughterhouse cases for the

Legal Defense Fund. Could you go over a couple of those cases?

I remember there was one custom processor who used to basically do a public service by going to the farm and slaughtering somebody's animal. He had a mobile unit that he could take to the farm. Maybe you could talk about what happened to him.

This comes under the category, 'No good deed goes unpunished,' because it wasn't much of a business proposition for him. You could talk about that.

Rich: That family had four businesses, and they were all very successful. One was a catering business, one was a store, and one was meat processing. Those three businesses were very profitable and successful. They had a fourth business doing custom slaughtering – as you described – where they would go to the farm and slaughter. I don't know exactly what they were charging for that, but I know that I've had it done on my farm. You generally pay about \$30.

For that \$30, they are spending the gas to drive to your farm, they are butchering your animal, and they are usually stringing it up to hang, and they usually quarter it. So it's at least an hour's worth of work, plus getting there. And it's \$30. It's not easy work, either. The animals are heavy.

Nobody who does that is in it for the money. What they are doing, and what this family is doing, was providing a community service.

The son said, "Dad, these inspectors are here every day. They are breathing down our necks. They are citing us for record-keeping violations. It's just too much. We have to drop that. We're not making any money on it. Why should we keep doing it?"

The dad said, "Because this is a needed community service. Where are these people going to go with their animals without us?"

So they wound up shutting down that part of the business just because of the regulations. There was one particular regulator in Wisconsin who is really enthusiastic, and he just seems intent on putting people out of business instead of helping them address what he perceives to be regulatory problems.

I'll tell another little story that illustrates this problem, and I will make it hypothetical.

Hypothetically I had a steer that I wanted to butcher, but I don't know how to do that. I've never butchered a steer before, and they are kind of big and require some knowledge of firearms that I don't have sufficient knowledge of to do. So hypothetically I hire my neighbor to come over and kill the cow for me.

Well, that would be a violation of law if I did that because the only person who can shoot that cow is me.

Then, hypothetically, now I've got a dead cow, and you want to hang it in a cooler. I don't have a big cooler like that, but I have a neighbor who does. So hypothetically we transported the beef to the cooler and hung it up in there. Now I've violated the law because that is not a licensed facility, and the neighbors violated the law because it's not a licensed facility and it's not his steer.

So the beef hangs, and now we are going to process the cow. So another neighbor has a meat grinder and a big stainless steel table in the garage for cutting up venison. So hypothetically I go to that neighbor with my beef carcass, and we cut it up as a community. There are other people, and I am offering my neighbors (my helpers) some beef in exchange for their help to cut it up and wrap it. Well, that is against the law, too, because this facility is not licensed.

In that hypothetical, we've got multiple violations of law when all we are doing is producing meat for me to eat from the steer that I raised myself. So it's an illustration of regulations gone amuck and overregulation of something that doesn't need to be.

We had another Mennonite client. The Mennonites get in trouble a lot because they value community and helping their neighbors, and sometimes that runs afoul of what our state inspectors think is legal.

One of the Mennonite clients got in trouble because a farmer had a downed cow. He knew that the cow wasn't sick. He saw the hole that it stepped in and

broke its leg in. So he knew it wasn't a sick cow, but because of the Mad Cow era there are all kinds of rules about how you handle that. So you are supposed to call a vet for anti-mortem and then post-mortem inspection. He did call the vet. The vet said, "There is nothing wrong with this cow. This cow is not sick. It's bright-eyed. I can see the break. That is why it's down."

But it doesn't matter. You are still supposed to shoot the animal up with a denaturing substance and landfill it.

The vet is supposed to report the downed cow to the state, which he did not. The Mennonite farmer is supposed to waste the cow, which he would not. Now we have two people who have violated the law. Then he did the same thing. He took it to an unlicensed cooler, and that person broke the law. Then he had it processed at a Mennonite-owned facility which is not supposed to process it without the proper notifications from the vet to the state, and he did it anyway. So he broke the law again, and everybody got in trouble.

That doesn't make any sense to me.

Kennedy: I just believe that you know you have a bad law when otherwise law-abiding citizens violate it with regularity. That is what we've had with raw milk. There is an interstate ban on raw milk. There are thousands of people who cross state lines every week in this country to get raw milk. It just seems like with the *growing* demand and the way the slaughterhouses are getting backed up, you're just going to have more and more farmers who come to a point where it's, "Either I break the law or I go out of business."

I don't think that enough has been done to increase access to small livestock farmers in this country. So it looks like it is just going to be a bigger and bigger problem.

There is another slaughterhouse case you had which involved a sting operation which is not uncommon in our area of work. It is usually someone who is not making a whole lot of money, just trying to do the best they can for their community producing quality food, and the government's tax dollars go towards stopping the producers. Maybe you could talk about that case and what happened there.

Rich: Was that the one with the pigs being slaughtered, or are you talking about a different one?

Kennedy: This was somebody responding to an advertisement.

Rich: Right. “The butcher, the baker, the bologna-sausage maker,” or something like that.

That client had a tiny little meat-processing facility that was a converted two-car garage. So it was very small. He put a small ad in the newspaper, and that attracted the attention of the regulators who, by the way, there was at least one full-time and maybe more than one full-time employee of the state regulatory agency who does nothing but troll the internet and comb newspapers and look for people who they might be able to do a sting on. So they might respond to an ad on Craig’s List for raw milk or whatever, so that is what happened to this client.

The inspectors will pretend to be customers and engage the person in conversation and try to elicit as much information as they can about potential violations. Then they will pounce – as they did on this person – and either take their license away or issue a special order requiring them to shut down.

In this case, that is what happened. Then the client responded by saying, “Okay. I didn’t understand that I needed this license if I was just doing custom work. So tell me what I need to do so that I can come into compliance.”

The government’s response was, “It’s not our job to tell you that. You have to figure that out.”

So he was able to come to Legal Defense Fund, and we could counsel him on what the requirements were. But it was disturbing to me that it was this ‘gotcha’ kind of antagonistic relationship instead of a collaborative relationship where they work to bring you into compliance.

Kennedy: The one regulator you were mentioning earlier was part of that case and has been part of all of these slaughterhouse cases that you are working. He seems to like playing legal games of ‘gotcha’. In our view, an effective regulator

does his job, gives the producer every opportunity to succeed, while still protecting the public health. In this individual's case, it was more figuring out ways to trip them up over minor violations of the regulations and make it more and more difficult for them to stay in business.

Speaking of which, I think that the most difficult of these slaughterhouse or meat-processing cases you handled was one where not only did the State Department of Agriculture go after the producer, but the United States Department of Agriculture *did* as well. You were extremely busy with that case from what I remember.

Rich: To me that was a sad one because this was a husband and wife team who produced a beautiful product. They were making sausage which was fermented the traditional way – the way that it was done centuries ago. The wife had scientific training, so she had meticulously researched this, and she had all of the science laid out. They had very safe processes in place, and the sausage that they were making was some of the best I've ever had.

The state *regulator*--our same friend, Paul Pierce--took it on himself to investigate this facility. *According to Pierce*, they couldn't do anything right. Unlike our Mennonite butcher up north, [this sausage processor] pushed back on DATCP, not in a rude way, but if they would say, "That's not allowed," he would ask, "What is the rule so that I can talk to my lawyer about it and read it and understand it?"

Sometimes they would just refuse to answer. Then he would say, "I'm just asking a question here so that I can be educated on what you want me to do."

They were just rude about it.

My client does have a bit of a temper, so he would push back and give them a piece of his mind, and that got them upset. But this husband and wife who were making sausage were so intent on compliance and following the rules and doing what was expected, but they just couldn't do anything right. [DATCP] found four flies in the changing room, and they were cited for that. It just went on and on.

Ultimately, they [DATCP] shut them down. That is when they came to us, and it was too late because they were operating on such a shoestring budget that they really only had 60 days of cushion. [DATCP] recalled their product for no reason. [DATCP and USDA] accused them of violating the CIS (Cooperative Interstate Shipment) program, which is designed to help small producers. It is designed to say that you can process your meat and have it inspected by the state and ship it across state lines instead of having to follow the usual Federal inspection rules. That is exactly the kind of law that we have been talking about where you recognize differences and scale back regulations for small producers.

You read the verbiage on the USDA's website, and that is what it says, "We are all about helping out the small producers and finding ways to make it easier."

To me that is just not the way it's being played out at all. There are very few states participating [in the CIS program], and in this client's case, they [DATCP and USDA] said that he had violated the rules.

He went through all of the hoops. There were eleven steps, and he followed all eleven steps. He got his labels inspected, and everything was done the way that it was supposed to be done. Then he started shipping. DATCP said, "You did that without getting final approval from us."

He had brought them into the loop, and they had been back twice for inspections, but they never issued a final, "Okay, we're satisfied."

They did tell him in the inspections, "Correct this and this," which he did. So he thought he was done, and I think that is legitimate. There is nothing in the law that says that you have to get the state to sign off. There is nothing that says that. So he was then accused of criminal activity. [DATCP and USDA] were going to prosecute him criminally for shipping meat across state lines without benefit of Federal inspection. Well, that is the whole purpose of the CIS program – to ship meat across state lines without the benefit of Federal inspection. So that was totally disingenuous.

They ultimately offered a settlement agreement, and I said, "No. Sit down with me and show me what rule they violated. Show me," and they couldn't. Ultimately that just went away. They never did acknowledge that I was right

because they don't do that. But they never pursued it.

In terms of the business, the business was shut down within two months because they just couldn't continue. They had to recall all of their product that was shipped, and they had five men in black from the Federal government at their door, wanting to take all of their records – which I did not allow. So the six of us wound up going to a local copy shop. They stood with arms folded as we copied thousands of pages of records because I wasn't going to turn over the originals.

It's such overkill for a tiny little operation that was producing a beautiful product.

Kennedy: You know that all this CIS program does is let a state-inspected facility ship across state lines. In Wisconsin the state regulations are more stringent than the Federal ones. You have to be at least as strict as the Federal, but I think that Wisconsin has gone even beyond that. So these were more stringent regulations than what the Feds had.

Rich: They were, yes.

Kennedy: Another thing that came out of it was these HACCP plans, which are basically food safety plans. The trouble with them is the regulator will tell you something is wrong with your HACCP plan, and you say, "What do I need to do to fix it?"

Like you said, they just say, "You figure it out."

You can have a HACCP plan that is perfectly okay with one inspector, and then the next inspector comes in, and all of a sudden there is a problem with it.

Rich: That is a huge problem. You and I have had the HACCP plan discussion. I see a value in them for a producer who is really conscientious and wants to produce a food product in a very safe manner that is over and above the law. That is what I was trying to do in my cheese plant.

As you have pointed out, and as has happened in this case, they had a beautiful

HACCP plan. It was three or four inches thick in a binder, meticulously documented and supported. As you've pointed out, in the past in our discussions on this, it was used against them.

That's what happens. You've got this meticulously laid out scheme of how you are going to do everything, and then they come in and say, "Well, this thermometer hasn't been calibrated in three days, so that means that you can't prove that your food is safe by your own plan."

Kennedy: That *leads* to another thing. I know that your biggest complaint is on the lack of due process that these farmers are afforded in so many of these hearings. Sometimes the government *takes producers* through *multiple* administrative procedures. You have to go through the *required* administrative *proceedings* to be able to get your day in a judicial court. It almost seems like it's designed to just run the meter up so high for the defendant who is going through all of these proceedings that they are going to quit somewhere along the line before they actually do get their day in court. That is one of the big advantages for the Legal Defense Fund. Most farmers that the Legal Defense Fund represents, it doesn't cost them a penny above their membership fee.

You could talk about the lack of due process,

Rich: Right. All of the food laws at the Federal level and at the state level involve a ton of discretion for the individual inspectors. So I find that problematic. The way the rules are implemented, it winds up being very different.

There was a Colorado inspector, at least I believe it was Colorado, who was just known for being completely unreasonable and forcing small producers to construct an entire office for him to come to when he was reviewing records. It was just overreach at every turn.

The process is very difficult to rein those people in. Of course, it takes more resources than the typical farmer has to fight back on any of this because it's a long, drawn out process, and it involves several layers of administrative appeals before you ever see an impartial judge to rule on the case. That's just money that most farmers don't have.

So the Legal Defense Fund helps.

Kennedy: Yes, you are getting home cooking for the agency all the way up until you get to judicial court.

Rich: And I think it [FTCLDF] is somewhat influential on regulators. When they get to know us, like right here in Wisconsin, I've had clients who have told me that they see a whole different attitude when the regulators realize that the Legal Defense Fund is involved because they know they're not going to be able to run over people as easily as they otherwise can.

Kennedy: I think that what a lot of our work boils down to not what the law says, but how you interpret the law. So I think that with the respect and regard you've built up over the years, someone like you is more likely to get a favorable interpretation than a food producer who is dealing with an agency for the first time.

Rich: The discussion that you and I have had before is: When they do have such broad discretion to interpret their own regulations, why not use that discretion – especially now in the midst of a crisis – to help the small farmer instead of hurt them? It's puzzling to me.

One example *is* from that poultry case that you and I worked on a few years ago; the poultry people were four farmers, each producing 1,000 chickens – which is the limit in Wisconsin. They had a mobile processing unit that they each contributed to to construct, and then the unit would go from one farm to the other to do the required on-farm processing of the chickens.

Then they set up a co-op, and they were selling the chickens through the co-op, which is not expressly against the law, *but DATCP contested the arrangement*. The law says something about 'on-farm sales', but what we pointed out to the state was, "Look, you [DATCP] have a rule in terms of on-farm production of poultry, and you have a memorandum that says that you are going to allow sales from a farmers market. *You say*, "We are going to say that that complies with this rule about on-farm sales."

The client said *to DATCP*, "If you can do that, first of all, congratulations to

you for making the liberal interpretation of your rule that favors small farmers, but then why can't you allow our chickens to be sold through the co-op?"

Ultimately we were able to resolve that case, but it is an example of, once again, a lack of due process and inconsistent interpretations of rules and using the strict interpretation against a farmer instead of saying, "Let's make a liberal interpretation and collaborate with each other."

Kennedy: Well, you do have an interim commissioner [of Agriculture in Wisconsin] who has done some things to at least attempt to increase access to slaughterhouses. That is some grounds for optimism. You can always be hopeful that it will be different now.

So in wrapping up, one main purpose of this podcast is to give people an idea of the work that the Legal Defense Fund does through your experience. Hopefully they would be interested in possibly joining as a farmer consumer member or donating to the organization.

Another good thing that can come out of this is we might get an attorney or two interested in the organization.

What is your elevator speech to attorneys as far as working for Farm-to-Consumer Legal Defense Fund?

Rich: First of all, it is very rewarding work. The clients are very grateful for everything that we do for them. It's also very important work, as we've discussed, because I don't think that there is anything more important than protecting independent food supply – as we've seen with empty shelves and food shortages. We've seen what the Legal Defense Fund has been saying for more than a decade about our broken food distribution system, and has now been experienced by people across the country.

It's interesting work, it's rewarding work, and it is important work. I came into working with the Legal Defense Fund with just a little bit of prior knowledge from my FDA work with a large law firm, but I've learned a lot over the years. I think it is also an area of law that is becoming increasingly important and increasingly in demand. Our volunteer lawyers gain some important and useful

legal knowledge that you can't find anywhere else.

Kennedy: Right. I have the same question: What would your elevator pitch be to consumers? There are very few enforcement actions that are actually taken against consumers; it is usually farmers that they are going after. So how would you go about convincing a consumer to join FTCLDF?

Rich: As a consumer, if you are satisfied with the food supply that is provided by national grocery chains, then maybe this work isn't that important to you. But if you are not able to access food products that you want, if you don't have local connections because there are no local farmers because they can't stay in business, then I think that this is an important cause to support.

I am hoping that as a nation we are now recognizing the importance of local food and support for local farmers. There is really no other way to access good, clean food that is not coming from overseas or that is not produced in a conventional way that involves a lot of chemicals and problematic substances.

I think it is critically important for consumers who care about their food to support the organization.

Kennedy: I sent you an email the other day with a story about all of the nanoparticles they are finding in food in Europe. Their regulatory system over there is more protective of the consumer than this country, especially when it comes to something like genetically-modified organisms. So who knows how much nanoparticles there are in our food supply? It's something else to think about when you are leaning towards buying at the farm and trying to get out of the conventional food system.

Rich: Right.

Kennedy: These days one of your hats is President of the Food Freedom Foundation, which is a 501(c)3 nonprofit that supports the work of Farm-to-Consumer Legal Defense Fund and other like-minded organizations. The difference between donating to Farm-to-Consumer and donating to Food Freedom Foundation is that donations to the Farm-to-Consumer Legal Defense Fund are not tax-deductible, but they are to the Food Freedom Foundation.

Could you talk a little bit about the work that you do for your 501(c)3 foundation?

Rich: Sure. We are working in general to support food freedom and what that means, but we don't do the legal work. Groups like Farm-to-Consumer Legal Defense Fund actually do the legal work, and they do the lobbying. That is why Farm-to-Consumer Legal Defense Fund is a 501(c)4 and not a 501(c)3. That *lobbying* work is critically important, but as a 501(c)3 we can't support that.

We do support public interest litigation, and we also have a compassionate relief fund. The purpose of the compassionate relief fund is to provide monetary support for farmers who are being shut down. They have their sole form of income and livelihood shut down by the government, and that is, of course, a huge hardship for people who are trying to get the mortgage paid. So those folks can make an application to the Foundation for compassionate relief, and we can give them a leg up during times of financial stress that are brought on by government overreach.

We also support public interest litigation which means that it's not just for the monetary interest of the farmer but it's for a greater public good as well. So we have supported a lot of the litigation efforts of the Farm-to-Consumer Legal Defense Fund in cases. They make a grant application, and we evaluate the application and see whether we think the case has a broader influence and potential to help a lot of the community that we are supporting, which is small, sustainable farmers and artisan food producers.

Kennedy: Just so people know, this podcast is focused mostly on the litigation efforts of the Legal Defense Fund. But the Legal Defense Fund, in addition to working on litigation, also works on lobbying both the state and federal legislators, like you said, and it works on rule-making *through* state and federal regulatory agencies, and also works in media and the court of public opinion.

Could you give people the contact information for your foundation if they want to get in touch with you?

Rich: Yes. We are in the process of rebranding and redoing our website. You may not be able to get in, but we will set it up so that you are redirected.

Right now it's www.FTCLDFF.org. There is a 'donate' button there. There is also a street address to which donations by check could be mailed, and that is 435 East Mill Street, Suite 3, Plymouth, Wisconsin 53073.

Kennedy: Elizabeth, thank you for being on the podcast. I wish you continued success with your efforts.

Rich: Thank you very much, Pete.

Kennedy: Take care.

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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