



# Animal Law Podcast: Transcript for Episode 88, Interview with Wayne Hsiung & Jon Frohnmayer

**Mariann Sullivan:** Welcome to the Animal Law Podcast, Wayne and Jon.

**Jon Frohnmayer:** Thanks so much for having us!

**Wayne Hsiung:** Glad to be on the show, Mariann.

**Mariann:** I am really delighted to have you, Jon, and to have you back, Wayne. And I think most of our listeners are at least somewhat familiar, probably a lot of them are very familiar, with what happened in this case.

And I'm really eager to get to the legal issues. But can you just start out by briefly telling the story? What happened here?

**Wayne:** Yeah. So January 2007, Smithfield made a commitment to end the use of gestation crates within 10 years. January 2017, the deadline was hit and we decided to check out what the facilities were actually looking like, because we had heard both from whistleblowers inside the company and from satellite imagery that we had been reviewing, we suspected that there was not much change.

And so we went to their single largest farm in Southern Utah, called Circle Four Farms, took a look inside and guess we found? Row after row after row of gestation crates. In fact, I think in the many, many occasions we visited Smithfield farms from January 2017 all the way through March of 2018, I don't think we ever saw a single mother pig inside a group housing facility, despite the fact that they publicly stated that they had fulfilled their commitment. But the reason we're being charged, at least in theory, is because in the process of the investigation, we saw two little baby piglets, both of whom were on the brink of starvation. One of them had a foot the size of a golf ball, a little claw that was swollen up three times its normal size because of an infection and a wound, and we took her to the vet. And for that reason, we're being charged

with two counts of burglary, one count of theft for two piglets removed and face up to 11 years in prison.

**Jon:** Originally, five of us were charged, myself included, and in October of 2018, three of us took a plea deal. That was just a plea in abeyance to two misdemeanors, I think. And it included the stipulation, originally for all three of us, that we would have to scrub our social media of any criticism of Smithfield and that we could further criticize Smithfield. And my lawyer, I think wisely, pushed back on that term and it was changed to I couldn't "harass" Smithfield.

**Wayne:** Only for you though, Jon, the other two were bound to not criticize Smithfield.

**Jon:** Exactly. So I think that tells you a little bit about what the underlying motivations for the prosecution are.

**Wayne:** Yeah, I guess I should also add, I mean, if we're talking about the motivations of the prosecution, the CO of Costco, the highest levels of the American food system, were involved in reporting this crime to the FBI.

Because the only reason they found out about the removal of the piglets is because we openly published what we did. We created a virtual reality documentary, it's about 14-13 minutes, I think it is, gave it to the *New York Times*, posted it on YouTube, and showed us both documenting the conditions and removing the piglets. And when we went to Costco when that was published, because Costco's a big buyer from Smithfield, and said, "Hey, you've been promising mother pigs the five freedoms, including the freedom to engage in natural behavior. A mother pig trapped in a two foot by seven foot crate, when the company's been claiming that they're not trapped in these crates, is both fraudulent and is inconsistent with the five freedoms." Instead of trying to do something about it, the Costco CO reported what we had done to the FBI.

**Mariann:** Now, Jon, I know you are an attorney, but your role here, you're not representing either of the defendants. Is that right?

**Jon:** Correct. Yes. I'm not attorney of record for either Wayne or Paul. I am on DXE's legal team, have been since March of 2017. And so I've been doing what I can just to help the attorneys who are attorneys of record.

**Wayne:** Jon is deeply, deeply involved. He's like the brains behind the operation. \*laughs\* At least a lot of our most creative strategies are Jon's ideas.

**Jon:** I have definitely been trying to help these two win because they should win.

**Mariann:** And the other defendant against whom charges are pending is Paul Picklesimer, is that right?

**Wayne:** Yeah. Great guy!

**Mariann:** That video you were talking about, that's what's called the Death Star video in these papers, right? And that was the one that was put online and also caught the attention, as you said, of the *New York Times*.

**Wayne:** Yeah. We called it Operation Death Star. Partly because the production company we were working with liked that name and partly because I thought the metaphor was just a good one. When you think about a factory farm, you know, most people think, "Okay, maybe it's cruel to animals, but we have to do this and we need a cheap system of food production," and we don't realize it's not just bad for the animals. It really is incredibly destructive to the local community and the entire planet.

I mean, we know greenhouse gas emissions have been...a number of studies recently showing that greenhouse gas emissions, in particular methane, from places like Circle Four are increasingly catastrophic for human civilization.

And the people who are immediately in the vicinity of factory farms see it first and foremost, because they're the ones who are dealing with the smell, the disease, even the feces that are sometimes sprayed onto their school playgrounds and their neighborhood churches. Because when you have 1.2 million pigs in a county of 5,000 people, there's a lot of poop that gets on a lot of people's stuff.

**Mariann:** So I know that some charges were dismissed earlier in this case. I wasn't clear whether you wanted to address those charges or just move on and talk about the charges that remain.

**Jon:** Yeah. I don't know if Wayne has an opinion on this. I mean, I think the fact that the charges were dismissed and the reason they were dismissed is very, very interesting and very relevant.

Correct me if I'm wrong, but the two additional charges were basically rioting and racketeering and I don't know if...was it both of them that depended on the quote/unquote victim being a lawful operation. And our attorneys pushed back

on that and they said, "No, this is a criminal enterprise. It's committing systematic animal cruelty. And so those two charges shouldn't apply."

And I think we asked for discovery to that effect. And instead of providing it and substantiating the prosecution's claim that Smithfield is a lawful operation, they just decided to take those two charges out and stick with the burglary and theft.

**Wayne:** I think it was just the rioting charge that had the lawful enterprise provision. It was disruption of a lawful enterprise. The other charge that related to lawful enterprise was the animal cruelty enhancement.

Originally we were charged with felony burglary and misdemeanor theft, and there was an animal cruelty enhancement that made them more serious felonies, but it required proof that we had given a burglary or theft against a lawful animal enterprise. So the rioting charge required disruption of a lawful enterprise and then the animal cruelty enhancements, I think required crime against a lawful enterprise.

The racketeering charge was the most serious charge, though. And it was, as anyone who knows racketeering charges will say, it was very, very convoluted and involved massive constellation of evidence and much of which I think the prosecution realized they just couldn't prove.

So one of the things they had to prove was that we were doing this for some sort of economic gain. And they would see my bank account \*laughs\* and I think probably the FBI realized, when they saw how I was living. I was sleeping on a couch, I think, at the time when they charged me. They realized this guy probably hasn't made much money out of this. \*laughs\*

**Mariann:** Well, doesn't seem like a profitable enterprise. So the prosecution voluntarily dropped those charges after the beginning of motion practice basically is what you're saying. They saw the writing on the wall.

**Wayne:** I think they saw that they would have a hard time fighting our discovery requests because we sought discovery about any evidence they had relating to whether Smithfield was a lawful enterprise. Because in Utah, there is an animal cruelty law. There's also an animal cruelty exemption for livestock animals, but it only applies to livestock raised pursuant to customary animal husbandry standards. I know Mariann, and probably a lot of your audience, is familiar with these animal cruelty exemptions for livestock. And because Smithfield had themselves conceded that gestation crates are no longer a

customary practice. In fact, they said they were gone, we're making the argument that this is not a customary animal husbandry practice. So we need all the evidence you have, all the inspections you've taken of any animal cruelty, any violations of law that Smithfield has committed. And instead of providing us discovery, they decided, "let's just drop the charges." But it was because we filed motions requesting discovery, and then motions to compel. Instead of actually providing us the documents they wanted, they just dropped the charges.

Again, which tells you what this case is about. It's really about gagging evidence of animal cruelty, not about prosecuting supposed property theft. It's about preventing the public from seeing what Smithfield is doing.

**Mariann:** I think we all know that, right? I do. \*laughs\* Unfortunately, I think almost everybody listening to this podcast is sadly aware of that. And the people who aren't probably aren't listening. But that doesn't mean it's not an important audience!

And this also doesn't mean that just because charges were dropped that you're still not facing some serious charges. So let's focus on those because that's the problem at hand.

And I understand there are still two charges pending. And can you tell us what they are and what they require?

**Wayne:** It's three charges, two counts of felony burglary, and one count of theft. The burglary accounts all require entering a building without the consent of the owner and/or remaining on the premises of a building without the consent of the owner, with the intent to commit a theft. And the theft charge requires the removal of property with the purpose to deprive a property owner permanently of that property without their consent. And under Utah law, the definition of property also requires that the property be a thing of value.

So, you know, one of the live arguments in this case, and we're actually about to file our proposed jury instructions and have an argument about this, is whether the jury should be required to be given an instruction that the thing that was removed, or in this case the living being that was removed, must be something of value. Which, under Utah law, if we get that instruction, means that the piglets must have had some fair market value. It can't be some symbolic value. It can't be sentimental value. It has to be some sort of value in a commercial and fair market sense.

**Mariann:** So that means that if somebody stole something from me that didn't have any market value in Utah, it wouldn't be a crime?

**Jon:** Yeah. I mean, it couldn't be a theft.

**Wayne:** It couldn't be a theft. Yeah.

**Mariann:** Okay.

**Wayne:** Could still be a trespass. You know, they could bring a civil claim of some sort, maybe for conversion, but it wouldn't be a criminal theft. There is case law in other jurisdictions, it's not only Utah, suggesting a de minimus fair market value is enough. But in our case even de minimus (which means just minimal, like maybe a penny, a 10th of the penny) doesn't exist because it's pretty clear these animals were not only not worth anything, but they were actually a liability for the farm.

And we just filed an expert report from a veterinarian documenting the many maladies these animals are facing, how dangerous that was not just for these two piglets, for all their litter mates, for the mother pig, and for all the other pigs at the farm. Because when you have a pig suffering from a digestive disease or respiratory disease, I mean all of us know this, hopefully the entire world is educated, that these infectious diseases are quite dangerous. Not just the person who's suffering the disease, but everyone around them too.

**Mariann:** Alright, so let's talk about this motion in limine, which for people who are listening who aren't lawyers is just a motion to decide what evidence is going to be admissible at trial. And, that's how a lot of this current litigation started.

And this section they filed it pursuant to was Utah rule of evidence, section 403. I mean, you can tell us what that is, and then maybe what they were arguing was the problem with the evidence that they thought that you would want to bring at trial. Which I assume they were assuming would include your Death Star video.

And perhaps they were aware pursuant to discovery, I don't know how discovery operates in a criminal case in Utah, perhaps they were aware of other evidence you were planning on bringing in. Or maybe they just imagined that you were going to want to bring in evidence of what things looked like and so they brought this motion.

Can you tell us what they were arguing?



**Jon:** So, well, interestingly, they actually filed two different motions. One was in May of 2020, and the other was, I think in July or August of 2020. The first, just dealt with animal conditions, period. And the second specifically addressed the Death Star video, but the arguments were basically the same and you're you're right.

They used Utah rule of evidence 403 and that's a pretty standard rule of evidence. I think there's a federal version of it also. And it basically just says that evidence, even relevant evidence, can be excluded if it's prejudicial or if it confuses the jury, or I guess if it confuses the issues. Or, there's one other... Wayne, what's the...do you know what the third...?

**Mariann:** I happen to have it in front of me, so I'm just going to read it.

“If it's probative value is substantially outweighed by a danger or one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”

I know they weren't arguing all of those, but we get the idea.

**Wayne:** Yeah, it was really just the first factor that was at play in this argument. Unfair prejudice.

**Jon:** Right. And then, you know, Janise Macanas, the prosecutor, would throw in like, “oh, this is also confusing the jury.” But like a lot of her arguments, she just didn't actually elaborate, she would just sort of use a particular buzzword. But I mean, what they were arguing is that the evidence of the conditions is not relevant because the prosecution was assuming that we were going to try and bring it in to use a necessity defense, or as they called it an animal rescue defense.

But their original argument was that Utah doesn't recognize a necessity defense for animals, which I think is false. It does. But they were saying that it didn't. And there's no other reason why this evidence would be relevant. And so that's number one, number two, they were arguing that it's it's prejudicial.

And again, this is another area where Janise just sort of mentioned that it was prejudicial, but didn't really explain why. And I think she just didn't want to actually say that this is just horrible, horrible stuff that would shock people. And so interestingly, in the Death Star motion, she pointed to things that Wayne said, as an example of what's prejudicial. Like Wayne's comment about “we're entering into the heart of evil,” for example, and your describing what you were

seeing when we were standing in front of the dumpster. Though, that's what she was saying was prejudicial, which I think is a little bit disingenuous.

And so, because of that, she was saying, "There's no necessity defense so all they're trying to do is introduce this for jury nullification." That was kind of the prosecution's favorite phrase throughout the briefing. "And so it should be excluded."

**Wayne:** Can I just add two things about that?

I respect your position on necessity defense, and I know it's to our advantage to say that necessity defense exists in Utah and for animals. I think from a strictly positivistic, formalistic case law perspective, I see the prosecution's argument on this. Because in Utah there're only statutory defenses, or at least there's a good argument there's only statutory affirmative defenses to criminal charges. And because there's not a kind of a formalized statutory necessity defense that includes animals, or even a necessity defense at all, just some dicta in a Supreme Court case in Utah. I understand the prosecution's argument on that.

The weird thing is we never actually brought the necessity defense. We never noticed it. We never said we're raising the necessity defense. We had talked about this in public in many other cases, including Matt Johnson's case. My prior case in North Carolina, in which I was convicted on two felonies. But we never actually raised the defense in this case, yet the prosecution kind of brought up on their own behest and said, "because there's no necessity defense in Utah, they're not entitled to any of this evidence or any discovery."

And that was the other part of the motion. It wasn't just that they were trying to gag us from presenting this evidence in court. They were trying to prevent us from getting access to documents that otherwise we should have a right to. We should have a right to the prosecution's file, any evidence they accumulated of misconduct.

They submitted a report to us, for example, that Smithfield had done that suggested there's some animal welfare issues. We never found out the basis for that report, any documents or evidence the veterinarian who did that inspection at Smithfield had done. And the fact that Smithfield's own inspection found some animal welfare issues is concerning because their own veterinarian, who they're paying, should be probably an unbiased source on whether there's animal welfare issues at Circle Four Farms.



But the other point I want to make is that, with respect to prejudices versus probative value, rule 403, both at the state and federal level, is almost always invoked on behalf of a defendant. In fact, when we scoured the Utah case law, we had multiple lawyers, law students, looking for every single case that cited rule 403. We could not find, I think, a single case where rule 403 was cited to exclude evidence that a defendant wanted to bring, much less the most probative evidence in a case. Right? And the most probative evidence in a case...

**Jon:** Well, for prejudice. I think for prejudice under 403, there was a case where the prosecution was trying to exclude evidence because it was confusing the jury by creating a trial within a trial.

**Wayne:** And they won? In Utah?

**Jon:** They did. Yes, that was...

**Wayne:** Okay. I could be wrong.

But what is clear is that the vast majority of the cases where you use rule 403, it's because there's video footage of a murder or like a victim's body is desecrated and the juror is gonna seek someone to punish, basically. And it's not necessarily probative because the fact that someone was murdered doesn't show that the defendant actually murdered them.

But virtually all the cases are cases where defendants seeking to use 403 to exclude evidence, not the prosecution, and they usually lose. So there's a case that we cited where there's a murder victim who was horribly assaulted, their body was desecrated. Again, the victim's body is not necessarily probative of who actually did this.

But even in a case like that, where there's a horrible moral victim who was mutilated in much more disturbing footage and photos than we would've been able to present in court for Circle Four, the defendant was not able to exclude that evidence. Yet, notwithstanding that, the prosecution argued, without a lot of empirical support or legal support, that our footage of mother pigs in gestation crates, pigs with sores, pigs collapsed on the ground. piglets in dumpsters, was so horrific that a juror just could not make a decision based on the evidence and the facts if they're exposed to this cruelty footage.

**Jon:** Really quick. Yeah, as Wayne was suggesting, every single case that the prosecution cited was either a case where a defendant...regarding unfair

prejudice, was either a civil case or a case where a defendant was trying to exclude evidence. They did not sight a single one for the prosecution.

**Mariann:** I think that makes a lot of sense. It has got to usually be the prejudice is going to be to the defendant. Especially when you've got a video tape of people committing the crime.

I just want to take a step back, Wayne, because I think that the necessity defense is pretty damn good. I hate to see you abandoning it.

I mean, there is that last...I don't know whether I have the language, but it's right that there is this statute which lays out the defenses of justification. But then there's this sort of weird catchall at the end of it that you can bring a justification defense when the actor's conduct is justified under any other reason under the laws of this state. Which is like, well, what the hell does that mean?I don't imagine anybody knows what it means.

And then there is that one case, which I agree, the Sanders case I think it is... And I hope I'm not losing our audience now I'm getting into details. Hang in there, everybody...that I agree, it's not a slam dunk. Most states have some sort of necessity defense. Or as it's often called a lesser of two evils defense. And in a lot of states it's statutory, in many states it's common law.

And even if there isn't any law at the moment, this could be the case that would create that law! And the fact that they insisted on calling it an animal rescue defense, which is nonsensical. I mean, in this particular instance, it is an animal rescue defense, that happened to be the necessity here, but the defense is a well known defense in law, and I think it applies so perfectly.

So I hate to see you just saying it's a dead loser and it seems to still be alive!

**Wayne:** Yeah, no. I didn't mean to say that I think it's a loser and that we weren't planning to bring it. I think we were planning to bring it. I just thought for the judge to rule on this before we had even noticed the defense or offered any argument on behalf of the defense was an improper procedure.

**Mariann:** No, absolutely.

**Wayne:** And understand why from...part of this has to do just kind of what your theory of lies. I'm gonna back up even further and say, I said from a positivistic perspective, I understand why someone would say this is a law of the state of Utah, because there is this case State vs Sanders that analyzes the

necessity defense and basically says “we have no necessity defense and even if we had it, it only applies to situations where it's clearly an absurd result.” And I don't think this is the situation where the absurd results doctrine would apply. The absurd results doctrine is just a situation where a law is clearly applied to a context where the legislator would not have intended for it to be applied. And I don't think this is clearly one of those situations.

I'm not a positivist. I think law is a question of a broader understanding of morality, of political culture, and I think law evolves over time. I believe in a living Constitution, as probably most of the people on this podcast and most of the listeners this podcast believe.

So, I think that even if there's not a statute, a piece of paper, that says there's a necessity defense that can be applied to animals, we are right, legally, to say that it exists. And we have to fight for it even if some people don't agree.

Because law...there's this old adage from Clausewitz about war. That war is just politics by other means, I've always thought that law is just politics by other means. And I think part of what allows for social change is understanding that what law is is a social process. It's a political process that includes us making arguments for necessity. And I think that's what we're trying to do in these cases.

And I think if we win, it does set an important legal, but also an important political precedent for activists and people beyond activism who just think that animals, like we think, are not things. They're living beings who should be protected.

**Mariann:** I wouldn't say I'm either a positivist or not, but I would say that you're absolutely right that these cases have an enormous political importance and that is their fundamental importance, but let's try to win it too. We got a little law on our side, let's use it! Because winning it would be even better. And I'm not sure that I agree that this is not an absurd result that this rampant, rampant, vicious animal cruelty is allowed to exist.

So, all right. We've gotten so far out of my format of the timeline here, that I'm not sure exactly how to go back. Because the necessity defense, as you mentioned, the court kind of dismissed it before you brought it, but then sort of maybe gave you permission to re-brief it. And you did, at a later point, and we will get to that, I promise everybody. So we will go more into the necessity defense, which I think is just a beautiful defense, but it's not your only defense.

You're also arguing that there's insufficient evidence. And this has to do with that question of value, which you talked about as an element of these offenses. And your argument is that bringing in all this evidence of what was happening at the quote/unquote farm, as it's called, is very relevant to the fact that you want to be able to show they can't prove this element of the crime. And it's ultimately an element of all these crimes, both the theft and the burglaries, because the burglary requires the theft. That these animals had some value.

So can you tell us a little bit more about how the evidence of the conditions...I mean, they are allowing you to bring in pictures of these particular piglets, who you rescued. And I think they're allowing you to bring in the testimony of a person who received them at a sanctuary shortly after they were evacuated from Smithfield.

But in addition, you want to show what was happening at large and why is that relevant to the fact that, as you're saying, these pigs not only had no value, they were probably worth less than nothing because in order to save them, you would have to spend a lot of money.

**Wayne:** You know, I think Sherstin Rosenberg, our expert veterinarian, put it best in her affidavit when we filed her motion challenging the judge's ruling on this. But imagine you're trying to estimate the value of even a chair from a factory. You have to know something about the factory to understand the value of the chair, right? If the factory is a piece of junk factory, everything's falling apart, the workers are kicking the chairs around, the chair is all broken. Even if this particular chair looks like it's of reasonable quality. There's probably some things underneath the covers, you know, the screws aren't quite working properly, the wood quality isn't quite good.

And I'm using this metaphor, not because I think a chair is a pig because a pig obviously has much more valuable than a chair, has intrinsic value that a chair doesn't. But in many ways it's even more important to understand the broader context in which an animal's been living. Because unlike a chair, a pig can face all sorts of unseen infections and diseases that are not visible just from physical inspection immediately.

And if you don't know how the mother was, what the other piglets are suffering, what diseases were unfolding in the farm, what the mortality rate in the farm is, you really can't get a sense of how valuable a pig is. And so we made the argument that it's impossible for us to really prove the value of the pig without looking at the broader context of the farm in which this pig was raised.

The judge, honestly, didn't seem to really engage with these arguments very thoroughly, both in oral argument and in his written opinion. His written opinion is just, you know, it's like a two paragraph order that was essentially what the prosecution requested and even included an additional provision that wasn't requested by the prosecution, that we couldn't present evidence of animal cruelty or the conditions of the animals. We also couldn't present evidence about our motive, which is strange and bizarre and, as far as I can tell, unprecedented.

I think the reason is because the argument is so straightforward. And the judge, even before we got into argument at our first hearing on this issue, he made very clear to us that he was not going to allow this case to be, in his words, "a referendum on the swine industry."

And that's not really his job. His job is not to be defense lawyer for the swine industry and prevent evidence from being presented in his courtroom that is negative towards the swine industry, but he made clear to us from day one that he didn't want any evidence that was critical or negative towards the swine industry to be part of this case.

**Jon:** And, by the way, maybe a little bit of context that might be helpful is, as I said, they filed those two motions in limine in 2020, we had the oral argument in February of 2022, so about six months ago. And in the oral argument, the judge said, "I'm granting the motions." And so the Death Star video will not be shown, but as you said, Mariann, still images can be shown.

And he specifically said the defense should be able to present evidence about the value of just these two particular pigs. And then so after that, that's when we submitted our motion for reconsideration arguing that "no, we should be able to bring in additional evidence about the general conditions that might still be probative about the value of these two piglets."

And again, as Wayne said, he didn't engage with that at all. He just rejected it. And then in the written order said that with respect to the first motion in limine, that we couldn't talk about any animal conditions. And we objected to that. That language came from the prosecution and then we objected to it and said, "no, there has to be carve out for these two particular piglets." Judge ignored it, signing the order.

So it was confusing because that was just very inconsistent with the oral ruling. And we still don't know exactly what's gonna happen at trial, but as you said, Mariann, very recently the judge indicated that he's going to let Faith Davis testify because she's the one who received the piglets and that her testimony

about the condition of just the two piglets is going to be permitted. So that's a positive indication that we can still talk about the two individual piglets.

**Mariann:** At least that, I mean, that would have to be. What you were talking about before, Wayne, that it's completely unprecedented where the evidence is eliminated that is showing exactly how the crime was committed and the violence, that it's being eliminated on behalf of the prosecution rather than behalf of the defense. But their argument, which I think is an ironic argument, is that all you were seeking here is jury nullification.

Basically their argument is the jury's going to be so horrified by what Smithfield is doing that they'll just throw the law aside and acquit you. It's a foul argument, but is there something to it? I mean, could that happen?

**Wayne:** Jury nullification is a right that every jury has in the United States of America.

It's not wrong or illegal to nullify. On the other hand, lawyers are not allowed to argue for it. And judges, rightly or wrongly, can instruct lawyers that ask for nullification. My view of the legal system is a little more nuanced. I think that there's almost always a way for a jury to look at the elements of a civil or criminal case and get to the outcome they want.

This is actually something Dick Posner told me a long time ago. He was my law professor when I was in law school. He's a very famous federal judge. And he said this, I mean, he's a strange judge because he admits things that most judges don't admit. And what he said to me was, "What happens in court cases, honestly, is that jurors and judges decide what they think the right moral outcome is and then they use the law to get there." And I think there's a lot of truth to that.

So for example, in our case, if a juror decides the right moral outcome is people shouldn't go to prison for trying to take these two sick baby pigs to the vet, maybe the legal rationale for doing so is that the piglets didn't have value. And they don't need to nullify because they can just look at the elements themselves and say, "you know, one of these elements just hasn't been proven beyond a reasonable doubt," but the outcome's the same either way. So I'm going to be representing myself, I cannot argue for nullification in this particular case.

I do think nullification is a useful doctrine for us to have in our legal system. And I certainly wouldn't fault a juror for nullifying, and no one should, because it is a right that every juror has. But I think there are very compelling arguments



in this case to acquit the two defendants that don't require nullification. And we've never argued for nullification in our papers and oral argument in this case.

**Mariann:** And I also think nullification would be one way for the jury to make the points you're talking about. And the other way would be to find for a necessity defense! \*laughs\* Which is such a great defense! And it's just one of my favorite defenses within the law.

All right, So all of this happened in Beaver County, which is where this Death Star farm is, Circle Four. And we're just gonna take a moment out to talk about the change of venue. I mean, you never get a change of venue. So how did that happen? And where are you now?

**Jon:** We were very much prepared to go to trial in Beaver and we had, I think, close to 200 people signed up to do court support in Beaver County.

And then a group of folks went to Beaver on Pioneer Day, which is a holiday in the state of Utah, just to do outreach and talk to folks. And as was popularized on a very popular YouTube channel called *Audit the Audit*, they had a very strange and disturbing experience with law enforcement where basically, three cops came up to them and basically just told them, point blank, “you can't be here talking about this in our community.” They said, “your company had a hand in shutting down Smithfield.”

Which I don't think is a fair characterization of the facts, at all. I think Smithfield shut down for business reasons and for increased regulation in California. The fact that...

**Wayne:** I honestly think it's not an unfair characterization. I think we probably put more public pressure on Smithfield than anyone else, especially in the state of California over the last five years

**Mariann:** And things don't happen for just one reason. You know, like...

**Jon:** Yeah, that's fair. But, so anyway, the cops basically told them “you have to leave” and then they stated that “you're gonna be killed by people in the town.” Which, I don't know if that was actually a reflection of anything that anyone had said, or if it was a threat from the officers. I think we don't know. And DXE and the individual activists in the Utah Animal Rights Coalition are now suing Beaver County over that incident.

**Wayne:** Can I just add, Jon? I think the declaration that was submitted just in the last couple days suggest that they did have some actual evidence of threats because the declaration signed by this gentleman, I don't remember his name.

**Mariann:** I spoke about that on the podcast, I believe. And one of his points was that they made him so mad that his wife was afraid he was going to become violent.

That was his idea of a threat of violence, that's the most bizarre argument I have ever heard.

**Jon:** It's so bizarre.

**Mariann:** I was so mad at them for what they believed that I wanted to hit them. And so that meant there was a threat of violence in my town.

**Wayne:** And just to be clear, this is a threat of violence by a passerby, by a resident of Beaver County against animal rights activists, not vice versa. Because they've made a lot of allegations against rights activists in the county. That we're intimidating or harassing local community members.

**Mariann:** Well, I don't wanna go too far afield on that. Perhaps we'll have you on again to discuss that lawsuit when it's a little further along, because it's certainly a fascinating lawsuit.

**Wayne:** Let me just add one other factual detail. It wasn't just that officers did this. It was the elected Sheriff of the entire county who walked up to a young woman named Ali Morikawa, who was sitting at a table. They had actually gotten prior consent to set up a table on a public sidewalk for Pioneer Day. She was just sitting there passively, she was not approaching anyone. And the elected Sheriff came up to her, within a few inches of her face, screamed at her, "You are going to be killed and I'm not gonna be here to do anything about it!"

And she felt so threatened that she immediately fled the table, went to her car and cried for the rest of the time she was there because there was a large man with a gun who said "you are going to be killed." And she thought this was a...

**Mariann:** It's like a bad movie!

**Wayne:** I mean, it is like a bad movie. And let me just say this in defense of Cameron Noel, because I've talked to Cam Noel. He's the elected Sheriff in

Beaver County. I actually think he's a good guy, even though he said this and did this, I think what he did was unconstitutional.

They shouldn't have charged Curtis. They certainly shouldn't have said to Ali, just for sitting there at a table, that she was gonna be killed. You should be protecting these people, not threatening them. But I think Cam Noel is so invested in this company.

And just to give you a sense of how embedded law enforcement is with Smithfield. I think it was the last time we were there we did kind of a little march around Circle Four Farms, on public streets. These are all, you know, public streets that everyone's entitled to walk on. And one of the deputies whispered to me that, "We're only allowing you to do this because Smithfield told us," And I was like, "Wait a minute, you're not security for Smithfield. You're a deputy in the Beaver County Sheriff's office. You're sworn to defend the constitution, not Smithfield foods." But even the deputies themselves...the culture of the police department was so invested in this company. Because one out of four employees in the company worked for Smithfield.

It is by far the largest business and they have tendrils everywhere that they saw their legal duty, their professional obligation, as Smithfield and not to defend the Constitution, not to protect local people, certainly not to protect outsiders and our constitutional rights. And that if you're in that culture, which Cam Noel is in that culture, I can understand why he saw someone merely sitting there at the table, leafleting about Smithfield as a dire threat to his role as a Sheriff.

Because if his job is to protect Smithfield, his job is being threatened by someone standing there handing out leaflets about Smithfield.

**Mariann:** Yeah, no, I mean, it really is like some old time movie. It's a very small place, right? Beaver County? With a small population and as dreadful of Smithfield is, it's kind of the name of the game.

**Wayne:** Yeah, they're controlled by Smithfield. They don't have a choice.

**Mariann:** All right. Can we get back to the case? Because I have a lot more questions.

Next comes a motion, a new motion. And this one brought by you, a new motion to eliminate brought by you instead of by the prosecution. And again, it is addressing a few different things. The same thing, perhaps in different context, and that's the customary farming exemption.

But I particularly like to address it, I mentioned this to Jon earlier, in the context of the necessity defense. And I'd like to revisit, we talked before about State vs Sanders, which is this case that arguably eliminated the necessity defense. But I think as you pointed out, Jon, it's really dicta because it didn't control the outcome of that case.

And I would just like to, because not everybody knows what the necessity defense is, I'd like to reiterate what State v Sanders said about what are the elements of the defense. And I'll just read them out, unless one of you want to. That the defendant acted with intent to avoid the greater harm. Check. Honestly and reasonably believe that the act was necessary to avoid the greater harm. Check. I'm adding the checks folks. No alternative course of action existed to avoid the imminent harm. That's for sure. Successfully avoided the greater harm. I don't know why that's an element, because it seems ridiculous. If you're not successful, you still should be able to have the defense, but you did successfully avoid the greater harm as it applies to these two piglets who are the subject of this prosecution. And you were not personally at fault in creating the situation. Well, that's sure is true.

So, alright. We don't know whether Sanders is good law. We have some reasons to think that maybe it isn't, but it's possible that it is. Another element that is frequently an element in other states, but not in Sanders, is that the activity that you're trying to address is illegal.

And that would certainly strengthen the case. If we could show that what Smithfield was doing to the piglets was actually illegal, was illegal cruelty. And you have made the argument that regardless of the customary farming practice exemption, well, this wasn't customary anymore because Smithfield had committed to not using gestation crates and presumably to cleaning up its act regarding the piglets.

But even if it were, and you devote a good deal of this motion to arguing that the customary farming practice exemption is actually unconstitutional. Can you just tell us a little bit about that argument?

**Jon:** We made three different arguments to attack the constitutionality of that livestock exemption, which by the way, exists I think in 37 out of 50 states. So it's very common. It's kind of the majority rule, I guess.

But we made three arguments against it. The first is it constitutes an unconstitutional delegation of law making authority because it's a case where the legislature is essentially letting the industry decide what is and is not animal

cruelty. And there's very good case law on the fact that the legislature cannot delegate rule making authority, sometimes even to other branches of government. And here it's delegating law making authority not only to a non-governmental entity, but a non-governmental entity that completely tries to shield itself from the public and is completely undemocratic. So that was the first argument we made.

The second is just that it's vague. So the statute doesn't say what a customary farming practice is or what traditional animal husbandry is at all. There's no, it provides zero guidance. And so it fails for the constitutional requirement that statutes are clear enough to be enforced.

And then the third was an equal protection argument that this essentially prejudices people who are trying to rescue, say pigs, while at the same time rewarding people who are rescuing dogs and cats, who are protected by the law. And our argument is there's no moral distinction at all here.

And we included evidence of the fact that pigs are just as, if not more intelligent than dogs, in a host of different ways. So those are basically the three arguments that we made. And very interestingly, the judge stated in his oral ruling that it does look like there are serious constitutional problems with this livestock exemption, but then for reasons that he did not make clear, he just said, I'm not going to rule on this. And just sort of threw up his hands.

And that was that. I don't remember him actually talking about standing. I'd have to look back at the...

**Mariann:** There was definitely a ruling on standing and it is very hard to imagine, I mean, I've been thinking about these laws for a long time, and it's very hard to imagine a way to get them into court.

But I'll tell ya. I mean, you're standing here, it seems to me, is the crux of your necessity defense or is a very important element of your necessity defense. Because it really helps a necessity defense if you can argue that the person who was perpetrating whatever you were trying to fix was actually committing a crime at the time, that makes this...it may not be necessary, but that's a much stronger argument.

So how could you bring a necessity defense if you can't make this argument that what they were doing was illegal? And how can you make that argument if you don't have standing to attack the very exemption on which they're relying to say,

“No, it was fine. It was legal. We're exempt from that law.” So I think it's such a great argument.

I can't imagine another way to get a customary farming practice exemption into court. Oh, another thing that I thought was interesting, and correct me if I'm wrong, the court said you had no standing and I think that deprives you of the ability to bring your defense. But the court seemed to think that this was just a reiteration of your argument that you were entitled to a necessity defense, and then that that had already been ruled on.

But in that ruling, which was very early in the case in another county, in another courtroom, that court had said, “Okay.” Your lawyer asked, “Can we rebrief this?” Because the court had just precipitously, without it being properly argued, ruled that you couldn't bring the defense. And the court gave you permission to rebrief it and here you are rebriefing it and the court said, “no, this was already decided.”

So it all seems really troubling to me. I want you to bring that necessity defense!

**Wayne:** We're definitely planning to still bring it and, if nothing else, to preserve a right to appeal.

So we're going to proffer the evidence and say, “this is what we're trying argue.” Sure, taking the judge's prior rulings, that'll be denied again. But you're right, it's an important defense and it's a defense worth fighting for. And if we were able to prevail on the defense, I think we would've had much stronger grounds, from a standing perspective, to challenge the constitutionality and legitimacy of this animal cruelty exemption.

**Mariann:** Totally!

**Wayne:** I was very surprised that the judge seemed to...it seemed to me, I don't even recall why, it could be just because I find this argument persuasive. I thought the delegation argument seemed to be the most compelling one to the judge. Because the federal case law on this, and the Utah constitution is very similar to the federal constitution in that it has enumerated powers for the various branches of government. And the legislature has the power to write laws, not Smithfield. You know, a foreign corporation owned by a Chinese billionaire is not delegated the power under the Utah or Federal Constitution to write the laws of the United States of America. But under the non delegation law, there are delegations of power that are authorized.



But even when you delegate power, there has to be some in intelligible principle. And the intelligible principle cannot be whatever the industry wants, right? That's not...that's the opposite of intelligible principle. That is an unintelligible principle, right? That's just, the industry gets to decide whatever the heck they want to do.

So if we can find the proper plaintiff withstanding, I think this judge, to the extent his opinion is representative of how another conservative judge might hear this, he's persuaded. And I think, honestly, this is an argument that on the right and the left, people in all walks of life, are increasingly receptive to.

There's a lot of right-wing folks who are right-wing judges, who are concerned about accumulation of corporate power and especially foreign influence. And corporations like Smithfield getting to decide what our criminal laws are. That's going to be concerning to Tucker Carlson, not just animal rights activists in Berkeley. So I think it's an argument needs to be brought.

**Mariann:** I absolutely agree with you. I think it's a huge opportunity to bring it. And even though the court has, so far, not permitted you to use this, I hope that decision changes in the course of this trial. And if not, and if unfortunately there is a conviction, which I certainly hope there is not, I hope it's something that you can bring on appeal because I think it's very powerful.

It's very hard to imagine another way of getting a lot of these issues into court. That's what's so powerful about you and other DXE defendants are doing, is that there's absolutely no other way to make these arguments, unless somebody is willing to put themselves at risk, at enormous risk.

And alright, before I let you go, even though I've kept you for a long time, just a few things, I have not read the papers on any of these issues because there's a lot of issues floating around in your case, but I just wanted to go through them. Apparently, there's stuff about the jury having to be anonymous and the courtroom being closed.

Can you talk a little bit about that?

**Jon:** The judge, kind of on his own, brought up concerns about whether the jury could be harassed. Funnily enough, and on three separate occasions, the judge brought up the fact that I had requested access to the juror spreadsheet that our attorneys had circulated.

And it was sort of a silly move on my part. I was doing it in my capacity as a legal team member. I thought that we had permission, since it was being sent to our attorneys, to do that. But then the judge, at first, just didn't know who it was and thought it was just a totally random person but he brought it up on three different occasions. And the prosecutor cited it, never actually explained what the relevance is or how it created any risk to the jurors. But anyway, the case law says that juror anonymity is extremely rare and because it creates a high risk of prejudice to the defendants and to the burden of proof and the presumption of innocence.

It's a relatively new thing. It was used, I think, for the first time in the 1970s. Wayne, correct me if I'm I'm wrong, during organized crime prosecutions where people were going after the mafia. And there were very real concerns that jurors could be threatened or killed. And that's why that exists.

There's a case in Utah about this called State v Ross and it identifies, I think, five different factors concerning whether jurors should be anonymized and it includes stuff like whether there's a threat to jurors. And the one that arguably applies, that the judge thinks applies, is just the amount of press coverage and whether the jurors might end up having their names in the paper.

And I mean, in our case, in DXEs...

**Wayne:** Jon, can I clarify? It's not just media coverage in that factor, it's media coverage that suggests that jurors will be exposed to intimidation or harassment or violence of some sort.

**Jon:** Right. Right.

**Wayne:** It's not just media coverage overall. That's very important, because it can't just be media coverage. It has to be that it exposes them to intimidation or harassment.

**Jon:** Yeah. Very true. Which there's no history...DXE has no history of violence or intimidation against anyone and there's no history of juror...we've been in a number of cases now and there's zero history of any juror ever ending up in the press or ever being harassed or intimidated in the press.

So this is a totally unprecedented move and I think reflects just a general bias against activism that the court has, unfortunately.

**Mariann:** I feel it's highly prejudicial. If I was on a jury and I was told that I would be expected to remain anonymous. I would be scared. I would think why. So I think it's very prejudicial.

**Wayne:** Yeah, I just want to say one other thing about that. My family came from China where they don't have public justice and, I'll just give an example. And Taiwan too. Taiwan was a dictatorship. We think of Taiwan positively now. Taiwan was not a democratic country until the 1990s.

And when my family was going up, we had a next door neighbor, my parents, who just disappeared one day because he was thought to be conspiring against the communist government. And no one knows what happened to him. And he just disappeared. That's the way things happen in other countries, but in our country, especially when you're accused of a crime, it's supposed to happen in public.

And the people who convict you, you're supposed to know who they are. It doesn't mean you get to harass them, obviously, or intimidate them. But the idea that you can be convicted and sitting in a prison and you don't even know who the heck sent you to prison. You don't know who the judge is, the prosecutors, you don't know who the jurors are...

There already are protections for jurors. You cannot intimidate jurors, there are laws to protect jurors. If anyone does that, that's a crime. The jurors names are not publicly released to anyone other than the defendants and the legal team until after the trial. But the notion that I don't even get to know the people who might be sending me to prison is profoundly inconsistent with the ideas in the American Constitution about public justice.

So, this is not just about some tactical or prejudicial issue in one court case. This is about one of the most fundamental principles of the American democratic system, which is justice is public.

**Mariann:** And they're also closing the courtroom. Is that correct? Or did I get that right?

**Wayne:** For the same reasons, because of the fear of intimidation and harassment.

**Mariann:** They could start out and if people caused a ruckus and there were problems, they could close it then. But to just start off closing the courtroom seems unbelievable to me.

We had talked about the person who received the piglets is going to be allowed to testify as to the condition of the piglets when they arrived. But are there any other proposed defense witnesses who are going to be limited?

**Jon:** I mean, technically, well I'm a defense witness and I mean, technically I'm subject to the judge's April 6th written order about any conditions of the animals. But again, the judge said that the defense can talk about the conditions of the animals and I can certainly talk about that. And I talk about our intent with respect to the same.

**Mariann:** The defense hasn't been limited in the witnesses it's allowed to bring.

**Jon:** Well the order does talk about the witnesses too. We just don't have a lot of clarity about what the orders say, but they do apply to witnesses.

**Wayne:** I mean, I would say the most severe limitation is we actually were attempting to subpoena the CO of Costco, and not just as a gimmick. I think the judge perceived it as a gimmick just because it's like, "okay, what is this really powerful influential person have to do with this case?" But because he is probably the only industry representative I talked to about this investigation, our plans to investigate Costco supply chain, before we actually did it. And so his evidence and testimony is highly probative of what I actually intended to do, what we actually intended to do, because Jon and Paul and I can testify as to what our intent was but the jurors can obviously be biased and think that, yeah, we're gonna say whatever we need to do to be acquitted.

But the Costco CO interacted with me on multiple occasions, because we had done prior investigations at Costco that had been in the *New York Times*, and I corresponded and he wrote back to me and explained why he didn't care about what we were finding. And we are not going to be able to present any of that evidence that suggests that our concern here was not an attempt to blackmail Costco or Smithfield, certainly not attempt to steal from them, anything of value. Our intent was merely to point out fraud and abuse in their supply chain. And we will not be able to present that evidence because power has a way of protecting itself. That's the way I'm interpreting it.

**Mariann:** Another issue that I just wanted to run through was regarding your decision to represent yourself. What brought you to make that decision? And have you been granted that? People are generally allowed to represent themselves if they really want to, but tell us why.

**Wayne:** Our motion for me to represent myself and Paul to have counsel was granted, very begrudgingly.

And the reason to do this is because this is not a traditional criminal defense case. In a traditional criminal defense case I think you're trying to sow doubt the jury and that's what traditional criminal defense lawyers do. You're try to suggest, "oh, this person wasn't there that night. He has an alibi," or, you know, "he didn't actually commit the crime."

We don't believe we committed a crime, but we believe that the reason we're not guilty of the crime that's being charged is because of what was in our minds and our hearts. Not because of the physical actions we took. And to convince a jury of that, they have to understand me. They have to understand us. They have to make a decision of conscience and they have to be inspired to believe what we say is true. And I think the best way to do that is for at least one of the defendants to speak directly to the jury.

So I am a board member of the Climate Defense Project, an amazing group of climate defense lawyers, who have represented activists across the country. And they've tried this strategy in a number of climate disobedience cases and had some success. And in similar fact patterns, where someone has engaged in actions that some industry or prosecutor believes are illegal. The defendants believe that what they're doing is at worse civil disobedience, but justified under what's called the climate necessity defense. And you know, the theory behind it, and I think this is correct, is that the best way to convince a juror that this is necessary and that these people are people of good intent is for them to hear directly from the people who did the things.

**Mariann:** I love the Climate Defense Project. And I think their use of the necessity defense which, you may have guessed, I also love is powerful. And I think a much harder case to make than yours when there was clearly a law protecting those innocent creatures who were in your hands.

So it's a further reach between shutting down a pipeline and saving the planet. There's a completely direct pipeline from picking up that piglet and leaving that facility to saving that pig.

**Wayne:** I agree. And interestingly, the lawyers other lawyers I've talked to agree with that too. They think from a strictly legal perspective, we should have a stronger defense because there is an exigent urgent need. There's literally a dying creature in our arms, right? Where with climate necessity, it's more of a long term political issue.

And one of the elements of the necessity defense in most states is that there's no alternative course of action. You have to do something right here and right now. The problem is animal rights just is not as politically powerful as the environmental movement. So we have the Washington Supreme Court rule recently that the climate defense is a necessity defense, we haven't had a ruling like that for animal rights.

And this is just an example of how the courts are political bodies that are, rightly or wrongly, very influenced by the political culture of the time we're living in right now. We're just not quite to the point yet where a court is ready or willing to announce that animals are protected as legal persons under the necessity defense.

**Mariann:** I don't think they have to be legal persons under the necessity defense, but they are always able to be victims of a crime. Maybe not considered victims, but still subjects of a crime. You are preventing a crime, whether the victim is a person or not. And alright, I'll stop trying to like win your case for you and move on.

**Wayne:** No, I love it! I wish you could be there with us in court, Mariann.

**Mariann:** Oh, I would love that. I would love that. Anything else you wanted to talk about before I let you go?

**Wayne:** No, just I'd say I appreciate your support, Mariann. You know, I've been on the podcast before, I know. But I appreciate the support and I appreciate the support of everyone listening to the podcast. This case really isn't ultimately about me and Paul, it's about Lily and Lizzie

**Mariann:** Nicely said. And yeah, I'm a fan. I'm a fan of a lot of the work, I won't say I'm a fan of everything, but I'm a fan of a lot of the work that DXE is doing. And other people who are using the law and putting themselves at risk to save animals.

So I wish you the very best of luck and we will be in touch and we'll all be paying attention to what's happening in Utah.

**Wayne:** And if I could take a moment, I'll just plug my blog and podcast, which you if you want to follow the trial and my personal journey over the next few weeks. Two weeks from now, I'm heading to Utah, and may not be back for quite some time, depending on how things go in court.



But if you're gonna follow my journey, my blog is called *The Simple Heart* on Substack and the podcast is released on that blog. But it used to be called *The Green Pill* but we wanted to make it a little more positive and a little less conspiratorial so we're calling it *Everybody Wayne Hsiung Tonight*. \*Mariann laughs\*

But just go to *The Simple Heart* Substack and you'll be able to follow what's unfolding in Utah over the next few weeks.

**Mariann:** Yeah, people, absolutely do that. Thanks so much for joining me, Wayne, Jon.

**Jon:** Thank you so much, Mariann. Really appreciate the support.

**Wayne:** Yeah, thanks. It was a lot of fun.