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**UNDISCLOSED SEASON 2:**      **THE STATE VS. JOEY WATKINS**

**ADDENDUM 16:**              **GANG OF ONE**  
**POSTED:**                      **NOVEMBER 10, 2016**

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**Colin Miller:**

Hello, and welcome to this week's *Undisclosed Addendum*. The talk show where we discuss all things *Undisclosed*. In Episode 16 of *Undisclosed*, 'The Gang', we discussed how the Georgia Bureau of Investigation was involved in the investigation into Isaac Dawkins' death, despite the absence of much of a paper trail, and how Stanley Sutton claimed that Joey Watkins was at the helm of a gang that terrorized Rome, Georgia, so he could get the FBI involved.

Now Jon's out this week, so this is Colin Miller filling in as host, and I'm joined by two terrific guests: Jill Twist has Emmy and Writers Guild of America awards based upon her work as a writer on one of my favorite shows, *Last Week Tonight with John Oliver*. Before that, she was a freelance contributor for *Saturday Night Live's Weekend Update*, and as a standup comedian she has performed at clubs all across the country. Jill also is a musical theatre actress and a voice-over artist.

Jill, welcome to the podcast.

**Jill Twist:**

Hi! Thank you!

**Colin Miller:**

Our next guest is Brendan Kenny, an attorney at Blackwell Burke PA in Minneapolis, Minnesota, and he practices in the area of toxic tort, complex liability, and other complex litigation. He's an author for *The Lawyerist*, a sought-after e-discovery writer and speaker, and an advocate for open data and open government. He's also frequently a 'Periscoper' who does videos about *Undisclosed* and other true crime media.

Brendan, welcome to the podcast.

**Brendan Kenny:**

Thanks! Very happy to be here.

**Colin Miller:**

Now Jill, I've read that actually you had applied to law school and were close to enrolling before being cast in a children's theatre troupe, so what was it that led you to go to law school and ultimately why, ultimately, did you decide against it?

**Jill Twist:**

Man... Yeah. I think my dad is still not happy with the decision. But yes! I was literally in my last day of school at William & Mary. I had been accepted to law school, I thought I was going to law school, and I just kind of freaked out. As far as, I wanted to be a public defender, and I started to read more about it, and I became more of an *admirer*, I guess, of public defenders. And I also just wondered if I could physically do it. Like if I could emotionally handle it. And also, I kind of realized that as a public defender, obviously you're not getting to choose your clients. And oftentimes you're very emotionally involved in something that you really can't choose the outcome of. And I *also* saw a poster and it said 'Touring Children's Theatre' and it didn't occur to me at the time that you could audition and *not* get cast in something.

**Colin Miller:**

[laughs] Yeah.

**Jill Twist:** So I just went, auditioned, got cast, uh, went on tour for a couple of years, actually moved to New York and my first job, working in a jury consulting firm and--

**Colin Miller:** Oh wow.

**Jill Twist:** So I didn't really escape that far. And now I kind of feel like I've stumbled back into *almost* being a lawyer, in a weird way, or at least informing cases. So somehow I kind of ended up a little bit back where I started.

**Colin Miller:** Yeah, that's actually-- I almost went to William & Mary. I think you probably would have been there at the same time, before I went to UVA, and I wanted to be a public defender too, and it didn't quite end up working out that way.

But Brendan, for *you*, you went straight from college – you graduated in the spring – and then in the fall entered law school, and your first job was actually the *other* side, the deputy attorney general in California. And so what was it that led you to being a lawyer and starting out as a deputy AG?

**Brendan Kenny:** Well, I've always been a person who liked to talk a lot. I was never any good at sports, was not good at math, or science. And my dad's a lawyer, and he never really talked much about his work. Now he does, but at the time, so it was a little mysterious. So, if you add that all together, law made sense.

And I think my whole life I've been fascinated and concerned and almost obsessed with how difficult it is to convince someone of *anything*. And how easy it is to convince someone, or for someone to *stay* convinced of something they want to stay convinced of. Which is something that recurs repeatedly in this case and in Adnan Syed's case, in any event.

So, I just assumed I was going to law school, and I did, and I actually went through one other path before I went to the AG's office, deputy to the AG's office in California, but I've always been interested in persuasion and the practice of the justice system.

And, yeah. Good to be here.

**Colin Miller:** And Jill, you mentioned how you sort of found your way back into discussing these issues, and it was an October episode of *Last Week Tonight* where John noted the following:

[audio recording from *Last Week Tonight with John Oliver*]

*...In force, which we've touched on multiple times before, uh, criminal justice is kind of our show's 'signature bit'. It is to us what assessing the shape of your poop is to Doctor Oz.*

[laughter]

**Colin Miller:** And you've discussed the full gamut. So, there was police accountability, there was mandatory minimums, and then to what you were saying before, you had a really terrific episode on public defenders that I use in my class. And so is this whole focus on the show, on criminal justice something from John? Or the writing staff? Or did it just sort of develop organically, since the start of the show?

**Jill Twist:** I think it has to be all of those things. I definitely *feel* like it developed organically, but that wouldn't have happened if we weren't pitching those stories and John wasn't *choosing* those

stories. So, I think *probably*, sort of just coincidentally we ended up with an entire staff of people who were very, very interested in that. I *think* I'm the only person that ever considered going to law school.

And by the way, I still think I would love law school. I just don't think I would like being a lawyer. But I still think, "Would they just let me go? Could I go to law school and then never, ever be a lawyer afterward?" Like, yeah. It's definitely *his* area of interest. It's definitely several of *our* area of interest, and it's in the news a lot. And that's a big thing for us. It's just you know, important issues that maybe you're only hearing one side of.

**Colin Miller:**

Yeah. And it's interesting, speaking to Brendan's point, Brendan was talking about being a convincing lawyer in the court room, and I saw, Jill, a recent interview with you, with *Medium.com* about writing jokes. And I actually thought it pretty well dovetailed with my approach with the podcast. And I think what a lot of lawyers thing as well. And it was sort of this Venn Diagram concept involving references the audience understands, and things they hadn't thought of yet. And so, could you explain a bit your thinking and how you go about crafting jokes and writing for the show?

[07:20]

**Jill Twist:**

Sure, yeah. I *think* what I said there, and I'm not actually the most sure, I think they asked me what makes something funny. Which, by the way, analyzing what makes something funny is the least funny thing anyone can ever do in the world, so I apologize for what is about to happen.

But I think jokes are funny if they're something that you can relate to. So, I can't make a joke about a commercial you never saw. But on the other hand it has to be something you haven't thought of yet. You know, if it's *another*, you know, "Oh my gosh, Viagra! An erection that lasts four hours..." It's like nobody wants to hear that joke, either, because everyone already thought of it. You have to find this very narrow set of things that are things people understand, but they didn't come up with on their own yet.

As far as writing them for the show, jokes are, very honestly the *last* part of the process. And they are the things that change the most. I will-- Very often, I have had jokes set up where I have written probably 15 different punchlines by the time the show airs. You know, sometimes we're writing a joke on a percentage, and the percentage changes by one point, and then you have to write a different joke.

And so, although the jokes are my favorite part, they're actually, certainly not the *least* important part of the show... But they are often the last part of the show, and we just... It's sheer labor.

[laughter]

It's not as much, you know, when I started writing jokes for fun, it was about being inspired, and now it's about some horrifying fact that you have to find a way to distract the audience from, and then make into something funny. And so, usually it's just sitting down, viewing a clip, and then writing, you know, four jokes off that clip, and then if they don't like any of those, writing five more.

**Colin Miller:**

And Brendan I noted before that you write for *The Lawyerist*, and one of the pieces you wrote was about that attempts at humor by lawyers usually fall flat. And so, for instance, you referenced in the article J Floyd – an attorney for the State of Texas – and he was practicing his argument against the right to choice in *Roe vs. Wade*:

[audio recording]

*Mister Chief Justice, may I please the court. It's an old joke, but when a argue-- Man argues against two beautiful ladies like this, they're going to have the last word.*

“Mister Chief Justice, may I please the court. It’s an old joke, but when a man argues against two beautiful ladies like this, they’re going to have the last word.”

So, he’s referring to the plaintiff, Roe, and the attorney, and so to what extent, Brendan, do you think that the court apparently is a place where humor falls flat? And to what extent do you think that lawyers are sort of tone deaf?

**Brendan Kenny:**

Both!

[laughter]

Can I say both? I want to go back on what Jill said about part of humor is getting someone to think something they hadn’t thought before, and I hadn’t thought of it that way before.

I think it’s really interesting *and* funny to think about why something is funny – it’s fascinating to me. It almost obsesses me, and the thing that helped me – the thing that I was reading somewhere that said what humor has to do one of the – at least, not the definition – but *one* of the things it has to do, is take something mildly transgressive and somehow flip things around in a way different than people expect.

And that’s what makes something funny, and maybe the inherent part of the courtroom is that many of these cases are serious – probably *all* of them, whether it’s a civil case or a criminal case, is *something* serious. And so, you have to be very careful about having something that is transgressive. A joke that is transgressive, transgresses some sort of taboo, but kind of a safe taboo, and also is not totally predictable.

And the part of the lawyer addressing the court, which, by the way, he did a terrible job, if you listen to the rest of the oral arguments – it’s very entertaining, he was just taken to task like no other oral argument I’ve ever heard. But he failed on both counts. One, the joke was a silly joke, but it was too transgressive because of what the case was about, and it was totally predictable.

I remember when I was in high school, I was in a speech contest, and the person told a joke, and it was like they were telling him what to do with the microphone, and he said, “Would you like fries with that.” Right? So, it was not transgressive at all and it was totally predictable and it wasn’t funny at all and it fell flat.

So, I think a lot about what’s funny and the tone deaf part, I could talk about that at length. But I think lawyers-- While I wouldn’t necessarily advise people to go to law school who *aren’t* going to practice law, because, it sounds bad, but I’m not sure that for a lot of people going to law school internally makes them better lawyers. Because I think some things that make us better persuaders – at least in my experience – when I graduated in 2005 were kind of beat out of me. And I had to relearn to the degree I knew it before.

[13:32]

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**Colin Miller:**

Jill, you mentioned before, it’s interesting because, you know, *Last Week Tonight* isn’t so much about jokes, it’s very much a serious news program with it told in a certain way by John Oliver. And I’m sure that you and the staff of writers that makes it interesting, and sort of a humorous perspective and as I said in your bio you’ve also written for ‘Weekend Update’ on *Saturday Night Live*, which is sort of *my* introduction, I guess, to, sort of a different take on the news.

What’s your take about the balance of comedy versus reporting on *Last Week Tonight*?

**Jill Twist:** I'm actually going to go back and say like I *barely* wrote for *Weekend Update*. [laughs] They let me freelance for them like two weeks before I got this job, so they probably don't even know who I am. If they ever listen to this--

[laughter]

And I also want to be really clear that although we do have nine writers, and though we do read and write and all that stuff, we also have a stack of researchers and footage people and *all* that stuff do *so* much work on the show. I don't want to make it sound like in any way I go and I sit down and I write an idea, and then there's the show, because that's very much not true. *But...* Uh, wait, I forgot the question! Oh no.

[laughter]

**Colin Miller:** Well, I mean, it's sort of interesting, because-- And this might speak to your question too. I saw another interview where I saw Brendan was talking about how tough it was to be humorous as an attorney, and to your point before about, if you were to get a law degree, it'd be tough to be a lawyer because as you say you have this humorous side. And it almost seems like the show you've landed on *is* the perfect vehicle for that. And I'm wondering how that show sort of strikes the balance between serious news reporting on the one hand and injecting this humorous, sardonic take on the material.

**Jill Twist:** Right. Well I definitely don't want to speak on behalf of the show, but I will say I think our goal really is comedy, for sure. Even though the joke might be the last thing you write. Because a joke really only works on a true thing. Or else you're creating a fantasy world and making jokes about it.

But you know, we are a comedy show first. We're not in it for the purpose of changing lives and reporting news, or something like that. But as far as jokes go, and I think this was said before, as far as it works and it doesn't work, sometimes you just choose the wrong victim.

Which sounds, maybe a *little* bit of like, and that guys' joke – obviously I don't know the whole context – but that's a big thing. I think that is in common with law, and that is a *lot* who your victim is.

And you know, punching down... The thing you *don't* want to do in comedy. You don't want to shoot the wrong victim. There's people that can handle being made fun of, or who deserve to be made fun of, or *facts* that deserve to be made fun of, and there's people and facts and things that *don't*. And sometimes you don't really know until you're in the middle of it, and then you're like, "Oh no, I think I just insulted a *baby!*"

[laughter]

How did I *do* that?! Or whatever. But I do think that that's part of sort of what we try to keep an eye on, if you're writing jokes. Generally, not just on the show. Because it can actually be true for any joke. There's a lot of times when I do standup comedy, and you'll just go, "Oh, you've chosen the wrong victim there." There's no reason to punch down on this one. You could make fun of anything in the world – so why not choose someone that deserves it.

**Colin Miller:** Brendan, I wonder with your Periscope videos, first of all we appreciate you doing the videos and I wonder, what's your approach with that too, and what was it about, I guess, *Serial* and then *Undisclosed* that led you to do these Periscopes, and what's your goal in these videos?

**Brendan Kenny:** Goal...? I'm not sure what the goal is, except, I started doing them because I was so *taken in* with the story that I had to find some avenue of talking about it. Because, similar to what Jill was saying about humor – that if someone doesn't know the context of the joke, they don't get it. Well, the same thing with these cases – someone has to know the case and someone

has to follow the case, and there's this community of people online who *do*. And I had ideas I wanted to play out and use, and I guess that... Yeah, I don't know if I could sit down and say what the purpose was.

I guess part of it was I wanted an opportunity to give my response to some of these things and I think what is *so powerful* about *Serial* and for all the criticism that we made about the format and about some of the choices – artistic, and also substantive choices that Sarah Koenig made – the format was so powerful and I just think that everyone in the law would do to listen to it because of the storytelling.

I mean, I talk about obsession and the things I'm obsessed with, and so often the case, what I see in my own work and see in other places in the legal profession is that lawyers fail and clients pay the price when the lawyer is not able to tell a story. Is not able to use the way the courtroom works or testimony works to tell a story.

And just one thing I want to say, and then I will move on, but I wanted to say before I forgot – really useful what Jill was saying about choosing the wrong victim – so important as a lawyer to have the right tone and understand the power dynamic, and why I talk about all the time on Periscope this idea of cross-examination as an argument with a witness is *so wrong* almost all the time, because you lower yourself to the person. And people tend to take the side of the witness, and what you're trying to do in cross-examination is get admissions of *facts*. But what you can use to build your case, and only when at all necessary to, really in a personal way, to attack the witness.

So, kind of a convoluted answer but I wanted to make sure I got it all in.

[19:15]

**Colin Miller:**

I think it's really interesting because you're speaking to the point of how we view cross-examination, and a lot of people view it as conflict. And I think the point your speaking to is it's not really that if you want to be productive.

And Jill, I saw this recent article, and it was comments by Adult Swim Executive Mike Lazzo, and he sort of, you know, he doubled back on himself but he made a first comment, quote: "When you get women in the writer's room you get conflict not comedy" and then he followed up and said, "Women don't tend to like conflict, comedy often comes from conflict so that's probably why we and others have so few female projects." And I know you just sort of had a humorous tweet in response, which I think was definitely the appropriate reaction.

I don't know. It's interesting because we're talking on this podcast, we're a true crime podcast, and I think *most* of the hosts of true crime podcasts are women, and it's interesting to see the reaction it gets; it sort of varies. I don't know, what's your perspective as being a female comedy writer, and what do you think about the unique struggles that might present themselves, either in comedy writing or in podcasting?

**Jill Twist:**

I don't mean this to be facetious, but I guess I'm kind of sick of hearing about it.

We have women that are doing a great job, they're obviously funny. I feel like maybe people are saying they're not to get attention? But I don't want to dignify it with a response because there's nothing to say. There are lots of funny women, they're great, we watch them all the time, so... What else is there?

[20:48]

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**Colin Miller:**

Turning to *Undisclosed* and our podcast now, I mean Jill, first became aware of your interesting in a *New York Times* piece where you said all your friends told you that you had to stop talking about it because you're so involved. Was true crime something that you were interested in before *Serial* and *Undisclosed*?

**Jill Twist:**

No. I think I just fell into this one. I'm a person that just-- When I get, like, my teeth around something, I can't let go. Which I think is both why I got into *Undisclosed*... But I get the impression might be how *Undisclosed* happened? Is just, it seems very much like a couple of people who were not related to the case just couldn't let it go. And I think that's just very appealing to me, and I'm like that in a lot of things. But especially, I think because my nature is towards, in a sense, that's just what I wanted to do, in some form. That I was going to be very interested.

And then once you just start to go, "Hold on, like, this guy maybe didn't do it!" And there's nothing worse, I think, that somebody who didn't commit a crime, being penalized for it, or, you know, losing his life, literally or figuratively, for it. And so, yeah. It just became something I was obsessed with.

Also, because I worked in a jury consulting firm, and I used to just sit, because I was at the very bottom of the totem pole, and watch videos of fake juries all day. And it became very clear to me then how randomly a decision could be made sometimes. I mean, I spent probably a year just sitting and watching videos of fake juries they would hire to try pretend cases before they would try the real case. And you would see just the dime it would turn on. And so when you see a case your like, I understand why people can't let this go. And you don't want to think that there's a lot more of this out there, but there has to be.

**Colin Miller:**

Going to a Twitter question, that leads into a point that we've discussed a bit, and we're going to discuss more in the podcast, and this is from 'Liz Clothier' and she asks: "Did I hear right? FBI were involved in the trajectory of the bullet that killed the dog?" And the answer to that is yes.

We actually discussed on the podcast the FBI was brought in -- we'll did into that a little bit more in this episode -- and that is, the FBI, one of the roles was we had this allegation that Joey Watkins was involved in the murder of Isaac Dawkins' dog. And we posited the theory, Jill, that this was something that had a huge impact on the jury and Joey himself has said he thought things were going pretty well until he saw that take place.

And I wonder, with your experience at the jury consulting firm, was there ever something in the testing you were discussing where it was something salacious like that, or something inflammatory where you really *did* see the jury turn on a dime?

**Jill Twist:**

I'm trying to-- First of all, that was 10 years ago. And I'm thinking, did I *sign* anything that said I couldn't talk about this? I don't think so, I'm *pretty* sure I didn't. We worked on a lot of, like, cigarette cases, a lot of Philip Morris cases, which, you know, could be very emotional. The thing I remember the most was just that, first of all, how much one articulate person with an idea in a jury room could sway a whole jury.

And sometimes I remember very specifically this woman goes: "I read that if someone blinks a lot that means they're lying, and he blinks a lot." And I was like, "Or he wears contacts, or any number of..." and they were like, "*Yeah*, I think I read that too." And that's what started to turn the room, and I was like yelling at the television like, "No! No!" I don't--

**Colin Miller:**

[laughs]

**Jill Twist:**

First of all, of course it wasn't a real witness, it was an actor, so the actor *was* lying, because he's an actor. Secondly, I don't think that's why he blinks a lot -- I have *no idea*. And you just go, "Oh my gosh, I don't know what's going on in this room, and there's no way to stop it." I just think that, that *can* happen. And I'm very curious from the legal perspective, how you guys go and decide what you want in a jury, because even though lots of lawyers do it, I still don't know.

**Colin Miller:** Your domino theory about the strong person in the jury is interesting and we'll get to that in Mark Free's trial, where we think that actually did happen to his advantage, and Brendan, as we mentioned before, you were a deputy attorney general.

So, speaking to Jill's point, how did you go about jury selection, and also, in terms of some of these salacious details that may have been tangentially related? How did you go about deciding, "I might include this fact or evidence" or "I might leave this out of my case"?

**Brendan Kenny:** Well this kind of covers any work I've done as a lawyer, and I'm surprised how much Jill and I have in common--

**Jill Twist:** [laughs]

**Brendan Kenny** Because in civil practice where I work now, we do a lot of trials, especially our main guy – who I call a trial lawyer genius, Jerry Blackwell, I'm not just saying this to plug the firm, he really is – he's like Gerry Spence, or someone like-- Or if anyone's familiar with Mark Lanier, a plaintiff's lawyer out of South, he's like, he's like him. He's just that unbelievable, incredible.

And I've seen a lot of-- Anyway I've seen him in action and I've also seen many different mock trials and what they said is *totally* true about a jury. And without getting too much *Inside Baseball*, you look on either side – whether on the plaintiff's side or the defendant's side – I'm on the defense side in civil cases – you're looking for characteristics about people. First of all, it's good to keep in mind when it comes to jury selection, it's a process of *deselection*. You're trying to get a jury you can live with, with people on there who won't try to destroy you. I know that sounds a little melodramatic but that's really the approach.

So, it's not like: "Well I want *this* perfect juror and *that* perfect juror." You're trying to have jurors that would be open to being persuadable. Which gets back to my position of how difficult it is to persuade someone of *anything*, you know? That they don't already want to believe.

So, it's *not* the process of – at least from what I've seen – where there's a lot of look at race, and gender, and all that stuff. I mean, you know, those things are known quantities of course, but you're looking at how a person responds to questions. In some cases you're looking at how much a person wants to be there. If you're in a civil product liability case, and the juror really wants to be there, there's a good chance they want to be there because they want to sock it to the company you're representing.

So, there's a lot of different things that go into it. But a lot of human psychology, I mean, the sort of stuff that I could think about all day long, and I apply every part of my life to everyone I meet. It's fascinating. It's not only fascinating what people do, but also why they do things. And Jill is so right, and you are too, Colin, how easily things can turn when it comes to those tangential details. They can be very important. And if we understand storytelling they might not be so tangential.

And I want to give one example that came out just loud and clear to me when it came to the FBI and the Georgia Bureau of Investigation being involved in this case: Sutton had them as *window dressing*, as far as I can tell. To be able to say to people, "Yeah and we got the FBI and the GBI involved." And so even if they weren't doing anything, he could namedrop them and people would fill in the details and they'd say, "We have forensic evidence. We *know* this person did it. Regardless of what you think, we have science."

So that was brilliant. I mean, I'm not supporting doing that, but to me that just struck out loud and clear that's what he was doing.

[30:10]

**Colin Miller:**

I have another Twitter question, this one's from 'Becca S', and Becca asks, "What is the legal definition of a 'gang' versus a group of friends who break laws?" and yeah, in terms of what Sutton did, there is a section of the United States Code, it's 18 US Code Section 521.

It says:

*'Criminal street gang' means an ongoing group, club, organization or association of five or more persons that has as one of its primary purposes the commission of one or more of the criminal offenses, which affect interstate commerce or foreign commerce.*

So that was the way that Stanley Sutton got the FBI involved. Was to claim, in essence, that Joey was the head of this criminal street gang with at least five members. And that they were, in effect, doing things like gunrunning, drug running, *et cetera*.

And as you say, Brendan, sort of window-dressing, but might have had a real effect on the case. And the question then that leads to is another Twitter question, that is, a Twitter question by 'Whitney Winshiddle' and she asks: "There's got to be a law about lying to the FBI?" And the answer is, there *is*, and it's at 18 US Code Section 1001.

And it says:

*Knowingly or willfully... makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry.*

That that is, in effect, a federal offense. It was used to prosecute Martha Stewart when they had the whole 'insider trading' prosecution, it was used to prosecute Bernie Madoff for his Ponzi scheme, and Brendan, looking at this episode and what Stanley Sutton did, I mean, would you think it rises to *that* level? Or was it justifiable, what he did?

**Brendan Kenny:**

Well I-- [laughs] I'm like Jill and others. I'm an opinionated person, and I don't like the way law enforcement operates a lot in these cases. So, no! I don't think it was justifiable... Maybe he could make a colorable argument, but I don't believe it.

Yeah, I really think that-- I mean, it's hard to speak because I wasn't aware of the statute that you're talking about. A lot of times I kind of – especially in criminal law – I think about it more just *practically*. Because I'm not in criminal law, I'm in civil law. Even when I was in the AG's office, I was in civil law representing the State against inmates, so, not exactly criminal law. And so I would just think that what he was doing – if we just look at the fruit's, right? "You shall know a tree by its fruits". The FBI wasn't really *doing* anything in the case. Wasn't necessary. Seemed as though it was posturing on Sutton's part. I don't see any way to get around *that*.

**Colin Miller:**

Yeah. And Jill, as someone who had been interested in being a public defender, I wonder in listening to Adnan Syed's case and Joey Watkins' case, and seeing what the police and the prosecution did in those cases, does that sort of stoke that flame a bit? I mean, what's your response to sort of seeing the way that they conducted these investigations?

**Jill Twist:**

It makes me so angry, because I *do* feel like there's a set of people who worked *so hard* and want very much just for the right thing to happen. It's incredibly naïve why I decided not to go to law school. I remember exactly getting a phone call from my uncle telling me to take a year off – he went to law school – and I said to him, I said, "The thing I don't know what to do

about is if there's such a thing as justice, who your lawyer is shouldn't matter." But if so, I wouldn't want to be a lawyer!

So, I don't know what to do. It's a constant struggle between a set of people who want to win. You know? And I would want to win, if I had a job like that.

I feel like a lot of times it has to be reframed as if you're prosecuting, you're not necessarily there to win, you're there for justice to be served. And... I don't know. I just think that it's so hard to realize that, like, sometimes there is a right answer – like, sometimes someone didn't do it. And no matter how great your lawyer is, no matter how great the prosecutor is, they still should be found not guilty, no matter how bad their lawyer is. The system should somehow get it together. And it's so frustrating when it doesn't.

I mean, we try to set it up in such a way that we're giving both sides a fair shot, but that's not necessarily going to happen because these are all *people*, and everybody believes that them doing their jobs the best means them *winning*, or finding someone guilty, or them catching a suspect and making sure that they're prosecuted. Whether that *is* necessarily what is justice. Yeah. I don't know. It's a 'keep me awake at night' kind of thing.

**Colin Miller:**

Yeah. And I think a big part of the problem is lack of transparency. And, as we've noted recently, we've tried to get the trial audio for Joey's case, and we just were denied by a Georgia judge. We're appealing to the Supreme Court of Georgia. And Brendan, I know, as I said in my introduction, you are a big advocate of open information, and luckily we *did* get these FBI documents after repeated requests, and that's why we have the information on the podcast,

And recently, Brendan, you've posted some documents you've gotten on Public Information Act requests on MuckRock and there's also an FBI investigation that was sort of recently exposed on MuckRock, so could you start by explaining exactly what MuckRock is?

[35:30]

**Brendan Kenny:**

MuckRock is great! I get back to the things that make me think. And one is, how hard it is to persuade people of things. And one of the reasons is, it's hard to present information and documents in a trial in a way that can prove your point. And one of the reasons is that a lot of information that's out there that *could*, isn't readily accessible. And so that's where the Freedom of Information Act comes in.

And I just want to say parenthetically – everyone who's at all interested in the law, or just interested in *life*, and how our government operates should look into the Freedom of Information Act – or the state equivalents – because it gives a great opportunity to get information. It's very useful in law suits for *everybody*. Whether you're representing the defendant or the plaintiff in a civil case.

Returning to my thing – MuckRock. MuckRock is an advice for the crowd sourcing, crowd *sharing* advice for making public record requests, funding them when necessary, and sharing the information. And so that's why whenever I do any requests or anything that's connected to public interest – even sometimes in cases I work on, I try to do them through MuckRock.

And basically, for five dollars, you can have a request. They will send it in, you can follow up, and you can use this service to respond, and you can also crowd funded, and get money for it, and there were some cases connected tangentially to the Adnan Syed case that we were able to do that way. So I encourage anyone to go to MuckRock – I don't get *paid* by them, I've never met any of them in person, but I'm 100% on board with what they're doing.

**Colin Miller:**

Yeah, and this collection of documents you retweeted recently was this investigation – a multi-year investigation by the FBI – into this 'God Hates Goths' website, and I'm reading from the report, that says:

...[blank] reported the 'Church of the Hammer' is an extremely right-wing Christian group that adheres to a middle-age catholic text called the Malleus Maleficarum, the 'Witches Hammer' [blank] reports this text was a guide to the inquisitor and how to identify witches and other means of Satan and how to best dispose of them. And [blank] also reports that as a part of this church's theology is a hatred for goths.

And so what was the outcome of that case, Brendan, of this multi-year investigation?

**Brendan Kenny:**

I think it didn't come to much of anything. I think it was like the multi-year investigation into the Insane Clown Posse followers. I'm trying to see... "The case was closed after the investigation revealed that the threat posed by the 'Church of the Hammer' did not exist. As the church Reverend [inaudible] all purported to church members were an internet fictional creation." Oh, okay. See I already forgot about all of this. Because there's- there's something like this every week that they just uh, Rick-Rolled. That's an old-fashioned term. I don't know what term we use now to say what they did. It's easy to do, and by the way, if you're- I almost am hesitant to recommend this because there's so many things for people to get distracted by, but on MuckRock you can find all sorts of FBI files – from J Edgar Hoover's personal files – a lot of funny stuff about who we thought were communists, what TV shows he liked and which ones he didn't, and things like that.

**Colin Miller:**

Jill, what I wonder is, the FBI is such a serious organization, whether they just don't realize attempts at humor when they see it, because this supposed 'God Hates Goths' group, they had as their mission kill several groups of people – "Kill witches", okay that makes sense, "Kill women who are not virgins on their wedding night". Okay, I mean that could somewhat make sense, but "Kill the entire town if one person worships another god."

[laughter]

**Colin Miller:**

I mean, I wonder, Jill, as you're sort of listening we've had these wire taps, and these conversations on the podcast this season and I just wonder – it seems this law enforcement in Rome, Georgia didn't realize what was actually serious and what was sort of said in a joking manner. I mean, you know, to what extent do you think a sense of humor is necessary if you're going to be investigating criminal activity?

**Jill Twist:**

Oh man, well, I mean... It would be helpful. For sure. But I guess in their defense, one person decides to kill the whole town because one person worshipped another god, well they're going to go, "Oh, we should have taken *that* one seriously!"

**Colin Miller:**

[laughs]

**Jill Twist:**

I don't know. I mean I'm not sure they're allowed to be like, "Oh that was just a sarcastic murder threat" on the extremely off-chance... I don't know, I mean I think when I see how many people in a given day will share an *Onion* article thinking it's serious... I don't think law enforcement is alone. And I guess it's a little bit on us to make better jokes and make it clearer, but I see their perspective there. Not in this particular case, probably, but at least you don't want to be the person who thought it was a joke, and it wasn't.

**Colin Miller:**

Yeah, it's true. And I wonder, in this most recent episode, we had the wire taps – and we don't have the actual wire taps; although we have the notes – because again our Public Information Act requests have been denied, but the theory here of the State was, even though when Joey was talking to Mark they were acting as if they had no involvement in the crime that this was

a big ruse and they had plotted this out and sort of scripted these conversations to make it *look* as though they were uninvolved when in fact they *were*.

Brendan, what do you think about this? I mean again you were the deputy attorney general – if you heard these wire taps of people you were prosecuting and literally tens of hours of conversations where they’re denying any liability but also making statements about, “Well I had an alibi for this day”, when it’s a different day, which clearly would show they are mistaken about when they supposedly committed this crime. Would you look at this and say, “Well I have a real question about whether in fact they were involved?”

**Brendan Kenny:**

Yes. And this is *really* timely. The kind of stuff I did at the attorney general’s office, some of it brings back memories because we dealt with gang investigations. We dealt with inmates that were validated as members of prison gangs. And members of prison gangs do not wear signs on their foreheads saying they’re a member of a prison gang. Because, whatever amount of time you’re serving – if you’re an associate or a member – you’re going to be in segregated housing. You’re going to be, essentially, in something like solitary confinement.

So, the way you find this information is by what symbols they’re using, what hidden words, codes... And so there’s an element of implausibility just to begin with. And I *did* have situations – without getting into detail – where I thought: “This really doesn’t seem very strong”.

And this is what I think happens, is: 1) the reason why a lot of people don’t have a sense of humor is because humor, like philosophy, has a way of smelling or pointing to fallacies, or theories that don’t make sense, that aren’t plausible. They don’t pass the ‘straight face’ test. Well, if all you have is a straight face, if there’s no possibility of any humor, you don’t have to worry about failing the straight-face test.

And 2) what’s going on when you’re on the side of the State, you’re automatically applying ‘strength of the evidence’ thinking. So you’re thinking, “Well, what I’m doing right now, the evidence I’m gathering, it’s not about whether this is enough to convict – whether it’s beyond a reasonable doubt – like, am I doing something that’s *useful* for this investigation? To push forward the investigation?”

And somewhere along the line someone else will figure out how much use it is. And I think if everybody does that, and nobody ever figures out how much use it really is, that’s how something like this happens. That’s how a district attorney can argue in closing arguments that this main witness that we *know* trumped-up a story, somehow, somehow, something he says is reliable. I think that’s how it happens.

**Colin Miller:**

And I wonder, Brendan, in terms of leaving the deputy AG’s office, was any of that due to being uncomfortable about some of the cases you had to prosecute?

**Brendan Kenny:**

Not exactly--

Because it was sort of a quasi-criminal, quasi-civil, because I was defending the State against lawsuits brought by prisoners.

**Colin Miller:**

Right.

**Brendan Kenny:**

So it wasn’t as though I was *directly* defending the conviction, but it was sometimes very fuzzy lines, because I was defending people who had rules violations based on them having weapons or something that was causing them to be in prison years longer, or being denied parole.

So, practically-speaking, was it that different from being on the criminal side? No, but that’s not the way I saw it. So I know that there was, some times when I felt a little uncomfortable

about it, but it's when you're in-- I'm not trying to sound melodramatic, but when you're *in* a system and doing this specific thing, a lot of times you don't take the big-picture view and I don't know if I thought-- A lot of the things I think about now and talk about now I really wasn't then.

I'll just say this final thing, and it's not to cast aspersions on anyone who works in law enforcement or for the government as a lawyer on the government's side. But I think the way things function tend to dull people's edges a bit. And so I'm a different person, a different lawyer than I was when I worked for the State, and I think part of that is just the way things run. So I think that's a factor that we can't remove from the equation.

**Colin Miller:**

Yeah. And Jill, what you said before, echoes so much of what the students in my criminal classes say about being a public defender, about choosing your clients, and they say, "I'd really love to be a public defender but..." a) speaking to what your show profiled and the resource constraints, but then b) I just, hear so many students saying "I just couldn't imagine being there and defending the rapist, the murderer, the kidnapper who I know is guilty." And how big of a role was that in you deciding, "I'm going to take a different route, as opposed to going to law school"?

**Jill Twist:**

It was *part* of it. I certainly don't have any philosophical problem with a rapist or an accused rapist or an accused murder or whatever getting a great lawyer – I think that's the way the whole system is set up.

I do think that not everyone is emotionally-equipped to do it. It's not that I would feel guilty all the time, it's that, you know, probably more with the innocent ones than I would with the guilty ones, but I think it's just a thing where *somehow* through, you know, happenstance and years where I've been a comedian, I get to do a thing where I choose my cases.

And still, I get very into these things and I think about it all the time, and I just kind of *knew* that maybe I wasn't set up for it. Or certainly not set up for the long term. But yeah. No, I *get* it, I totally get it. But someone does have to defend the accused rapist, and there's the hope is that both sides are so good that the right thing happens.

And so all you want to do, I *think*, is be the greatest attorney you can, defending that person, and then if they are found guilty then you can go to sleep knowing that they should have been.

[46:40]

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**Colin Miller:**

Well, either of you have any questions or thoughts about Season 2 that you would like to ask or share with me now?

**Jill Twist:**

I just mostly want to know about your *processes*. Not as much I guess specific to the case--

**Colin Miller:**

Mm-hmm.

**Jill Twist:**

But, I'm so fascinated by how you kind of evolved from people who were aware of these cases and were on the outside of them to getting in the middle of them. So that's a question for you, Colin.

**Colin Miller:**

Yeah. Well it's something where I became a law professor in 2007, and I really love teaching and writing about the law, but then when I saw the Adnan Syed case and *Serial* it just struck me so much to hear the injustice and see the response it was getting from people, and that's why I felt compelled to write about it in my blog.

And then when Rabia and Dennis had the idea for this podcast, I thought it was just a great opportunity to educate the public. And then after that, to see the response of people writing and saying “I was wrongfully convicted” – my brother, my wife, my son, my daughter – and the response, and I just think, through our podcast and other podcasts and through other great investigative journalism out there.

I think it’s terrific that it’s giving a voice to people who haven’t been heard, and I think it’s really exposing people – and I think your show does such a great job too – of what the criminal justice system really looks like and really *is*, and I think it just gives them a more nuanced understanding of how things work, and we can partner with the Georgia Innocence Project, and they’re so resource-strapped and so in need of assistance, and to shine a light on that and to try to help with one of their clients, it’s just been a really cathartic experience.

**Jill Twist:** How likely do you think it is that someone who used to work in a jury consulting firm would get kicked off a jury pretty quickly? Do you think I’ll ever get to serve?

**Colin Miller:** Yeah, well were you sort of hired by particular firms?

**Jill Twist:** Yes.

**Colin Miller:** Okay so it was probably for both sides, right? You probably were consulting on cases--

**Jill Twist:** Yeah, I think it was, mostly-- It was very rare for criminal cases. Mostly for civil cases, but it was both. And yeah, it would be hired by a law firm who was you know on one side of whatever big case that was big enough to have that many lawyers and jury consultants.

**Colin Miller:** Yeah. And speaking to Brendan’s point, I think that probably if you were in the jury pool during questioning they would probably see you as someone who is interested in the law, extremely intelligent, has this experience that is not tilted towards one side or the other. So I think speaking to that ‘domino theory’ that you mentioned at the consulting firm, how one person can be influential... I think if they got a good read on you in terms of their case, yeah they could be very interested in having you on the jury. And I don’t think that opposing counsel would be *that* opposed because they want people who are, you know, assuming it’s a case where both sides think they have a pretty good argument, they want smart people who are interested in the law and who are going to give both sides a fair shake, so I mean, yeah. I mean, I don’t know... Have you ever been called to jury duty?

**Jill Twist:** Only once, and I never even made it

**Colin Miller:** Yeah. I mean, if I were picking a jury I would definitely--

[laughter]

I’d have you on the jury.

**Brendan Kenny:** And, yeah. Colin, my question for you is just, looking at-- To paraphrase *The Bible*, you know, “The harvest is ready but the workers are few.” There’s *so much* work to be done in this area, and you folks’, you all at *Undisclosed* podcast are doing a *lot*, so my question is: 1) what are the plans moving forward? You know, every week there’s *more* that you’re doing, and you

guys are making this even *better*, so what is the plan with moving forward? – Season 3 – and also where do you see this *movement* – if I can call it that – going?

**Colin Miller:**

Yeah. We're currently in the planning stages, I think pretty soon we'll come out with our schedule for the first half of next year. I think we have different projects we're all individually working on projects that are going to come to fruition, and then we're sort of working and researching and thinking about a full-blown Season 3 case, so... And I have a case that I'm working on that I'm really excited about that I look forward to sharing, and I think it's another case of wrongful conviction, so I can't wait to present that to the public.

And in terms of a broader movement, I mean I think it *is* something where – and I mean I think *Serial* gets all the credit here – it's started a moment in this country where people are paying more attention to what's going on in the criminal justice system than they ever had before. I think, legislatively, we're seeing some things that are being voted on today that are steps in the right direction, I think we're seeing legislators on both sides of the aisle interested in criminal justice reform, so I think you have both the public more interested, you have legislators more interested, you have shows like *Last Week Tonight* that are looking at it from their perspective and bringing a whole entirely different audience. Which has a good deal of overlap to *our* audience.

And I think we're going to see in the next decade or so a lot of positive changes in the way that the criminal justice system is handled. I think the *big* thing that's going to be tough to solve is just the finances. In terms of how we can fund public defender's offices. But I think a lot of the reform effort is out there, but without the monetary support that can go out there to the justice system, *that's* going to be the missing piece of the puzzle that has to be filled in.

**Brendan Kenny:**

Yeah.

**Colin Miller:**

Thank you so much to our guests. Again, Jill Twist is a writer on *Last Week Tonight with John Oliver*, which, if you're not watching it, it's a fantastic show – it's really funny, it's really smart – so definitely check it out on HBO. And Brendan Kenny has terrific Periscopes – you can follow him- What's your Twitter tag, Brendan?

**Brendan Kenny:**

K-E-N-N-Y-B-R-E-N-D-A-N

**Colin Miller:**

Yeah. So, definitely follow Brendan and watch his Periscope videos, and *Last Week Tonight* – again, terrific show. I'm sure they're going to have a great episode following-up on the election so Jill and Brendan, thanks so much for joining us today.

**Brendan Kenny:**

Thanks!

**Jill Twist:**

Thank you so much!

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