The wrongful convictions of Sebastian Burns and Atif Rafay: *Presumption of Guilt*

> *When it might help us, it's significant. When it turns out to be in conflict with our theory, just ignore it…it's not important anymore.*
>
> *Jeff Robinson*

Just as error itself is a part of being human and part of any system created by human beings, wrongful convictions along with wrongful incarcerations are inevitable in any legal system. Public pressure on authorities to solve and successfully prosecute major crimes, along with the career enhancement for those securing the conviction, make errors even more likely. While no one can seriously argue against the fact that wrongful convictions do occur, the system itself is resistant to change. Time and again, the innocent are made to suffer needlessly during extraordinarily long periods of incarceration or even, in some instances, by execution.

One might think that a wrongful conviction is only recognizable in hindsight, but that is just not so. In fact, wrongful convictions are easy to recognize by their symptoms: an absence of hard evidence; false confessions; unreliable or suborned witnesses; ineffective lawyers; prosecutors, police and judges with tunnel vision. As in any syndrome, the presence of a majority of these factors in a criminal case is a warning that a miscarriage of justice is occurring or may have already occurred.

The 2004 wrongful convictions of Sebastian Burns and Atif Rafay for the gruesome 1994 slaughter of Rafay's family in Bellevue, Washington, have not been addressed in any detail outside of court documents submitted for their long-delayed upcoming appeal. The convictions are a tragic but understandable miscarriage of justice and a grievous infringement upon the lives of innocent persons and their families. Nothing will ever be able to lessen the scope of this tragedy, but justice, however late and cumbersome, might ameliorate some of the excruciating pain that has been caused to the defendants and to the Burns family.

The following interlocking questions shed light on the arrest, the trial and the aftermath:

1. How valid were the "confessions" made to police posing as gangsters?
2. Why was it so easy for the prosecutors, the police and the media to create a story about the crime that the public, the jurors, and the judge were ready to accept?
3. Was there significant circumstantial evidence against Burns and Rafay?
4. Was an echo of similar cases superimposed on this one?
5. How was the phenomenon of "tunnel vision" at work here, where only facts that confirmed the prejudice of the investigators and prosecutors were acceptable and factors pointing to innocence ignored or rejected?

Mr. Big

The reliability of the "Mr. Big" sting operation run by the Royal Canadian Mounted Police has been assessed by a majority of innocence projects and legal clinics in Canada. This technique, designed to elicit confessions from criminal suspects, is central to the case of Burns and Rafay. To be succinct, without the so-called confessions, the case against them lacked substance. Prosecutors and police, mechanically echoing each other after the fact, have referred to "a mountain of circumstantial evidence" against the pair, insisting that Mr. Big simply amplified already existing evidence. Three innocence projects (Innocence International, The Idaho Innocence Project, and the Pacific Northwest Innocence Project) disagree with this assessment. Such evidence that *was* found, aside from the false confessions, would not have resulted in a conviction—was insufficient even to have justified a trial. Based on that lack of evidence, the RCMP should never have been granted permission to run the sting.

Several studies have been written on the reliability of the undercover technique employed in this case. All the Canadian legal clinics and innocence projects weighing in have come to common conclusions, differing only in their ultimate recommendations. The majority of the studies concede that Mr. Big is a tool that has met with a level of success—75% in attaining confessions and 95% turning the confessions into convictions—in solving cold

cases or cases where hard evidence is insufficient or ambiguous. However, *every study* also acknowledges the real danger of false confessions and wrongful convictions, especially, but by no means exclusively, amongst the young, the poor, and the intellectually impaired. Universally, the studies recommend putting safeguards in place, chief amongst them being the requirement of at least some *hard evidence* before the technique is employed. Hard evidence is the type that would exclude innuendo, "gut feelings" and character assumptions, all of which factor significantly into the police activity and the trial of Sebastian Burns and Atif Rafay.

An analysis of Mr. Big by MaDonna Maidment of the University of Guelph (Ontario) in her book, When Justice is a Game: *Unravelling Wrongful Convictions in Canada*, (Fernwood) contains this succinct summation:

> *If there is insufficient evidence to bring an accused to trial, then the police should be prohibited from adopting extreme methods to exact a confession at any and all costs.*

The word "costs" may in some way refer to the cost to the Canadian taxpayer. The Burns and Rafay sting alone cost over one million dollars; the RCMP has admitted to using the technique over five hundred times in British Columbia alone. If nothing else, these numbers indicate an unhealthy reliance on unscientific evidence gathering. It is far easier to elicit a confession from an unsuspecting or gullible person, guilty or innocent, than to engage in the long and tough work that would result in less questionable results. The immensity of this funding and the methodology itself also invites corruption. Who is keeping track of where and how this money is spent?

Other published studies on Mr. Big include: *Proof of Innocence* by Steven Smith, Veronica Stinson, and Marc Patry (St. Mary's University, Halifax) and reprinted in the American Psychological Journal; *He Could Have Walked Away*, Timothy Moore Regina Schuller, Karina Gagnier (York University, Toronto); *Mr. Big Recruiting for the Criminal Underworld: An Examination of Undercover Police Investigations in Canada,*

Kouri Keenan (Simon Fraser University, Burnaby, BC); and *Coercing a Confession: A Comparison of Tactics Used During In-Custody Interrogations and Mr. Big Investigations*, Samuel Loeb and Michael Toulch, (UBC Law Innocence Project Vancouver, BC). In addition, the SFU study has spawned a book by Joan Brockman and Kouri Keenan: Mr. Big: Exposing Undercover Investigations in Canada (Fernwood). The thesis of the book is that wrongful convictions from Mr. Big, despite all the public relations announcements by the RCMP to the contrary, present a serious danger for wrongful convictions.

Finally, the following individuals have either been released from prison and/or compensated for errors that occurred through Mr. Big operations: Jason Dix, Clayton Mentuck, Kyle Unger and Andrew Rose. In addition, serious doubts exist in the cases of Patrick Fischer, Wade Skiffington, Sebastian Burns and Atif Rafay. This list is by no means exclusive of other cases about which there is insufficient information. Two more recent court decisions, R v. Osmar (Ontario) and Hart v. Queen (Labrador/Newfoundland) threw out Mr. Big convictions, holding that the technique, *as used in those two cases*, was inherently flawed.

It is difficult for those advocating civil liberties and better policing to see any situation in which police, masquerading as gangsters, be allowed to produce confessions through financial inducements, extortion and overwhelming intimidation. Such evidence is corrupted by definition and, in an American courtroom, a violation of the right against self-incrimination. Canada has similar laws pertaining to the viability of confessions without the suspect being advised of his/her right to remain silent, but Mr. Big has been allowed an exemption because of the Supreme Court of Canada's perverse ruling that the voluntariness of statements is only at issue when the suspect believes he is dealing with persons in authority (i.e. police and prosecutors). The confession is deemed okay when the suspect believes he is dealing with gangsters because gangsters are not required to inform the suspect of his right to remain silent. Never mind that the gangsters really are policemen and never mind that the applicability of such a standard is so wide as to admit virtually any form of coercion.

In point of fact, the danger of Mr. Big is not limited to the target suspect. Law enforcement itself is at risk. Police behaving like gangsters recalls the analogy of the duck: if it looks like a duck and walks like a duck and quacks like a duck, it is a duck. Police behaving like, sounding like, and throwing money around in the manner of organized crime, are gangsters. Even the court admits that the confession is not being made to police, but to gangsters. The confession should only have weight if the confession is repeated to actual police officers who inform the suspect of his or her right to remain silent, in other words, a legal confession. The further dangers of Mr. Big are loss of respect for law enforcement in general and a tendency to thuggish and violent behavior for some within the force itself. With respect to concerns of violence in the use of Mr. Big, the Guelph study makes specific references to the methodology:

> *The remarkable imbalance of power inherent in these sting operations and the limitless monetary means available to the police to stage their plots creates a breeding ground for wrongful convictions… [These] stings are shocking due to their characteristic reliance on the sexual degradation of women, the use of drugs, alcohol and state sanctioned criminal activity, and the…use of violence to demonstrate the hyper-masculinity of the actors.*

In answer, then, to the validity of the confessions given to Mr. Big, the methodology employed made the confessions extremely suspect. The boys told the gangsters exactly what the gangsters urged them to say, because the dangers of confessing to falsehoods appeared to be less than the danger of telling the truth.

The Legal and Historical Context of Rafay/Burns: How the Story Gained Credibility

Four similar criminal cases have a strong bearing on this case and affected the Burns/Rafay trial on both a conscious and unconscious level. The oft-cited Loeb and Leopold (1924) case provided historical context for the killings of the Rafay family. The cases of Darren Heunemann, Derick Lord, and David Muir in British Columbia, the Menendez brothers in California, and Marty Tankleff in New York, provided three ready

examples of young people supposedly killing their parents for money and confessing to the crime. Let us state at the outset that Tankleff has since been released from prison because the confession was invalidated by the facts of the case. Huenemann, Lord, and Muir were convicted in 1992; the Menendez and Tankleff cases were also being played out at the same time (tried in 1993-4) the Rafay family was murdered and would presumably have been in the minds of the police investigators and the future prosecutors. The three contemporary cases attracted considerable notoriety; Loeb and Leopold remains one of the most infamous crimes in the history of the United States.

Richard Loeb and Nathan Leopold

The personal parallels between Rafay and Burns and Richard Loeb and Nathan Leopold are occasionally striking. Rafay and Burns were eighteen, and Loeb and Leopold were nineteen years old at the time of the separate murders for which all four were convicted. That Loeb and Leopold actually killed their friend, Bobbie Franks, has never been in serious question. That all four had more than a passing interest in Friedrich Nietzsche is also true. That Sebastian Burns appeared in a school play which was roughly based on the Loeb and Leopold case and in which he substituted a baseball bat for a rope as a murder weapon was an important factor in the jury's verdict against Burns and Rafay.

Loeb and Leopold, two "wealthy socialites", used the philosophy of Friedrich Nietszche to justify their abnegation of conventional morality. Their openly homosexual relationship was an act of defiance, but at least a completely harmless one. Loeb, however, was fascinated by crime, criminal behavior, detective novels, and had a previous criminal record. Looking back on Richard Loeb's life, his sense of values was distorted; his preoccupation, even obsession, was to commit a major crime and get away with it. Nathan Leopold, under Loeb's sway, wandered into an abyss of amorality, joining his friend in killing a youngster whom they deemed a worthless individual, while trying to cover up their involvement in the crime. Their sense of entitlement and superiority was attributed to Nietzsche, but their understanding of the philosopher was selective, a gross perversion.

Rafay and Burns may have thought of themselves as intellectually superior to other students and exuded a certain arrogance in this regard, but then any high school student with intellectual pretensions finds him or herself excluded from the mainstream. Anti-intellectualism is universal in the social setting of a public school, even a public school catering to wealthy families. Those who are excluded often create their own barriers, their own exclusivity. Rafay and Burns were unquestionably perceived by some teachers and students as different. The point must also be made that anti-intellectualism extends far beyond the school environment and permeates North American society. Jurors would be far less sympathetic to defendants they perceive as "smart asses".

However, aside from adolescent pranks and the normal stupidities, there was not a hint of criminality nor violence in their previous actions. The worst that could be said was that Burns rubbed people the wrong way and got into an accident with the family car and tried to cover it up with a lie. Anyone who has raised an adolescent has experienced this very thing or something much like it. Yet they were convicted of having conceived of and carried out a plan to annihilate a family for financial gain, notwithstanding that the *manner* of the crime might well have indicated either psychopathology or fanaticism. They lacked the criminality of Loeb, yet they supposedly committed a crime far more bloody and sick. Was it the love of Nietzsche that compelled this bludgeoning?

Nietzsche himself has been smeared through guilt by association. A perfect example of this type of thinking occurs in the book Perfectly Executed, by Peter Van Sant and Jenna Jackson. This book was based upon a made for TV (*48 Hours)* "true crime account" of the case. Although the book purports to be objective and supposedly leaves this murder mystery with the reader as jury, such statements as follows tilt the book firmly into the camp of those who believe that Rafay and Burns were modern day versions of Loeb and Leopold:

> *Nietzsche was best known for his "superman" theory, the belief that the morals and rules of society don't apply to the intellectually superior. Nietzsche wrote*

> *about the* wille zur macht, *the will to power, referring to the superman's use of violence and deceit to get what he wants. Nietzsche also once famously declared that "God is dead". Adolf Hitler referred to Nietzsche as one of the founding fathers of Nazism, even though Nietzsche lived in another time…*

The work of Nietzsche, amongst the greatest philosophers in the Western tradition, is beyond the scope of this article. Suffice to say that Nietzsche is the single most cited author in all Humanities and Social Science periodicals. An attempt was made, successfully as it turns out, to conflate the interest in Nietzsche with the crime of bludgeoning the Rafay family to death. Burns and Rafay were student intellectuals with a strong interest in Nietzsche; therefore, the flawed reasoning goes, they must have believed 1) that the rules of society did not apply to them, 2) that they had an inherent right to use violence and deceit to further their ends, 3) that they didn't believe in God, and, because Hitler referred to Nietzsche as an inspiration, 4) that love of the philosopher could be equated with the Nazi's policy of exterminating inferior races, never mind that this was Rafay's own family. It may be generally accepted that atheism does not constitute a proclivity to criminality, but if the other suppositions were true, all university philosophy scholars whose work centers on Nietzsche should be removed from their positions since they must be potential criminals and even mass murderers. Hence, it is pure coincidence that Burns and Rafay professed, as did Loeb and Leopold, a love for Nietzsche and that this fact, while stressed by investigators and the media, was an example of guilt by association and, more importantly, altogether meaningless. While a love of Hitler is often a common thread in school shootings, Nietzsche should in no way be equated to Hitler. The Nazi interpretations of him were decisively refuted in 1954 by Walter Kaufman.

Burns' school play, *The Rope*, in which a baseball bat is used as a murder weapon instead of the eponymous rope, appears to be circumstantial evidence for Burns' involvement in the bludgeoning deaths of the Rafays. But it hardly seems clever or "deceitful" to advertise one's choice of murder weapon and then to actually employ it in the commission of so hideous a crime. While it has never been proven that a baseball bat

was used in the bludgeoning, the crime as performed in Burns' adaptation is admittedly similar to the crime in reality.

However, one important distinction, hard evidence, separates Burns and Rafay from Loeb and Leopold. Nathan Leopold's glasses were found where Franks' body was buried. The typewriter at Loeb's law school was likely the one that produced the ransom note to Franks' parents. They confessed to the crime—eventually to the police. They never withdrew the confessions. They pled guilty and did not go to trial. At a hearing, their lives were saved by Clarence Darrow who argued passionately against the death penalty.

Hard evidence, however, does not tie Burns and Rafay to the Rafay family murders. The prosecutors made much of and still refer to Sebastian Burns' hairs found in the shower where the killers washed off the blood of their victims. Considering that Burns was staying at the Rafay home and using that particular shower, the hairs do not constitute evidence at all, unless one were to believe that an adolescent constantly cleans up after himself. A pubic hair was found in Tariq Rafay's bed but it didn't belong to Burns or anyone in the Rafay family. The police and prosecutors originally thought the pubic hair would be the lynchpin of the whole case, but when it didn't match the suspects, Burns' hair in the shower was considered to have more probative value. DNA found in the house was not a match for Burns or anyone in the Rafay family and so it was considered to be irrelevant. This prejudicial reasoning is what prompted Jeff Robinson's words in the epigraph, repeated here for emphasis:

> *When it might help us, it's significant. When it turns out to be in conflict with our theory, just ignore it…it's not important anymore.*

In fact, Burns and Rafay were taken by police to a grubby motel room, thoroughly examined for traces of blood, injuries or bruises sustained from the killings, and were subjected to intense questioning. Although this testing and questioning occurred over several days, nothing of any substance was discovered linking them to the crime. Blood, especially blood lodged in hair follicles, is extremely difficult to wash away. Yet Bob

Thompson, a detective from Bellevue, Washington who had never before investigated a murder case, did not see the absence of incriminating evidence as proof of innocence. It only confirmed for him that the two boys had tried, like Richard Loeb, to commit "the perfect crime".

Promising leads to Muslim fundamentalists were disallowed in the courtroom. A tip from an FBI informant warned of a plot to kill a Pakistani family that had moved to Bellevue. The judge refused to allow this evidence into the courtroom. Tariq Rafay's friend and colleague, Riasat Ali Khan, founder of the Pakistan Canada Association of which Tariq Rafay was a former director, was gunned down outside his Vancouver home shortly before the Rafay/Burns trial. The seemingly senseless crime has never been solved, just as the murder of the Rafay family has ever been solved.

The biggest problem for Detective Thompson was that the boys were unquestionably at a film, *The Lion King*, that night. They were seen there. The promos began at 9:50, and the film started at 10. The neighbors heard thumping noises and groans in the Rafay home between 9:45 and 10:15. It appeared, then, that the killings were done while the boys were at the movies. At 10:05, as the film began, Sebastian Burns came out to complain that the curtain was malfunctioning. The police were sure that he was trying to attract attention, i.e. to establish an alibi, although the average person might also dislike seeing a film through a scrim. Partly through Burns's false confession, where, in order to impress the gangsters and alleviate his predicament, he was too smart and inventive for his own good, it was theorized that 1) they stealthily left the movie theatre out the side door, 2) returned to Rafay's home, 3) stripped down to their underwear, 4) killed the family, 5) showered and dressed, 6) went elsewhere, and 7) returned later to "discover" the bodies. That the timing and the details of this scenario were unlikely and the fact that it was "perfectly executed" unlikelier, must even have impressed the prosecutor, Richard Konat, who had helped to create it. In his summation, he allowed that the crime may not have taken place during the time of the film, partially abandoning his own theory at the last moment.

Atif's and Sebastian's absence from the Rafay home during the attack was treated as evidence against them in and of itself. It never seemed to occur to the investigators and the prosecutors that the killers may have been watching the house until the boys went out. Those killers, likely three of them according to blood spatter evidence, may have wanted to avoid a physical confrontation with two eighteen-year-olds or to avoid being outnumbered. But since Rafay and Burns *had* to be guilty, alternate theories were readily rationalized or disregarded.

The credibility of the so-called evidence against Burns and Rafay arose in part from the confessions to the RCMP gangsters, but also from the use of an unreliable witness. Since they confessed to the killings, everything must follow from that, i.e. they *had* to have left the theatre or the neighbors were mistaken about the timing because how else could they have killed the family? The false scenario was fed to Sebastian and Atif's close friend, star witness, Jimmy Miyoshi, who vaguely repeated the details on a recording in Seattle where, not so incidentally, he had signed an immunity agreement. For the jury and the media, Miyoshi was confirming the prosecution's theories. In all likelihood, his testimony was partially fabricated and partially a pastiche of previously known information. Who could blame Miyoshi? Since he was told that Burns and Rafay had "confessed" to the RCMP, he did what almost anyone else would have done in the circumstances. Why put his neck on the line and be charged as an accomplice when his friends had already been decapitated?

Tunnel vision dictated that everything the teenagers did would be characterized as criminal intent, criminal deceit and criminal behavior. They rented a video machine and a film to use in the motel room. That showed the heartlessness of criminals. Why, it was asked, did they do something so frivolous in light of the terrible traumatizing murders? The question is meaningless and rhetorical; it comes about through a flawed premise, i.e. they must have been the killers. If the presumption of innocence was accorded them, one might just as well say that they were escaping from the reality of a hideous situation.

They weren't under arrest and yet they agreed to the testing without the participation of legal counsel. This supposedly showed arrogance and bravado, waving the red cape at the bull. Miyoshi said they planned the killing, like Loeb and Leopold, in such a way as to outwit the police. In his testimony, each detail that might have proved their innocence was explained as part of the cunning plot. For example, nothing in the way of evidence came from the listening devices in the Burns' home or in their automobile. That was because, as Miyoshi and the prosecutors claimed, they knew they were being bugged. They were not under arrest and were given permission to leave the country. Burns lived in West Vancouver and Rafay was from the same place until his family moved to Bellevue. In other words, they went *home*. Thompson and Konat alleged over and over that they "fled" to Canada. That contention was and has been continuously and uncritically repeated in the media. Rafay's family had a memorial service in Bellevue on the day they left. Since the boys had been held in isolation, they knew nothing about the funeral. Yet their "fleeing" was also taken as a sign of criminal heartlessness and, so it follows, their guilt. Finally, Miyoshi alleged that the reason Sebastian was visiting the Rafay's at the time was not to spend time together during a school holiday but to spread their DNA around the house so that it would be a matter of course for the investigators discover it there. This allegation further suggested to a credulous jury that Atif and Sebastian were schemers of the first order. Because Atif was characterized by Miyoshi as hostile to his own family, the jury might (and did) believe that the visit to Bellevue was something unusual.

Konat's summation attempts to demonstrate that Burns and Rafay were latter day versions of Loeb and Leopold:

> *Ladies and gentlemen of the jury, almost ten years to the day, an Ivy League intellectual, Atif Rafay, and his very best friend in the world, Sebastian Burns…conspired in the spring of 1994 to act on a plan of theirs, and ultimately capture that sense of entitlement that they believed belonged to them.*

In essence, the police and the prosecutors and the judge created, with some assistance from historical cases, the "amoral" monsters, who could commit the crime attributed to

them. Their guilt was presupposed, so they had to be characterized in such a way as to fit the heinous acts *that they did not do*.

Darren Huenemann, Derik Lord, and David Muir

Darren Huenemann, Derick Lord and David Muir were convicted in 1992 of the 1990 murders of Darren Huenemann's mother, Sharon, and grandmother, Doris Leatherbarrow. It was alleged that Huenemann, 19, hired Lord, then 17, and Muir 16, to kill his wealthy grandmother and mother in order to inherit his grandmother's four million dollar estate. This murder took place on Vancouver Island, near Victoria, British Columbia involving as well the ferry passage between Swartz Bay and Tsawwassen, a short distance from Vancouver. The case attracted considerable attention along with engendering a book named below. The guilty verdict against this trio may have influenced the decision to allow the RCMP to run a sting on Burns and Rafay in the absence of hard evidence.

The police made it appear as if David Muir confessed to his involvement in the crime before the trial, but there is no verification and no transcript. Muir was presented with a written confession and a demand that he sign it, but he never did. In any event, the so-called confession was disallowed in the courtroom because he was never apprised of his right to remain silent. After the trial, in exchange for a deal which allowed him to leave prison in ten years, Muir confessed to prison authorities that he'd committed the crime. This confession has never been seen by the public, but Muir was released as promised. It takes bravery and commitment to reject a plea deal while facing a life sentence, but some people like Derick Lord cannot live with themselves in the face of a self-incriminating lie. Lord has continued to protest his innocence, remaining behind bars until today, nineteen years and counting. Huenemann has never admitted to his guilt either. A book by Lisa Hobbs Birnie entitled <u>Such a Good Boy: How a Pampered Son's Greed Led to Murder</u>, gives a supposedly objective account of what happened. The title of the book alone calls into question its objectivity, in the same way that the title <u>Perfectly Executed</u> appears to condemn Burns and Rafay. Almost by definition, the verdict of a trial is

treated as objective truth. “The whole truth and nothing but the truth”, real or manufactured, is comforting. The legal system, society and the relatives of the victim need closure.

Huenemann’s former girlfriend, Amanda Cousins, was the chief witness against her former boyfriend and his two younger friends. For us, the single most important similarity in these two cases is the use of the two witnesses, Cousins and Miyoshi, who were both facing charges as co-conspirators and whose testimony came in exchange for immunity from prosecution. For Huenemann, Lord and Muir, the judge allowed that Cousins’ testimony constituted the entire case.

The manner of the two separate crimes was equally ghastly. Could two previously normal teenagers slice the throats and jugular veins of two adult women in exchange for a job as Huenemann’s bodyguard? Could Burns and Rafay have bludgeoned Rafay’s family in order to fund the making of a movie? Darren Huenemann was reported to have expressed hostility toward his grandmother while playing Dungeons and Dragons with his friends. Rafay was said by Jimmy Miyoshi to have expressed a desire to kill his family, a claim that has no credibility given the source. After killing the grandmother and her daughter, Muir and Lord apparently tried to make the crime look like a burglary. The same was said of Burns and Rafay. This point is especially disturbing since the faked burglary was used as circumstantial evidence. Anyone committing such a crime, a former boyfriend, for example, or a vengeful religious group, would try to make it appear like a burglary, since it’s well known that burglars might kill if discovered in the act.

It must be reiterated that both cases offered *nothing* in the way of hard evidence. Rafay was offered a deal for a confession against Burns whereby he’d serve his sentence in Canada and be eligible for parole. Like Derick Lord, he refused the plea deal.

Erik and Lyle Menendez

The Menendez brothers, confessed killers of their parents, came from a very wealthy California family. Celebrities made use of their palatial home. The Burns and Rafay families were not in that class, although the Burns family has a fine home in West Vancouver. Most stories about Burns and Rafay refer to the wealth of West Vancouver (most recently "wealth soaked West Vancouver" in the Globe and Mail) as if wealth itself, like extreme poverty, has some relationship to criminality. In point of fact, however, the Rafay family was not at all wealthy. Their home in Bellevue, Washington was heavily mortgaged. And why? Because Tariq Rafay had to put aside money to pay tuition for Atif at Cornell University. He had a brilliant son and he wanted him to have every educational advantage. Mr. Rafay made less than sixty thousand dollars a year, had a severely brain damaged daughter and two life insurance policies worth one hundred thousand dollars each. No evidence indicates that Atif was aware of the policies until after the killings. Indeed, Dave Burns, Sebastian's father, held that "if they really wanted to kill someone, it should have been me." And, of course, Canada does not have the death penalty. Someone who carefully planned such a crime solely for money would certainly have been aware of these factors.

Erik and Lyle Menendez pled guilty to the murder of their parents. Their trial hinged on the motive for the crime. If their claim of having been sexually abused by their father, emotionally abused by both parents and facing imminent danger could be established, then they could not be convicted of first-degree murder. The prosecutors alleged that the killings were done for control of their parents' estate. The first jury was hung, but the second jury was convinced of the financial motive. Interestingly, the prosecutors in Burns and Rafay, not wanting to take any chances, attributed both motives to the pair. First, Konat said that the boys wanted to acquire Rafay's family estate in order to make a film, although it was clear that they didn't think about making a film until much later. (In another odd parallel, Erik Menendez and his friend had written a screenplay entitled "Friends" that they wanted to produce.) Secondly, it was alleged by the prosecutors that Tariq Rafay was a "devoutly religious domineering father". "Domineering" was the same term used by investigators to describe Jose Menendez. But that was untrue of the mild mannered Tariq Rafay.

Both cases featured a 911 call by the alleged perpetrators to report the murders. The police reported that Erik and Lyle were running around and yelling, but not, in their estimation, emotionally upset. Burns and Rafay were said to be acting strangely, not as one might expect a person to act when they have discovered murdered persons that they knew so well. This same issue, how a person acts after a murder, both at the crime scene and in the courtroom, came into play in the recent case of Amanda Knox (perhaps wrongly convicted as well) who was said to have a "strange attitude" at the police station. Amanda sat on the lap of her co-convicted, Raffaele Sollecito, while awaiting interrogation and both smiled in the courtroom. No specific etiquette governs the manner of behavior at a crime scene, nor can any conclusions less than prejudicial be drawn from the observations of such behavior. Nor can Burns much ballyhooed sexual tryst with his attorney be any more relevant than Knox sitting on her boyfriend's lap. Burns had already spent several years in a Canadian prison awaiting extradition; he was not immune to his attorney's desires or his own.

At their arraignment, Erik and Lyle were described as "cocky and arrogant". With regard to Burns and Rafay, the investigators, the jury and the public were highly influenced by their behavior. Extraordinary aspersions, especially about Burns, were cast throughout and following the trial. Indicative is Konat's summation:

> *Sebastian Burns, an incredibly annoying, and, if ever it was possible, perhaps even more arrogant individual…*

or to the words of a juror:

> *Sebastian sneered. He had an evil look on his face.*

or to the words of the judge:

> *You're not immoral, Mr. Burns, you're amoral.*

These statements are indicative of an animus, especially toward Sebastian but also Atif, that dominated Mertel's courtroom and still remains years after the trial. Jurors who had convicted them said they were "terrified" of Sebastian even though he was in custody and condemned to life without the possibility of parole. One of his former teachers opined

that she wasn't surprised that Burns could be a murderer, although none of the other teachers interviewed would go anywhere near such a conclusion, saying only that he could be threatening in his manner. Rafay, on the other hand, was almost universally liked and admired by his teachers and the parents of his friends. Yet in response to a recent sensationalist article in Vancouver's tabloid paper, *The Province*, an individual wrote in complaining that Atif Rafay should not be allowed to mingle with other prisoners lest he insidiously persuade someone to murder another inmate. The belief that Rafay was the puppeteer conflicts with the equally wrongheaded view of Judge Mertel, i.e. Burns, like Richard Loeb and Lyle Menendez, was the evil genius manipulating the dupe, in this case, Atif Rafay, into participating in the murder of his parents. Once again, the monsters had to be created to fit the crime.

In that Sebastian Burns' character was an issue in the courtroom, it may be pointed out that the traits he displayed are irrelevant to the crime for which he was convicted. That Menendez and Loeb, through their social class standing conferred on them by wealth, had such traits as described above, was extraneous to the acts *they* committed. A courtroom can be less a sanctuary of blind justice and more like a sporting contest; the viewer (or the juror) identifies with one "side" or the other, sometimes for completely unconscious reasons. Unconscious feelings can be surfaced by clever prosecutors who use the trial as a "game" to score points. Playing upon the perception of arrogance in and of itself produces a powerful animus against a defendant, irrespective of the merits of the case and irrespective of the truth. Everyone involved in the legal system should be an advocate of truth, but this is an ideal, an unreachable ideal if the judge herself happens to be prejudiced, however unconsciously, against the defendants.

The traits of Sebastian Burns are also present in people with Asperger's Syndrome, a "mild" form of autism. It is possible that Burns had this syndrome; the traits themselves are shown simply to demonstrate that such behavior is irrelevant to murderous intent. According to the Autism Spectrum Disorders Health Center, a person with Asperger's might exhibit the following tendencies:

1. An inability to pick up on social cues and an absence of social skills, such as being able to read others' body language... (Burns was easily fooled by the Mr. Big sting operation and constantly rubbed people the wrong way.)
2. The appearance of a lack of empathy. (Judge Mertel thought he was amoral; most saw him as "obnoxious" or "arrogant".)
3. Be unable to recognize subtle differences in speech tone, pitch and accent that alter the meaning of others' speech. (Burns' behavior showed that he didn't understand the way other people saw him—especially if they employed irony or understatement to correct him.)
4. Have a formal style of speaking that is advanced for his age. (His use of such language enforced the view that he was arrogant.)
5. Avoid eye contact or stare at others. (The jury complained about Burns' menacing stare.)
6. Have unusual facial expressions or postures. (Every close observer of Sebastian Burns commented on this trait.)
7. Be preoccupied with only one or few interests, which he may be very knowledgeable about…They may show unusual interest in certain topics (as Burns did about the movies).
8. Have a tendency to talk a lot. One-sided conversations are common. Internal thoughts are often verbalized. (Burns spoke for an hour and a half before sentencing and his appearance on the witness stand was a disaster.)

Once again, no one knows for certain that Burns' has Aspergers, but such character traits could be prejudicial in a courtroom; they certainly do not constitute circumstantial evidence. Jeff Robinson, one of the defense lawyers, mentioned all of these reservations about the so-called evidence in his summation; everything in that summation was true and reasonable, but none of what he said could overcome the animus.

> *…you are being given a not-so-subtle invitation by the state to judge this young man, not on the evidence, but on…personality*.

Marty Tankleff

The Tankleff case originated in Suffolk County, Long Island. The motivation attributed to Tankleff and the way the case hinged on a false confession makes it similar to Rafay/Burns. Marty, then age seventeen, was suspected by police of knifing his father and mother in their beds for financial motives, another heartless and grisly crime by someone who showed no previous penchant for violence. He was browbeaten and denied sleep during the interrogation until a moment of complete exhaustion swept over him. The police asked if he might have blacked out and then committed the murder in a trance. Marty allowed that he may have blacked out but he had no way of knowing. As far as the police were concerned, that statement constituted a confession. When they asked their suspect to sign a statement, he refused, but his fate was sealed. He was convicted in the absence of hard evidence and served 17 years in prison until his release and exoneration in 2009.

Former New York police detective, Jay Salpeter, broke the case open by discovering the hired killer and the person who hired him, a former business associate of Marty's father. Mr. Tankleff was owed a very large sum of money by his associate. Marty had protested his innocence the entire time he was in prison, but such is the power of tunnel vision and the nexus between confessions and convictions that the Suffolk County authorities continued to insist that he was guilty, even after his release. Marty's extended family stayed behind him for the whole ordeal, just as the Burns family and the Lord family continue to support their sons.

A jury was convinced of Tankleff's guilt despite the fact that the so-called confession was retracted. Retracted confessions cannot be seen as confessions in the sense that Loeb and Leopold, the Menendez brothers, and David Muir actually confessed. While it's certainly possible that Muir confessed in order to cop a plea, the fact remains that he did not withdraw the confession. Burns and Rafay confessed to the gangsters because they were told that the Bellevue police were fabricating evidence against them by using their DNA, and that they, the gangsters, had the power to make the evidence go away. Of course they also led the boys to believe that they were ruthless individuals who held their

lives in the balance. The point here is that confessions lead to convictions more than any other form of evidence, so the police will go to any lengths to get them. Once a confession leads to a conviction, the possibility that it was a false confession leading to a wrongful conviction is *always* denied, because the cost to the reputations of numerous officials who may have unwittingly participated in the whole injustice would be too great for them to bear.

3. ***Guy Paul Morin and Tunnel Vision***

The Guy Paul Morin case was the landmark case for wrongful convictions in Canada. Out of this case was formed the Association in Defense of the Wrongly Convicted (AIDWYC), Canada's foremost innocence project, headed at that time by Rubin "Hurricane" Carter. In every respect, the case is a litany of things that can go wrong when public officials are hindered by "tunnel vision". Morin was originally acquitted of the rape and murder of a nine year old child, Christine Jessop. But Canadians, in certain rare circumstances surrounding a judge's instructions, are not accorded the right against double jeopardy. Fastening on the judge's instructions in the first trial and receiving a favorable ruling from the appeal court, the prosecutors were able to try Morin again. He was convicted on the second go-round and sent to prison. The conviction resulted from the manipulation of evidence, the testimony of unreliable witnesses, and, most importantly, from character assassination. Morin's case provides a template for Burns and Rafay.

The most troubling piece of evidence in the case was the attempt by the Crown to establish the time when Christine Jessop's parents had returned home. Between the time Christine was dropped off by the school bus and her mother's return, there was a window of opportunity for the abduction. The original time the Jessops gave made it impossible for Morin to have committed the crime; he had a corroborated airtight alibi as to his whereabouts in that timeframe. His first acquittal rested in part on this successful alibi. However, under intense pressure from the police and crown attorneys, the Jessops became confused, admitting by the second trial that they might have returned home later

than they first thought. The new story now being put forth by the prosecution gained credibility with this new jury. An exact parallel occurred in the Rafay/Burns case. One of the Rafay's neighbours, Marc Sidell, tried to alter the time he heard the killings, from 9:45 to 9:20, which he later admitted was incorrect.

An inquiry into the wrongful conviction of Guy Paul Morin blamed the prosecutors for having "a single-minded and overly narrow focus on a…prosecutorial theory so as to unreasonably color the evaluation of information received." They *presumed* Morin was guilty, so all information was either filtered or distorted.

In the Burns/Rafay case, the foremost problem facing the prosecutors was the corroborated alibi that placed the two teenagers at the movie during the time of the killings along with the doubly corroborated times given by the neighbours on both sides of the Rafay home. As alluded to previously, the boys either left the movie theatre during the film or the murder didn't take place when the neighbors swore they heard it. Had the police believed the most likely story, that Sebastian and Atif had nothing to do with the murders, then they would have been forced to look elsewhere for more likely suspects. But since, in their view, the boys *had* to be guilty, the facts themselves must have been in error. Along with tunnel vision, then, comes a corollary phenomenon known as Meyer's Law. Stated succinctly, if the facts don't fit the theory, change the facts.

Another factor in the second trial of Guy Paul Morin, and one linked directly to Burns and Rafay, was successful character assassination. Morin was described by the prosecutors as abnormal; in fact, he had been diagnosed with mild schizophrenia. He had used the term "very innocent" when describing Christine Jessop to the police; he was "weird"; he lived with his parents; he tinkered with cars all hours of the night; he kept bees; he played in a band; he kept to himself. And, after all, he lived almost next door to the Jessops. These prejudicial innuendoes together with the Jessops' revised testimony, the perjury of the witnesses and the misuse of forensic evidence, led to a wrongful conviction. The prosecutors were vindicated, their reputations salvaged, and Guy Paul Morin went back to prison.

Burns and Rafay were portrayed as an amalgam of the perpetrators (or supposed perpetrators) of similar crimes. The self-congratulatory hoopla after the guilty verdicts in Burns/Rafay was all about the prosecutors' belief that good had triumphed over evil, along with a dash of egotism. They had triumphed in the courtroom, their reputations enhanced, while Burns and Rafay went to prison for life without parole. But then who can judge a prosecutor by the way he behaves after a trial? It's somewhat like trying to judge a person by the way he behaves at a murder scene.

One of the main witnesses in the Morin case was a jailhouse snitch, Robert May. In 2007, Justice Michael Brown of the Ontario Superior Court, while sentencing May as a dangerous offender in a totally unrelated case, described the Crown's star witness in the Morin case as a "psychopath and an incorrigible liar with little prospect of rehabilitation." Witnesses like May are used when the case against the defendant is either weak or non-existent. But, the reasoning must go, it's okay to use suborned witnesses when you're on the side of "good".

The belief in Morin's guilt was so profound and indelible that even when the DNA found inside Christine's body excluded Morin, the prosecutor still insisted that he was guilty. That this prosecutor, weeping publicly, was forced to apologize for her statements to the media did little to assuage the humiliation of the Morin family and the grief of the Jessops. The problem in this case was characterized as "error", a tragic mistake, the result of tunnel vision. An inquiry into the conviction of Thomas Sophonow, a Canadian eventually exonerated of the crime of killing his wife, concluded the following:

> *Tunnel vision is insidious. It can affect anyone involved in the administration of justice with sometimes tragic consequences. It results in the officer becoming so focused upon an individual or incident that no other person or incident registers in the officer's thoughts. Thus tunnel vision can result in the elimination of other suspects who should be investigated. Any one, police officer, counsel or judge can become infected by this virus.*

This statement puts forth a bad analogy. The problem with this virus is that while the various workers of the justice system appear to have the disease, the suffering and the consequences of that virus are borne by someone else. It is the same as saying that you have cancer, but the tumor is growing inside your friend's body. And what suffering! For the average prisoner, an enormous toll is taken on the spirit each and every day the count is taken and the iron doors slide shut. At least they can be consoled by some abstract notion of justice: they did the crime, they pay the time. For the wrongly convicted, the ordeal approaches agony. Sebastian Burns spent six years at Walla Walla in solitary confinement; his personality quirks made it difficult for him to avoid conflicts with hardened inmates. (Walla Walla is known to be the roughest prison in the state of Washington.) Burns, now at Clallum Bay on the Olympic Peninsula, appears to have suffered a mental breakdown from which he will likely not recover. Since Rafay barely weighs 130 pounds, Burns *must* have been the one who wielded the bludgeon that killed the Rafay family; he therefore deserved a greater punishment.

The perpetrators of injustice do not endure the negative consequences visited upon the wrongly convicted. They have been responsible, howsoever unconsciously, for a crime of their own making: the imprisonment of an innocent person. They don't even pay the compensation when the verdict is overturned; the taxpayer does. What is truly insidious is that the respect for the truth is sometimes, as it was in the case of Sebastian Burns and Atif Rafay, co-opted by the need to win the legal game. In the Canadian case, *Boucher v. The Queen*, the point is made emphatically. By definition,

> *The role of the prosecutor excludes any notion of winning or losing*.

Jeff Robinson himself must bear some of the blame for what transpired in Judge Mertel's courtroom. As the trial began, he said, "This is going to be a war," meaning that he was engaged in a life or death struggle with the prosecutors. The first casualty of war, it has been said, is the truth.

One day, it will become clear that the two young men, Atif Rafay and Sebastian Burns, were completely innocent of the killing of Rafay's family. Common sense, not attorneys and investigators vying for supremacy, was, and still is, all that was needed to apprehend this truth. Rafay and Burns were incapable of committing such a crime, never mind that the prosecutors and the judge depicted them as amoral monsters. The monster in this case is the monster of wrongful convictions, the ugly hybrid of false evidence, false confessions, false innuendo, suborned witnesses and tunnel vision.

TABLE OF EVIDENCE

Evidence used against Burns/Rafay	Presumed Innocent	Presumed Guilty
Rafay's Love of Nietzsche	Intellectual interest having nothing to do with criminality	Belief in elitist superman theories led to the crime
Burns school play	Coincidence	Plan for Rafay murders already in Sebastian's mind
Burns' hair in the shower where blood was found	Burns was staying at the house	Burns washed the Rafay family's blood off in the shower
Pubic hair on the Rafay bed	No match for Atif Rafay or Sebastian Burns or the Rafay family; another person, likely one of the killers, was in the room	The pubic hair was brought in on someone's clothing and is therefore irrelevant
No physical evidence tying either to the bloody crime	They didn't do it.	They were clever enough to hide it.
Burns and Rafay seen at the Lion King at 10 p.m.	Airtight alibi; they could not have killed the Rafay family in the time frame when the neighbors said they heard the noises from the Rafay home.	They made sure they were seen in the theatre in order to provide an alibi. The time of the killing was uncertain.
Crime scene made to look like a burglary had occurred	An enemy of the family would also have tried to make it look like a burglary	Atif and Sebastian made the crime scene look as if a burglary had occurred
They rented a video player and watched videos in the motel room where they were being interrogated	Two teenagers, having just experienced a traumatic event, were trying to escape from reality. They had nothing else to do.	They were heartless and unfeeling

They didn't attend the Rafay family funeral	Having been isolated, they didn't know about it.	They were heartless and unfeeling
Miyoshi's testimony	Miyoshi would have been tried as a co-conspirator; he was suborned	Miyoshi told the truth
Leaving the USA to go to Canada	Burns lived in Canada. Atif Rafay's extended family is Canadian. The American and Canadian authorities let them go; there was no evidence to hold them on	They fled to avoid further questioning
Motive: greed	Tariq Rafay sent his son to Cornell at 30,000 dollars a year. The Rafay family was not wealthy.	They wanted the money to fund a film
Behaviour at the crime scene	Irrelevant and immaterial	Strange behaviour of both boys indicated guilt
Burns abrasive personality	Means nothing in and of itself although he may have Asperger symptoms that alienated the jury	Showed that he was capable of murder
The confessions	Coerced and extorted by police behaving like ruthless gangsters	They confessed, ergo they must be guilty
The DNA found at the crime scene	Did not match Burns, Rafay or Rafay's family, therefore others were in the house	Anyone might have left it there; it's not relevant.