

Visualizing Interrogative Injustice: Challenging Law Enforcement Narratives of Mr. Big Operations through Documentary Film

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Abstract:

Documentary films can play a substantial role in visualizing key issues of legal significance concerning police interrogations and wrongful convictions. This article examines the ways in which the film, *Mr. Big: A Documentary (MBAD)* makes visible problems related to Mr. Big Operations (MBOs) in Canada. MBOs are undercover operations conducted by law enforcement officials for the purpose of eliciting incriminating information from an individual who they suspect has committed a serious crime such as murder. During these operations, undercover officers use strong financial and social inducements to entice targets to join the organization. In exchange for membership, targets are expected to reveal information about the crime they committed. This is usually contextualized as a demonstration of trust and/or in order for the organization to arrange to have another person admit to the crime. Law enforcement officials will also intimate their willingness to perpetrate violence on those who do not comply with their demands. This leads to targets feeling a sense of being threatened if they do not comply. Through numerous on-screen interviews with those who have expertise or are knowledgeable with respect to MBOs, *MBAD* attempts to accomplish several objectives. More generally, it stresses that there are dangers attached to MBOs that may lead to targets to falsely confess leading to wrongful convictions. Second, it scrutinizes problems associated with a particular Mr. Big scenario: targeting Atif Rafay and Sebastien Burns led to their convictions. Third, by shining a light on the problematic nature of MBOs and the Rafay-

Burns case, *MBAD* effectively constructs law enforcement officials as questionable actors who knowingly and intentionally adopt these techniques.

Introduction

In recent years, the notion of visibility has been a growing theme in social science literature. Exposing the largely unseen but unlawful or abusive acts of various actors who exercise significant legal, political, social and/or economic power is to render such conduct visible and open to public scrutiny. Though not new, the conduct of police officers (as one particular class of persons holding power) towards vulnerable sections of society has received increased attention due to the videotaping of several deadly interactions on cell phones or other recording devices. Termed as the “new visibility,” the displaying of these lethal or otherwise harmful moments on social media and on YouTube has significantly altered law enforcement’s ability to control perceptions about their practices (Goldsmith 2010). The exposing of such police conduct is by no means a passive event. As John B. Thompson (2005) argues, “the making visible of actions and events is not just the outcome of leakage in systems of communication and information flow that are increasingly difficult to control: it is also an explicit strategy of individuals who know very well that mediated visibility can be a weapon in the struggles they wage in their day-to-day lives” (31). Though not as concise, pithy or perhaps in some cases as accessible as the short clips that navigate virally through the internet in seconds, more traditional audio-visual media such as film and television programming may also nevertheless bring much needed visibility, context and sophistication to a number of concerns related to criminal justice issues. Indeed they might do so in ways that might not otherwise be possible through the types of short cell phone-based clips that circulate on the Internet. For example, how might ordinary citizens capture police operations that are undercover and outside of public view speak to the dangers of surreptitious police work to suspects? Film and television may assist in bringing visibility to numerous issues arising from undercover operations,

including the reliability of confessions that arise from them, and the methods employed to procure them.

Films and television shows are key staples in many North American popular culture diets. While not determinative, by making certain phenomenon more visible, they can play a significant and influential role in shaping (and distorting) public opinion and/or responses to current legal and criminal justice issues (Welsh, Fleming and Dowler 2011). Though perhaps less consumed in comparison to fictional stories and docudramas (that is, visual and dramatized narratives purporting to portray real life events), documentary films also comprise a modest portion of North American viewers' visual and informational intake. They are screened at film festivals, in movie theatres, on television, and many are accessible online as well as through companies such as Netflix. Despite the "documentary" label and their purported objectivity, documentary films present a version of reality processed through subjective lenses and in some cases may in fact be significantly skewed (Greenfield, Osborn and Robson 2010). Nevertheless, they visualize and heighten the visibility of numerous legal issues that might otherwise remain relatively obscured and unexposed. Documentaries may also influence viewers by contextualizing and deconstructing ongoing legal controversies. As law and documentary film scholar Regina Austin observes (2006), documentary films are "powerful tools for putting legal disputes into context" and ideal instruments for "bringing to life and making palpable the backdrop of contested and competing material, social, and political "realities" that underlie legal disputes in whatever fora they are waged." In so doing they can provide much-needed depth to a particular issue while consequently disrupting certain prevalent narratives and the simplistic assumptions upon which such narratives are based. Documentaries can also play an important role in challenging dominant and official narratives. By openly critiquing such narratives, documentary filmmaking (as with other forms of popular culture) can destabilise them by exposing weaknesses that lie within official and dominant discourses. In some instances, such filmmaking may represent an act of resistance by challenging such dominant discourses (Skelton 2000).

The power and influence of documentaries can provide much needed exposure on broad and specific instantiations of injustices perpetrated by prosecutors and/or law enforcement officials. These include processes in which police interrogations methods have or may produce false confessions and possibly wrongful convictions. Such processes may not be deemed illegal, but nevertheless cause tremendous harm to those subjected to them. This was illustrated most vividly in a recent Public Broadcasting Service's production regarding the coerced confessions and wrongful convictions of five African-American youth known collectively as the "Central Park Five" (Burns, McMahon and Burns 2012). Documentary films may even inspire or effect substantial changes of legal significance to an individual's life. For instance, Errol Morris' film *The Thin Blue Line* has been recognized as establishing the innocence of an individual wrongfully convicted of murdering a police officer and sentenced to death (Musser 1996).

While many documentaries have been produced concerning American events and phenomena, including those in connection with criminal justice matters, in this article, I focus attention on how a particular Canadian documentary confronts and makes visible a controversial investigative technique employed by Canadian law enforcement officials – Mr. Big Operations (MBOs). This documentary film, *Mr. Big: A Documentary* (Burns 2010) challenges the central narratives of Canadian law enforcement officials (particularly the Royal Canadian Mounted Police) concerning MBOs and the appropriateness of their use. MBOs involve undercover police officers masquerading as members of a violent criminal organization seeking to recruit an individual into their fictitious organization with the goal of extracting a confession or incriminating statements from that person. An offer of membership into the organization is made contingent on the targeted individual confessing to a crime the police suspect s/he has committed. As part of MBOs, the police often invest significant time and money inducing the target to join through promises of a substantial income and an opulent lifestyle. When these prove to be insufficient, undercover police officers have applied greater pressure through threats of violence, though such threats are often implied.

The threats may be voiced against the target or someone they know and wish to protect.

For years, Canadian courts refrained in considerable measure to provide any meaningful oversight concerning the admission of confessions or incriminating statements procured through MBOs. Such statements were freely admitted into evidence. They were rarely, if ever, subjected to the more rigorous scrutiny that other types of incriminating statements are normally given as part of pre-trial deliberations on the admissibility of such evidence – either on the basis of the *Canadian Charter of Rights and Freedoms* (the *Charter*) or the common law. Law enforcement officials exploited the gaps within prevailing protections to slip MBO confessions through the door. For instance, the common law confessions rule which purportedly guards against the admission of involuntary and unreliable statements, does not come into play unless the statements are made by the accused to someone whom he subjectively believes is a person in authority (*R. v. Oickle* 2000). As the Supreme Court of Canada has determined, an undercover police officer posing as a member of an organized criminal organization during an MBO will not be considered a person in authority (*R. v. Grandinetti* 2005). In addition, the constitutional right to silence located within section seven of the *Charter* does not apply to circumstances where statements are made outside of detention. A violation of the right to silence will be found where a state agent actively elicits incriminating statements from the accused but only where this takes place while the accused is in detention (*R. v. Hebert* 1990). In MBOs, most accused are not (typically) in detention in a state facility or otherwise in police custody. Thus the right to silence has not led, in most cases, to exclusions of incriminating statements. An exception to this is found in a Newfoundland and Labrador Court of Appeal decision where it expanded the notion of what constitutes “detention” (*R. v. Hart* 2011). On appeal before the Supreme Court of Canada, the Court affirmed the Court of Appeal’s conclusion about the inadmissibility of the statements but rested its holding on different grounds (*R. v. Hart* 2014).

In 2014, the Supreme Court of Canada significantly altered the ease in which the Crown could have MBO-derived confessions admitted

into evidence. In *R. v. Hart* (2014), the Court held that confessions procured through MBOs were to be deemed presumptively inadmissible. The presumption may however be overcome where the Crown demonstrates on a balance of probabilities that the probative value of the confessions or incriminating statements outweighs their prejudicial impact. Henceforth, courts are to assess the probative value by scrutinizing the reliability of the confession evidence, the methods employed, and other relevant factors. The prejudicial impact arises from the moral prejudice that emanates from the jury hearing evidence of the accused boasting about having committed a heinous crime to gain entrance into a criminal organization. The *Hart* Court also asserted that even where the probative value outweighs their prejudicial impact, if the state's conduct amounted to an abuse of process (involving the use or threat of violence) such incriminating statements could still be considered inadmissible.

Despite the *Hart* decision, law enforcement officials may still choose to continue to employ MBOs and courts may find that the facts in cases before them are sufficiently distinguishable enough from *Hart* to warrant their admission (*R. v. Mack* 2014). This does not allay the dangers associated with the reliability of the statements procured through such operations. This is why documentaries that probe into the nature of MBOs and the problematic nature of their use in particular cases are thus still relevant. In this article, I examine how *Mr. Big: A Documentary (MBAD)*, though produced prior to the Supreme Court's decision in *Hart*, examines the phenomenon of MBOs, and exposes the questionable techniques employed by law enforcement visible to broader public scrutiny. *MBAD* is a documentary film that has been shown as an official selection in several North American and European film festivals and was for many years only accessible, it would appear, through DVD purchase from the distribution company. The film has thus far been unavailable for viewing on YouTube. Put together this has limited its visibility and impact. However, more recently, the film has been more readily available for purchase or for rent through iTunes – thus enhancing its ability to be more accessible and visible. The film was directed and produced by Tiffany Burns, a former broadcast journalist, current freelance writer and the elder sibling of Glen

Sebastien Burns. Sebastien Burns was a target of an MBO by the Royal Canadian Mounted Police (RCMP). The statements he and his co-accused made were used at trial and formed the substantial basis for their convictions in a Washington state court. *MBAD* presents a critical perspective of MBOs more generally but also argues how a particular MBO was employed to produce evidence that (wrongfully) convicted Burns and his best friend Atif Rafay for the murders of Rafay's mother, father and sister. Rafay and Burns were sentenced to serve three consecutive life sentences in a Washington state penal facility.

In examining this documentary, I argue that *MBAD* resists the official narrative advanced by law enforcement officials that MBOs are effective and proper tools in procuring voluntary confessions from otherwise recalcitrant killers. Drawing from Orit Kamir (2005) and other scholars, I contend that *MBAD* invites viewers to critically judge and assess the value of MBOs more generally as well as scrutinize its role in the Rafay-Burns case more specifically. Furthermore, through *MBAD*'s own critical assessment of MBOs, it serves as visual jurisprudence that counters the dominant law enforcement narrative. *MBAD* does all this by constructing MBOs as more-than-likely generators of unreliable confessions that in turn lead to or has a high probability of leading to wrongful convictions. However, rather than solely mounting a more abstracted attack on MBOs generally, *MBAD* also turns its attention to the specifics of the Rafay-Burns case and how the confessions overshadowed and obscured attention to important details which weakened or undermined the prosecution's case. *MBAD* also depicts the RCMP and law enforcement agencies that use these techniques as suspect for their lack of transparency and secrecy surrounding MBOs all in the name of protecting the public. In many ways, the attitude of various Crown prosecutors and law enforcement has been to ask the public to trust it while seeking to keep as many details about MBOs generally and specific cases outside the public sphere. By exposing law enforcement's techniques, *MBAD* challenges this attempted sequestering of the techniques employed during MBOs from public scrutiny and the lack of transparency that flows from this. This is important for, unlike the short clips that capture patently illegal and brutal conduct of state actors and circulate throughout the Internet,

the complexity of what transpires during an MBO cannot easily be distilled in the same way. Documentary films can provide context, explanations and analysis of such complexity.

This article is divided into two parts. In the first part, I discuss the connection between documentary films (as products of popular culture) and legal normativity. The second part scrutinizes *MBAD* and is divided into three sections. In the first section, I examine how *MBAD* judges and indoctrinates viewers to critically scrutinize MBOs more generally and the inherent problems connected with them. The second section turns its attention to *MBAD*'s treatment of the Rafay-Burns case specifically and the precise issues it raises. Lastly, the third section analyzes the way in which law enforcement officers are constructed as a result of the techniques employed in MBOs.

I. Documentaries, Narratives and Legal Normativity

Before examining *MBAD* in more detail, it may be useful at this stage to examine what role mediums of popular culture, and documentaries specifically, can play in the (re)shaping and/or transmission of legal normativity. Significant scholarly attention has been devoted to this. In his seminal piece, "*The Supreme Court, 1982 Term – Forward: Nomos and Narrative*," Robert Cover (1983) posited that individuals inhabit a *nomos*, or a normative universe. He articulated that what was identifiable within such a universe were rules and principles of justice, formal institutions of law founded within the state as well as conventions of a social order. For Cover, these were however only a smaller part of the normative universe, since such rules, institutions and conventions were inseparably related to the larger narratives that give them meaning. Perhaps more importantly, he argued that through these narratives, people are constantly creating and maintaining a world of right and wrong, of lawful and unlawful, of valid and void. Narratives, in turn can be transmitted through different forms.

Building from Cover, Richard Sherwin (2001) has identified films and other visual media as part of the universe of meaning-making and posited that they offer normative visions which may point us

toward some possible (better) future. In a similar fashion, Austin Sarat, Lawrence Douglas, and Martha Umphrey (2005) articulate that the “moving image attunes us to the ‘might-have-beens’ that have shaped our worlds and the ‘might-bes’ against which those worlds can be judged and toward which they might be pointed” (2). Going even further, William MacNeil (2007) has argued that films, television and literature form part of the *lex populi* or people’s law. He observes that such jurisprudence holds out for a much broader and more public debate around a number of important issues (MacNeil 2007). Reaching a much broader audience than standard legal texts, MacNeil contends *lex populi* helps restore topics of jurisprudential import such as justice, rights and ethics with the community at large (MacNeil 2007). *MBAD*, like other documentary films concerned with matters of state injustice, performs the task of highlighting and making visible the issue of police conduct in investigating crimes through MBOs. Consequently *MBAD* broadens the audience beyond a narrow group of jurists, lawyers, scholars and students that might otherwise be exposed to the issue through traditional scholarly sources and court decisions.

By constructing narratives, producers of documentaries can contribute to two specific things. Drawing from Orit Kamir’s writings on law and (fictional or docudramatic) commercial films, documentaries can similarly elicit a popular jurisprudence while indoctrinating viewers to engage in judgement on particular legal matters. In connection with producing films that critically examine police investigative techniques for solving crimes, viewers may be trained to look more critically at confessions that are procured by state actors and view more sceptically claims of government officials about the purported guilt of accused based on such practices.

Films can be influential in the construction (or reconstruction) of individuals and groups in contemporary society (Kamir 2005). In the case of documentary films concerning (putatively) wrongful convictions, the exercise typically involves reconstructing the convicted individual as an innocent person who has been the victim of perfidious state conduct. Consequently, this also tends to lead almost inevitably to reconstructing police officers who were in

charge of the investigation as being the perfidious villains of the plot. It also extends to some degree to the reputation of the administration of justice for permitting police techniques that have considerable danger of leading to unreliable confessions.

All of this connects back to Kamir's argument that films may lead viewers through "cinematic judgments" concerning notions of justice, equality, honour and gender and consequently mould public actions and reactions (Kamir 2005). She argues that like judicial decisions and other legal texts, films as visual texts are inherently imbued with judgment and focused on matters of justice; they construct subjects and communities in ways that are inseparable from judgment and the search for justice. She observes that: "Touching the viewer's emotions and imagination, a law-film can introduce a viewer to jurisprudential issues and value-systems. More people are likely to be influenced by cinematic judging and jurisprudence than by theoretical legal texts or even judicial rhetoric" (Kamir 2005). What becomes evident from *MBAD* is a reconceptualization of the police as shady and untrustworthy actors while the accused targeted in MBOs are constructed as victims because of the state's conduct.

Documentaries can perform legal indoctrination in that, like commercial films more broadly, "they train and mould viewers in judgment, while examining – and often reinforcing – legal norms, logic and structures" (Kamir 2005). Documentaries may echo (if not endorse) the worldview being portrayed, but alternatively it may also criticize or undercut the one that it is depicting. Indeed, by critiquing a dominant discourse, a documentary filmmaker engages in a form of resistance to the status quo presented. As it will become apparent below, *MBAD* fits into the mould of criticizing the state's use of MBOs and by implication the legal system's traditional allowance for them to continue relatively unchecked. Though *Hart* has changed this landscape for prospective cases to some degree, MBOs may still continue. Furthermore, *Hart* does not change the outcome of earlier cases. There may very well be serious concerns about convictions obtained in pre-*Hart* cases and *MBAD* highlights concerns that are relevant to them.

Drawing from the foregoing, I examine in the next part how *MBAD* judges MBOs, those who engage in them, and those who are subjected to them.

II. Judging Mr. Big

MBAD takes a critical perspective of MBOs by constructing them as harmful investigative practices. Indeed it visualizes MBOs as an inherently problematic investigative technique that leads to wrongful convictions. In mounting its critique against MBOs, *MBAD* trains its viewers to exercise judgment against the police and their practices. It does this in a few ways. First, it marshals critical and learned voices with respect to MBOs more generally and also in connection with the prosecution's case against Burns and Rafay. Second, the film constructs and judges the police as being highly secretive as well as questionable if not immoral actors by adopting these techniques while attempting to keep the tactics secret from the Canadian public.

An important component of *MBAD* is its reliance and visual use of the perspectives of various "experts" on MBOs or police interrogations more generally. This reliance is notable as one of the critiques the film wages against the trial decision convicting Burns and Rafay is the exclusion of expert testimony relating to MBOs (*State v. Rafay* 2012) and false confessions. It also lends credence and legitimacy to a documentary film produced and directed by a clearly interested and non-neutral party. These expert testimonials include those provided by a journalist for a major national newspaper (Brian Hutchinson), two law professors (American Richard Leo and Canadian David Deutscher), a British forensic psychologist who specializes in the area of wrongful confessions (Gisli Gudjonsson), a former United States law enforcement official who specialized in undercover operations (Michael Levine), and, importantly, several individuals who have been targeted for MBOs (Kyle Unger, George Mentuck, Jason Dix). Dix never confessed despite being subjected to an MBO. After being held in confinement for two years, he was released after the Crown dropped all charges against him. Mentuck confessed to committing murder during an MBO but the trial court judge held that the confession was unreliable and that the Crown failed to discharge its burden to prove

guilt beyond a reasonable doubt. Lastly, Unger was convicted of murder based in part on a hair follicle found at the murder scene and his MBO confessions. After his conviction it was determined that the hair sample found at the scene was not in fact his. Further to Unger's application, the federal minister of justice ordered a new trial, but given that the Manitoba Crown would only be able to rely on the MBO-derived confession, it dropped the charges and Unger was released. These testimonials provide credibility and insights into various aspects about MBOs and the quality of the confessions they produce. *MBAD* marshals both Canadian and foreign experts to critique the validity of these techniques.

MBOs and the Risk of Procuring Unreliable Confessions

A key message that *MBAD* attempts to make visible (and heard) is that MBOs produce unreliable confessions. It does so through a series of filmed interviews with experts or those otherwise knowledgeable with MBOs. What emerges through watching these interviews is that when law enforcement employs inducements and/or threats of harm to secure a confession, issues of reliability and voluntariness tend to arise. Such concerns are of course nothing new to the legal system. As noted earlier, the common law confessions rule already exists to guard against confessions that have been made in manner that makes them involuntary and/or unreliable (*R. v. Oickle* 2000). The rule is concerned, in part, with confessions whereby the confessor has been induced to confess as a consequence of some incentive. Courts also look to whether there were any threats that would render the confession involuntary. In addition to inducements and threats of violence, courts also examine whether an accused was subjected to an atmosphere of oppression. However, in order for the confessions rule to apply, the confession or incriminating statements must be given to a person whom the accused subjectively believes is a person in authority over them (typically a state actor) and one who can affect the prosecution of their case. The Supreme Court of Canada has held that this does not apply in the case of an individual confessing to a crime boss. Hence, subject to any other normative prohibition, such confessions can be admitted into evidence (*R. v. Grandinetti* 2005). This was the legal

context at the time *MBAD* was produced and prior to the changes created by *R. v. Hart* mentioned above.

Following Kamir, I argue that *MBAD* engages in a form of cinematic judgment against MBOs while indoctrinating its viewers regarding the dangers of these confessions. It does so by attacking the principal methods employed in these operations while casting a shadow on those who employ them. *MBAD* relies substantially on the knowledge and stature of legal scholars, journalists, a forensic psychologist and former targets to explain the dangers inherent in MBOs – individuals who are learned in the law, the way these operations transpire and/or have experienced this technique first hand. Doing so lends credibility and weight to the documentary's judgment on MBOs. This provides a balance (or semblance of balance) given that the documentary is explicitly directed by a clearly interested person – the sibling of an individual convicted of murder by virtue of evidence procured through an MBO.

MBAD visually deploys its arsenal of interviewed speakers to address two key aspects that constitute MBOs: the use of inducements and (often implied) threats of violence. Common to all MBOs are the use of financial inducements. They are powerful monetary tools employed to persuade an individual to falsely inculcate him or herself. In order to emphasize this for viewers, *MBAD* draws on several individuals to speak to the danger of inducements. For instance, this includes Professor David Deutscher, a Canadian law professor at the University of Manitoba. As with other learned and professional speakers respecting MBOs, Deutscher's interview is situated in a recognized environment of erudition – his office at the faculty of law and surrounded by books in the background. This lends an implied gravitas to the content of his interview. Through Deutscher's interview, the audience is informed that undercover officers encourage targets to confess and if they do so, positive consequences will ensue. Specifically, targets will convince themselves that there is no downside to falsely confessing; admitting guilt will lead to them joining the organization and becoming rich. Deutscher correctly identifies the problematic nature of all this as many people will falsely confess to a crime to a person whom they think is a criminal that they would not necessarily

do if they knew they were speaking to a police officer. Deutscher's point here implicates a fundamental legal principle in Canadian jurisprudence that individual's right to choose whether to speak to the authorities should be respected (*R. v. Hebert* 1990). MBOs involve trickery that undermines this choice.

The issue of monetary inducements becomes all the more critical where a target is experiencing financial difficulties. While the sober erudition of legal and other experts brings value through their appearance, *MBAD* makes further visible and accentuates the problematic nature of these inducements by enlisting the faces and voices of former targets to argue that for those who are experiencing economic hardship, such inducements can be particularly powerful. For instance, George Mentuck explains, as a member of a First Nations community, that it is easy to "get sucked" in and tempted by the money where there is poverty and lack of jobs. That MBO targets may come from poor or impoverished backgrounds can make them vulnerable in succumbing to such inducements. Furthermore, what also draws people in are the disproportionately substantial amounts of money given for simple tasks. Mentuck affirms that he was instructed to make simple deliveries and given anywhere between five hundred to a thousand dollars for such tasks. Mentuck asks rhetorically: "Who's going to turn that down?" Jason Dix, another former target notes that he was once offered two hundred dollars just to go for a car ride. Dix posits that at the time of the MBO launched against him, he and his spouse at the time were "financially strapped." He states that it was the allure of the money that just kept him going. He explains that this was why he would make himself out to be something he was not to the undercover police officers. Dix asserts that at the time, he felt that if he did not mirror their language and speak about killing people, he would be "out" of the organization. Kyle Wayne Unger who was similarly targeted and confessed during an MBO states that undercover police officers design a scenario where they feed off an individual's desires and greed. It may be compelling enough that individuals will be willing to speak a certain way and say a whole host of heinous things to gain admission into the organization. These audio-visual testimonials provide visible evidence about the power of these

inducements on those targeted. We hear it from the voices of those directly impacted. Indeed in the cases of Mentuck and Unger (and many others whose stories are not exposed on camera), the inducements contributed to giving incriminating statements.

MBOs do more than create the conditions likely to produce incriminating statements by suspected targets. Targets typically express enthusiasm for killing people in order to become a part of a criminal organization is likely that a jury typically hears these statements in conjunction with the confession. The combined impact of a jury hearing confessions and the accused's enthusiasm for committing serious crimes may be profound. Indeed, as the Supreme Court of Canada has observed in *Hart*, the admission of such statements creates a moral prejudice and its prejudicial impact may outweigh the probative value of the statements.

Also problematic in relation to such confessions is that jurors may not see the full picture regarding what has led up to the pivotal conversation that included their confession. On this point, Richard Leo, a law professor and wrongful convictions specialist from the United States, posits that one of the related dangers in MBO cases specifically is that the jury typically only sees and hears the video footage of the final confession or hears about this through prosecution witnesses. He asserts that jurors are not shown footage of other interactions in the months or weeks leading to the final confession (assuming any were filmed). Thus, the full picture or context is not shown, including any threatening statements and statements that would suggest an implied threat if a target failed to disclose information. Leo contends that in the United States, such confessions would be viewed as impermissibly coercive and do not take place. The proper methods through which to secure a confession is after an accused has been properly instructed of their rights to counsel and silence under the *Miranda* ruling and the entire interrogation has been recorded. This is despite the fact that not every police interrogation in the United States may follow these strictures regarding video recordings. Also, *Miranda* does not prevent undercover police officers from pretending to be a fellow inmate while actively eliciting incriminating statements within or outside custody provided formal adversarial proceeding have been

initiated with the respect to the crime being investigated (*Illinois v. Perkins* 1990).

In addition to making visible the impact of financial inducements, *MBAD* also exposes the viewers to the use of implied threats that would ensue if the target failed to reveal incriminating information. This was addressed as well through the former MBO targets interviewed for *MBAD*. George Mentuck for instance asserts that he was reluctant to leave the fictitious organization for fear that there would be repercussions to his family. Furthermore, the undercover cops in his case boasted about having killed people, including one of their own parents. This of course paints a picture to an MBO target (and to *MBAD*'s audience) that no one is off limits. In Jason Dix's case, undercover police officers orchestrated a scenario where they feigned the killing of an individual who was alleged to have reneged on a deal. Dix observes that the impression the undercover police officers left on him was that someone who crossed the organization or did not give them what they wanted was susceptible to being killed or seriously harmed. As in Mentuck's case, the officers in the Dix MBO also professed to him about having killed people and asked Dix if he was willing to do so as well. Dix affirmed that threats were not made directly, but were intimidated in other ways. Dix was told that they knew where his wife worked and if they needed help, he better be willing to assist when called upon. Dix explains:

It's pretty scary right? If I wasn't doing what they wanted me to do, then I could be harmed in some way. But how do you, once you get that knowledge behind you, how do you say "I want out now"? You know "I don't want to do this anymore" you know? And it's, it's hard. Um, I felt like I was in over my head and, but what am I going to do? (Burns 2010: *MBAD*)

Unger similarly experienced a sense of compulsion. He articulates that where the officer playing Mr. Big believes that the target is lying to him, the other officers will feign disbelief and fear that Mr. Big will punish them for not knowing the target is a liar. The target is then left with an impression that if individuals who have a history with Mr. Big feel like they are in danger then the target, who has no

such history with the crime boss, should be ever more fearful. Through these individual voices taken in the aggregate, *MBAD* makes visible a striking narrative of coercion through MBOs that falls short of direct threats but nevertheless portrays how fear can be instilled in an individual.

In making visible the use of inducements and implied threats through on-screen interviews, *MBAD* strongly injects the notion that these techniques produce false confessions. It then proceeds to draw the link between false confessions and wrongful convictions for the audience. Amongst the more prominent of these voices impugning MBOs is Richard Leo, mentioned earlier. Employing his designated status as an expert in false confessions, *MBAD* deploys Leo to situate MBO confessions within the larger context of wrongful convictions and false confessions. Leo explains that MBOs are extreme forms of interrogation due to the means employed and their surreptitious nature. He argues that in light of DNA testing, it is well-known that individuals have been wrongfully convicted on the basis of false confessions despite the difficulty people in society (and jurors) have in believing that people falsely confess. Leo explains that (at least at the time the documentary was made), roughly 20 to 25% of wrongful convictions that were overturned, were based on false confessions. Interspersed with Leo's explanations are audio-visual segments of an MBO confession in the case of Patrick Fischer. The not-so-subtle association that viewers are to derive from this is that MBOs can clearly lead to false confessions and wrongful convictions.

MBAD draws important attention to the issue of unreliable confessions, inducements, threats and wrongful convictions. To a certain degree, *MBAD*'s connecting of MBOs with the danger of wrongful confessions has been vindicated by the Supreme Court's decision in *Hart*. In addition to noting the correlation between the level of inducements and unreliable confessions, the Court stated:

Unreliable confessions present a unique danger. They provide compelling evidence of guilt and present a clear and straightforward path to conviction. Certainly in the case of conventional confessions, triers of fact have difficulty accepting that an innocent person would confess to a crime he did not

commit. And yet our experience with wrongful convictions shows that innocent people can, and do, falsely confess. Unreliable confessions have been responsible for wrongful convictions — a fact we cannot ignore. (*R. v. Hart* 2014: para. 6)

Turning to the way that MBOs intersect with unreliable confessions, the *Hart* Court acknowledged (2014) that it had hitherto “failed to adopt a consistent approach to assessing the reliability of Mr. Big confessions before they go to the jury. This is so despite the obvious nature of the inducements these operations create.” Furthermore, it recognized (2014) finally that it would be “dangerous and unwise to assume that we do not need to be concerned about the reliability of Mr. Big confessions simply because the suspect does not know that the person pressuring him to confess is a police officer.”

What is important about *MBAD*'s visual contribution to the discourse relating to MBOs is its highlighting of the reliability issues concerning MBOs several years before the Court's addressing of it in *Hart*. Given that *Hart* does not ban the use of MBOs altogether, *MBAD* at the very least fosters greater visibility to the issue and asserts a measure of credibility by addressing it through the perspectives of scholars and former MBO targets. That the Court eventually recognized the importance of addressing the issue of reliability in MBOs only highlights the prescient nature of the documentary on these issues. With the broader concerns in mind, I now examine how *MBAD* makes visible specific concerns about the Rafay-Burns case as a particular instantiation of the MBO phenomenon.

Visualizing Problems with the Rafay-Burns Case

Having exposed its viewers to the dangers identified with MBOs more generally, *MBAD* then focuses its attention to problems related with the Rafay-Burns case more specifically. Recalling once again that Tiffany Burns is the sister of an individual convicted by virtue of evidence procured through an MBO, one of the central features of the film is to attack the basis for Rafay's and Burns' convictions. This relies upon the general concerns relating to MBOs and

unreliable confessions based on inducements and threats utilized and the experiences of Unger, Dix and Mentuck. *MBAD* then takes these concerns and applies them specifically to the Rafay-Burns case. By making visible the problems with the incriminating statements made by Rafay and Burns, *MBAD* not only makes a tangible connection between the dangers of MBOs more generally, but also clearly advocates the notion that these two individuals were wrongfully convicted.

The Rafay-Burns case is amongst the better-known MBO cases in recent decades. The case wound its way up to the Supreme Court of Canada on the specific issue of whether constitutional rights were infringed where Canadian authorities seek to extradite criminal defendants to jurisdictions (in this case Washington State) where the death penalty might be imposed (*United States v. Burns* 2001). In addition to other cases, the Rafay-Burns case has also been featured on CBC's (1975) *The Fifth Estate* newsmagazine show several times. Burns and Rafay were accused of killing Rafay's father, mother and mentally disabled sister in their home in Washington State to which they moved the previous year. Following the murders and knowing that the police suspected them, Burns and Rafay, both Canadian citizens returned to British Columbia. After asserting their right not to speak to authorities or assist in the investigation surrounding the murders, the RCMP initiated their MBO against Burns and Rafay. The pair lived off the proceeds Rafay received from the insurance company. However, news spread to others in the community about the murders and their part in them. Burns was unable to obtain employment and eventually quit community college. After cultivating a relationship with Burns, undercover RCMP officers successfully obtained confessions from both Rafay and Burns. Following their extradition to the United States, their incriminating statements were admitted into evidence at trial. Both were convicted and sentenced to serve three consecutive life sentences despite the lack of any physical evidence tying them to the murders.

Through this information set against the backdrop of the experts mentioned previously, one can sense how the concerns respecting MBOs played a determinative role in inducing Burns and Rafay to

confess. First, *MBAD* highlights concerns about the dangers of an unreliable confession in the absence of any corroborating physical evidence. The film stresses that there was no physical evidence tying either accused to the murders. Indeed it was emphasized through one of the experts (Michael Levine) that there was evidence of a blood sample found in the shower that did not belong to either Rafay or Burns or the other victims. Second, there was the use of inducements to draw an individual in and elicit a confession. In Burns' case, he was unable to find work and inducements can play an important role in pushing someone to telling undercover officers about actions in order to guarantee receipt of the inducements on a longer-term basis. There were also statements made to the accused by Al Haslett, the undercover officer playing Mr. Big, that he had killed others who have crossed him. As such there was an implied threat of violence upon two impressionable young adults.

MBAD's exposition of the Rafay-Burns case also visualizes how focused law enforcement, courts and juries may be drawn to believing confessions despite the existence of other evidence that contradicts or problematizes the simplistic narrative told by prosecutors. Similar to its use of experts on MBOs more broadly and those experienced with being a target of MBOs in attacking the technique, *MBAD* deploys former United States Drug Enforcement Agency officer, Michael Levine, who specialized in undercover operations to scrutinize the evidence in the Rafay-Burns case. By interviewing him, *MBAD* makes visible specific problems with the case. What also lends credibility to Levine's position, and unlike most of the other voices in the documentary, is the fact that Levine expressly states that he is a proponent of undercover operations, including MBOs, provided they are done properly and one is able to obtain reliable confessions.

Levine speaks on film about a number of flaws in the investigation of the Rafay family murders. First, he argues that there was a failure by local police in Washington to properly pursue other credible leads pointing to possible alternative suspects. For instance, Levine contends that Tariq Rafay, Atif Rafay's father, had produced a computer program, which indicated the proper and precise

geographic location of Mecca. Levine indicated that the consequence of this was that it suggested many Muslims were essentially directing their prayers toward the wrong direction (and away from the holy city). This furthermore purportedly angered many who were of a particularly conservative religious bent and actual threats were issued against Tariq Rafay's life. Second, Levine identifies that after listening to the RCMP's extensive recordings of Burns' and Rafay's conversations in Vancouver after the murders, there were no discussions between them relating to the murders. Drawing from his own professional experiences, Levine posits that typically in such recordings there is always some mention to the crime(s) even via coded language. Levine maintains that there were no such references made in the many recordings he listened to. Third, Levine also points to the fact that when the conversation between Rafay, Burns and Haslett (playing Mr. Big) took place, there were inconsistencies in Rafay's and Burns' stories. For instance, when asked how they disposed of the evidence, one said they disposed of the evidence by throwing it out a window while the other said they threw it into a dumpster. Levine also addresses that when Haslett tries to gauge Burns' willingness to kill again, Burns shows no interest and indeed reluctance to do so. These and other issues, Levine points to, suggest that there were exculpatory evidence and/or leads that police should have sought out. They failed to do so. Thus, combined with the typical inducements and implied threats that are part of the MBO narrative, the lack of direct physical evidence tying Burns and Rafay to the murders, the failure to pursue alternative leads and exculpatory evidence make their convictions appear extremely problematic.

Through its visual use of expert analysts speaking into the camera, including Richard Leo and Michael Levine, *MBAD* makes visible information that jurors in the Rafay-Burns case were unable to access. During the trial, defence counsel sought to call Levine and Leo as expert witnesses. Leo was to be called as an expert on false confessions and the role that MBOs can play in eliciting false confessions. Levine was to be summoned to speak as an expert on undercover operations and the weaknesses of the evidence including the nature of Burns' and Rafay's confessions. The trial court refused to allow their testimony as expert witnesses, which decision was

subsequently affirmed by the state intermediate court of appeal. As such, certain testimony was rendered invisible to and unheard by the jury. Because the governing rules concerning expert testimony shielded their evidence from being heard, *MBAD*'s goal was to make visible information about the weaknesses of the Rafay-Burns case specifically and the dangerous nature of MBOs more generally to a larger court of public opinion. Furthermore, by deploying these various experts, *MBAD* attempts to show that notwithstanding the rather subjective space from which the film emanates, various experts support the main arguments regarding MBOs and/or the Rafay-Burns case more specifically.

Judging and Reconstructing Law Enforcement Officials

Films can play a significant role in promoting judgment and in (re)constructing individuals and groups in contemporary societies (Kamir 2005). As Kamir (2005) observes, films "train and mould viewers and audiences in judgment" (268). This might include in the context of fictional stories, undercutting and criticizing communities and value systems presented in the visual narrative. This principle also applies by analogy to documentary films where certain communities and value systems may be challenged and reconstructed. *MBAD* in particular takes a critical view of the law enforcement community and the legal system more generally that permits MBOs to transpire.

Films can also play a critical role in projecting certain dominant narratives and stereotypes. Some dominant themes include the need for vigilantes or rogue police officers who must adopt extra-legal means to counter crime which is in turn constructed as an invading social evil perpetrated by serial killers and violent street criminals (Welsh, Fleming and Dowler 2011). This is founded in a number of American films such as the *Death Wish* (e.g., Landers, Roberts and Winner 1974) and "Dirty Harry" (e.g., Siegel 1971) films or more recently in *The Brave One* (Downey, Silver and Jordan 2007). The primary focus is on punishment, retribution and the ineffectiveness of law enforcement to deal with such violence. While not going to the lengths of fictional onscreen vigilante figures, MBOs employ

means that the criminal justice system may be otherwise loathe to endorse, particularly under the confessions rule. Yet, courts allowed a loophole to persist for many years despite the various dangers and concerns associated with wrongful confessions. Because MBOs have led to confessions and convictions for serious crimes, law enforcement could tout their effectiveness and legitimacy. Courts were likely willing to permit such behavior in light of the stakes and the seriousness of the crimes investigated.

MBAD challenges the legitimacy of MBOs and those engaged in these operations. If the nature of MBOs is such that they may produce unreliable confessions and wrongful convictions, this cannot but reflect back on those who employ such tactics. *MBAD* runs counter to the laudatory constructions of vigilante private citizens and/or rogue cops in mainstream commercial films. Indeed, a rather striking and critical image of law enforcement officials, particularly in Canada, emerges out of *MBAD*. Through police conduct in MBOs, suspects engage in behaviour that will impact on their ability to advance an effective defence and impede trial fairness. Typically, MBOs require their targets to demonstrate their willingness to commit serious crimes in order to be fully accepted into the organization. Targets not only confess to murder, but they often feign delight and pleasure in having done so to ingratiate themselves and demonstrate their capacity for wickedness. As the Supreme Court in *Hart* emphasizes (2014), such incriminating statements made by an accused “sullies the accused’s character and, in doing so, carries with it the risk of prejudice.” By contrast, *MBAD* turns the spotlight against law enforcement officials for their use of MBOs to elicit confessions and as well because of the time and money spent on procuring such confessions.

MBAD’s construction of law enforcement officials is not just limited to scrutiny of their tactics during MBOs. It also concerns the lack of transparency and secrecy surrounding these operations. Interspersed throughout *MBAD* is Tiffany Burns’ telephone interview with Pete Marsh, the RCMP’s Director of Undercover Interrogations in British Columbia, and the various topics that she attempts to discuss with him regarding MBOs. Although it is unclear that Marsh is aware that he is being recorded, what does become evident is his reluctance to

speak about MBOs or provide any real information about them. Indeed, Marsh specifically asserts that he does not want to say too much to Burns about these operations because they would be of diminished value as an investigative tool the more people knew about them. He thus essentially concedes that the “effectiveness” of MBOs lies in the larger public’s ignorance of them (particularly those who may be future targets). Yet, Marsh couches this secrecy in the need to serve the public. While law enforcement seeks to keep information concerning MBOs secret or relatively undisclosed, *MBAD* seeks to do the opposite – to expose such operations as broadly as possible.

So determined has the state been to keep information regarding MBOs secret, that it has fought to maintain this secrecy all the way to the Supreme Court of Canada. One concern that may arise in reporting about MBOs is the revelation of the names of undercover police officers. The secrecy respecting MBOs is not just about the concern for the names of undercover agents being revealed (a legitimate concern), but also about the general nature of the operations becoming public knowledge. Amongst its interviewees, *MBAD* includes an interview with Nicholas Hirst, the former editor-in-chief of the *Winnipeg Free Press* who articulates that in connection with George Mentuck’s case, the government sought a publication ban on discussion in the newspaper about even the operational methods of the MBO used in his case. An appeal concerning the publication ban reached the Supreme Court of Canada (*R. v. Mentuck 2001*). In *Mentuck*, the Court concluded that a publication ban on the operational details was unnecessary since the publication of such information did not impact on police operations or the administration of justice. What emerges is the state’s attempt to keep MBOs as invisible as possible and to have legal sanction to perpetuate the secrecy so that it may ensnare more individuals, thus retaining its “effectiveness.”

Through the interview process with Marsh, *MBAD* exposes that there is not only a clear reluctance to speak about MBOs, but also a willingness to be disingenuous. When asked about the use of threats and intimidation in MBOs, Marsh flatly denies this and goes so far

as to label any such notion as “absolutely wrong.” This is however contradicted by information provided by Unger, Mentuck, and Dix that implied threats were employed against them. In addition, as noted above, courts have observed when more direct threats have been employed. In a variety of cases, undercover police officers in MBOs will stage a beating of another undercover officer to demonstrate a propensity for violence if they are lied to or are being defied (*R. v. Bonisteel* 2008).

The larger picture that materializes from this portrayal is that of police forces willing to use substantial amounts of public money (by providing money to the accused for performing small jobs as well as to feign a particular lifestyle), and issue threats if necessary to secure much needed confessions when other evidence is not forthcoming. Substantial funds are spent on such operations which can last for significant periods of time. Furthermore, Canadian law enforcement officials in the name of protecting the public seek to hide information that is in the public interest and the ways in which tax payer dollars are spent. Dedicated to preserving the secrecy of their methods from the public, police seek to prevent that information from being widely disseminated. By making these techniques visible through video interviews of legal and other experts (including those subjected to them), *MBAD* operates as an act of resistance to the state’s attempt to keep MBOs as invisible as possible.

Conclusion

MBAD inserts into the larger public discourse considerable questions and doubts concerning the methods Canadian law enforcement employ to procure evidence in serious cases involving murder. While many of these questions and criticisms have been echoed by scholars researching MBOs and false confessions more broadly, the vehicle of a documentary film makes visible these questions and criticisms to be seen and heard by a potentially larger audience, both domestically and internationally. While MBOs and the confessions procured by them have not been for the most part stringently regulated by courts until relatively recently, *MBAD* offers an alternative vision of legal normativity. The vision projected is that MBO confessions are inherently unreliable because of the use of

inducements and/or threats. Furthermore, they may lead to unsafe prosecutions and wrongful convictions. *MBAD* also plants doubts about the soundness of the verdict of Sebastian Burns and Atif Rafay given that the main evidence used was the confessions (based on the inducements used in the operation), as well as the lack of physical evidence tying them to the crime, and evidence of alternative motives to murder the family by other actors. Lastly, because of the dangers inherent in MBOs in producing false confessions, *MBAD* reconstructs Canadian law enforcement as secretive and engaged in detrimental conduct to the population at large. It is detrimental because the secrecy surrounding MBOs does not allow for great public oversight and scrutiny on matters of public concern – wrongful convictions as well as how public funds are spent to fund these operations.

References

- Austin, R. (2006). The next “new wave:” Law-genre documentaries, lawyering in support of the creative process, and visual legal advocacy. *Fordham Intellectual Property, Media & Entertainment Law Journal*, 16, 809-867.
- Burns, S., McMahon, D., & Burns, K. (Producers, Directors). (2012). *The Central Park Five* [Motion picture]. US: Florentine Films.
- Burns, T. (Producer, Director). (2010). *Mr. Big: A documentary* [Motion picture]. Canada (no distributor).
- CBC. (1975). *The Fifth Estate* [News program]. Series current to date. Available online from: <http://www.cbc.ca/fifth/>
- CBC News. (2009, October 23). Kyle Unger acquitted of 1990 killing. *CBC News*. Winnipeg, Manitoba: Canadian Broadcast Corporation.
- Cover, R. (1983). The Supreme Court, 1982 term -- forward: Nomos and narrative. *Harvard Law Review*, 97, 4-68.
- Downey, S., Silver, J. (Producers), & Jordan, N. (Director). (2007). *The Brave One* [Motion picture]. US: Warner Bros.
- Goldsmith, A. J. (2010). Policing’s new visibility. *British Journal of Criminology*, 50(5), 914-934.
- Greenfield, S., Osborn, G., & Robson, P. (2010). *Film and the law: The cinema of justice* (2nd Ed.). Portland, OR: Hart Publishing.
- Kamir, O. (2005). Why “law-and-film” and what does it actually mean? A perspective. *Continuum: Journal of Media & Cultural Studies*, 19(2), 255-278.
- Khoday, A. (2013). Scrutinizing Mr. Big: Police trickery, the confessions rule and the need to regulate extra-custodial undercover interrogations. *Criminal Law Quarterly*, 60, 277-300.
- Landers, H., Roberts, B. (Producers), & Winner, M. (Director). (1974). *Death Wish* [Motion picture]. US: Dino De Laurentiis Company.
- MacNeil, W. P. (2007). *Lex populi: The jurisprudence of popular culture*. Stanford: Stanford University Press.
- Musser, C. (1996). Film truth, documentary, and the law: Justice at the margins. *University of South Florida Law Review*, 30, 963-984.
- Sarat, A., Douglas, L., & Umphrey, M. M. (2005). On film and law: Broadening the focus. In A. Sarat, L. Douglas, & M. M. Umphrey (Eds.), *Law on the Screen* (pp. 1-24). Stanford: Stanford University Press.
- Sherwin, R. (2001). Nomos and cinema. *UCLA Law Review*, 48, 1519-1543.
- Siegel, D. (Producer, Director). (1971). *Dirty Harry* [Motion picture]. US: Warner Bros.

- Skelton, T. (2000). Jamaican yardies on British television: Dominant representations, spaces for resistance?. In J. P. Sharp, P. Routledge, C. Philo, & R. Paddison (Eds.), *Entanglements of power: Geographies of domination/resistance* (pp. 182-203). London: Routledge.
- Thompson, J. (2005). The new visibility. *Theory, Culture & Society*, 22(6), 31-51.
- Welsh, A., Fleming, T., & Dowler, K. (2011). Constructing crime and justice on film: Meaning and message in cinema. *Contemporary Justice Review*, 14(4), 457-476.

Canadian Case Law

- R. v. Bonisteel*, 2008 BCCA 344 (British Columbia Court of Appeal September 9, 2008).
- R. v. Grandinetti*, [2005] 1 S.C.R. 27 (Supreme Court of Canada January 27, 2005).
- R. v. Hart*, 2012 NLCA 61 (Newfoundland and Labrador Court of Appeal September 17, 2011).
- R. v. Hart*, 2014 SCC 52 (Supreme Court of Canada July 31, 2014).
- R. v. Hebert*, [1990] 2 S.C.R. 151 (Supreme Court of Canada June 21, 1990).
- R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3 (Supreme Court of Canada September 26, 2014).
- R. v. Mentuck*, [2001] 3 S.C.R. 442 (Supreme Court of Canada November 15, 2001).
- R. v. Oickle*, [2000] 2 S.C.R. 3 (Supreme Court of Canada September 29, 2000).
- R. v. Unger*, 85 Man. R. (2d) 284 (Manitoba Court of Appeal July 7, 1993).
- R. v. Unger*, 2005 MBQB 242 (Manitoba Court of Queen's Bench November 8, 2005).
- United States v. Burns*, [2001] 1 S.C.R. 283 (Supreme Court of Canada February 15, 2001).

U.S. Case Law

- Illinois v. Perkins*, 496 U.S. 292 (United States Supreme Court June 4, 1990).
- State v. Rafay*, 285 P.3d 83 (Court of Appeals of Washington June 18, 2012).
- State v. Rafay*, 299 P.3d 1171 (Washington Supreme Court March 19, 2013).