

‘SCUM OF THE EARTH’: AN ANALYSIS OF PREJUDICIAL TWITTER CONVERSATIONS DURING THE BADEN-CLAY MURDER TRIAL

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I INTRODUCTION

In countries where trial by jury is the norm, governments and courts are increasingly concerned about the potential impact of social media on the fairness of criminal trials. Information that might influence jurors and prejudice an ongoing trial has the potential to be spread through social media conversations in a way that is not as easily controlled as information disseminated through mainstream media. The increasing prevalence of social media accordingly raises important questions about the potential for unregulated prejudicial information to influence juries and jeopardise the right to a fair trial.

This article aims to investigate how prejudicial information about high-profile criminal trials flows on social media. As a discrete case study, we undertake an analysis of Twitter conversations during the high-profile murder trial of Gerard Baden-Clay.¹ Through content analysis we assess the prevalence of prejudicial conversations, identify the main actors involved in publishing and amplifying prejudicial information, and investigate how users engage with that information. We use the results to consider how appropriately the doctrine of sub judice contempt (which prohibits the publication of information that might prejudice pending criminal trials) operates in the social media environment.

The doctrine of sub judice contempt has typically addressed two main categories of publications. The first are publications made before a trial commences, when prejudicial publicity might influence the general public, including potential jurors. The second are publications made during the trial

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1 *R v Baden-Clay* [2014] QSC 154.

about material that is not available to the jury (because it is excluded from the trial entirely or it is presented in the jury's absence). This study focusses on tweets during the trial, due to increasing concerns that jurors are accessing social media throughout the course of trials² and, possibly, during deliberations.³ Social media is now a major source of news, and there are good reasons to think that jurors may be exposed to content about a trial either because they are deliberately seeking it out, or because it is presented within their personal feeds. The intimacies of social media make it impossible to know what conversations jurors may be exposed to or participating in within the privacy of their social media feeds and whether they might be negatively influenced.⁴ Social media platforms provide no options to filter or exclude trial related information and the visibility of material that is made available to a juror is largely determined by the algorithms governing each particular social media platform. The 'social' aspect of social media means that the information jurors are presented with may be selectively amplified and coloured by the views of a broad range of their friends and acquaintances.⁵

It is not easy to tell whether jurors are actually likely to be influenced by material on social media. It is difficult to tell both whether they have actually been exposed to potentially prejudicial material, and whether that exposure is actually likely to influence their deliberations. Some studies suggest jurors are less susceptible to media influence than commonly thought;⁶ it is possible jurors may not be influenced by online reports about trials on which they are serving, but we do not know for sure. We do know that if media coverage is encountered after a trial has begun or close to the starting date, jurors are likely to note it, recall it and discuss it during the trial, even if only briefly.⁷ In this article, by

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- 2 Jacqueline Horan, *Juries in the 21st Century* (Federation Press, 2012) 187–94; Jane Johnston et al, 'Juries and Social Media – A Report Prepared for the Victorian Department of Justice' (Report, Victorian Department of Justice, 1 June 2013) 1, 9–13; Cheryl Thomas, 'Are Juries Fair?' (Research Paper No 1/10, Ministry of Justice, February 2010) 44
<<http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>>.
 - 3 In 2008, the Queensland legislature removed the requirement to sequester juries and introduced amendments providing for majority verdicts and judge-only trials: *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld) ss 5, 8; *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld) s 26. See also *Skaf v The Queen* [2008] NSWCCA 303, [28] (The Court): 'The contemporary view is that it is not necessary for the jury to be sequestered with exposure to the media thereby eliminated'.
 - 4 Horan, above n 2, 193.
 - 5 Michela Del Vicario et al, 'The Spreading of Misinformation Online' (2016) 113 *Proceedings of the National Academy of Sciences* 554, 554, 558.
 - 6 Michael Chesterman, Janet Chan and Shelley Hampton, 'Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales' (Report, Justice Research Centre, Law and Justice Foundation of NSW, February 2001) 5–6, 76, 80–84, 89–90; New South Wales Law Reform Commission, *Contempt by Publication*, Discussion Paper No 43(2000) 42–4 [2.30]–[2.35], 53–61 [2.55]–[2.68] ('*Contempt Discussion Paper*'); New Zealand Law Commission, *Juries in Criminal Trials*, Report No 69 (2001) 47. As early as 1979, Brennan, McGregor and Lockhart JJ commented that '[i]t is wrong to assume that jurors do not have or will not exercise a critical judgement of what they see, read or hear in the media': *Duff v The Queen* (1979) 39 FLR 315, 333.
 - 7 Chesterman, Chan and Hampton, above n 6, 80–7. In 32 out of 34 trials that attracted in-trial publicity in this study, jurors discussed media coverage, at least briefly, in the jury room: at 84

extracting trial-related Twitter conversations, we are able to provide insight into the content and nature of conversations to which jurors may have been exposed. We do not make any claims about the likelihood that jurors may have been exposed to these tweets, nor of the likely effects of any such exposure.

This article focusses on sub judice contempt, but this is not the only legal mechanism for dealing with in-trial prejudicial publicity and the need to ensure a fair trial. It is also possible for courts to issue in camera or suppression orders prohibiting the publication of particular prejudicial information;⁸ adjourn proceedings to a later time when the publicity has faded;⁹ admonish or otherwise direct the jury to disregard prejudicial publicity; change the venue to a different location where members of the jury pool may be less likely to have been exposed to prejudicial publicity; question individual persons who have been selected to serve on a trial;¹⁰ order a permanent stay of proceedings where it is deemed impossible for the defendant to ever receive a fair trial;¹¹ discharge the jury; or quash convictions on appeal.¹² If a defendant is aware of prejudicial publicity at the commencement of the trial, they may also apply for the trial to be heard by a judge alone, without a jury.¹³ It is the doctrine of sub judice contempt, however, that most directly targets the content of media publications about trial proceedings, and this doctrine accordingly guides the focus of this article.

We conclude that the doctrine of sub judice contempt is largely effective in regulating the way professional journalists report and communicate news. Unsurprisingly, their tweets mostly contain legally compliant and objectively-phrased news reports and only rarely include prejudicial information. In contrast, non-journalists in our sample more often respond to news in ways that are opinionated and prejudicial, suggesting the doctrine is less effective in regulating their behaviour. We note there are occasions, however, when journalists could be more careful to prevent criminal liability by providing attribution to the maker of any claims included in their tweets, and by ensuring their 140 character narratives remain fair and not distorted or exaggerated. We note a tendency, as in mainstream media headlines, for journalists to craft short tweets that are strongly suggestive or emotive without technically being prejudicial. Beyond this, we found a tendency for tweets from both journalists and non-journalists to focus on the prosecution narrative and to largely ignore the defence narrative by comparison. If this turns out to be a more general trend in the reporting of other

8 *John Fairfax & Sons Pty Ltd v Police Tribunal of New South Wales* (1986) 5 NSWLR 465.

9 See, eg, *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, 359 [55] (Spigelman CJ).

10 *R v Patel [No 4]* (2013) 2 Qd R 544; *R v Baden-Clay* [2014] QSC 156.

11 The successful application in *R v Liddy* [2010] SADC 80 may be compared with the unsuccessful application in *Dupas v The Queen* (2010) 241 CLR 237.

12 New South Wales Law Reform Commission, *Contempt by Publication, Report 100 Summary* (2003) [2.69]–[2.87] ('*Contempt Report Summary*'); Michael Chesterman, 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury Is Dealt with in Australia and America' (1997) 45 *American Journal of Comparative Law* 109, 122–3, 130.

13 *Criminal Code Act 1899* (Qld) ss 614–615E. The right to apply for a 'no jury order' was added to the *Criminal Code Act 1899* (Qld) in 2008: *Criminal Code and Jury and Another Act Amendment Act 2008* (Qld). See also, *Supreme Court Act 1933* (ACT) s 68B; *Criminal Procedure Act 1986* (NSW) ss 132–132A; *Juries Act 1927* (SA) s 7; *Criminal Procedure Act 2004* (WA) pt 4 div 7.

cases, it may lead to a more general public sentiment that is weighted against the defendant.¹⁴ We also found cumulative negative sentiment – caused by the collective weight of low-level negative sentiment – may have the potential to cause prejudice. Finally, we raise concerns about the potential for trials to be unfairly prejudiced by adverse media coverage that falls outside the ambit of sub judice contempt. We discuss, in particular, the challenges of seeking legal redress in response to the effects of multiple publications (tweets), as the scope of sub judice contempt is limited to individual publications. We note neither a prosecution bias nor cumulative negative sentiment caused by multiple publications can be addressed through the doctrine of sub judice contempt. This has flow-on effects as the costs and responsibility for ensuring a fair trial then shift away from the state (Director of Public Prosecutions) and on to the parties involved in the trial, some of whom may not have the means to adequately protect their rights. Overall, we note there is enough evidence here to suggest that the potential for prejudicial information on social media to influence jurors is a continuing cause for concern.

A A High-Profile Murder Trial

Few criminal trials in Brisbane's history have attracted as much media attention as the 2014 Baden-Clay murder trial. On 15 July 2014, Baden-Clay was convicted of the murder of his wife, Allison, following a lengthy police investigation and high-profile trial. The trial attracted such large crowds to the Brisbane Supreme Court that a ticketing system was introduced and overflow courtrooms opened to accommodate those in the long queues.¹⁵ The extraordinary interest in the case and the prolific media coverage prompted Justice John Byrne to invoke a rarely used power to question prospective jurors about their attitudes towards the defendant.¹⁶ This power had long existed but had never been successfully applied for until 2013 at the commencement of another high-profile trial.¹⁷ Baden-Clay was found guilty of murder by the jury at first instance. On 8 December 2015, however, Baden-Clay's murder conviction was downgraded to

14 It should be noted that this tendency to favour the prosecution may not be peculiar to tweets. We have not undertaken a content analysis of mainstream media where it is possible, perhaps even probable, that coverage may be similarly focussed. It would make interesting future research to conduct a simultaneous content analysis of social and mainstream media for the purposes of comparison.

15 The ticketing system ensured those members of the community wanting to observe the trial were permitted into the courtroom on a first-come, first-served basis. Those remaining in the queues were ushered into overflow courtrooms where they could view the trial in real-time on large screens: David Murray, 'Baden-Clay Murder Case Has Tickets to Get in, Security to Stop Fights and Crowds Flocking to Courts of Law Building in Brisbane', *The Courier Mail* (online), 28 June 2014 <<http://www.couriermail.com.au/news/queensland/badenclay-murder-case-has-tickets-to-get-in-security-to-stop-fights-and-crowds-flocking-to-courts-of-law-building-in-brisbane/news-story/3b85122bd4ddfa7d2edcc97686330fe8>>; Daniel Winters, 'Baden-Clay Murder Trial: Large Crowds in Court Evidence of a Healthy Legal System, Top Barrister Says', *ABC News* (online), 11 July 2014 <<http://www.abc.net.au/news/2014-07-11/baden-clay-crowds-a-sign-of-healthy-legal-system-lawyer-says/5591114>>.

16 *Jury Act 1995* (Qld) s 47.

17 *R v Patel [No 4]* (2013) 2 Qd R 544. This case was the first time the Court had accepted an application under s 47 of the *Jury Act 1995* (Qld), however there had been earlier applications that were unsuccessful: see, eg, *R v D'Arcy* [2005] QCA 292.

manslaughter in a unanimous decision by the Queensland Court of Appeal.¹⁸ The Court was satisfied it was reasonably open for the jury to find Baden-Clay had killed his wife, but not that he had *intended* to do so. This decision was followed by extraordinary public outcry. In response to the Court of Appeal decision, the Queensland Director of Public Prosecutions lodged an appeal to the High Court of Australia seeking a reinstatement of the murder conviction. On 26 July 2016, the appeal was heard by the High Court and on 31 August 2016 it handed down its decision to allow the appeal and reinstate the original verdict of murder.¹⁹

During the trial itself, the extraordinary publicity surrounding this case could not be ignored by the Court and counsel. Criticism of the media's 'ill-informed comment[s]'²⁰ and concerns about sensationalised coverage prompted both the trial judge and defence counsel to remind jurors that it was 'not a soap-opera' and to ignore media headlines about the guilt of the accused. While it is not possible to determine with certainty whether media reports during the trial played a role in the jury's verdict,²¹ some commentators have suggested that the media coverage may have been influential. When the *Queensland Law Reporter* published its summary of the Court of Appeal decision, the editor (an experienced barrister and Queen's Counsel) expressed the view that 'it would be far from unreasonable to assume that the amount of pre-trial publicity which this matter received had no small impact on the verdict such that the correction by the Court of Appeal was both necessary and inevitable'.²² Although media attention did not form the basis of either appeal, this case raises clear questions about the potential for prejudicial information on social media to influence jurors.

B Sub Judice Contempt and Juror Bias

The law has long recognised the need to regulate prejudicial publicity in the media, with the aim of preserving juror impartiality.²³ Sub judice contempt of court prohibits the publication of prejudicial material while a criminal (or civil) matter is before the courts.²⁴ Historically, this doctrine has predominantly been applied to people and firms who are responsible for high profile publications that have significant impact – typically journalists, editors, producers and proprietors

18 *R v Baden-Clay* [2015] QCA 265.

19 *R v Baden-Clay* (2016) 258 CLR 308.

20 Roger Derrington, 'Editors' Selection of New Cases: *R v Baden-Clay* [2015] QCA 265' [2015] (49) QLR *Queensland Law Reporter* 10.

21 It should be noted that the authors do not contend the accused's right to a fair trial was compromised in this case. Conclusions drawn are general only and are made for the purpose of comparison with future cases.

22 Derrington, above n 20, 10.

23 *Ex parte Auld; Re Consolidated Press Ltd* (1936) 36 SR (NSW) 596, 597 (Jordan CJ).

24 Sub judice contempt prohibits the publication of material that has a 'real and definite tendency ... to prejudice ... particular legal proceedings': see New South Wales Law Reform Commission, *Contempt Discussion Paper*, above n 6, 106 [4.3]. It need not be shown that a juror has *actually* been influenced by published material, only that there is a sufficient risk of influence to juror impartiality: see *Bell v Stewart* (1920) 28 CLR 419, 432 (Isaacs and Rich JJ); *A-G (NSW) v John Fairfax & Sons Ltd* (1980) 1 NSWLR 362, 368 (The Court); *R v West Australian Newspapers Ltd; Ex parte DPP (WA)* (1996) 16 WAR 518, 531 (The Court).

of media organisations.²⁵ Traditionally, those responsible for highly influential publications have been few in number and easy to identify, making sub judice contempt relatively straightforward to enforce. However, the doctrine has never really been enforced against ordinary consumers of media who might make prejudicial comments to relatively small audiences. With the rise of social media, ordinary consumers can make prejudicial comments to potentially large audiences and those comments can be widely amplified by other users, including potential or actual jurors.

This doctrine is enforced not only – and probably not primarily – through law, but has been incorporated into many different institutions of mainstream media publishing. The rules of sub judice contempt are broadly embedded, for example, within the ethical codes of practice that are impressed upon professional journalists and particularly through university journalism subjects.²⁶ These laws also shape news organisations themselves. Mainstream media organisations typically develop extensive compliance processes that take great care about the legality of the material they publish.²⁷ The concept that an editor or producer is responsible at law for all content published by a newspaper or broadcaster means that legal reviews have been inserted into the normal workflows of mass media organisations. Since media institutions may be liable if their journalists breach the law, those institutions have a strong incentive to exercise control over the conduct of their staff.²⁸ In contrast, many social media users may be unaware of the offence of sub judice contempt, or unable to easily evaluate whether their posts are unlawful. Some suggest this factor alone may mean social media users are more likely to post contemptuous material than their more legally-aware mainstream media counterparts.²⁹

In the course of the last decade, a number of studies have considered the effects of prejudicial publicity upon jurors. Research investigating juror misconduct,³⁰ juror use of social media³¹ and juror psychology in decision-

25 New South Wales Law Reform Commission, *Contempt Report Summary*, above n 12, 8.

26 See, eg, the Media, Entertainment and Arts Alliance Code of Ethics requires, inter alia, that journalists report honestly, fairly and without distortion: Media, Entertainment and Arts Alliance, 'MEAA Journalist Code of Ethics' (Code of Ethics, February 1999) <<https://www.maaa.org/meaa-media/code-of-ethics/>>. Similarly, the Australian Press Council has a statement of principles, advisory guidelines and standards of practice, which include the requirement to avoid causing or contributing to prejudice: see Australian Press Council, *Standards* <<http://www.presscouncil.org.au/search-standards/>>. Students of journalism will study contempt more specifically, including sub judice contempt, as well as notions of freedom of speech, open justice and regulation of the media which include the requirement not to publish prejudicial material about criminal trials. Publications in the traditional mass media must be vetted and approved by an editor whose role it is to reject material that does not comply with the legal requirements of publishing: see Mark Pearson and Mark Polden, *The Journalist's Guide to Media Law - A Handbook for Communicators in a Digital World* (Allen & Unwin, 5th ed, 2015) 7–10.

27 Pearson and Polden, above n 26, 7–10.

28 Ibid.

29 Johnston et al, above n 2, 4.

30 Ibid 9; Anne Wallace et al, 'Courts and Social Media: Opportunities and Challenges?' (2013) 40(7) *Brief* 36, 37; Patrick Keyzer et al, 'The Courts and Social Media: What Do Judges and Court Workers Think?' (2013) 25 *Judicial Officers' Bulletin* 47, 49.

31 Johnston et al, above n 2, 9; Wallace et al, above n 30, 37; Keyzer et al, above n 30, 49.

making,³² has consistently raised concerns about the challenges surrounding jurors and social media. Significantly, it has been shown that jurors commonly refer to media reports in their deliberations³³ and, at least in some cases, exposure to prejudicial publicity has been considered responsible for causing jurors to reach ‘unsafe’ verdicts.³⁴ Even jurors who regard themselves as unbiased after being exposed to prejudicial content in the media are more likely to reach a guilty verdict than those who have not been exposed to prejudice.³⁵

Courts take the potential effects of juror exposure to prejudicial information seriously. When a jury is potentially prejudiced, either through sub judice publications or through the misconduct of jurors, the results can be considerable. These results come at a high cost to society as well as to offenders and victims, as they can result in juries being discharged and trials abandoned,³⁶ or appeals launched and verdicts overturned.³⁷ As the costs of an aborted trial can be so significant, attempts have even been made in some jurisdictions to introduce statutory powers requiring the media to pay the costs of a discontinued trial, if it is found responsible.³⁸

C Social Media News Distribution and Consumption

The way that social media has changed the face of news raises significant concerns about the potential need to revisit sub judice law and its enforcement. Consumers are increasingly accessing news via mobile devices, engagement with that news has become a two-way and collaborative experience, and social media companies are wielding greater control over news distribution than ever before. Greater access to the internet³⁹ and the growth of social media⁴⁰ mean that news consumption is no longer limited to that distributed in the morning newspaper or on the evening news. Instead, personal devices are increasingly being used to read or listen to news frequently throughout the day, with some 59 per cent of Australians using smartphones to access news.⁴¹ Many consumers have shifted away from traditional news sources altogether, instead relying on social media

32 David Tait, ‘Deliberating about Terrorism: Prejudice and Jury Verdicts in a Mock Terrorism Trial’ (2011) 44 *Australian & New Zealand Journal of Criminology* 387; Thomas, above n 2.

33 Chesterman, Chan and Hampton, above n 6, xv.

34 Ibid 63, 109–11. Verdicts were considered ‘unsafe’ where they appeared unwarranted by the evidence and were aligned with publicity, meaning it seemed likely the jury was influenced by the media.

35 Ibid.

36 Keyzer et al, above n 30, 49; Thomas, above n 2, 6.

37 Johnston et al, above n 2, 10.

38 New South Wales Law Reform Commission, *Contempt Discussion Paper*, above n 6, 482.

39 Almost all Australian premises have access to fixed-line broadband services: see Jerry Watkins et al, ‘Digital News Report: Australia 2015’ (Report, News & Media Research Centre, University of Canberra, Reuters Institute for the Study of Journalism, University of Oxford, 2015) 6, 10.

40 See Niki Alcorn et al, ‘Media Consumer Survey 2015: Australia Media and Digital Preferences – 4th Edition’ (Report, Deloitte, 2015), which claims ‘80% of Australian survey respondents use social media, up from 65% in 2012’: at 7; Watkins et al, ‘Digital News Report: Australia 2015’, above n 39, 7.

41 This places Australia at the top of the list of all countries evaluated, including Denmark, Ireland, Finland, Spain, Italy, USA, UK, France, Germany and Japan: Watkins et al, ‘Digital News Report: Australia 2015’, above n 39, 16.

platforms, such as Facebook, YouTube and Twitter,⁴² as their 'one main source of news'.⁴³

Although people have always conversed about news, social media may have changed the way we experience news and court processes. The relationship between audiences and influential mainstream publications has become two-way in a much more pronounced way than, say, letters to the editor. For high-profile trials, users can engage in conversations about the trial with larger audiences. Conversations that may once have taken place with a few people may now be visible to thousands. Users' tweets – including those that are prejudicial – can form part of highly visible conversations with a potentially global public and they can spread rapidly. The immediacy of networks like Twitter provides a window into criminal courtrooms previously only accessible to those physically present.⁴⁴ In cases of high public interest, users will often transcribe and tweet large sections of oral testimony of witnesses, arguments of counsel, and instructions from judges. Social media provides a way for people involved in news events to 'share information directly from the scene',⁴⁵ and real-time citizen journalism gets picked up by professionals and concerned citizens alike. Viewers can now track developments in near real-time, comment on the story (or on other people's comments), share additional information, and evaluate what is known.⁴⁶ Social media also enables users to disseminate a greater level of detail than generally seen in mainstream media, where time and space restrictions would make such extensive reporting impracticable. The fact that social media users can actively share and participate in online news discussions⁴⁷ may strengthen and transform the influence of published material in ways that are not possible in traditional media. Some commentators suggest that social media coverage of criminal proceedings tends to be emotionally-orientated, at times indicating guilt before

42 Ibid 12.

43 The number of consumers who identify online and social platforms as their 'one main source of news' is 44.4 per cent: *ibid* 7.

44 In Queensland, accredited media in a courtroom are permitted to use electronic devices to report on proceedings in real-time using text-based communication (including social media), provided they do not interrupt the court: see Supreme Court of Queensland, *Practice Direction No 8 – Electronic Devices in Courtrooms*, 17 February 2014, [8]–[9].

45 Folker Hanusch and Axel Bruns, 'Journalistic Branding on Twitter: A Representative Study of Australian Journalists' Profile Descriptions' (2017) 5 *Digital Journalism* 26, 27.

46 Axel Bruns, 'Working the Story: News Curation in Social Media as a Second Wave of Citizen Journalism' in Chris Atton (ed), *The Routledge Companion to Alternative and Community Media* (Routledge, 2015) 379; Axel Bruns and Tim Highfield, 'Blogs, Twitter, and Breaking News: The Producers of Citizen Journalism' in Rebecca Ann Lind (ed), *Producing Theory in a Digital World: The Intersection of Audiences and Production in Contemporary Theory* (Peter Lang, 2012) 15.

47 While 38.9 per cent of consumers still discuss news face-to-face, many are active sharers and participants of online news discussion, with 14.6 per cent talking online to friends and colleagues about a news story, 21.5 per cent sharing a news story via social networks, 16.6 per cent commenting on a news story on social networks, 12.5 per cent rating, liking or favouriting a news story and 11.2 per cent sharing a news story via email: see Jerry Watkins et al, 'Digital News Report: Australia 2016' (Report, News & Media Research Centre, University of Canberra, Reuters Institute for the Study of Journalism, University of Oxford, 2016) 11–12.

trial, and may include prejudicial photographs, footage and emotive statements designed to increase levels of sentiment and sympathy in the community.⁴⁸

This shift towards online news consumption has also introduced a different relationship between jurors and social media, compared to that between jurors and traditional media. The fact that prejudicial material may be generated by a person's friends, colleagues, acquaintances or other influencers might have the effect of being more persuasive. It is also possible that large numbers of social media posts may have a collective or cumulative effect that reinforces prejudice or negative sentiment.⁴⁹ Concerns extend beyond the risk that jurors may be directly exposed to prejudicial information online. Even those who are not social media users may be susceptible to the influence of social media, given social media publications (including those by 'ordinary' citizens) have been shown to play a role in agenda-setting for mainstream media.⁵⁰

Finally, the changes in news distribution also have a profound potential impact on how sub judice law is enforced in practice. Social media companies are becoming increasingly powerful, as they seize control over who 'publishes what to whom' and 'how that publication is monetized'.⁵¹ Some are concerned that platforms like Facebook are wielding such extraordinary power and control in our lives, that it is almost as if 'Facebook is eating the internet'⁵² or even 'the world'.⁵³ This increase in power means traditional publishers are losing control of news distribution,⁵⁴ which has important consequences for a sub judice doctrine that has historically applied primarily to those publishers. The law technically applies to Facebook and other social media platforms as well, but the fact that these massive companies are incorporated outside of Australia and immunised from legal penalty by US law⁵⁵ makes it much more difficult (though not impossible)⁵⁶ to apply the law in practice. The fact that social media platforms do not exercise the same degree of editorial control over user posts that mainstream media exercises over journalists also makes it difficult to prevent prejudicial information from being published on the internet. In social media, systematic controls such as journalist training, editorial management and extensive fact-

48 Isaac Frawley Buckley, 'Pre-Trial Publicity, Social Media and the "Fair Trial": Protecting Impartiality in the Queensland Criminal Justice System' (2013) 33 *Queensland Lawyer* 38, 42.

49 Johnston et al, above n 2, 5.

50 Sanja Milivojevic and Alyce McGovern, 'The Death of Jill Meagher: Crime and Punishment on Social Media' (2014) 3(3) *International Journal for Crime, Justice and Social Democracy* 22, 28.

51 Emily Bell, 'Facebook Is Eating the World', *Columbia Journalism Review* (online), 7 March 2016 <http://www.cjr.org/analysis/facebook_and_media.php>.

52 Adrienne LaFrance, 'Facebook Is Eating the Internet', *The Atlantic* (online), 29 April 2015 <<http://www.theatlantic.com/technology/archive/2015/04/facebook-is-eating-the-internet/391766/>>; Teddy Amenabar, 'How Facebook Is Slowly Eating the Rest of the Internet', *The Washington Post* (online), 11 April 2016 <<https://www.washingtonpost.com/news/the-intersect/wp/2016/04/11/how-facebook-is-slowly-eating-the-rest-of-the-internet/>>.

53 Bell, above n 51.

54 Ibid.

55 See *Communications Decency Act of 1996*, 47 USC § 230 (1998).

56 There are no reported examples of sub judice contempt judgments being made against these types of massive corporations, however, there are a number of Australian defamation cases where judgments have successfully been applied to Google: see, eg, *Google Inc v Duffy* [2017] SASFC 130; *Trkulja v Google Inc* [No 5] [2012] VSC 533.

checking do not exist in the same way they do for mainstream media.⁵⁷ While these controls may not offer a complete solution for traditional media, the fact that social media users are not constrained in the same way as mainstream publishers may mean information they post is more likely to be prejudicial.⁵⁸

D Why Study Twitter?

We focus on Twitter as an initial case study. With 320 million active monthly users worldwide,⁵⁹ Twitter is one of the most prominent platforms involved in changing how users access, discuss, and share news.⁶⁰ Twitter presents an interesting case for this analysis, given the platform's volume of users, its underlying communicative structure, and the fact that posts from 95 per cent of all accounts are globally public.⁶¹ As at 2013, in Australia there were approximately 2.8 million unique Twitter accounts, representing 12 per cent of the general population.⁶² The public nature of tweets is important here; whereas Facebook's network is created by reciprocal 'friend' relationships which create 'smaller-scale, stronger-tie networks',⁶³ Twitter users can follow any globally public account without the need for those accounts to follow back, resulting in larger-scale and weaker-tie networks.⁶⁴ This means the communicative structure underlying the Twitter platform makes it particularly 'responsive to breaking news events ... facilitating the broad dissemination of emerging information within very short timeframes'.⁶⁵ Like most social media platforms, Twitter helps news circulate in a way that provides 'interaction, participation and connectivity' for journalists and audiences alike,⁶⁶ making it a useful resource for better understanding the flow of prejudicial information on social media. While it will become important to study other networks in future, Twitter provides a particularly useful lens through which to examine the dissemination of trial related news and user engagement with that information. In particular it allows us

57 Wallace et al, above n 30.

58 Tom Griffith, Katie Kossian and Tania Kowalczyk, 'Twitter, Suppression and the Courts' (2012) 15(3) *Internet Law Bulletin* 42.

59 Axel Bruns and Katrin Weller, 'Twitter As a First Draft of the Present – And the Challenges of Preserving It for the Future' in *Proceedings of the 8th ACM Conference on Web Science* (Paper presented at 8th International ACM Web Science Conference 2016, Hannover, Germany, 22–25 May 2016) 183, 183 <<http://doi.acm.org/10.1145/2908131.2908174>>.

60 Hanusch and Bruns, above n 45, 2.

61 Bruns and Weller, above n 59, 183.

62 Axel Bruns, 'First Survey Finds 2.8 Million Twitter Accounts in Australia', *The Conversation* (online), 4 August 2014 <<http://theconversation.com/first-survey-finds-2-8-million-twitter-accounts-in-australia-29829>>. This userbase was updated in early 2016 and increased the known Australian userbase from 2.8 million to just over 4 million accounts: see Bruns et al, *TrISMA: Tracking Infrastructure for Social Media Analysis* (2016) <<http://trisma.org/>>.

63 Bruns and Weller, above n 59, 183.

64 *Ibid* 183–4.

65 *Ibid* 184.

66 Hanusch and Bruns, above n 45, 27; Axel Bruns, 'Journalists and Twitter: How Australian News Organisations Adapt to a New Medium' (2012) 144 *Media International Australia, Incorporating Culture and Policy* 97.

to investigate how potentially prejudicial information flows on these networks and whether tweets containing prejudicial information are highly visible or not.

II METHODS

In this article, we present an analysis of the flow of potentially prejudicial information on Twitter⁶⁷ over the period of the high profile⁶⁸ murder trial of Gerard Baden-Clay.⁶⁹ The trial lasted for about five weeks, generated intense public interest, and received prolific media attention. To obtain our data we used automated search tools to collect tweets⁷⁰ by keyword, looking for tweets that directly mentioned the terms ‘baden-clay’ or the hashtags ‘#badenclay’ or ‘#gbc’.⁷¹ Tweets were collected from two sources. First, we extracted data directly from the Twitter Application Programming Interface (‘API’) using the Digital Methods Initiative – Twitter Capture and Analysis Toolset (‘DMI-TCAT’).⁷² We supplemented this data using Tracking Infrastructure for Social Media Analysis (‘TrISMA’),⁷³ which captures the public tweets of 2.8 million accounts that have been identified as Australian.⁷⁴ The total dataset for the trial period contained 33 067 tweets.⁷⁵ The addition of TrISMA enabled us to include an additional 2 700 tweets (approximately) that formed part of conversations between Australian accounts where only some of the tweets directly mentioned one of the keywords. This includes, for example, where users make responses directly to news that is posted on Twitter; if these responses do not contain one of our keywords, they would otherwise not be captured within our dataset.

We chose to look at tweets sent during the trial, since this represents a time when jurors have been selected and are at greatest risk of influence until they

67 Ethics approval has been received for this research at Queensland University of Technology (QUT Approval #1400000861).

68 ‘High-profile criminal trials’ are those that last for two weeks or more and have ‘substantial pre-trial and in-trial media coverage’: Thomas, above n 2, 40–41.

69 This study focusses on ‘during trial’ data – a period during which the jury is open to influence up until the verdict: see New South Wales Law Reform Commission, *Contempt Report Summary*, above n 12, 26, [75]. Many studies examine pre-trial prejudice and while this may be the topic of future research, it is not the focus of this article.

70 In order to protect the privacy of individuals, examples of tweets provided in this article have been paraphrased and do not include identifying information, with the exception of a small number of tweets posted by professional journalists. Tweets included in their original form were those that were both significant to the discussion and also posted by a high profile professional journalist or media organisation that would be aware of the public nature of their tweets.

71 We also included minor variations on these terms, including ‘badenclay’ and ‘baden clay’.

72 Erik Borra and Bernhard Rieder, ‘Programmed Method: Developing a Toolset for Capturing and Analyzing Tweets’ (2014) 66 *Aslib Journal of Information Management* 262.

73 This research is supported by infrastructure provided through the Australian Research Council funded *Tracking Infrastructure for Social Media Analysis* (TrISMA – LIEF LE140100148): see Bruns et al, above n 62.

74 The Australian Twitter userbase was first collected in 2013 and resulted in the tracking (by TrISMA) of just under 2.8 million Australian accounts. This is the userbase relied upon in this research. In early 2016, the userbase was re-collected and TrISMA is currently tracking over 4 million accounts identified as Australian.

75 Individual tweets are identified by unique tweet identification numbers.

deliver their verdict. This is also the period when prejudicial publicity may result in aborted trials, at significant expense to the parties and the criminal justice system.⁷⁶ For these reasons, we filtered the dataset to select tweets from 9:00 am on 9 June 2014, the day the jury was empanelled, to 11:51 am on 15 July 2014, one minute before the verdict was delivered.⁷⁷

From the total dataset of 33 067 tweets, we generated a random sample of 7 427 tweets (22.5 per cent) for the purposes of manual coding. There is a range of sampling strategies we could have used to emphasise different aspects of user engagement with the Twitter platform. By using a random sample it was possible to recreate activity patterns in the data, such that highly active users were better represented than less active users, and highly retweeted tweets were better represented than tweets not retweeted. For the purposes of understanding the flow of social media conversations, it was important that these activity patterns were recreated. This strategy makes the tweets of influential users (particularly professional journalists and media organisations with large established audiences) more prominent, reflecting their increased visibility as they would be perceived by average users, or by non-users searching for information on Twitter. In this way, our random sample was biased towards content that was more popular. This increased the chances of catching popular tweets through their retweets – tweets we may not have captured if we sampled, say, only a slice of time or a set number of tweets per person.

We determined the appropriate random sample size by considering how we intended to use the data. While our analysis was predominantly qualitative, we have undertaken some basic quantitative analysis to calculate the percentage of tweets from accounts identifiable as professional journalists and the percentage of tweets containing prejudicial information. For this reason, we selected a random sample size that was statistically generalisable across the sample for these basic calculations. Based on our total dataset of 33 067 tweets, we used a confidence level of 95 per cent and a confidence interval of one, to calculate the appropriate random sample size as 7 427 tweets. This means we can be satisfied to a level of 95 per cent certainty (confidence level) that the statistics we have generated are accurate within a margin of error of ± 1 per cent (confidence interval). That is, a finding that 6 per cent of tweets in the random sample are prejudicial equates to a finding (with 95 per cent certainty) that between 5–7 per cent of tweets in the total dataset are prejudicial.

A Isolating Tweets from Accounts of Professional Journalists

During our first pass of manual coding, we separated tweets from accounts that were identifiable as *professional journalists* from tweets posted by *other*

76 Joanne Baker, Adrian Allen and Don Weatherburn, 'Hung Juries and Aborted Trials: An Analysis of Their Prevalence, Predictors and Effects' (2002) 66 *Crime and Justice Bulletin* 1, 2–3.

77 In a legal sense, proceedings remain sub judice between a verdict and a sentence, and until after the time for lodging any appeals has expired: see *Delbert-Evans v Davies* (1945) 2 All ER 167; *Ex parte A-G (NSW); Re Truth & Sportsman Ltd* (1961) 61 SR (NSW) 484. However, once a verdict has been handed down and the jury is no longer involved in the trial process, the potential effect of prejudicial publications is considered to be slight.

users. We made this distinction so we could understand whether media professionals – who are required both by their institutions and at law to operate within the constraints of the sub judice contempt doctrine – converse about trials in a different way to those who are not accountable to an employer or who may not be aware of the law. To determine whether users fell into the *professional journalists* or *other users* category, we referred to the information posted by users on their Twitter profile. Twitter allows users to publish information including their name, a 160 character ‘bio’ or user description about themselves or their work, professional information, personal details, their location, links to their institutional or personal website, as well as a photo or avatar.⁷⁸ We relied primarily on the users’ provided name and description.

Users were allocated to the *professional journalists* category where they identified themselves as having ‘past or present occupational experience with a news organization that adheres to mainstream journalistic practices’.⁷⁹ This category included users ‘with experience as ... reporters, editors, and producers for print and broadcast media ... [as well as] professionals working for online publications that still adhere to most mainstream journalistic practices’.⁸⁰ This category was not limited to individuals, but also included mainstream news sources, outlets and organisations.⁸¹ All users falling outside these definitions were allocated to the *other users* category.

It should be noted that a decision was made to exclude users from the *professional journalists*’ category where they identified themselves as a ‘journalist’ but did not provide any further description or link to a media institution or publication. This decision was based on our interest in understanding whether those who are required both by their institution and at law to operate within the constraints of the sub judice contempt doctrine, engage in different conversations about criminal trials to those who are not accountable to an employer or may not be aware of the doctrine. While freelance journalists, student journalists and amateur journalists will be personally responsible for the content of their tweets, the employers of users tweeting in a professional capacity may additionally be liable for unlawful posts. There were approximately half a dozen users who fell into this category. Freelance, student or amateur journalists, who included a link to a media institution in a way that suggested they were reporting for that organisation, were included in the *professional journalists* category.

B Coding for Prejudicial Content

Once our random sample was divided into the *professional journalists* and *other users* categories, we coded each tweet for the presence of prejudicial information. Each tweet was regarded as a single 140 character sampling unit,

78 Hanusch and Bruns, above n 45, 2, 4.

79 Andrew M Lindner, Emma Connell and Erin Meyer, ‘Professional Journalists in “Citizen” Journalism’ (2015) 18 *Information, Communication & Society* 553, 555.

80 *Ibid.*

81 *Ibid* 554.

'sent by a unique user at a particular moment',⁸² that was categorised according to whether it contained *None*, *Low* or *High* levels of prejudicial information. In developing this coding scale, we referred to the legal principles outlined in a number of legal cases dealing with sub judice contempt. Whether a publication is contemptuous is not clearly defined at law, however, there are a number of broad categories of prejudicial publications that have been found to be contemptuous and these were used to inform our code. Tweets were coded as prejudicial (*Low* or *High*) where their content contained: statements as to guilt;⁸³ statements as to innocence;⁸⁴ content that criticised or disparaged the accused;⁸⁵ information about confessions;⁸⁶ or information about prior convictions.⁸⁷ While all five categories of publication may constitute sub judice contempt, the law is more often concerned with statements as to guilt,⁸⁸ information about confessions, and information about prior convictions. These three categories are thought to more strongly assert guilt than the remaining two and may have a greater effect on juror impartiality. For this reason, tweets containing statements as to guilt were coded as highly prejudicial (*High*). Tweets containing information about confessions or prior convictions would also have been coded as highly prejudicial (*High*), but these were not relevant in the Baden-Clay trial. Statements as to innocence and content criticising or disparaging the accused (but not asserting guilt) were coded as containing low-level prejudice (*Low*). All remaining tweets were categorised as *None*, that is, they did not contain any prejudicial information.

The law of sub judice contempt has developed to ensure that, according to principles of open justice, the media is permitted to publish factual information about ongoing criminal matters. Any report must be fair, accurate, contemporaneous and made in good faith.⁸⁹ After a defendant has been charged, a

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- 82 Jessica Einspanner, Mark Dang-Anh and Caja Thimm, 'Computer-Assisted Content Analysis of Twitter Data' in Katrin Weller et al (eds), *Twitter and Society* (Peter Lang, 2014) 97, 100.
- 83 *A-G (NSW) v Radio 2UE Sydney Pty Ltd* [1998] NSWSC 28; *A-G (Qld) v WIN Television Qld Pty Ltd* [2003] QSC 157. Statements of guilt include 'material that asserts, suggests or creates the impression that an accused person committed the crime with which he or she has been charged': see Des Butler and Sharon Rodrick, *Australian Media Law* (Thomson Reuters, 5th ed, 2015) 393.
- 84 Statements asserting the accused is innocent can also be prejudicial, as sub judice contempt is concerned not only with the risk of the innocent being convicted, but also with the risk of the guilty being acquitted. See also *R v Castro* (1873) LR 9 QB 219; *R v Pearce* (1992) 7 WAR 395.
- 85 This includes comments that are generally adverse or denigrate the accused or that excite feelings of hostility or antipathy against an accused: see *DPP (SA) v Francis* (2006) 95 SASR 302; *R v Saxon* (1984) WAR 283. This may also include a photograph or film footage: see *R v Australian Broadcasting Corporation* (1983) Tas R 161.
- 86 *A-G (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368, 380 (The Court). If a confession has been admitted into evidence, it is lawful to publish a fair and factual report about it in the same way lawful reports about any other evidence presented in court may be published.
- 87 *Maxwell v DPP (UK)* [1935] AC 309, 317 (Viscount Sankey LC); *A-G (NSW) v Willesee* (1980) 2 NSWLR 143.
- 88 Dorothy J Imrich, Charles Mullin and Daniel Linz, 'Measuring the Extent of Prejudicial Pretrial Publicity in Major American Newspapers: A Content Analysis' (1995) 45(3) *Journal of Communication* 94, 102. It should be noted that although this study was undertaken in the US, the coding methods and decisions used are very similar to ours and are consistent with Australian laws.
- 89 *Ex parte Terrill; Re Consolidated Press Ltd* (1937) 37 SR (NSW) 255, 257–9 (Jordan CJ); *A-G (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695, 714 (McHugh JA).

report about the matter must be limited to the ‘bare facts of the crime’ and must not include information that might identify the accused (where identity is in issue) or cause a jury to be prejudiced against them.⁹⁰ ‘Bare facts’ include ‘extrinsic ascertained facts to which any eyewitness could bear testimony, such as the finding of a body and its condition, the place in which it is found, the persons by whom it was found, the arrest of a person accused, and so on’.⁹¹ During trials, this means it is also lawful to report the ‘bare facts’ of witness oral testimony, counsel arguments, judicial instructions and any other courtroom activity. This type of lawful reporting caused some complications during coding, since publications that may have been prejudicial *pre-trial* might not have been prejudicial *during trial*. This issue arose primarily in the category of ‘content that criticised or disparaged the accused’. Take for example the hypothetical tweet: ‘*Baden-Clay is an adulterous liar*’. Pre-trial, this statement would be coded as *Low* level prejudice because it criticises the accused, suggests he is of bad character, and may excite feelings of hostility against him.⁹² In contrast, once the accused gave evidence during trial that he had lied to his wife and committed adultery, it is less clear whether this tweet is prejudicial.⁹³ While comments by witnesses in general are not considered facts until accepted by the court, self-incriminating claims made by an accused may generally be presumed to be true. The content of some tweets then could be accepted as true, even if critical of the accused, and in this case they would not be prejudicial. For this reason, many tweets that would have been coded as *Low* pre-trial were coded as *None* in our during trial dataset. This had the effect of reducing the percentage of our sample that contained prejudice, but allowed us to ensure we were conservative in our coding.⁹⁴ After all tweets were coded for prejudicial content, we counted how frequently the *None*, *Low* and *High* categories occurred across the sample.⁹⁵ From here, we undertook basic calculations about the prevalence of prejudicial information during the trial.

It should be noted that tweets in our sample containing prejudicial content will not necessarily constitute sub judice contempt. For a publication to be in contempt, it must have ‘a real and definite tendency ... to prejudice ... [pending criminal] proceedings’.⁹⁶ The use of the phrase *real and definite tendency* is important.⁹⁷ It need not be shown that a juror has actually been influenced by

90 Pearson and Polden, above n 26, 138.

91 *Packer v Peacock* (1912) 13 CLR 577, 588 (The Court).

92 *DPP (SA) v Francis* (2006) 95 SASR 302; *R v Saxon* (1984) WAR 283.

93 We did not obtain the court transcript in this case due to significant costs. However, multiple journalists contemporaneously tweeted minute-by-minute from the courtroom during the trial and these comprehensive ‘reports’ formed a ‘transcript’ of sorts. As the tweets we extracted were date and time stamped, we were able to analyse them chronologically, so it was possible to contextualise them using the journalists’ reports interspersed throughout.

94 We coded our data in the context of being posted during trial, but did not also code it as if it had been posted pre-trial, so we cannot provide the number of tweets affected here.

95 Norman K Denzin and Yvonna S Lincoln, *The SAGE Handbook of Qualitative Research* (Sage, 4th ed, 2011) 596, 599.

96 New South Wales Law Reform Commission, *Contempt Discussion Paper*, above n 6, 106 [4.3].

97 Whether a publication has the requisite tendency to prejudice proceedings will be determined objectively, having regard to ‘the nature of the material published and ... the circumstances existing at the time of

published material, only that there is a sufficient risk of influence to juror impartiality.⁹⁸ The tendency must be clear, or 'real and definite', such that there is a 'substantial risk of serious interference'.⁹⁹ It is ultimately for the courts to establish objectively whether a particular publication is contemptuous.¹⁰⁰ In coding our sample, we accordingly focussed only on the content of tweets, and not on any further evaluation of the likelihood of actual prejudice.

C Limitations

There are some limitations with our dataset that must be acknowledged. First, tweets that do not match the keywords are generally not captured. This will necessarily exclude some discussion of the trial and is a limitation of the search strategy. In addition, the DMI-TCAT dataset does not contain data for Day 1 of the trial (as it was not captured) and the TrISMA data for Day 1 is incomplete. It has only been possible to extract comprehensive data samples using TrISMA since August 2015. When extracting data from before this time-frame, we are limited by the API. In this study we aim to back-capture tweets from June/July 2014 (during the trial), however, the API will only provide up to 3 200 tweets per Twitter account. This means that for those accounts where users tweeted fewer than 3 200 tweets from June/July 2014 to August 2015, we will have captured all their tweets. However, for those highly-active users who have tweeted many thousands of tweets during that timeframe, we will have been restricted to capturing only their most recent 3 200 tweets and these will likely have fallen after the trial dates. This means we may have missed many relevant tweets from highly-active users. However, these highly-active users *are* included in the DMI-TCAT dataset, meaning this limitation will be minimised from Day 2 of the trial onwards. On this basis, Day 1 has been excluded from coding and analysis. Day 2 will be selected as the starting point, specifically 9:39:01 am,¹⁰¹ 11 June 2014, as this is the time at which the dataset is most complete and limitations are minimised.

Despite these limitations, we elected to supplement the DMI-TCAT data with information from TrISMA, because it provides a number of conversations that are not captured by the DMI-TCAT strategy. In addition to capturing tweets containing specific keywords and hashtags, TrISMA provides tweets that *reply-to* those tweets containing keywords/hashtags, and the earlier tweets that those containing keywords/hashtags are *in-reply-to*. The inclusion of *reply-to* and *in-reply-to* tweets makes it possible to better understand the flow of conversations containing prejudicial information. It should be noted that DMI-TCAT

publication': *A-G (NSW) v John Fairfax and Sons Ltd* (1985) 6 NSWLR 695, 697 (Glass JA). See also *DPP (NSW) v Wran* (1987) 7 NSWLR 616, 626 (The Court).

98 *Bell v Stewart* (1920) 28 CLR 419, 432 (Isaacs and Rich JJ); *A-G (NSW) v John Fairfax and Sons Ltd* (1980) 1 NSWLR 362, 368 (The Court); *R v West Australian Newspapers Ltd; Ex parte DPP (WA)* (1996) 16 WAR 518, 533 (The Court).

99 *Hinch v A-G (Vic)* (1987) 164 CLR 15, 27 (Mason CJ), 34 (Wilson J).

100 *A-G (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695, 697 (Glass JA), 708 (McHugh JA); *DPP (NSW) v Wran* (1987) 7 NSWLR 616, 626 (The Court).

101 This is the time at which the DMI-TCAT dataset commenced.

includes non-Australian Twitter users, however, supplemented data from TrISMA is limited only to pre-2013¹⁰² Australian Twitter users.¹⁰³ Further, some conversations will be omitted where they took place with those highly-active users who have already been identified as being excluded from the dataset (due to the API limitation which restricts our data extraction, before August 2015, to the most recent 3 200 tweets). As a result of these limitations, the conversation data comprising *reply-to* and *in-reply-to* tweets is quite small, at approximately 2 700 tweets of the original 33 067. While this data cannot be used to make generalised findings, it is useful for providing some insight into Twitter conversations that potentially contain prejudicial information.

III RESULTS AND FINDINGS

Predictably, our *total dataset* (33 067 tweets) showed that tweet activity during the trial was highest at those times when court was sitting. Activity peaked when key witnesses were giving evidence, when the accused took the stand, and during closing arguments. The highest level of activity was during the lead-up to the verdict and the least activity was evident on those days when court was not sitting and on weekends. The overall pattern of activity is depicted in Figure 1.

102 The current list of accounts dates to September 2013. It contains 2.827 million accounts matching any of the selection criteria. This includes: 1.563 million accounts matching one of the eight Australian timezones; 1.866 million accounts matching one of the location filters; and 414 000 accounts matching one of the description filters. It should be noted that accounts may match one or more of the three filter criteria; thus, the sum of matches across the three filters is greater than the total number of 2.8 million accounts.

103 TrISMA only captures tweets from Australian users. Location terms being tested for include the 45 largest Australian cities (covering more than 80 per cent of the Australian population), the names and abbreviations of states and territories, 'Australia' and variations, and terms such as 'down under' and 'Oz'. Most of the common false positives (eg Perth, Scotland; Brisbane, California) have been removed automatically. A very small number of placenames (eg Orange; ACT) could not be tested for because of their frequent occurrence in other contexts.

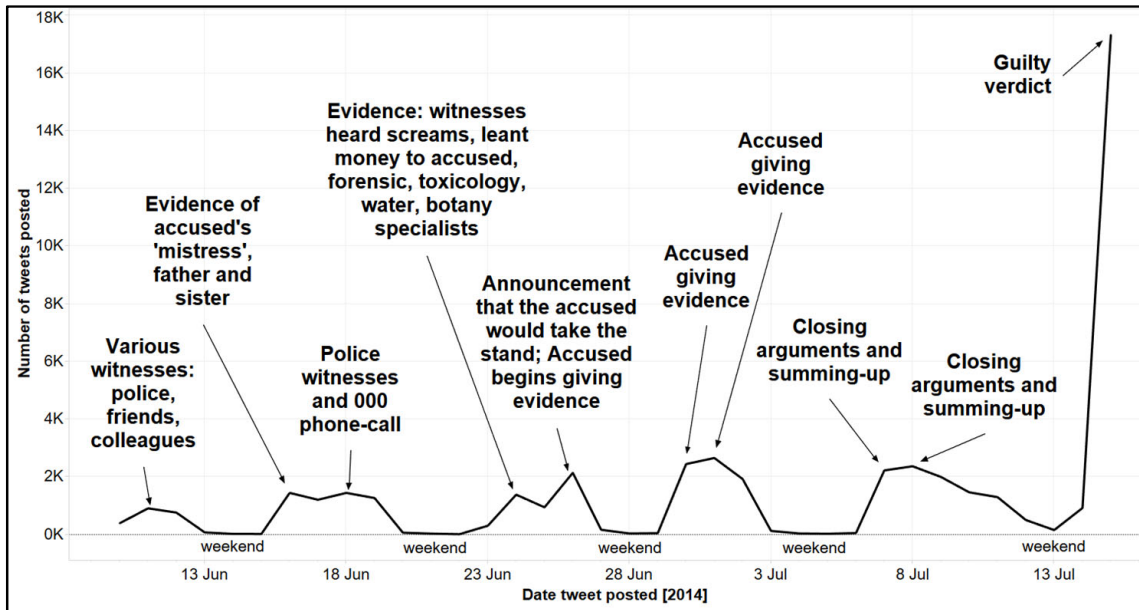


Figure 1: Tweet activity during the trial up to delivery of the verdict (*total dataset*)

1 Random Sample (7427 Tweets)

About two-thirds (64.8 per cent) of all tweets contained in our random sample (of 7 427 tweets) were posted by *professional journalists* and the remaining third (35.2 per cent) were posted by *other users*, that is, those users we did not classify as professional journalists. This data is represented by the grey columns in Figure 2.

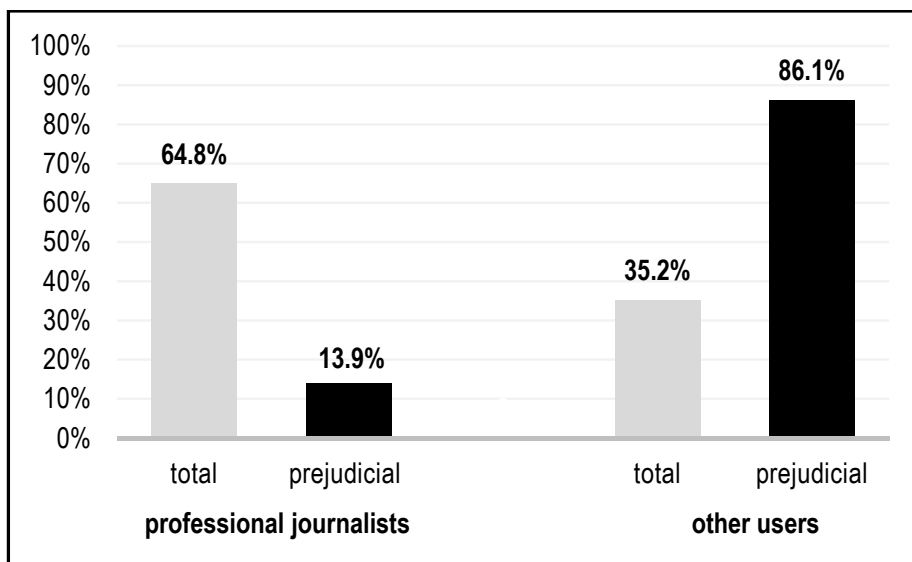


Figure 2: Total tweets by user type as percentage of total *random sample* (grey) and total prejudicial tweets by user type as percentage of *random sample subset of prejudicial tweets* (black).

Percentages are generalisable to the *total dataset* with a confidence level of 95 per cent and a margin of error of ± 1 per cent.

Overall, 6 per cent of tweets in our random sample contained prejudicial information. Based on our margin of error, this means we can be 95 per cent confident that 5–7 per cent of our total dataset contains prejudicial information. While we have no means of comparison for this figure, it is regardless a non-negligible sum of prejudice that warrants further investigation. From the total volume of tweets posted by ordinary users in our random sample, 14.7 per cent contained prejudicial information (13.7–15.7 per cent in the total dataset). By contrast, only 1.3 per cent of tweets posted by professional journalists in our random sample (0.3–2.3 per cent in the total dataset) contained prejudicial information. The breakdown of tweets from professional journalists and other users, together with the percentage of prejudicial information contained in tweets, is set out in Table 1 and Figure 3.

	Other Users	Professional Journalists	Total Random Sample
None	85.3% 2230 tweets	98.7% 4751 tweets	94.0% 6981 tweets
Low	12.0% 313 tweets	1.0% 48 tweets	4.9% 361 tweets
High	2.7% 71 tweets	0.3% 14 tweets	1.1% 85 tweets
Total	100.0% 2614 tweets	100.0% 4813 tweets	100.0% 7427 tweets

Table 1: Percentage of prejudicial information in tweets (breakdown of *random sample*)

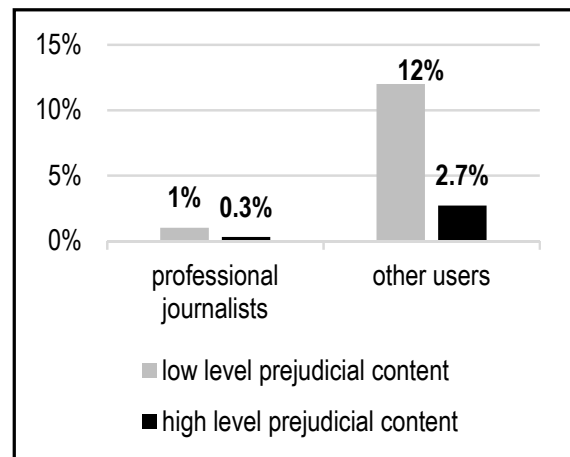


Figure 3: Percentage of prejudicial information in tweets by professional journalists and other users (*random sample*)

2 *Random Sample Subset of Prejudicial Tweets (446 Tweets)*

From our random sample we created a subset of those tweets containing prejudicial information, that is, those tweets coded as containing *Low* or *High* levels of prejudicial information. This subset contained 446 tweets in total, posted by 263 users, and it replicated the peaks and troughs of the original dataset. As can be seen in Figure 4, of the 263 users who posted prejudicial information, the vast majority were ordinary people tweeting about the trial (90.5 per cent were *other users*) rather than professional journalists (9.5 per cent). The majority of these 263 users (73 per cent) posted just one tweet containing prejudicial information, with the remaining 27 per cent posting between two and 14 prejudicial tweets. Surprisingly, it was a professional journalist who was responsible for posting 14 prejudicial tweets. This was primarily due to that user's failure to attribute tweet content – a pitfall which is discussed in more detail later. This user was an outlier in the data, however, and it was non-journalists who were mostly responsible for posting multiple prejudicial tweets.

Figure 5 depicts the breakdown of the 446 tweets in the random sample subset, by user type. It shows the majority of prejudicial tweets were posted by *other users* in our sample (86.1 per cent), while a much smaller number were posted by *professional journalists* (13.9 per cent). These figures suggest the posting of prejudicial tweets by non-journalists was in complete disproportion to the posting of prejudicial tweets by professional journalists, and this is represented by the black columns in Figure 2 above.

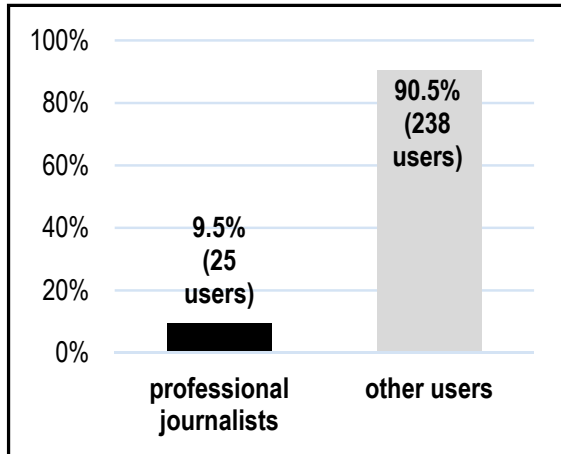


Figure 4: Breakdown of 263 users by user type (*random sample subset of prejudicial tweets*)

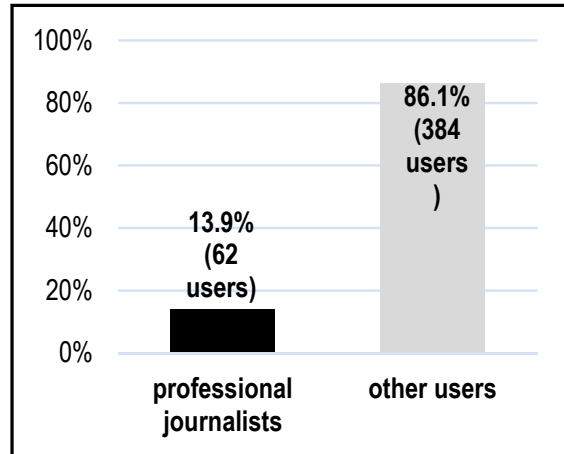


Figure 5: Breakdown of 446 prejudicial tweets by user type (*random sample subset of prejudicial tweets*)

We next analysed tweet content in greater depth to better understand the flow of prejudicial information during the trial and this led to a number of interesting findings. First, sub judge contempt appears to be largely effective for professional journalists, save for some minor exceptions. Second, and consistent with our previous finding, non-journalists are more likely than professional journalists to post prejudicial information online. Third, we identify a distinct trend for tweets in our datasets to focus on claims made by the prosecution and to ignore the defence narrative in comparison. We raise considerable concerns about the potential for this bias to affect jurors in criminal trials. Finally, we consider the potential for cumulative negative sentiment on social media to work to influence jurors in ways that may also jeopardise the right to a fair trial.

A Sub Judge Contempt Largely Effective for Professional Journalists

Given the low proportion of apparently prejudicial tweets sent by professional journalists, the sub judge doctrine appears to be largely effective in shaping the way they report on and communicate about the news. Likely as a result of the way mainstream media organisations have incorporated the law into their normal workflows, tweets posted by professional journalists mostly contain legally compliant and objective news reports and rarely include prejudicial information. Professional journalists appear to be more careful with their language choices than other users and generally attempt to present information

about the trial in objective terms. They use journalistic language, aim to be factual and avoid the inclusion of opinionated or offensive terminology. Only a very small percentage of tweets by professional journalists in our sample (0.3–2.3 per cent) appeared to meet the technical requirements of prejudice.

1 Sometimes Professional Journalists Could Be More Careful

Although this percentage may appear insignificant at first, our analysis highlighted other aspects of tweets by professional journalists that may be problematic. This meant we could not simply conclude that all tweets by professional journalists were benign and unlikely to influence jurors. For professional journalists, Twitter (and social media generally) offers a novel approach to distributing information from the courtroom. It is used by professional journalists not only to report news but also to market, support, advertise and make more visible tweets and stories of their own, as well as those from colleagues, associated broadcasters, and mainstream networks. The economy of Twitter encourages users to craft tweets that are likely to be retweeted and there is a clear reputational incentive for users to write interesting (sensational) tweets. When linking to news articles, there is a direct financial incentive for journalists and news organisations to use headlines and tweets that are likely to catch attention, draw clicks, and be retweeted in large volumes. We see in our data that the most retweeted tweets are also those containing the most sensational information, evidence or claims as made by the prosecution or witnesses; in most cases, though, these are carefully crafted to avoid being prejudicial at law.

New challenges are also created by the immediacy and speed with which tweets (or other social media posts) are generated and by their ability to convey information in near real-time. In our sample, a handful of journalists were so detailed in their reporting that they tweeted almost continuously. Their moment-by-moment reports saw them each post thousands of tweets throughout the trial, allowing viewers to experience the courtroom proceedings almost live. Verbatim courtroom details were tweeted to potentially large audiences of thousands, or even hundreds-of-thousands, of followers who could instantly respond both by participating in conversations and interacting with the ‘story’, prejudicial or otherwise, as it unfolded. This immediacy and volume of tweets from the courtroom allowed followers to engage with the murder trial at a pace and in detail not generally provoked by traditional media reporting. This also created the potential for jurors to be exposed to or participate in conversations that are quite different to those typically seen via media coverage in the past.

Some professional journalists could stand to be more careful in how they tweet to avoid potential criminal liability. Primarily, journalists ought to ensure they use attribution to make clear that they are reporting on facts rather than restating an opinion. By way of example, a tweet such as ‘*Prosecution: Alison’s death was not a misadventure*’ attributes the claim to the prosecution, whereas ‘*Alison’s death was not a misadventure*’ does not. The small proportion of prejudicial tweets in our sample sent from journalists were almost all direct reports of claims made in court, that could have been remedied by providing

attribution. It is important that journalists identify the maker of any claims made in their tweets and that they understand even a single tweet has the potential to breach the sub judice doctrine.¹⁰⁴ When they do not provide attribution, journalists could easily give the impression to readers that they are tweeting personal opinions or accepted facts. A number of tweets in our sample included claims about the violent killing of the victim and the dragging of her body to a car. Because this trial relied heavily on circumstantial evidence, claims made about the killing or disposal of the victim's body were not facts, but rather assertions put to the Court by the prosecution or expert witnesses. In repeating these assertions through unattributed tweets, some journalists gave the impression they were making personal claims about the guilt of the accused.

Even where tweet content was attributed, we found evidence of a strong tendency for media reports by professional journalists to focus on the more sensational aspects of the case and the highly emotive claims of the prosecution. As we've noted previously, it may be that there is nothing peculiar about tweets in this regard, as it is possible (or even probable) that a focus on the sensational aspects of stories also occurs in traditional media. However, there appears to be a fine line between a fair and contemporaneous report, and one that is distorted or exaggerated, particularly when information is presented as a 140 character narrative. Two examples of legally compliant but potentially prejudicial tweets include: '*Prosecution: GBC efficient and effective killer*' and '*Prosecution: whatever method was used to kill Allison it was two things, efficient and effective*'. Regardless of attribution, these tweets appear to assert guilt or criticise the accused, but it was true the prosecution made these claims and it is lawful to contemporaneously report what is stated in court. It is possible that a juror who hears the prosecution make a claim in court, may be further influenced if the claim is also amplified by repeated publication in the media, especially where that repetition hones in on the most prejudicial aspect of the claim – *efficient and effective killer* – without including the context that was evident in the courtroom. Technically, the journalists in the examples above are reporting the 'fact' that the prosecution made a claim; but it is somewhat difficult to accept that readers of these claims, presented as facts, would necessarily be able to quickly distinguish the content as an argument made by the prosecution from a bare fact. It may be that either the attribution or the timing of the types of tweets (coming after the jury has already heard the allegations from the prosecution) may mean that they are not likely to prejudice the trial, but this assumption seems potentially suspect.

In some instances, journalists in our sample included compilations of prosecution claims into single abbreviated tweets that created sequences of

104 In 2015, a jury was discharged and trial abandoned because of a single post on Instagram (and a link on Twitter to the same Instagram post) posted from an account appearing to be that of one of the co-accused's barristers: Louise Hall, 'How Barrister Charles Waterstreet Caused Rogerson, McNamara Trial to be Aborted', *The Sydney Morning Herald* (online), 15 June 2016 <<http://www.smh.com.au/nsw/how-barrister-charles-waterstreet-caused-rogerson-mcnamara-trial-to-be-aborted-20160602-gp9uov.html>>. This case was unusual as the alleged offending party was involved in the trial, but it does make clear how a single post on social media can result in a negative outcome for the trial process and the criminal justice system.

events that were different to the way the evidence was presented in court. This tweet creates a plausible and potentially persuasive narrative but it is probably not strictly prejudicial: *‘Prosecution: Gerard #badenclay was looking for a way out & driven by love & money to efficiently & effectively kill his wife’*. It is clearly the role of journalists to create narratives from information before them, but it may be that the concentration of key themes or messages into 140 characters could create a more distorted or exaggerated view than traditional news reporting. If so, it is possible the presentation of information in this way could actually influence jurors if they have access to it.

B The Law is Less Effective for Non-Journalists

Unlike professional journalists, non-journalists in our sample more often responded to news in ways that were opinionated and prejudicial, and this suggests the doctrine is less effective in regulating their behaviour. This stark difference in the percentage of prejudicial tweets posted by non-journalists (86.1 per cent) in comparison to professional journalists (13.9 per cent),¹⁰⁵ reflects not only journalistic training, but also the remarkably different way that journalists and non-journalists tweet about ongoing trials. These differences in how they use Twitter, combined with different styles of discourse and issues of attribution, meant tweets by non-journalists were much more likely to meet the technical requirements of prejudice.

For non-journalists in our sample, Twitter was a space for conversation, discussion and commentary about the trial. Non-journalists engaged in rich and diverse conversations around the news, and did so in ways that were far more frequently prejudicial. The discourse of non-journalists in our sample lacked the careful language of professional journalists; their language was conversational, informal, and sometimes included coarse or offensive vocabulary. They were also more inclined to tweet statements about the guilt of the accused, or to be critical or disparaging. Many of the prejudicial tweets we found that were posted by non-journalists were responding to news in highly emotionally charged ways. Examples of this style of language – that strongly implies guilt or criticism – included claims that the accused was *‘scum of the earth’*, *‘guilty as hell’*, *‘full of shit’*, *‘a lying killer’* or *‘murdering scum’*. Other tweets implied the accused was guilty by calling for a conviction, claiming there was plenty of evidence to convict, hoping the accused would be made to suffer in the prison yard, and by demanding the jury reach a guilty verdict.

In addition to problematic language choices, non-journalists rarely provided the attribution that would be required to negate prejudicial content. While professional journalists were primarily responsible for tweeting claims made in court, some non-journalists also engaged in this type of court reporting. When they did so, however, they generally did not include attribution, meaning a tweet such as *‘You killed your wife Mr Baden-Clay’*, had the effect of making it appear to be the opinion of the person posting the tweet, rather than a re-statement of a

105 See Figure 2: Total prejudicial tweets by user type as percentage of *random sample subset of prejudicial tweets* (black).

claim made by the prosecution in court. It is not necessarily surprising that non-journalists were primarily responsible for prejudicial tweets; few users who are not journalists would be familiar with the rules of sub judice contempt,¹⁰⁶ and others may lack the skills or desire to moderate the content of their tweets.

C Some Potential Prejudice is beyond the Scope of Sub Judice Contempt

As the law of sub judice contempt is concerned with the *possibility* of prejudice, not the actuality,¹⁰⁷ it might seem appropriate for the law to address the broader risks of prejudice such as prosecution bias or cumulative negative sentiment. However, sub judice contempt is designed only to address *individual* contemptuous publications, and does not address groups of social media users whose posts may collectively be responsible for prejudice.¹⁰⁸ There is no way of enforcing existing laws in a way that addresses prejudice arising from multiple publications collectively, and the effect of reducing this threshold is that everyone would be in contempt. The law is not completely without redress, although the alternatives may be inadequate due to costs to society, offenders and victims.¹⁰⁹

1 Prosecution Bias

In a way that is perhaps more worrying than the presence of technically prejudicial information, we found a distinct trend for tweets in our sample to accept and reinforce the prosecution's theory of the case. The defence's narrative is largely ignored in reporting by comparison, which may lead to a more general public sentiment that is weighted against the defendant. The theory of the prosecution's case as expressed in its line of questioning and assertions obviously reflects a guilty narrative, but these are also the more interesting and sensational aspects of the story. It is these assertions that may be disproportionately amplified by first the media and then the general public. The net result, in our sample, shows a social media discourse that is one-sided and biased towards the prosecution. As no *individual* publication is responsible for this prosecution bias, it falls outside the scope of sub judice contempt – the very law intended to regulate publications.

We identified this bias by looking particularly at the types of content that were amplified through retweets and found that, during the trial, the most retweeted posts were those recounting evidence from the prosecution or

106 Johnston et al, above n 2, 4.

107 *Bell v Stewart* (1920) 28 CLR 419, 432 (Isaacs and Rich JJ); *A-G (NSW) v John Fairfax and Sons Ltd* (1980) 1 NSWLR 362, 368 (The Court); *R v West Australian Newspapers Ltd; Ex parte DPP (WA)* (1996) 16 WAR 518, 531 (The Court).

108 The actus reus of sub judice contempt has three elements. There must be (i) a publication of material: *R v Griffiths; Ex parte Attorney-General* [1957] 2 QB 192, 202 (The Court); (ii) which is published whilst the criminal proceeding is sub judice ('under a judge' or pending): *James v Robinson* (1963) 109 CLR 593, 615 (Windeyer J); and (iii) as a matter of practical reality, the publication must have the requisite tendency to interfere with the course of justice: *A-G (NSW) v John Fairfax & Sons Ltd* (1985) 6 NSWLR 695, 697 (Samuels JA).

109 New South Wales Law Reform Commission, *Contempt Discussion Paper*, above n 6, 42.

discussing prosecution style arguments.¹¹⁰ Twitter users responded slowly (if at all) to less-sensational evidence, especially where it supported the defendant or had a tendency to weaken the prosecution case. The most highly amplified claims were those discussing evidence about alleged fingernail scratches on the accused's face and particular species of leaves that were found in the victim's hair (evidence that proved pivotal in establishing the accused's guilt). Highly amplified tweets also included claims about the accused's affairs, recordings of his conversations with police (during which it was claimed he had lied), and disparaging descriptions of him such as '*murdering scum*'. Questions asked by the prosecution and witness responses were tweeted in greater volumes and were more likely to be amplified, even when clarifications or contrary evidence were later provided. For example, tweets including claims made by a witness (a neighbour) that they heard screams coming from the direction of the Baden-Clay home on the night the victim went missing were amplified in Twitter conversations. Yet there was minimal amplification when another neighbour testified the screams were those of her teenage daughter who, on the same night, had been frightened by a cobweb. Although jurors are physically present when evidence is presented in court, it is difficult to know whether the amplification or concentration of prosecution claims – in the absence of defence counter-claims – might distort the evidence, or a juror's recollection of the evidence, such that they are influenced in favour of the prosecution.

This amplification of the prosecution's assertions meant the vast majority of tweets supported the notion of guilt or were neutral as to guilt. We saw few retweets of claims defending the accused, other than neutral statements such as those reporting that the accused continued to maintain his innocence or that counsel was summing up the case for the defence. In this way the case for the defence was muted, with very few people reporting the accused defending himself and even fewer voicing the possibility he was not-guilty. It could be argued this disproportionate focus on the prosecution narrative was simply because the evidence pointed towards the guilt of the accused. However, this case was far from straightforward.

It is fair to say the weight of public sentiment was against the defendant in this case. The accused in this trial was a divisive figure. On his own admission he had been lying to his wife for many years, had engaged in more than one affair, and had borrowed hundreds of thousands of dollars from friends and acquaintances which, the evidence suggests, he could not repay. When his wife was initially missing he had publicly played the role of the grieving husband seeking his wife's return, although once he was charged with her murder it became clear this may have been an act. The accused was also considered by many to be arrogant, selfish, and oddly reliant on his genetic connection to his great-grandfather, Lord Baden-Powell,¹¹¹ for notoriety and prestige. The accused

110 The user accounts of many tweets are able to be re-identified by posting the tweet text into an internet browser such as Google. Due to ethical considerations, we have generally removed the text of tweets from our discussion and relied on a summary instead.

111 Lord Baden-Powell was a celebrated member of the British Army in the late 1800s and early 1900s, who rose to the rank of Lieutenant-General. He is particularly well known for his role in founding the scout

chose to take the stand to give evidence in this trial, and this appears to have provided an opportunity for the public to criticise him and to reiterate claims made by the prosecution in cross-examination. This overall negative public sentiment was reflected in Twitter conversations where members of the public made strong claims about their dislike for the accused. Many focussed on their belief in his guilt and expressed their anger by attacking him and agitating for a guilty verdict and life-long jail sentence, or even wishing harm would come to him. Naturally, many also expressed their grief for the victim, her three daughters and her family.

Although the weight of public sentiment was against the accused, the same could not be said for the strength of the evidence against him. This was a trial in which the evidence was wholly circumstantial. There were no eye-witnesses, no closed-circuit television footage, and even the victim's cause of death could not be determined conclusively. The uncertainty surrounding the facts was further highlighted by the fact the matter went on appeal to the Court of Appeal (which downgraded the initial verdict of murder to manslaughter) and then to the High Court (which overturned the Court of Appeal's decision and reinstated the original murder verdict).¹¹² Given the complexities involved in these appeals, it is apparent the case was not clear-cut. This makes it seem unlikely that the tenor of the evidence alone could be responsible for the largely negative sentiment seen on Twitter.

This pro-prosecution focus and an absence of the defence narrative is a clear cause for concern. Perhaps it is not surprising that some Twitter users themselves raised concerns about negative sentiment in the media by levelling criticism at the sensational headlines, the hype and the bias. Some users questioned the impact of social media reporting on the trial process, suggesting jury trials are no longer workable or relevant, criticising the 'media circus' around the trial and claiming the verdict was disturbing given the potential for jurors to be biased. Certainly our data suggests there is some legitimacy to these various concerns¹¹³ and only further research will reveal whether a pro-prosecution bias on social media is replicated for other criminal trials.

2 *Cumulative Negative Sentiment*

The collective weight of low-level prejudicial or negative information across multiple posts on social media may also work to influence juror impartiality, but again this will fall outside the scope of sub judice contempt. Prejudice caused by cumulative negative sentiment tends to occur in two ways, by contextualisation or sequencing, and by repetition or amplification. Many tweets in our sample seem individually innocuous by legal standards, but when they are contextualised by or sequenced with other posts they may together be prejudicial in effect. Similarly, isolated negative tweets might pass with little effect, but when

movement and was the first Chief Scout of The (Boy) Scout Association: see John Fox, 'Lord Robert Baden-Powell (1857–1941)' (2013) 43 *Prospects* 251, 255, 260.

112 *R v Baden-Clay* (2016) 258 CLR 308.

113 Our data legitimates concerns in a general sense only; we do not contend the jury was biased in this case.

hundreds or thousands of negative tweets are posted en masse their repetition or amplification may result in prejudice. At law, jurors should not have read tweets during the Baden-Clay trial, but studies suggest at least some jurors are likely to have seen or engaged with media coverage about the trial,¹¹⁴ possibly including Twitter. Jurors would not need to have read many tweets to recognise the collective sentiment in our dataset that was largely critical of the accused and reflected a broad community belief in his guilt. It is this ‘collective effect of commentary on a case’ that may constitute prejudice.¹¹⁵

The minutiae of evidence in this trial were conveyed through large numbers of legally compliant tweets. Discussions included claims about: the victim’s depression; the couple’s ‘non-existent sex life’; the accused’s affair and large debts; his mistress’ anger; his desire to ‘wipe the slate clean’; loud screams coming from the couple’s home the night the victim went missing; traces of blood in the car which matched the victim’s DNA; fingernail scratches on the accused’ face and grazes on his chest; and his calls to his insurer after his wife’s death. Presented as ‘facts’, these are the aspects of the evidence that most people following the trial would have seen on social media. These are also the types of information that were most likely to be amplified in our sample, given their prosecution focus. The motives, screams, blood and injuries from a struggle are all consistent with murder. As we identified previously, defence arguments were more likely to be suppressed. For this reason, few followers would have been aware of significant evidentiary developments that weakened the prosecution case. Followers may not have known that the screams and the phone call about the insurance claim were ultimately unable to be relied upon by the prosecution,¹¹⁶ or that the traces of blood could not be dated or definitively linked to the victim’s death. Our sample also revealed little support for the accused’s claims that scratches on his face were from shaving or that marks on his chest were self-inflicted from scratching. While individual tweets may seem innocuous, there is a good chance that the light in which the public discussed the trial – including contextualisation, sequencing, repetition and amplification – could have a serious prejudicial impact. This may have a significant effect on a follower’s perceptions of the way a crime was committed and it is not clear how this may affect jurors.

3 Multiple Publications and the Law

As already highlighted, issues of prosecution bias or cumulative negative sentiment caused by multiple publications cannot be addressed by the law of sub judice contempt. Significantly, this shifts the burden and costs for prosecuting those responsible for prejudicial publications away from the state (the Director of Public Prosecutions) and onto the parties involved in the trial, some of whom

114 Chesterman, Chan and Hampton, above n 6, 82–88, 91; Thomas, above n 2, 41.

115 Johnston et al, above n 2, 5.

116 A neighbour’s alternative explanation for the screams made it impossible for the prosecution to argue the screams were those of the victim. Similarly, the accused’s father provided evidence that it was he who insisted the accused contact the insurer, meaning this information could not be used as evidence of post-offence conduct that might indicate an intention to murder.

may have insufficient means to protect their right to a fair trial. An example of this type of remedy is an application for a *no jury order* (or trial by judge-alone), which will rarely focus on a single prejudicial publication, but instead focus on the cumulative effect of multiple publications containing adverse publicity.¹¹⁷ In an application for a trial by judge-alone last year, the Court accepted it was the cumulative effect of a substantial volume of both social and mainstream media publicity that was prejudicial to the accused, rather than any individual publication.¹¹⁸ In the same case, the Court expressed concern at the ease and speed with which 'members of the public (including the jury panel)' could engage in electronic searches to access the range of prejudicial information.¹¹⁹ Similarly, it was the effects of multiple publications that caused a 2016 case in the Northern Territory Supreme Court to be aborted mid-trial because of the 'cumulative effect of the errors and overstatement of ... the crown case' in media reports. Justice Blokland noted that 'none of the reports referred to ... by themselves would ... justify discharging the jury', however, it was their cumulative negative effect that had the 'potential to seriously prejudice the trial'.¹²⁰ In another case in 2016, the cumulative negative effect of media publications—that humiliated an accused and were likely to have an enduring impact on her reputation—was relied on as a mitigating factor in sentencing.¹²¹ These cases demonstrate the broad and ongoing challenges of a prosecution focus or cumulative negative sentiment in the media, and reinforce the notion that further work is needed to better understand the potential for jurors to be influenced and how the law might respond.

IV CONCLUSION AND FUTURE WORK

The potential for prejudicial information on social media to influence jurors is a continuing cause for concern. While the net effect of existing media regulation (broadly conceived) is somewhat effective in influencing the behaviour of professional journalists, it is much less successful for ordinary users. It is also important to recognise that while the law is effective in limiting tweets that are legally prejudicial, many tweets are posted that are technically compliant but could still have the practical effect of influencing jurors. We note too that the law is not at all suited to addressing either the pro-prosecution content of tweets or the widespread collective negative sentiment that we saw in

117 For examples of high-profile cases where the accused has made an application for a trial by judge alone on the basis of cumulative prejudicial publicity – some successfully and others not – see *R v McNeil* (2015) 250 A Crim R 12; *R v Gittany* [2013] NSWSC 1503; *R v Patel* [2012] QSC 419; *R v Fardon* [2010] QCA 317; *Dupas v The Queen* (2010) 241 CLR 237; *R v Ferguson*; *Ex parte A-G (Qld)* (2008) 186 A Crim R 483.

118 *R v McNeil* (2015) 250 A Crim R 12, 16 [13], 24–6 [51]–[62], 29 [72] (Johnson J).

119 *Ibid* 23 [45], 33 [106], 33–34 [111]–[112].

120 'Avani Dias, Mulhall Trial Aborted, Judge Blames "Potentially Prejudicial" Reporting', *ABC News* (online), 20 April 2016 <<http://www.abc.net.au/news/2016-04-20/shane-mulhall-fabian-brock-killing-revenge-attack-mistrial/7342952>>.

121 *R v Wran* [2016] NSWSC 1015.

our sample, both of which may also have the potential to bias jurors and jeopardise the right to a fair trial.

This trial was particularly inflammatory and further work is needed to compare our findings to other criminal trials. The sensational and negative aspects of this case resonated particularly strongly through social media. The evidence that weakened the prosecution case or supported the accused's defence were generally not reported or amplified in the same way. The sense of public betrayal may also have played into the public's anger with the accused. His choice to play the role of the grieving husband after reporting his wife missing initially drew some level of public sympathy, but this was quickly withdrawn when he was charged with her murder. Overall, social media users appeared to identify with emotive evidence, but we do not know how this could play out in other contexts.

Future research is also needed to better understand how existing laws are working and how people (jurors) actually access prejudicial information. There is a chance that the careful way that journalists construct tweets and headlines could prejudice jurors, regardless of whether they are technically prejudicial at law. There is little work about how this type of information is perceived. Without it, it is impossible to say at this stage whether the larger proportion of technically prejudicial tweets by non-journalists is likely to be influencing jurors. These preliminary questions need to be addressed in order to understand what sort of activities the law should actually target. Our findings also suggest that greater attention should be paid to the way that witnesses and counsel present evidence in court, given that the most sensational aspects are likely to be immediately and strongly amplified in social media.¹²²

We also need to further conceptualise how existing media regulation might be extended or adapted. Sub judice contempt laws appear to regulate the speech of users with journalistic training and the institutional oversight processes of mass media industries. Non-journalists are more likely to commit contempt. How exactly the law may respond, though, is not clear. There are difficult contested questions of what responsibilities platforms may have in setting norms for acceptable behaviour or enforcing the law. There are inherent tensions here between a platform user's right to freedom of expression, the need to prevent

122 By way of example, during the High Court hearing for this case, counsel for the appellant initially described the accused's behaviour as 'cold-blooded': see Transcript of Proceedings, *R v Baden-Clay* [2016] HCA Trans 166 (26 July 2016) 820, 868. Only a short time into the hearing the Court requested counsel refrain from using the term and the appellant's arguments were thereafter presented using more legalistic terminology. Despite its brief use, the term 'cold-blooded' (an arguably prejudicial term) was used repeatedly in news reports both online and in mainstream media. Perhaps not surprisingly, the court's request was not reported. This example is not one where potential jurors may have been influenced (as it was an appeal hearing), but it demonstrates nonetheless how potentially prejudicial information may be strongly amplified on social media even if referred to only briefly in court. See, eg, 'Baden-Clay "calculated, cold-blooded", Crown Says in Murder Downgrade Appeal', *ABC News* (online), 26 July 2016.

juror exposure to prejudice online, and any potential requirements that platforms bear some responsibility for user-generated content.¹²³

This research presents a useful opportunity to develop the application of digital methods for legal analysis and policy reform. While this study is limited to a set of tweets posted by accounts identified as Australian, we have been able to examine more closely how discussions about ongoing criminal trials actually play out. In future work, we will seek to extend our use of digital methods to improve our understanding of whether tweets containing prejudicial information are highly visible or not. It is our hope this understanding will guide future legal principles and ultimately ensure greater fairness in criminal trials.

123 Rebecca MacKinnon et al, 'Fostering Freedom Online: The Role of Internet Intermediaries' (Report, United Nations Educational, Scientific and Cultural Organization, 2014) 132.