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HIGH-PROFILE CRIMINAL TRIALS, SOCIAL MEDIA CONVERSATIONS AND JUROR PREJUDICE: UNDERSTANDING MEDIA REGULATION IN THE DIGITAL AGE

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Governments and courts around the world are increasingly concerned about the potential for social media conversations to cause juror bias and jeopardise the right of an accused to a fair trial (Bartels & Lee, 2013; Johnston et al., 2013; Keyzer, Johnston, Pearson, Rodrick, & Wallace, 2013; Wallace, Keyzer, Johnston, Pearson, & Rodrick, 2013; Hannaford-Agor, Rottman & Waters, 2011; Tait, 2011; Thomas, 2010). Information that might prejudice an ongoing trial may be spread through social media in a way that is not as easily controlled as information disseminated through mainstream media. The rise of social media enables prejudicial comments made by individuals, including comments as to a person's perceived guilt or innocence, to reach a much larger potential audience. There are significant fears that even small numbers of highly prejudicial posts on social media could influence a jury if those posts are made to a large audience or widely amplified by other users. It is also possible that the collective weight of low-level prejudicial information on social media may work to influence juries. The increasing prevalence of social media accordingly raises important questions about the potential for unregulated prejudicial information to influence juries and the outcome of trials.

As a discrete case study, we used digital methods to investigate Twitter conversations during the high-profile murder trial of Gerard Baden-Clay (*R v Baden-Clay* (2014) QSC 154). We undertook a discourse analysis of tweets during the trial to assess the prevalence of prejudicial conversations, identify the main actors involved in publishing and amplifying (or suppressing) prejudicial information, and understand how users engage with that information (Robson, 2002). We then used these findings to complete a doctrinal analysis of how appropriately the *sub judice* contempt doctrine, which prohibits the publication of prejudicial information by mainstream media during a trial, appears to be operating in the context of social media.

To obtain our data we extracted tweets that matched the date range of the trial and associated keywords and hashtags, as well as any tweets that directly referenced those

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tweets, from the Australian Twitter Collection.¹ We categorised a sample of these tweets according to whether their content contained prejudicial information and then counted the frequency of each category (Denzin & Lincoln, 2011). The coding scheme was informed by the legal principles of *sub judice* contempt.² A tweet was classified as *prejudicial* where its contents contained: statements as to guilt (*Attorney-General (NSW) v Radio 2UE Sydney Pty Ltd and John Laws* [1998] NSWSC 28); statements as to innocence (*Director of Public Prosecutions v Wran* (1987) 86 FLR 92); content that criticized or disparaged the accused (*Director of Public Prosecutions v Francis* (2006) 95 SASR 302); information about confessions (*Attorney-General (NSW) v TCN Channel Nine Pty Ltd* (1990) 20 NSWLR 368) or information about prior convictions (*Maxwell v Director of Public Prosecutions* [1935] AC 309). We also separated tweets from accounts that were identifiable as *professional journalists* from tweets posted by *other users*. We made this distinction so that 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.

This paper presents a useful opportunity to develop the application of digital methods for legal analysis and policy reform (Rogers, 2013). Traditional media regulation makes it unlawful to publish prejudicial information about pending criminal trials (*R v Daily Mirror* (1927) 1 KB 845). By imposing liability on those responsible for publications such as journalists, editors, producers and proprietors of media organisations (New South Wales Law Reform Commission, 2003), it has generally been possible to limit juror exposure to prejudice in the mass media and thereby preserve juror impartiality (*Ex parte Auld; Re Consolidated Press Ltd* (1936) 36 SR NSW 596) and the right to a fair trial. However, the decentralised nature of social media makes it difficult to prevent prejudicial information from being published on the internet. To date, however, legal analyses have generally not been able to consider the extent to which prejudicial information does actually circulate on social media. While this study is limited to a set of tweets posted by accounts identified as Australian, it provides an opportunity to examine more closely how discussions about ongoing criminal trials actually play out. In particular, this research seeks to understand how potentially prejudicial information flows on these networks, given that a substantial proportion of the discourse continues to be dominated by news from mainstream media organisations. It seeks particularly to understand whether tweets containing prejudicial information are highly visible or not, rather than assuming at the outset that social media will likely prejudice ongoing trials. In this context, this paper then develops a legal analysis of the operation of traditional media regulation, to consider how well adapted it is for regulating prejudicial information in the social media environment.

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² A publication will be in *sub judice* contempt of court where it has, 'as a matter of practical reality, a tendency to interfere with the course of justice in a particular case' (*John Fairfax & Sons Pty Ltd and Reynolds v McRae*, 1955)

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