

# Public Contempt and Compassion: Media Biases and Their Effect on Juror Impartiality and Wrongful Convictions

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## ABSTRACT

This paper investigates news and social media's role in wrongful convictions in the Canadian criminal justice system by utilizing a prior analysis of three men wrongfully convicted of murder in Canada—Guy Paul Morin, Robert Baltovich, and James Driskell—along with multiple studies on the media's role in creating public prejudice against an accused. The presumption of juror impartiality should be reevaluated to account for the prejudicial nature of news and social media. I explore the role the media plays in both causing wrongful convictions through pre-trial publicity and in affecting change by bringing attention to innocence cases. Canadian wrongful conviction research has not seriously addressed the issues surrounding media and the ensuing bias that may lead to the partiality of jurors. I will begin by reviewing the Canadian presumptions of innocence and juror impartiality before reviewing the roles of news and social media with their impact on wrongful convictions. Finally, recommendations will be made for improvements to the criminal justice system to ensure a fairer trial for the accused and to limit wrongful convictions.

**Keywords:** juror impartiality; presumption of innocence; challenge for cause; wrongful convictions; pre-trial publicity; social media; news media; media bias; judicial instructions

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## I. INTRODUCTION

The media has a strong role to play in the criminal justice system through its influence on public opinion. Much of the information the public receives regarding crime and the criminal justice system is through newspaper reports, television news stories, and, more recently, social media. The media frequently focuses on details of individual crimes, which overemphasizes the amount of serious crime in society. This failure to provide the necessary contextual information leaves readers misunderstanding the criminal justice system, which can lead to the prospering of fear of crime narratives and the “perception of criminal justice in crisis.”<sup>1</sup>

In recent decades, the public has been made aware of wrongful convictions through media reports and high-profile exonerations, including the Central Park Five in New York. Shows such as *Making a Murderer* and podcasts like *Serial* have made the public question the accuracy of the criminal justice system more seriously. Documentaries like these are crucial in eliciting public sympathy for innocence campaigns.<sup>2</sup> However, the media can also have a detrimental effect on an accused person’s right to a fair trial by jury. The purpose of crime news is to “give the reader the impression that he is himself a direct witness to the facts” which requires presenting information to the public as though it is fact, whether or not it could be heard in a court proceeding as evidence.<sup>3</sup> Pre-trial publicity frequently provides prejudicial information to the public—especially in high-profile or serious crimes—which limits the ability to find truly impartial jurors who have not been affected by the associated publicity.

The presumption of juror impartiality should be reevaluated to account for the prejudicial nature of news and social media. This paper will explore the role both media forms play in both causing wrongful convictions through pre-trial publicity and in affecting change by bringing attention to innocence cases. The paper will begin by reviewing the Canadian presumptions of innocence and juror impartiality before reviewing the roles

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<sup>1</sup> Richard Nobles & David Schiff, *Understanding Miscarriages of Justice: Law, the Media, and the Inevitability of Crisis* (Oxford: Oxford University Press, 2000) at 38.

<sup>2</sup> Greg Stratton, “Innocent Narratives: Wrongful Conviction, *Australian Story*, and the Influence on Public Opinion” (2013) 27:6 *J Media & Cultural Studies* 875 at 876.

<sup>3</sup> Antoine Garapon, “Justice out of Court: The Dangers of Trial by Media” in David Nelken, ed, *Law as Communication* (Aldershot: Dartmouth, 1996) at 233

of news and social media with their impact on wrongful convictions. Finally, recommendations will be made for improvements to the criminal justice system to ensure a fairer trial for the accused that will limit wrongful convictions.

## II. DEFINITIONS

It is important to note the different understanding of wrongful convictions in law and the media or public sphere. Nobles and Schiff provide a legal definition of wrongful convictions as “the people who have been convicted of offences did not in fact commit those offences, or that their convictions were flawed because some part of the process that produced those convictions did not operate as it should.”<sup>4</sup> This can be referred to as a concern with truth and due process, respectively. However, they also note that the media focuses much less on due process or the rights of the suspect, instead attaching all relevance to concerns with the truth. When someone claims innocence or is exonerated, the media focuses on their innocence in fact—that they are not the person who committed the crime. It is seen as unpalatable to be acquitted on a “technicality,” or due process, when the media still presents the individual as factually guilty.<sup>5</sup> This difference becomes apparent in the media’s presentation of pre-trial stories compared to the coverage of exonerations.

This paper focuses on the presentations of crime through news and social media. Social media is an ever-changing concept—what was popular ten years ago is no longer utilized today. For example, Myspace lost favour as Facebook, Twitter, and Instagram took over, which will in turn eventually be overcome by ever-newer websites and apps. Generally, social media is participatory and accessible to the masses. It has been described as content “not merely consumed by users, [but] also created, organized and distributed by them.”<sup>6</sup> For the purpose of this paper, the use of ‘social media’ refers to online platforms that allow for discussion, such as Facebook, Twitter, blogging platforms like WordPress, and editable entries on Wikipedia.<sup>7</sup>

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<sup>4</sup> Nobles & Schiff, *supra* note 1 at 16.

<sup>5</sup> *Ibid* at 38.

<sup>6</sup> Australia, Commonwealth, Standing Council on Law and Justice, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice*, by Jane Johnston et al (Melbourne: Standing Council on Law and Justice, 2013) [*Juries and Social Media*].

<sup>7</sup> See *ibid* at Appendix 1.

In comparison, news media consists of the traditional media originally found in newspapers and on television news programs. In the age of the Internet, these sources have expanded onto online platforms, as well. Newspapers and television programs now have websites online that house their video, audio, and written content, and their stories are shared on social media platforms. To clarify, the distinction between traditional news media and social media is not based on the medium's online capabilities, but instead on the ability of social media to crowdsource and share information independent from traditional journalistic enterprises found in news media. This line becomes indistinct as journalists from traditional media create their own profiles and blogs to share additional content and communicate stories in real-time with their audience on social media. For the purposes of this paper, a distinction will be made between the news media's postings on their own platforms and that which is shared and discussed between individuals on social media.

### III. LITERATURE REVIEW

Legal wrongful conviction research often falls into a "familiar plot" of the innocent person unjustly accused and convicted, then later exonerated after a heroic struggle.<sup>8</sup> Leo argued this created an "intellectual dead end"<sup>9</sup> as those that conducted such research viewed the miscarriages of justice with the same lens, neglecting to expand their methodological or conceptual understanding.<sup>10</sup> The fields of criminology and sociology have conducted much research on the media's representation of crime. The media has a strong influence over its audience, acting as the "public's surrogate" to produce what the audience expects to be objective and reliable information.<sup>11</sup> Previous studies in other disciplines have revealed that the media contributes to many of the causes of wrongful convictions, especially in cases of serious and high-profile offences.<sup>12</sup>

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<sup>8</sup> Richard A Leo, "Rethinking the Study of Miscarriages of Justice: Developing a Criminology of Wrongful Conviction" (2005) 21:3 J Contemporary Crim Justice 201 at 207.

<sup>9</sup> *Ibid* at 207.

<sup>10</sup> *Ibid* at 207, 212.

<sup>11</sup> Stratton, *supra* note 2 at 875.

<sup>12</sup> Jon B Gould & Richard A Leo, "One Hundred Years Later: Wrongful Convictions after a Century of Research" (2010) 100:3 J Crim L & Criminology 825.

However, Canadian wrongful conviction research has not seriously addressed the issues surrounding media and the ensuing bias that may lead to the partiality of jurors. Although research has been done to associate media coverage of crime with public reactions, it does not frequently assess the effect of such reactions on specific criminal trials. This paper will bridge this research gap by connecting media reporting and the public's perception of the presumption of innocence to jury trials, where that presumption is of paramount importance. If jury members are affected by the pre-trial publicity in a specific case, this may cause an improper weighing of evidence or a neglect of the presumption of innocence altogether.

#### IV. PRESUMPTION OF INNOCENCE

Section 11(d) of the *Charter* provides a presumption of innocence for all who have been accused of an offence in Canada.<sup>13</sup> As with many European nations, Canada has two elements to this presumption.<sup>14</sup> First, the prosecution must prove an accused's guilt within a trial. The accused is not required to call a defense to disprove the Crown's case; but instead, it is the Crown's burden to prove to the judge or jury beyond a reasonable doubt that the accused is guilty and should be convicted. The second element is found in European human rights law and takes a wider interpretation of the presumption. This element requires that the pre-trial must also be conducted as if the accused were innocent. This is mirrored in Canada through *Charter* rights and *Criminal Code* provisions that ensure a balancing of the rights of the accused against state and public interests.<sup>15</sup>

The reasons this presumption extends beyond the trial itself is three-fold. First, censure and punishment stem from the finding of guilt.<sup>16</sup> Fair procedures must be utilized as the conviction can lead to imprisonment and incredible stigma that may last a lifetime. Second, trials rarely produce absolute certainty. Evidence can be wrong or strongly connected to past miscarriages of justice and the presumption of innocence "allocat[es] the

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<sup>13</sup> *Canadian Charter of Rights and Freedoms*, s 11(d), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 [*Charter*].

<sup>14</sup> Andrew Ashworth, "Four Threats to the Presumption of Innocence" (2006) 10:1 *Intl J Evidence & Proof* 241 at 243.

<sup>15</sup> See *Charter*, *supra* note 13, s 11; *Criminal Code*, RSC 1985, c C-46, s 515 [*Criminal Code*].

<sup>16</sup> Ashworth, *supra* note 14 at 247.

risk of misdecision.”<sup>17</sup> Finally, the state should view its citizens as innocent.<sup>18</sup> As the state has ample resources for investigation and prosecution, the state should also have the burden to prove an accused’s guilt.

The presumption of innocence leads to issues regarding news and social media’s presentation of suspects and accused people. Although the values espoused in our *Charter* should extend throughout our society, this rarely appears to be the case in news media, which presents the prosecution case and other information it sources as fact, or on social media, where anyone can speculate or share unsupported information and rumours with others. In both instances, media denounces the “artificiality of the law” which includes “the fiction of presumed innocence.”<sup>19</sup> Nobles and Schiff state that “[p]ublic confidence will only be satisfied if the truth the public (as constructed by the media) expects to hear is confirmed in the courts, even if the evidence available does not justify the statement demanded.”<sup>20</sup> A stigma is attached to people accused of crimes from the moment news or social media identifies them as a suspect. If information of the crime is reported in news media or dispersed through social media’s word of mouth and the accused has been identified and charged, the public will expect them to be convicted irrespective of whether the Crown prosecutor has provided evidence of the person’s guilt beyond a reasonable doubt. The public can reject the legal process, in turn also shirking the presumption of innocence, through their moral indignation at the crime that has been committed and a demand for someone to be held accountable.<sup>21</sup>

## V. PRESUMPTION OF JUROR IMPARTIALITY

*Charter* subsection 11(d) also requires a trial by an impartial tribunal, whether that is a judge or jury.<sup>22</sup> This requires that jurors are not biased or prejudiced for or against the accused. Hence, they must maintain the presumption of innocence that can be stripped away in media presentations of a case. This is necessary to ensure that jurors do not have preconceived ideas of a case before hearing evidence at trial, which should assist in

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<sup>17</sup> *Ibid* at 248

<sup>18</sup> *Ibid* at 249

<sup>19</sup> Garapon, *supra* note 3 at 233.

<sup>20</sup> Nobles & Schiff, *supra* note 1 at 129.

<sup>21</sup> Garapon, *supra* note 3 at 235.

<sup>22</sup> *Charter*, *supra* note 13, s 11(d).

preventing wrongful convictions based on extraneous and unsubstantiated material. *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)* clarified that prejudice based on pre-trial publicity is “highly speculative” which necessitates that it is difficult to obtain a *Charter* remedy on those grounds.<sup>23</sup> The *Criminal Code* provides an ability for Crown and defence to challenge a juror for cause during the jury selection process, instead. This is intended to ensure that an accused has a fair trial. Paragraph 638(1)(b) provides that challenges can be conducted if the potential juror is “not indifferent between the Queen and the accused” which allows for applications regarding pre-trial publicity.<sup>24</sup>

The Canadian courts have addressed this challenge for cause procedure multiple times. In *R v Sherratt*, the Court stated that “while there must be an ‘air of reality’ to the application, it need not be an ‘extreme’ case” to allow challenges for cause to be conducted.<sup>25</sup> However, mere publication of the facts of the offence or proceedings is usually not sufficient to warrant such a challenge, as our justice system is open to the public and that publicity is to be expected.<sup>26</sup> The Court in *R v Zundel* provided that the real question to be addressed is whether pre-trial publicity “could potentially have the effect of destroying the prospective juror’s indifference between the Crown and the accused.”<sup>27</sup> Since *Zundel*, this test has been adapted to a “realistic potential for partiality” that must be established by the party seeking to challenge potential jurors.<sup>28</sup>

*R v Find* breaks this threshold into two components.<sup>29</sup> First, that “widespread bias exists in the community” and second, that “some jurors may be incapable of setting aside this bias.”<sup>30</sup> Both the nature or type of information shared and the time since publication are important to determine the prejudicial potential of pre-trial publicity and whether there

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<sup>23</sup> *Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97, [1995] SCJ No 36 at para 35-36. This case dealt with the prejudicial effect of media publication of an accused’s testimony in a public inquiry before their criminal case was heard. The Court suggested remedies including publication bans, *in camera* hearings, and the postponement of testimony in the public inquiry.

<sup>24</sup> *Criminal Code*, *supra* note 15, s 638(1)(b).

<sup>25</sup> *R v Sherratt*, [1991] 1 SCR 509, [1991] SCJ No 21 at para 63 [*Sherratt*].

<sup>26</sup> *Ibid* at para 42.

<sup>27</sup> *R v Zundel* (1987), 35 DLR (4th) 338 at para 100, 31 CCC (3d) 97 (Ont CA) [*Zundel*].

<sup>28</sup> *Sherratt*, *supra* note 25 at para 64; *R v Le*, 2008 MBQB 81 at para 3 [*Le*].

<sup>29</sup> *R v Find*, 2001 SCC 32 at paras 32-33.

<sup>30</sup> *Ibid* at para 32.

are grounds under the first component of the test. Publicity that is deemed to be more prejudicial in nature includes “[r]eports that misrepresent the evidence, publish discreditable information about the accused, engage in speculation about the guilt of the accused, or offer information which would not be admissible in court.”<sup>31</sup> In assessing the second component, it must be noted that the focus is on whether jurors may be unable or unwilling to put aside the prejudices they may have developed from the pre-trial publications, not whether they hold any opinions on the case at all. The presumption of impartiality indicates that jurors are expected to be able to put aside their potential biases and hear a case impartially as their oath requires.

Despite the safeguards put in place through the challenge for cause provisions in the *Criminal Code*, the pool of potential jurors for any criminal case are made up of the Canadian public who are exposed to news and social media before—and sometimes during—the trial process. The media frequently contains the prejudicial information as listed above in *Le*.<sup>32</sup> There are far-reaching impacts of the expanding media presence within people’s lives that have yet to be fully addressed by the courts. Some of the issues related to this publicity and the prejudicial nature of media reports will be discussed in the below sections on news and social media.

## VI. ‘TRIAL BY MEDIA’: NEWS MEDIA’S IMPACT ON WRONGFUL CONVICTIONS

It is important to recognize that the news media is a business, focused on attaining a greater readership through the sale of advertisements on television and online. News media provides entertainment through newsworthy and public interest stories, including crime reports. This provides an incentive to follow certain criminal cases—especially serious offences—from discovery of the offending conduct through the trial and subsequent conviction or acquittal. Frequently, the public also has a desire to follow a story through the investigative and trial processes to ensure justice is attained. Nobles and Schiff describe the news media’s presentation of crime stories as newsworthy through what crime has been committed rather than if the suspect has committed the offence.<sup>33</sup> This has a powerful

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<sup>31</sup> *Le*, *supra* note 28 at para 9.

<sup>32</sup> *Ibid.*

<sup>33</sup> Nobles & Schiff, *supra* note 1 at 97.



impact on the public who read crime stories in news media, as these stories are frequently accompanied by “misperceptions and prejudicial accounts.”<sup>34</sup>

Media coverage of crime can contribute to wrongful convictions in two capacities. First, pressure is put on the criminal justice system to apprehend those responsible for serious crimes through media narratives that create a “connection between crime and public emotionality.”<sup>35</sup> This can lead to rushed investigations and heightened tunnel vision that may lead to the incorrect person charged with the offence.<sup>36</sup> Second, once a person has been charged with a crime, pre-trial publicity can lead to a trial by media. This phenomenon has been defined as “a market-driven form of multi-dimensional, interactive, populist justice in which individuals are exposed, tried, judged and sentenced in the ‘court of public opinion’”<sup>37</sup> As jurors are selected from the public that is exposed to these publications, pre-trial publicity can become a serious issue when prejudicial material is reported to the public.

After the United States Supreme Court ruled that pre-trial publicity seriously compromised an accused’s right to a fair trial in the 1960s, the American Bar Association [ABA] provided a list of types of information that would be prejudicial if dispersed by lawyers or published by the media.<sup>38</sup> This was created in the hopes that news media in the United States would refrain from reporting prejudicial information and solidify an accused person’s procedural rights to a fair trial. The Canadian Judicial Council [CJC] also released documentation regarding pre-trial publicity and the prejudicial information that may impact someone’s right to a fair trial.<sup>39</sup> Key

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<sup>34</sup> Katherine Rozad, *Critical Champions or Careless Condemners? Exploring News Media Constructions in Cases of Wrongful Conviction* (MA Thesis, Wilfrid Laurier University, 2013), online: <scholars.wlu.ca/cgi/viewcontent.cgi?article=2867&context=etd> [perma.cc/SRC2-FSSS] at 21.

<sup>35</sup> *Ibid* at 8.

<sup>36</sup> Tunnel vision is a single-minded or overly focused police investigation or prosecutorial theory. This can cause information to be utilized incorrectly, to ensure it fits within the specific theory espoused by the police or prosecutor. See Fred Kaufman (1998) *The Commission on Proceedings Involving Guy Paul Morin: Report*.

<sup>37</sup> Rozad, *supra* note 34 at 11 [emphasis added].

<sup>38</sup> Rafaële Dumas, Nadia Lepastourel & Benoît Testé, “Press Articles and Influence Processes: The Different Effects of Incriminating Information and Crime Story Information on Judgments of Guilt” (2014) 20:7 *Psychology, Crime & L* 659 at 660; The American Bar Association, *ABA Criminal Justice Section Standards*, Chicago: ABA, 8-1.1(b)

<sup>39</sup> Canadian Judicial Council, *The Canadian Justice System and the Media*, (Ottawa: CJC,

types of this information include reported confessions, criminal history, and other evidence not before the jury. The Canadian report also specified that the “media must avoid linking an accused directly to a crime” or providing sensationalized information which will be more influential to “people who could wind up on the jury.”<sup>40</sup> Nonetheless, this information is frequently reported. According to a 1979 US study, researchers found that two thirds of examined newspaper articles contained prejudicial information from the contemporary ABA list.<sup>41</sup>

Katherine Rozad studied the media coverage surrounding three Canadian wrongful convictions: Guy Paul Morin, Robert Baltovich, and James Driskell. Rozad canvassed newspaper articles from four major sources regarding these cases, from the time the victims were murdered or went missing until the subsequent exoneration of these three men. It is important to note that all of these cases occurred before the boom of social media, with the third exoneration occurring in 2008, which would likely increase the public fervor surrounding a similar case today. Rozad found that the media has two opposing roles as the “public’s surrogate.”<sup>42</sup> The media contributes to wrongful convictions through the creation of fear of crime narratives. Fear of crime narratives describe “psychological and social reactions to perceived threats of crime and/or victimization” and can be developed through the media’s portrayal of victims and the offenders or accused persons.<sup>43</sup> Women have a greater fear of crime than men, perhaps due to the sensational nature of reports of violence against female victims.<sup>44</sup> The second role of news media is to support innocence claims at the exoneration stage if there is sufficient information to change public perception. This will be discussed further, below.

In the pre-trial context, publicity hinders an accused person’s ability to have a fair trial due to the media narratives that are constructed. Examining the media surrounding Morin and Baltovich pre-trial and Driskell at appeal

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2010) [CJC, “CJS and the Media”].

<sup>40</sup> *Ibid* at 4-5.

<sup>41</sup> James W Tankard, Kent Middleton & Tony Rimmer, “Compliance with American Bar Association Fair Trial-free Press Guidelines” (1979) 56 *Journalism Quarterly*.

<sup>42</sup> CJC, “CJS and the Media”, *supra* note 39 at 1.

<sup>43</sup> Rachael E Collins, “Addressing the Inconsistencies in Fear of Crime Research: A Meta-Analytic Review” (2016) 47 *J Crim Justice* 21 at 21.

<sup>44</sup> Rachael E Collins, “‘Beauty and Bullets’: A Content Analysis of Female Offenders and Victims in Four Canadian Newspapers” (2016) 52:2 *J Sociology* 296 at 297 [Collins, “Beauty and Bullets”].

showed three main constructions that negatively impacted the accused.<sup>45</sup> First, the victims of these crimes were constructed sympathetically to garner public interest that would induce people to follow the story until its conclusion. This began a melodramatic narrative with easily identifiable good and bad sides.<sup>46</sup> In Morin, Christine Jessop was depicted as an innocent nine-year old riding her bike and buying bubblegum before her abduction and murder, a pure individual that would draw audience sympathy and worry over their own children.<sup>47</sup>

The second construction is the building of audience fear. “[F]ear is entertaining and readers have ‘come to expect entertainment’” in their media.<sup>48</sup> News media utilizes this tactic to ensure people take their stories seriously and become engaged in knowing the result. This fear can be created through reporting on early details of the crime, speculating on a motive, or, in an article on Baltovich’s case, connecting Elizabeth Bain’s death to other murders and the steadily rising rates of reported sex assaults in Toronto.<sup>49</sup> Readers are connected to victims through “excessive detail of their victimization,” and reinforcements of the victim as a normal person create fear of the consumer’s own potential victimization.<sup>50</sup>

Finally, pre-trial publicity also creates a focused direction for moral outrage in the suspected or accused person. When the news media identifies a specific suspect, the audience expects justice against this person who is “seemingly deserving of blame.”<sup>51</sup> Rozad noted that the media would present somewhat indirect connections between a victim and the suspect. For example, an article linked Baltovich to the victim through an FBI profile that said Bains knew her killer. In other instances, the media would provide direct information such as a Provincial Court judge in Morin’s case ruling that there was sufficient evidence to proceed to trial.<sup>52</sup> When Driskell’s case

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<sup>45</sup> Rozad, *supra* note 34 at 66: Rozad found minimal coverage of the Driskell case in the pre-trial or trial stages of his case. This is likely due to the focus on sympathetic victims and developing a fear of crime narrative, while “criminals murdering criminals” does not fit this portrayal.

<sup>46</sup> *Ibid* at 52.

<sup>47</sup> *Ibid* at 45.

<sup>48</sup> *Ibid* at 53.

<sup>49</sup> *Ibid* at 55.

<sup>50</sup> Collins, “Beauty and Bullets”, *supra* note 44, at 298.

<sup>51</sup> Rozad, *supra* note 34 at 59.

<sup>52</sup> *Ibid* at 60, 63.

finally made headlines at the appeal stage, he was cast in a similar predatory manner by focusing on his criminal background.

Morin and Baltovich were both subject to media trials, characterized by “massive and intensive coverage” that discussed everything from personal idiosyncrasies of the accused, continued sympathetic framing of the victims, and Othering the “evil predatory criminal.”<sup>53</sup> Past actions of the accused men were framed as “indicative of guilt,” prejudicial information was shared—even if it was not presented at trial—and vast evidentiary issues in a case were pushed aside as understandable mistakes rather than the intentional tampering of evidence or framing a suspect.<sup>54</sup>

Prejudicial pre-trial publicity results in the limited possibility of a fair trial for the accused. Studies conducted with mock jury trials show that media attention affects a juror’s decision-making. It is essential to the Canadian presumption of innocence that all jurors “hear the same thing in a case, and nothing else”<sup>55</sup> as extrajudicial information “has the potential to create a bias against the [accused] prior to the trial even beginning.”<sup>56</sup> This can create assumptions of guilt in members of the public, which becomes problematic if those members are selected for jury duty as they may not be able to fulfil their oath in setting aside the information they have already heard.

## VII. ‘WORD OF MOUTH’: SOCIAL MEDIA’S IMPACT ON WRONGFUL CONVICTIONS

In addition to the issues surrounding news media’s coverage of crime is that of social media and the Internet. On social media, there is limited fact checking of information and people are generally unaware of the legal constraints on what information can be shared. It allows for competing accounts of guilt and innocence to be heard, rather than the singular news media narrative as discussed above. However, this can continue to have a prejudicial effect on the accused throughout their trial. Information that used to be difficult for layperson jurors to find has now become readily available through simple Internet searches.<sup>57</sup> It has become second nature

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<sup>53</sup> *Ibid* at 68, 69, 85.

<sup>54</sup> *Ibid* at 85, 93-99.

<sup>55</sup> Garapon, *supra* note 3 at 241.

<sup>56</sup> Rozad, *supra* note 34 at 11.

<sup>57</sup> Nancy S Marder, “Jurors and Social Media: Is a Fair Trial Still Possible” (2014) 67 SMU

for many people to quickly research on their phones, yet this is problematic in the context of a juror in a criminal trial.

Jurors have an increasing ability to access additional information about the case they are currently hearing, whether through intentional searches or being “inadvertently exposed” while online or engaging with their social media.<sup>58</sup> An anonymous self-reporting study of jurors post-verdict in the United States asked whether jurors had looked for information on the internet during the trial. 12 percent of jurors had actively engaged in social media research for high-profile cases while 26 percent came across the material without explicitly searching for it.<sup>59</sup> Other jurors have been found to share information of their experience on social media during the trial. Reuters Legal monitored Twitter for three weeks in 2010 and found new tweets posted every three minutes from people identifying as prospective or sitting jurors.<sup>60</sup> This can provide the appearance to others that jurors are not taking their role seriously, they are open to influence or additional information, and—depending on the information in the tweet—that they have already made their decision.<sup>61</sup> Reuters Legal also found at least 90 trials with juror social media misconduct causing retrials or overturned verdicts from 1999–2010.<sup>62</sup> In the United Kingdom, there have been cases of jurors contacting the accused mid-trial, posting details from testimony on social media, and making a Facebook poll to decide the verdict.<sup>63</sup>

These numbers are incredibly concerning, as it shows that a substantial number of jurors do not follow their oath to hear only the information presented in trial, and that even more are affected unintentionally. Canadian courts must focus attention on the issue of prejudicial pre- and mid-trial publicity and consider the impact that social media has on juror impartiality. This assessment must be conducted throughout the trial, in addition to at the jury selection stage.

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L Rev 617 at 626.

<sup>58</sup> *Ibid* at 617.

<sup>59</sup> *Ibid* at 634.

<sup>60</sup> *Ibid* at 631.

<sup>61</sup> *Ibid* at 629.

<sup>62</sup> *Juries and Social Media*, *supra* note 6 at 10.

<sup>63</sup> *Ibid*.

## VIII. COMPASSIONATE MEDIA: MEDIA'S POSITIVE IMPACT ON EXONERATIONS

Despite these constructions which contribute to wrongful convictions, news media can also be helpful when investigating claims of innocence post-conviction and shedding light on miscarriages of justice.<sup>64</sup> News media can push a case to be re-opened if they cast “doubt on the accuracy of the conviction” and social media has the ability to create public support for such cases.<sup>65</sup> The *Serial* podcast allowed for Adnan Syed to open another appeal. This podcast garnered substantial public attention for Syed’s case which in turn brought more funding and legal assistance for Syed.

News media has shifted from a “pro[-]prosecution hostility” against those claiming innocence, towards a favourable reporting of innocence claims which are found to be worthy.<sup>66</sup> However, Rozad notes that exoneration media coverage is still largely unwilling to critique the criminal justice system altogether.<sup>67</sup> The exonerees were given sympathy through the effects of their wrongful convictions such as imprisonment and lost time, but the news media rarely turned to depictions of the system in crisis. In the UK, Nobles and Schiff noted that the public can lose confidence in the criminal justice system upon learning of wrongful convictions.<sup>68</sup>

Although news media was still recognized as very important to wrongful conviction activism, social media’s benefits of immediate connectivity provided additional supports to those working in the field. Social media provides activists with “a platform to protest the innocence of the wrongly convicted.”<sup>69</sup> It allows for quick mobilization of a supportive base for such protest movements. From a case study of those involved in the Amanda Knox and Raffaele Sollecito innocence campaign, a prominent goal was to have their views heard. None of the interviewees claimed the social media campaign had a direct impact on Knox and Sollecito’s exonerations, but one did espouse a belief that international attention placed more pressure

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<sup>64</sup> Rozad, *supra* note 34 at 7.

<sup>65</sup> Eza B Zakirova, “Media Framing of Wrongful Convictions” (2018) *CUNY Academic Works* at 24 [unpublished].

<sup>66</sup> Marvin Zalman, Matthew J Larson & Brad Smith, “Citizens’ Attitudes Toward Wrongful Convictions” (2012) 37:1 *Crim Justice Rev* 51 at 52.

<sup>67</sup> Rozad, *supra* note 34, at 150-151.

<sup>68</sup> Nobles & Schiff, *supra* note 1, at 99.

<sup>69</sup> Lieve Gies, “Miscarriages of Justice in the Age of Social Media: The Amanda Knox and Raffaele Sollecito Innocence Campaign” (2017) 57 *Brit J Crim* 723 at 723.

on the Italian justice system to right this wrongful conviction.<sup>70</sup> Their attention was placed on combatting the prejudicial information found in much of the pre-trial news media and disputing social media theories of guilt in the hopes of alleviating the stigma the wrongfully convicted individuals faced.

## IX. RECOMMENDATIONS

Now that this paper has shown that the public—and, in turn, juries—have been and continue to be affected by the coverage of crime in news and social media, a discussion of multiple recommendations will seek to redress this issue. There have been no formal recommendations in Canada regarding media and its effect on wrongful convictions. Although the CJC did provide a report regarding media coverage of trials, these recommendations were created to guide journalists regarding contempt and publication bans rather than to advise those in the justice system when prejudicial information has been publicized.<sup>71</sup> An Australian judicial report regarding social media and jurors listed multiple recommendations for how to combat social media’s troubling effects, and there are also multiple American papers that discuss approaches to media.<sup>72</sup>

### A. Rebutting the Presumption of Juror Impartiality

It is unrealistic to expect that jurors will not be affected by media’s portrayals of accused people. Justice Dawson states in *Ahmed* that “[e]xtensive pre-trial publicity is problematic if jurors may be unable to set aside what they have heard outside the courtroom and reach a verdict based only on the evidence and the trial judge’s instructions.”<sup>73</sup> Studies have shown that this is not only an issue for extensive publicity, but also for publicity which provides crime story information. A 2014 study compared individuals’ reactions to articles with crime story information, which provides details of the crime but does not discuss the guilt or innocence of the accused, with reactions to articles containing incriminating information, compromising evidence that goes towards the accused’s guilt.<sup>74</sup>

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<sup>70</sup> *Ibid* at 732.

<sup>71</sup> CJC, “CJS and the Media”, *supra* note 39.

<sup>72</sup> See *Juries and Social Media*, *supra* note 6; Marder, *supra* note 57.

<sup>73</sup> *R v Ahmad*, 2010 ONSC 256 at para 15.

<sup>74</sup> See Dumas, Lepastourel & Testé, *supra* note 38.

They found that the more incriminating information present in publicity, the more likely readers were to find the accused guilty.<sup>75</sup> This was a relatively unsurprising finding as incriminating information is largely what the ABA describes as prejudicial to an accused's right to a fair trial. However, the study also found that articles with more crime story information arose a heightened anger level in readers, which in turn promoted a stronger formation of guilty verdicts.<sup>76</sup> This indicates that even pre-trial publicity without inherently prejudicial information may still affect the jury's decision-making process.

It is necessary for the courts to address the public's potential inability to set aside previous ideas and hear a case impartially, as required when acting as a jury member. *Zundel* indicates that publication bans can be utilized to effectively curtail the release of prejudicial information that may affect the impartiality of the public or jurors.<sup>77</sup> It will be necessary to utilize publication bans in more circumstances where prejudicial information is available to be dispersed by the media. This may be utilized as an effort to curtail the issue of partial jurors before they hear or read such prejudicial information. Additionally, it may be necessary to seek an order for a change of venue if the pre-trial publicity has become so prejudicial that it would be unlikely to find appropriate impartial jurors at the originating venue.

In *Le*, a challenge for cause was approved for pre-trial publication despite the time since the prejudicial publications that provided information of the accused's criminal past.<sup>78</sup> Challenges for cause should be approved in more cases to combat the issue of juror partiality. The test provided post-*Zundel* of a "realistic potential for partiality" should not be a high threshold, but instead should be routinely allowed when there has been media coverage of a case relevant to the accused.<sup>79</sup> This would dramatically lower the presumption of juror impartiality regarding the effect of pre-trial publicity. Furthermore, it would assist in limiting wrongful convictions as accused individuals would be able to maintain their presumption of innocence that should be held in a juror's mind.

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<sup>75</sup> *Ibid* at 661.

<sup>76</sup> *Ibid* at 667.

<sup>77</sup> *Zundel*, *supra* note 27 at para 111.

<sup>78</sup> *Le*, *supra* note 28 at para 19.

<sup>79</sup> *Ibid*.



## B. Juror Education and Judicial Instructions

Continuous education must be provided to jurors throughout the trial process. The Australian judicial report has recommended specific training modules for jurors pre-trial that would teach fundamental legal principles such as the beyond a reasonable doubt standard and would also provide strong guidelines on news and social media.<sup>80</sup> A more comprehensive system that continues juror education throughout the trial process must be put in place. This may include frequent warnings to the jury not to access news or social media, implementation of an anonymous juror questionnaire post-verdict to assess what jury members based their decisions on, and additional challenges or reporting when a jury member has been compromised or prejudiced by news and social media.

The primary judicial instructions to the jury must specifically refer to social media and online research, with examples of simple things that jurors may not consider—such as searching for definitions online or looking up witnesses or the accused on social media.<sup>81</sup> These instructions should be written in plain language and provide a comprehensive reason why research is prohibited and the use of social media is strongly warned against. The current Canadian Judicial Council guideline provides a preliminary jury instruction regarding social media:

Do not use the Internet or any electronic device in connection with this case in any way. This includes chat rooms, Facebook, MySpace, Twitter, Apps, or any other electronic social network. Do not read or post anything about this trial. Do not engage in tweeting or texting about this trial. Do not discuss or read anything about this trial on a blog. Do not discuss this case on e-mail. You must decide the case solely on the evidence you hear in the courtroom.<sup>82</sup>

A further instruction provides that jurors should not research anything regarding the case. These instructions provide much of the requisite information, yet there are no examples or a mention of research on social media as this paper argues is necessary. These guidelines should be updated to provide reasons why the instructions against research and social media use are imperative.

Despite the need for stronger jury warnings and more fulsome juror training, the banning of electronic devices or immediate sequestering of a

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<sup>80</sup> *Juries and Social Media*, *supra* note 6 at 24.

<sup>81</sup> Marder, *supra* note 57 at 629.

<sup>82</sup> Canadian Judicial Council, *Model Jury Instructions: Preliminary Instructions*, (Ottawa: CJC, 2012) at para 61.

jury are likely not successful strategies. Both of these options would cause jury duty to become additionally cumbersome and would result in fewer individuals that are available or willing to become jury members.

## X. CONCLUSION

Wrongful convictions are harmful to society as they cause the public to lose faith in the justice system. However, more damaging is the effect to the innocent individual. Those who are wrongfully convicted may suffer lasting trauma associated with their incarceration, as well as a continued stigma post-exoneration due to their time in prison and lasting public assumptions of guilt.

The presumption of innocence is a *Charter* right that needs to be respected within society. One cause of wrongful convictions is prejudicial news and social media coverage before and during a trial. This prejudicial publicity can create bias within the public and cause partiality in jury members that lead to an accused's conviction. News media frequently sensationalizes or dramatizes crimes to entertain viewers. This publicity has been shown to negatively affect the right to a fair trial by jury, per subsection 11(d) of the *Charter*, yet jurors are presumed to remain impartial with little education or instruction.

The presumption of juror impartiality should be relaxed to allow for a fulsome analysis of potential juror's bias stemming from prejudicial pre-trial publicity. Challenges for cause should be extended to more accused individuals, to ensure that jurors have not already formed an opinion on the case from news and social media publications and discussions. In addition, jury instructions should be bolstered with examples and additional explanation regarding why social media use and research are prohibited. Jury education programs should be developed or adapted to account for these prejudices, and jury members should be informed that they can report discoveries of prejudicial information to the court to aid in an analysis of prejudice or partiality.