

Article

Are criminal convictions a public matter? The USA and Spain

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Abstract

A criminal conviction, if widely known, constitutes a life-long stigma that limits the convicted person's employment and other opportunities. European countries, including Spain, recognizing an individual right of informational privacy and a societal interest in limiting recidivism, sharply restrict the dissemination of individual criminal history information. By contrast, the USA, in accordance with its emphasis on open court proceedings, free speech and the individual's right of self protection, allows (and even promotes) extensive dissemination of individual criminal history information. This article compares the profoundly different policies on providing public access to individual criminal history information in Spain and the USA, illuminating the cultural and legal values behind each country's policies and the tensions both countries encounter in attempting to reconcile these policies with other socio-political values and goals.

Keywords

collateral consequences, court records, criminal records, informational privacy, re-entry, rehabilitation

Introduction

Whether individual criminal history information should be public information, available to anybody who is interested, or kept partially or totally confidential, has important implications for a convicted offender's future. The defendant may

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well regard the indelible stigma of 'convicted criminal' as more injurious than community supervision, fines, or even incarceration. If a convicted offender has to bear his conviction publicly, like a brand, his chances of successfully reintegrating into society are diminished (Pager, 2007). However, keeping information about the conviction confidential might undermine deterrence and put individuals and organizations at risk of being victimized by an individual of proven criminal propensities (Jacobs, 2006).

Deciding to whom individual criminal history information should be accessible requires balancing the values of free speech, judicial transparency, deterrence, and individual and societal protection against the values of individual privacy, dignity, and rehabilitation. Moreover, modern-day information technology makes it difficult to control how widely information about individual criminal history disseminates.

US law and practice concerning the 'publicness' of an individual's prior criminal convictions contrasts strikingly with European law and practice. Although there are minor differences among European countries with regard to this issue, Spanish law and policy is typical of how European countries regard public disclosure of criminal history as degrading (Whitman, 2003/2005). Focusing just on Spain allows for a manageable and in-depth comparison between US and European policy.¹ The comparison might persuade US readers that US policy and practice is not inevitable. Likewise, this comparison may persuade European readers that it will be difficult to resist diverse pressures to make individual criminal history information more widely available.

In the USA, criminal records can be obtained in three different ways. First, the federal and state criminal record repositories release criminal record information to all federal, state, and local law enforcement agencies and many other authorized public and private agencies, organizations, and businesses. Second, anyone who is curious about whether a particular person was previously convicted in a particular court can visit that courthouse and ask to see the docket and any case files that are of interest. Except for a small category of 'sealed' cases, it is not difficult to locate a particular case file because each court's docket of past and pending cases is searchable by a defendant's name. Members of the public can inspect and copy court records. In addition, court records are increasingly available on-line and searchable from remote locations (Morrison, 2009).

Third, the inquisitive person who may not want to devote time and effort to searching court records can obtain the desired information from a flourishing marketplace of private information vendors. The vendors will, for a fee, search locally, statewide, or nationally. They can locate the information by a document search at each courthouse or, increasingly, by searching court files electronically. In some states, the centralized court administration agency sells criminal record information to private vendors.

US law and practice on access to individual criminal history information is significantly determined by constitutional law and a politico-legal culture that abhors secret courts and secret court judgments. If a person obtains information

about a criminal conviction, the First Amendment protects her right to pass that information along to others in an oral or written communication and/or publish it in print or on the internet. The Government cannot prevent or punish people for disclosing true information about a named individual's criminal record: 'Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it' (*Cox Broadcasting Corp. v. Cohn*, 420 US 469, 496 (1974)).

The US policy of liberal access to and dissemination of criminal history information reflects and reinforces the belief that just deserts and deterrence are the primary rationales for the use of criminal law. It is implicitly assumed that would-be offenders are dissuaded from criminal conduct because they fear that, if caught, they will be disgraced, shunned, and denied employment opportunities (Zimring and Hawkins, 1973). As the eminent legal scholar Henry Hart (1958: 409) observed: '[A constitution maker] will be likely to regard the desire of the ordinary man to avoid the moral condemnation of his community... as a powerful factor influencing human behavior which can scarcely with safety be dispensed with.'

US policy on open courts and open criminal records also reflects the belief that people have a legitimate interest in being informed about the character of persons whom they employ, to whom they rent accommodation, with whom they enter into business arrangements, and with whom they become romantically involved. Many federal and state laws prohibit people with criminal records from working in particular jobs, professions, and industries. Employers regularly screen and reject job applicants with prior convictions. This kind of crime prevention requires that public and private employers, and people generally, have ready access to the criminal histories of those with whom they interact. Most Americans would think it obvious that a bank should be able to find out whether a job applicant had been previously convicted of embezzlement or theft; that school officials would be irresponsible in failing to find out if a bus driver applicant had been previously convicted of drunk or reckless driving. Likewise, they would support a parent's right to determine whether a potential babysitter had ever been convicted of a sex offense against children or any other criminal offense that might be relevant to admitting a babysitter into their home. The state-level 'Megan's laws' are a striking example of this preference for making a person's criminal record publicly available. They require government officials to post on the worldwide web convicted sex offenders' names, photos, and criminal convictions (Terry and Furlong, 2003).

By contrast, Spain, like other European countries (except the UK; Thomas, 2007; Thomas and Thompson, 2010), recognizes rights of privacy, dignity, and honor that protect the individual from governmental and non-governmental disclosure of criminal record information. The Criminal Code (art. 136.4) provides that the National Conviction Registry (NCR) may release individual conviction records only to courts, certain police agencies, and to the record-subject. The Spanish Constitution recognizes the right to a public trial (art. 120), but in order to protect honor and privacy, court files, including criminal judgments, are not available for public inspection. Indeed, published court decisions protect the

defendant's privacy by anonymizing real names and other identifying information. While Spanish law treats a criminal defendant's past convictions as relevant for sentencing, it does not recognize shaming as a legitimate anti-crime or deterrence strategy; indeed, Spanish jurists find that idea appalling (Díez Ripollés, 2007; Larrauri, 2000; Mir, 2008). The preference for keeping an individual's criminal history confidential is reinforced by Spanish law's strong commitment to rehabilitation as the primary goal of criminal sentencing.

This article contrasts the very different Spanish and US policies on access to individual criminal history information. Part 2 considers six Spanish cases involving disputes about access to court records or dissemination of information about an individual's conviction or sentence. In Part 3 we identify and compare the key legal principles that differentiate Spanish and US law and policy on public access to individual criminal history information; namely, access to court records, protection of honor and privacy, protection of personal data, free speech and rehabilitation.

Illustrative Spanish cases

Is it possible to obtain criminal record information from court judgments?

Case 1: Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 1^a) STS, 3 March 1995. *Grupo Interpres, S.A.* supplies financial information to business clients. In furtherance of its business, it asked to see the Castilla y León and Canarias court's civil judgments, citing Constitution art. 120 ('Judicial proceedings will be public with the exceptions foreseen by the procedural laws') and Ley Orgánica del Poder Judicial (LOPJ)² arts 235 and 266 ('Any interested person can have access to the court's judgment'). The lower court denied the request and the company appealed. The Supreme Court ruled that the public's right to obtain information about court proceedings varied according to the stage of the proceedings. The Court recognized that the publicity principle, contained in the Spanish Constitution and the LOPJ, gives citizens a presumptive right to attend court proceedings. However, only the litigants have a right to be notified of the Court's judgment. The Court then addressed the following question: May/should the judge provide a copy of the judgment to a non-litigant entity or person? The relevant statute (LOPJ) says that a signed judgment must be physically stored in the judge's office and made available for inspection by *any interested person*. However, in the Court's view, an 'interested person' is not merely a curious person, but a person who can demonstrate a concrete and singular connection with the case that is the subject of the judgment. Unfortunately, the Court did not explain what constitutes 'a concrete and singular connection'.

Even if an individual satisfies this test, however, she must also meet two additional requirements: (1) that release of the desired information would not affect the litigants' fundamental privacy rights; and (2) that the disclosed information will be used for only judicial purposes (like sentencing). Because the Supreme Court found that *Grupo Interpres, S.A.* had a commercial interest in the information, it rejected

the company's appeal. While this decision involved a dispute over access to information about a civil judgment, all courts and legal commentators assume that it applies to criminal judgments as well.

In the USA the public has a right to inspect and copy court records, including dockets, judgments, sentences, transcripts, and lawyers' briefs.³ US judges, political scientists and legal academics regard judicial transparency as a *sine qua non* of democratic government (Fenner and Koley, 1981). In the USA, *Grupo Interpres, S.A.* would have been able to read and copy any judgment at the courthouse where it was rendered.

Can non-law-enforcement government agencies obtain criminal conviction information from the NCR?

Case 2: STC 22 July 1999 (No. 144). The Spanish Supreme Court affirmed H's (the anonymized defendant) criminal libel conviction, sentenced him to prison for one month and one day and temporarily suspended his right to run for office. The libeled victim urged the Electoral Body to disqualify H from running for an elective office. The Electoral Body followed up by requesting and receiving H's criminal record from the National Conviction Registry (NCR). Upon reviewing his record, it disqualified H from running for elective office. H appealed this decision to the Constitutional Court on the ground that the NCR violated his rights by disclosing to the Electoral Body the information about his criminal conviction.

The Constitutional Court agreed that the constitutional right to privacy protects an individual from having his personal information conveyed from one person or agency to another person or agency. The Court pointed out that criminal history information is private information that the NCR must keep confidential. The NCR is only authorized to provide individual criminal history information to the record-subject, a court, or certain police agencies. In the present case, the Electoral Body was not authorized to request the information and the NCR was not authorized to honor the request.⁴ The Constitutional Court concluded that the right to privacy requires the NCR to keep criminal judgments confidential because 'the constitutional right to privacy guarantees anonymity, a right not to be known, so that the community is not aware of who we are or what we do.'

Each US state has a criminal records repository. These state-level criminal record databases are connected and coordinated by the Federal Bureau of Investigation's (FBI) Interstate Identification Index and Integrated Automated Fingerprint Identification System.⁵ The public does not have a right to access this law enforcement information system, but numerous federal and state laws authorize the repositories to provide criminal history information to most public agencies and many categories of private employers and voluntary associations. A federal statute, passed in 1972, authorizes the FBI to release criminal record information to any person or organization authorized by a state law (and approved by the US attorney general) to make such a request. There are more than 1000 state laws authorizing various public and private agencies, organizations, and businesses

to obtain such information (Jacobs and Crepet, 2008). Therefore, in the USA a government agency, like a state election supervising agency, would be authorized to obtain information about an individual's previous criminal convictions from the state criminal records repository.

Do the media have more access to criminal judgments than the general public?

Case 3: Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 7^a), 6 April 2001. In March 1995 a journalist requested from a Spanish military court a copy of a 1973 judgment that resulted in a death sentence. The military court refused the request on the ground that the journalist did not satisfy the legal test for an 'interested party'. On appeal, the Catalan Superior Justice Court reversed, holding that the military court's decision violated the journalist's freedom of speech. The state lawyer appealed to the Supreme Court.

The Supreme Court reinforced the rule laid down in its *Grupo Interpres, S.A.* decision. It reaffirmed that the constitutional right to a public trial does not give the public the right to obtain transcripts or judgments from a completed trial. While the public may attend court proceedings, the documents generated by those proceedings are only available to individuals or organizations with a 'singular and concrete' relation to the case. Moreover, the Court explained that: 'The dissemination of the judicial proceedings could affect, without any doubt, the fundamental rights of privacy and honor of the people who took part in the criminal proceedings.'

Had this case arisen in the USA, the journalist would have had no difficulty obtaining the desired information. A journalist, or anyone else, can see and copy all court documents related to a completed criminal case.⁶ Legal scholars and others routinely scrutinize and debate the fairness and reliability of the procedures and fact finding of completed cases. Death penalty cases are often subject to intense scrutiny.

If a private individual or entity posts information about a criminal conviction of a named individual on a website, is it subject to criminal or civil liability?

Case 4: Tribunal Supremo (Sala de lo Contencioso-Administrativo, Sección 6^a), 26 June 2008. The Director of Police submitted a complaint to the Spanish Data Protection Agency (DPA) that the Association Against Torture (the Association) had posted on its website a list of the names of Civil Guard officers, police officers, and politicians who had previously been found guilty of torture or whose criminal prosecutions for torture were presently pending. For each name, the list included the place where the torture was committed and, if there was a conviction, its date.

The DPA ruled that the Association violated the Personal Data Protection Law (PDPL). It therefore fined the Association and ordered it to take the information off its website. On appeal, the Association argued that: (1) the posted information

constituted a report, not a database; (2) information about accused and convicted torturers is not personal data because it does not deal with an individual's 'private sphere'; (3) the criminal judgments and formal criminal charges, from which the information was obtained, are publicly accessible sources; and (4) the Association's dissemination of information about the identity of people found guilty of torture is protected speech.

The Supreme Court agreed with the DPA, finding that: (1) information about accusations against and convictions of named individuals is personal data; (2) the PDPL makes it illegal to post such information on a website; (3) information contained in court judgments is not publicly accessible data; (4) only a government agency can maintain a database of criminal convictions; and (5) the Association's right of free speech does not outweigh the privacy rights of the persons named on the posted list. (The Court added that a journalist's free speech right is stronger than a private individual's or organization's free speech right.)

In the USA, any individual's or organization's publication, whether in print or on-line, of torture charges and convictions would be absolutely protected by the First Amendment's free speech guarantee. In *N.Y. Times v. United States*, 403 US 713 (1971), the US Supreme Court held that a newspaper's publication of stolen classified documents was protected by the First Amendment. American law makes no distinction between print and electronic disclosure.

Can government agencies post on the web a named individual's criminal convictions?

Case 5: Sentencia de la Audiencia Nacional (10 February 2010). A member of the Melilla Local Police was convicted and sentenced to two years imprisonment (suspended) for sexually assaulting a Moroccan woman. After the Supreme Court upheld his conviction, the Melilla City Hall fired him from the police force. For that administrative sanction to become effective, City Hall officials had to notify the officer, but his police colleagues prevented notification by warning him so that he could elude the officials who sought to deliver notice. Finally, the City Hall officials posted the negative personnel administrative action on their Legal Bulletin website, an accepted means of providing notice of an administrative sanction. The fired police officer filed a complaint with the DPA, charging that City Hall violated his privacy right by publicizing his sexual assault conviction. The DPA agreed that the fired officer's right not to have his 'sexual personal data' published had been infringed.

On appeal, the Court held that posting the officer's name and conviction offense on the City Hall website, even though not part of a database, constituted 'processing personal data' under the meaning of the Personal Data Protection Law. While City Hall officials had acted properly in posting the termination of service order on the website, the posting should not have disclosed the officer's criminal conviction. Even if a newspaper had previously reported the conviction, this information should not have been posted on the web because it is personal, even if already

public, and therefore entitled to protection. Thus, the Court affirmed the DPA's decision.

There is no US constitutional law of informational privacy, although there is increasing concern about misuse of both private and government databases. Most relevant to our discussion here, neither US law nor public opinion considers a criminal conviction to be personal information. In any event, the First Amendment absolutely protects the publication of information about an individual's criminal history.

Case 6: *The domestic violence website.* In 2001, Castilla-La Mancha's 'Preventing Battering and Protecting Women' law authorized publishing a list of names of men convicted of domestic violence against female partners. The law's proponents hoped that making offenders' identities known would increase social rejection of violence against women. The law's preamble stated: 'The sentence must be imposed by the judge, but the government is responsible that victims not remain silent and that sentences become known.' Practically all legal and lay commentators criticized this law on the ground that it violated the convicted batterer's constitutional rights of honor, privacy, and rehabilitation (Bustos, 2002; Gómez, 2002; Rallo, 2009; Rebollo, 2001; Silguero, 2008).

The DPA ruled that the PDPL prohibited posting such information unless the posted data were already available from a public source, and that court judgments are not a public source. Moreover, the DPA pointed out that no statute authorized a City Hall to create a database of convicted offenders.

In the United States the best examples of governmental websites containing individual criminal history information are the state sex offender registries that provide the names and conviction offenses (and often provide photos and addresses) of convicted sex offenders. In addition, some states post on a website the names and criminal offenses of all prison inmates. A few states make all conviction records accessible via the internet. Private individuals and organizations are free to post on websites any true information about convicted offenders and conviction offenses.

The controlling Spanish principles

The key legal principles that explain the difference between Spanish and US law and policy on public access to individual criminal history information are in our opinion: publicity of the judgment and access to court records; protection of honor and privacy; protection of personal data, free speech, and rehabilitation.

Publicity of the judgment

As our discussion of several cases in Part 2 makes clear, there is a tension in Spanish jurisprudence over whether criminal judgments are public. Spanish

scholars and judges take as a matter of received wisdom that criminal judgments are public. They base that conclusion on the Constitution's article 120 which states that:

1. Judicial proceedings will be public with the exceptions foreseen by the procedural laws.
2. The trial will be mostly oral, especially in criminal law cases.
3. Judgments will always be justified and rendered in a public hearing.

In interpreting this constitutional provision, however, judges have distinguished between the public's right to be present at trial proceedings and its right to find out about the judgment (Silguero, 2008). As we saw in the *Grupo Interpres, S.A.* case, although the law states that interested persons shall have access to criminal judgments, the courts have interpreted 'interested person' restrictively. Moreover, after a 2003 amendment, the law (art. 266 LOPJ) now provides that: 'Access to judgments *may be restricted* when an individual's privacy is affected' (emphasis added). Furthermore, a person who wants to find out how a criminal case was resolved cannot even obtain that information by attending all court proceedings, because criminal judgments are rarely announced in open court. There is no mechanism for compelling judges to follow art. 120.3's constitutional requirement that: 'Judgments will always be justified and rendered in a public hearing.'

The vast majority of penal judgments, unless they involve a notorious case widely reported in the media, never become known. Lower court judges are prohibited from publishing or otherwise disclosing criminal judgments. Only the Supreme Court's and Appellate Courts' decisions are published, and even then, names and other identifying data must be anonymized by the Center of Judicial Documentation (CENDOJ), a public agency created in 1997. CENDOJ changes the names of persons, streets, cars, and so on, so that the defendant, victim, and witnesses cannot be identified. Then CENDOJ indexes criminal judgments by date and court. Unlike in the USA, Spanish court decisions are not known or cited by the parties' names, but by court, case number, and date. On account of the Constitution's art. 164, Constitutional Court decisions are *not* anonymized (STC 5 April 2006, no. 114).⁷ That Court publishes its decisions, with the litigants' real names, in the Legal Bulletin ('*Boletín Oficial del Estado*') and on the Constitutional Court's own website.

The right to honor

The Spanish Constitution includes a right to honor and a right to privacy. Both rights aim to protect the individual's dignity against disclosure of shameful information. Honor includes one's reputation in the community and one's sense of self-worth and self-respect. The Constitutional Court explains the right to honor as the right to a good reputation, the right not to be despised, and the right not to be humiliated in front of others. While a criminal conviction itself impugns the

defendant's good reputation, the Constitutional Court has stated that the imposition of a sentence (STC 18 May 1981, no. 16) or sanction (STC 14 June 1983, no. 50) does not violate the right to honor, since 'the injury to honor is not due to the judgment and sentence, but to the individual's own conduct; neither the Constitution nor statutory law can guarantee honor to a person who has blighted his reputation through his own conduct'. However, while the Court's adjudication of a criminal case does not infringe the right to honor, the dissemination of individual conviction information can infringe that right unless disseminating the information is protected by the right of free speech (see 'Freedom of Speech' later).

Honor can be injured by both truthful and untruthful information; even true information can embarrass and humiliate. For example, even if it is true that X is a prostitute, publication of that information violates her right. Thus, a journalist would be infringing X's right to honor by reporting in a newspaper article that X is a prostitute unless, given the specific facts of the case, the journalist's free speech right trumps X's honor right. Therefore, Spanish courts do not focus on the truth or falsity of the injurious communication, but on whether the communicator had a right to disclose the information.

Most Spanish judges and law professors strongly disapprove of some US jurisdictions' practice of publishing the names of persons convicted (or even worse, just arrested) for prostitution or for patronizing a prostitute (Jacobs, 2009). They consider this public labeling to be degrading punishment and have analogized publishing a convicted person's name with the Spanish Inquisition's practice of posting a convicted person's name and crime at a village's entrance (Bustos, 2002; Gómez, 2002).

The right to privacy

The Spanish constitutional privacy right seeks to protect and promote individual dignity. It guarantees the individual a personal life, a sphere that she can protect from public scrutiny. The disclosure of information about an individual's personal life, whether by a government official or a private party, violates this right.

No Spanish criminal law treatise or law journal writer has addressed the question of whether a criminal conviction is personal information belonging to the individual's private sphere (for an exception Del Carpio Fiestas, 2005). However, we saw in Case 2 that the Constitutional Court found that the Electoral Body violated an individual's constitutional right to privacy when it requested and obtained his criminal record from the NCR. While this Constitutional Court decision said that information about a criminal conviction is protected by the right to privacy, another of the Court's decisions (STC 14 December 1992, no. 227) said that publicizing an administrative sanction did not violate the right to privacy. To say the least, the law on this question is unclear.

We think that the lack of scholarly discussion on whether convictions are private information is due to the emergence of new laws on personal data protection in

databases (PDPL, 1999). It really does not matter if conviction records are private. They certainly are considered '*personal data*'⁸ and afforded constitutional protection (see 'The right to personal data protection').

Even if the constitutional honor and privacy rights do provide protection against the embarrassing disclosure of a criminal conviction, a newspaper is still able to make such a disclosure with impunity if that disclosure satisfies the free speech test, that is, the news is truthful, newsworthy and germane (see 'Freedom of speech' later).

The right to personal data protection

In 1981, the Council of Europe approved the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data,⁹ which protects the individual from the misuse of personal information, explicitly including criminal conviction information, collected and stored in electronic databases:

Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions. (art. 6, emphasis added)

In 1995, the European Union Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 augmented the Convention: 'Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, . . . a complete register of criminal convictions may be kept only under the control of official authority' (art. 8.5, emphasis added). The Spanish PDPL, passed to comply with the Convention, provides that: (1) personal data can only be maintained in a database from which information can be retrieved with the consent of the affected person, except when a law provides otherwise; (2) judicial judgments are not a public source of information; and (3) only government official agencies can create criminal offender databases.

The Constitutional Court (STC 30 November 2002, no. 292) has held that there is a constitutional right to the protection of personal data, which provides broader protection than the Constitution's right to privacy. The PDPL protects any personal data, *private or not* that, if used by third parties, may affect that individual's rights. The individual has a right to know which agencies possess her personal data and for what purposes. The PDPL authorizes the data subject to request that data be corrected or deleted if they have been collected without consent for reasons not foreseen by the law, or if they have been improperly transferred to a third party.

The DPA has issued several decisions prohibiting disclosure of criminal history information via the internet. Moreover, although the PDPL does not prohibit publishing data drawn from public sources, the DPA has emphatically ruled that a criminal judgment is not a public source. Additionally the PDPL clearly states that databases with criminal information can only be kept by governmental official

agencies. Therefore, posting on a website information about a named individual's criminal conviction violates that individual's right to personal data protection and the violator is subject to an administrative fine.

Freedom of speech

The Spanish constitution protects free speech (art. 20). Nevertheless, the courts have been reluctant, even unwilling, to embrace fully the right to free expression when it comes to dissemination of criminal history information. Instead, they have sought to balance the media's free speech right and the public's right to receive truthful information with the individual's right to keep disreputable personal information confidential, even if true.

To date, no Spanish court has squarely ruled on whether the right to free speech insulates from criminal punishment or civil damages a person or entity that publishes (or otherwise discloses) the names of convicted offenders. The general position of the Constitutional Court and of the Supreme Court is that publishing criminal conviction information infringes honor and privacy, but free speech will prevail over privacy and honor if the Court finds the injurious information to be: *true* or the result of a good faith and reasonable effort to determine the truth; *newsworthy*, meaning relevant to informing public opinion and not simply satisfying curiosity; and *germane* to the news story in which it is embedded. Based on that test, the Supreme Court has recently rendered several decisions in favor of newspapers and journalists.

We discern a trend toward interpreting 'newsworthy' more broadly, thereby giving newspapers greater leeway to report on criminal cases.¹⁰ However, we hasten to add that this trend does not include allowing newspapers to publish lists of convicted offenders or lists of criminal judgments as is routinely done in the USA. The Spanish courts would almost certainly not deem newsworthy a list of ordinary people's criminal convictions, but the newsworthiness of politicians' prior criminal convictions would be a closer question.

We also emphasize that, whatever freedom newspapers and journalists have to publish criminal conviction information, they are restricted in their ability to obtain this information in the first place because courts almost never announce criminal judgments or make them available, with real names, in any docket, set of law reports, or in databases.¹¹

The principle of rehabilitation

The Spanish Constitution (art. 25) provides that 'criminal punishments involving deprivation of freedom should aim towards rehabilitation and social integration'. Spanish law-makers and scholars believe that the rehabilitative goal would be seriously undermined if criminal conviction information was available to the public (Bueno Arús, 2006; Grosso, 1983; Larrauri, 2011). Therefore, only judges,

public prosecutors, certain police agencies, and the record-subject may obtain conviction information from the NCR.

While employers cannot obtain criminal record information from the NCR, they are not prohibited from requesting job applicants to submit a *certificado de antecedentes penales*, an official summary of past convictions or, if they have none, documentary proof of a clean record. Spanish academics seem to universally believe that Spanish employers, public and private, rarely ask job applicants to submit a certificate, but data provided by the NCR cast some doubt on this widely shared belief.

US law/policies permitting/compelling the publicity of criminal conviction records

Open Courts and Court Records

In the USA the public trial right belongs to the public, including the media, as well as to the criminal defendant (*Press-Enterprise Co. v. Superior Court*, 478 US 1, 7 (1986)). Members of the public have a right to attend court proceedings (*Richmond Newspapers v. Virginia*, 448 US 555, 576 (1980)). For good reason, the trial judge can exclude the public from certain *pre-trial* hearings. Furthermore, under very limited circumstances the trial judge may clear the courtroom when a child witness testifies. The public cannot be excluded, however, to protect the *defendant's* privacy.¹²

Judicial transparency is regarded as an important check on police, prosecutorial, and judicial abuse of power. As the Supreme Court said in *Globe Newspaper Co. v. Superior Court* (457 US 596, 603 (1982)):

Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

Recently, the US Supreme Court, in *Presley v. Georgia* (558 US, 130 S. Ct. 721, 724 (2010)), reaffirmed that the constitution's First Amendment guarantee of free speech gives the public, including the media, the right to attend criminal trials. While the FBI, local police and other executive branch agencies do not have to, and often choose not to, make criminal record information publicly available (*Department of Justice v. Reporters Committee For a Free Press*, 489 US 749 (1972)), by law and tradition, American court records are available for public inspection.

The US Supreme Court (e.g. *Press Enter. Co. v. Superior Ct.*, 478 US 1 (1986)) has emphasized the importance of transparency, especially judicial transparency, in

assuring the state's legitimacy. As the Court said in *Richmond Newspapers v. Virginia* (448 US 555, 592 (1980)):

Open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous 'checks and balances' of our system, because contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.

In the US few criminal court judgments (the vast majority of which result from guilty pleas) are published in law books, but they are all publicly available at the courthouse and, increasingly, on-line. Federal court criminal judgments and those of several states are accessible over the internet. Commercial companies publish almost all appellate decisions in law reporters and electronically. Court opinions are titled and indexed by the defendant's real name (e.g., *State v. Willie Jones* or *United States v. Margaret Smith*); except in reported juvenile proceedings, there is no anonymizing of identifying information about defendants, witnesses or victims. Indeed, the names and charges against defendants whose prosecutions resulted in dismissal or acquittal are widely available; arrests are also public information (Jacobs, 2010).

Admittedly, the US Supreme Court has never squarely held that there is a constitutional right of public access to court documents, but it came close to such a ruling in *Nixon v. Warner Communications Inc.* (435 US 589, 597 (1978)), where it noted with approval that the common law has assumed that private citizens can inspect and copy court records. While the Court also recognized that, *for compelling reasons*, court records can be sealed, the long-standing practice is to make court records publicly available. The 2002 federal 'E-Government Act' and its state equivalents have made many types of court records (including dockets, indictments, motions, lawyers' briefs, judicial rulings, trial and sentencing transcripts, appellate decisions) accessible on-line.¹³

Free Speech & Press

The US Constitution's First Amendment is unrivaled in the protection that it affords speech and other forms of expression (Chemerinsky, 2006). For example, the federal government could not prevent the media from publishing a classified history of the Vietnam War, even though the documents had been stolen from the Pentagon (*United States v. New York Times* (403 US 713 (1971))). However, there are exceptions. Criminal conspiracy, although committed via talking, is not insulated from criminal prosecution. Expression can be regulated, even prohibited, if it creates 'a clear and present danger of imminent lawlessness'. There is no right to shout 'fire' in a crowded theater, thereby causing a riot. Fighting words, obscenity, commercial advertising, express incitement to unlawful conduct, child pornography and false statements of fact that defame individuals can be prohibited and punished.

Disseminating true but highly embarrassing or humiliating information about a troubled marriage, a debilitating illness, or a sexual escapade, is probably constitutionally protected (against criminal, civil or administrative limitation), although the matter continues to be debated (Voloach, 2000; Stone 2010). However, there is no doubt that disclosing information about a previous criminal conviction is constitutionally protected.

The First Amendment clearly protects private persons' or entities' communications about criminal records. Newspapers and electronic media can publish the names of people who have been convicted, acquitted, or even arrested. A federal, state, or local agency could not prohibit a private person from posting to the worldwide web lists or databases of convicted persons. Publishing information about an expunged conviction cannot be prohibited or punished. Information vendors cannot be prohibited from supplying clients with individual criminal history information.¹⁴

Informed Decisionmaking and Personal Security

American law and policy support an individual's right to obtain information necessary to make commercial and personal decisions, so that they can make informed choices about whom to hire and with whom to associate (Lam and Harcourt 2003; Holzer, Raphael and Stoll, 2004; Bushway, Stoll and Weiman, 2007). The sex offender registration laws are a striking example of the belief that Americans have a legitimate interest in protecting themselves (cf. the constitutional right to keep and bear arms: Jacobs, 2002).

Members of the public have access to individual criminal history information via court proceedings and documents. Private individuals and entities need no authorization to examine and copy court records. Some state court systems make individual criminal history records available on-line or offer to provide them for a fee (Jacobs, 2009). For example, for \$65 the New York State Office of Court Administration (OCA) will provide any requester a list of any person's convictions in New York State courts. If people do not wish to search court records themselves, or do not know how to, they can pay an information vendor to obtain the desired information. Scores of information vendors, including large national firms as well as small local companies, collect and sell criminal record information. Some maintain their own databases constructed from information obtained from court records. Other information vendors undertake, on a case-by-case basis, electronic searches (and sometimes physical searches in the court house) for criminal record information that a customer desires. They advertise on the internet and elsewhere; for a small fee, anyone can seek and obtain criminal conviction information about any person who is of interest to them.

In the US, public and private employers can easily obtain information about job applicants' and employees' prior criminal convictions. Indeed, the licensing boards for many professions and occupations *must obtain such information* because so many occupations are closed to persons with some (or any) past criminal

convictions.¹⁵ Employers can obtain criminal record information from the criminal record system maintained by the FBI and state criminal record repositories, from court records, or from private information vendors.

Privacy

The US Constitution's Fourth Amendment protects individual privacy by prohibiting unreasonable *government* searches and seizures. It prohibits government officials from searching the individual's person or property without a search warrant or probable cause. Government officials violate the privacy right implicit in the Fourth Amendment by eavesdropping on telephone calls without court authorization or by spying on people in their homes (LaFave, 2009). Some states also make private individuals' 'invasions of privacy' a criminal offense. Such laws prohibit spying on or photographing someone who is nude or engaged in sex in a private setting (N.J. Stat Ann. § 2C:14-9). The victim of such an intrusion could also obtain civil monetary damages. It is the *intrusion on privacy*, rather than the disclosure of information revealed by the intrusion, that violates the US constitution. In *Paul v. Davis* (424 US 693, 701 (1976)) the Supreme Court held that an individual's constitutional rights were not violated when a government official injured his reputation by disclosing a previous shoplifting arrest by means of a letter to local businesses listing the plaintiff as an 'active shoplifter'.

[Davis] claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be private, but instead on a claim that the State may not publicize a record of an official action such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to employ them in this manner.

The US is not unconcerned with data privacy (Regan, 1995; Nissenbaum, 2010), but protection is far less than in Europe. The 1974 federal Privacy Act prohibits federal officials from unauthorized disclosure of information maintained in government databases; many states have similar laws (Solove and Schwartz, 2008).¹⁶ Other laws prohibit private health insurance companies from disclosing medical information to employers and marketing companies and prohibit universities from releasing information about students' grades. However, the First Amendment prevents the government and the courts from restraining or punishing a media organization or private person who discloses personal information (*Bartnicki v. Vopper*, 532 US 514 (2001)).

Personal Honor

Most Americans would find the Spanish (and European) 'right to honor' quite strange,¹⁷ especially to the extent that it prevents disclosure of information about

convictions. Is not public condemnation the essence of a criminal prosecution? Why should the state guarantee that a convicted person can keep his image clean and integrity unblemished? In the US, it is considered inevitable and perhaps desirable that a criminal is shamed by his or her conviction. Doesn't public condemnation serve retributive and deterrence goals of the criminal law? Won't would be offenders be dissuaded by knowing that, if caught and convicted, their conduct will be condemned before the community and in the name of the community? (For a discussion of shame see Braithwaite, 1989; Duff, 2001; Kahan, 2006; Massaro, 1991; Pace, 2003; Whitman, 1998). In addition to serving deterrence goals, public condemnation furthers the educative goal of criminal law. Even rehabilitation may be served to the extent that shaming triggers repentance. Finally, wide dissemination of conviction information arguably enhances public safety because it allows people to avoid convicted criminals or take precautions in their business and social interactions with them.

Dignity

The US constitution makes no explicit mention of 'dignity.' However, individual dignity as a constraint on governmental behavior, has come up from time to time with respect to police searches and seizures and Eighth Amendment (Cruel and Unusual Punishment) jurisprudence. In its famous 1952 decision in *Rochin v. California* (342 US 165), the Supreme Court held that it was unconstitutional for police to force a tube with an emetic down a suspect's throat so that the suspect would vomit capsules of morphine swallowed to avoid a drug seizure. Finding that such police tactics 'shock the conscience', Justice Frankfurter said: 'Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents - this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.' With respect to the Eighth Amendment, the Supreme Court has said that criminal punishment 'must draw its meaning from evolving standards of decency.' Under this standard, courts, from time to time, have found certain prison conditions and practices to unconstitutionally infringe human dignity.

Rehabilitation

US law does not recognize a right to rehabilitation. Rehabilitation was once a popular concept in the US, but since the 1960s 'the rehabilitative ideal' has been in decline (Allen, 1981). In the last few years, however, there has been resurgent support for rehabilitation (Maruna, Immerigeon and LeBel, 2004; Gideon and Sung, 2010).¹⁸ Notwithstanding that a majority of Americans tell pollsters that they favor programs to assist ex-offenders become productive citizens (Heumann, Pinaire and Thomas, 2005) and the existence of efforts to reintegrate offenders

(Petersilia, 2003; Travis, 2005; Love, 2006), most Americans would likely find it difficult to conceive of guilty verdicts that did not involve public condemnation. In American policy and jurisprudence, such condemnation is thought necessary to further the retributive, deterrent, educative, protective and perhaps even rehabilitative goals of criminal sentencing. As Professor Andrew Taslitz (2009) recently observed:

'[D]isesteem-imposition, even if not phrased quite this way, is a clear goal of our criminal justice system. The system assumes that conviction carries stigma with it and that the degrees of, and actual imposition of, various sentences reflect various degrees of disesteem.'

Conclusion

The US and Spanish law and policies on dissemination of and access to criminal conviction information differ dramatically. US court records have always been open to the public, but before computerization, ordinary individuals had to expend considerable time and effort to determine whether a particular individual had previously been convicted of a crime. The IT revolution has made criminal record information much more accessible. Some states post to a website the names and conviction offenses of all persons incarcerated in that state. A few states make individual criminal history records available over the internet, by request, usually for a small fee. The computerization of criminal history information has spawned a thriving private sector industry. At the present time, in the US, information about an individual's prior criminal convictions is readily available to anyone willing to devote a modest amount of time and resources to find it.

A substantial number of US criminologists view this seemingly inexorable movement toward completely public criminal records negatively (Demleitner, 1999; Travis, 2002) because they believe that it poses a significant obstacle to prisoners' reintegration and contributes to the reification of a criminal underclass isolated from legitimate employment and social institutions. The question is: what, if anything, can be done, given US constitutional and statutory law, to make individual criminal history information less accessible to the public. This is not the place for a comprehensive vetting of policy options (for an attempt to do so, see Jacobs, 2006). Suffice it to say that it would be no easy matter to make individual criminal history information less public. As long as court records are open for public inspection, it will be impossible to shield an individual's prior criminal record information from public view. And as long as people want this information, there will be information vendors ready, willing and able to sell it to them. The strong demand for such information is consistent with the American emphasis on individual responsibility and self-help.

Spain, for constitutional, cultural and policy reasons, treats individual criminal history information as confidential. Spanish law values individual dignity, honor

and privacy highly. Spanish judges, criminal law scholars, and policy makers believe that because criminal history information belongs to the individual's private sphere, the dissemination of conviction information should be severely restricted, indeed only cautiously permitted when free speech prohibits censoring or punishing such dissemination. This commitment to confidentiality is reflected in and reinforced by the PDPL which prohibits posting databases of named criminal offenders on the worldwide web.

Spanish and other European criminal law theorists oppose shaming sanctions. Spanish criminal law scholars believe that the dissemination of information about a criminal conviction constitutes an additional sanction that infringes both the proportionality principle (von Hirsch and Wasik, 1997) and the legality principle because the statute prescribing the range of possible sanctions for a criminal offense does not include public humiliation. Thus, even if the name/offense of a convicted offender would qualify as protected free speech, Spanish legal culture would resist publishing this information.

There are probably many socio-legal explanations that account for the different European and US law, jurisprudence and policy on the publicness of individual criminal history information. This paper does *not* intend to provide a full explanation of the motives that account for such diverse practices. In this paper we just attempt to identify the legal principles responsible for the differences. A complete socio-legal explanation would have to take account of the different levels of saliency of crime in these societies (Zimring and Johnson, 2006), different conceptions of privacy (Whitman, 2004), different weight given to governmental transparency, and greater European confidence in government professionals. Furthermore, the civil law system is more compatible with confidential court records confidential than the common law system which emphasizes judicial precedents.

While European commitment to keeping individual criminal history information confidential is clear, maintaining the policies which implement these values is becoming increasingly complicated, especially with respect to sex offenders (Boone, 2011; Martine-Evans, 2011; Morgenstern, 2011). The media, free speech proponents, legal and social science researchers, and advocacy groups seek to obtain conviction information about named offenders for purposes of reporting, analysis, or political advocacy. Electronic databases and especially the internet make retrieval and communication of information faster, cheaper, more efficient, and more difficult to control. It remains to be seen whether the Spanish and European effort to limit the stigma of a criminal record will continue to prevail as part of a distinctive European crime policy (Snacken, 2010), or whether technology, politics, and emphasis on free speech will move Spain's law and policy in the direction of the US.

Notes

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1. While there are differences in detail among European countries, especially the UK (Padfield, 2011; Thomas, 2007; Thomas and Thompson, 2010), all of these countries are much more restrictive than the USA in making criminal records available. One can therefore speak of a 'European position' which is also reflected and reinforced by the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data (see 'The right to personal data protection' later). We do not claim expertise in all countries. For a further analysis see the following sources: for the Netherlands (Boone, 2011); for France (Herzog-Evans, 2011); for Spain (Larrauri, 2011); for Germany (Morgenstern, 2011). In Finland information recorded in the criminal register shall be kept secret and provided only to a restricted number of agencies (statute number 1993/770) (Matti Joutsen, personal communication). Greece does not allow the disclosure of criminal records either (Dimitra Blitsa, personal communication). See information about some other countries at: http://www.cpni.gov.uk/Docs/Criminal_Records_Disclosure-CountriesF-L-March09.pdf
2. This law regulates the entire judicial system. Ley Orgánica 6/1985 de 1 de Julio del Poder Judicial [LOPJ].
3. Adult criminal court cases, other than acquittals and dismissals, are never completely sealed, but certain documents may be sealed, e.g. an affidavit from an undercover agent. When case files are sealed, a court order, based upon good cause, is required in order to see the file. Historically, juvenile court records have been sealed. However, that tradition has been steadily eroding (Laubenstein, 1995).
4. The Electoral Body had other legal means for disqualifying H's candidacy. The Constitutional Court refers to two different procedures by which the Courts could have informed the Junta Electoral about the criminal conviction and sentence. What the Electoral Body could not do was directly request the information from the NCR.
5. The FBI's Interstate Identification Index (III) links all of the state repositories together into a comprehensive national criminal record system that enables a police officer anywhere in the country to find out if the person she has just arrested (or stopped) has a criminal record anywhere in the country (Jacobs and Crepet, 2008).
6. Courts-martial of US military personnel are open to the public. However, it is not clear whether 'military commissions' which try suspected foreign terrorists must

also be open to the public. Since the 9/11 terrorist attacks, the issue of using military commissions to try suspected foreign terrorists has been much debated. The Obama administration has permitted journalists to cover the first military commission trial at Guantanamo Bay, but reporters have to agree to certain ground rules, that is, not reporting the names of certain witnesses. Journalists who almost immediately violated that ground rule were barred from attending the proceedings, but not otherwise punished. It is not yet clear whether the records of these proceedings will be publically available. See <http://www.harpers.org/archive/2010/05/hbc-90007004>

7. The reasons why judgments of the Supreme Courts and all the other courts are published without names and judgments of the Constitutional Court are published with names are not easy to understand (see discussion in Arenas, 2006 and Salvador Coderch et al., 2006). They might be part of a continuous tension between the more open Constitutional Court and the more traditional Supreme Court (Aragoneses, 2009).
8. The PDPL defines personal data as any information that relates to an identified physical person (art. 3).
9. Signed 28 January 1981; ETS (no. 108). <http://conventions.coe.int/Treaty/en/Treaties/Html/108.htm>
10. The trend considers *criminal cases* as newsworthy even if the news refers only to a *private citizen*. See Tribunal Supremo (Sala de lo Civil) 16 October 2008 (no. 948); Tribunal Supremo (Sala de lo Civil) 28 October 2008 (no. 1013); Tribunal Supremo (Sala de lo Civil) 23 December 2009 (no. 868); Tribunal Supremo (Sala de lo Civil) 9 March 2010 (no. 155); Tribunal Supremo (Sala de lo Civil) 28 April 2010 (no. 264).
11. There is no general law granting access to the judgments. Catalunya, for example, has a regulation that declares a journalist an 'interested party' in order to grant her access to the judgment (Instrucción 5/2008 sobre Acceso a la Informacion Judicial por parte de los medios de comunicaci3n). See Rodriguez Valls (2010).
12. The NCR reports that in 2010 there were 1.512.166 petitions of such certificates. Further research will be necessary to determine the purposes of these requests, e.g. for submission to employers, to obtain residence permits or guns license (see Jacobs and Larrauri, 2012).
13. All US courts, except for juvenile courts, are open to the public. The Supreme Court has never held that restricting access to juvenile court proceedings is unconstitutional. It also has never held that juveniles have a right to exclude the public and the media from delinquency (criminal) proceedings.
14. The Public Access to Court Electronic Records (PACER) system provides public internet access to federal courts' case and docket information. An individual wishing to use the system must register and provide her name, address, phone number, and email address. While registration is free, users must pay \$.08 per page viewed. It is possible to search PACER by case file number or defendant name.
15. In the USA, libel does not exist as a criminal offense. US law does, however, recognize a civil action for defamation/libel. For example, in the *Paul v. Davis*

- case discussed earlier, the Supreme Court noted that the plaintiff might be able to sue the police chief under the State's civil libel law. However, unlike in Spain, truth is an absolute defense to defamation and libel actions (*New York Times Co. v. Sullivan*, 376 US 254, 279–80 (1964)).
16. After the 9/11, 2001 Al Qaeda attack on the World Trade Center and Pentagon, several federal laws mandated background checking in various industries and sectors.
 17. The Privacy Act, 5 USC s. 522(a), 'protects the public from unwarranted collection, maintenance, use and dissemination of personal information contained in agency records . . . by allowing an individual to participate in ensuring that his records are accurate and properly used'. Section 522(b) states that 'no agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains', except if one of several enumerated circumstances applies (Privacy Act of 1974, Pub. L. No. 93-579, 5 USC § 552a (1974). See Information Practices Act of 1977 CAL. CIV. CODE § 1798.)
 18. But one does find concern for reputational honor here and there in US constitutional jurisprudence, mostly in dissenting opinions by Supreme Court justices. Two examples are Justice Field's dissent in *Brown v. Walker*, 161 US 591 (1896), and Justice Douglas' dissent in *Ullman v. United States*, 350 US 422 (1956). Both justices argued that the right against self-incrimination should not be limited to shielding yourself from a criminal conviction, but rather it should also protect honor and dignity.
 19. The federal 'Second Chance Act' passed in 2007, authorizes federal grants to government agencies and non-profit organizations that provide services (i.e. employment assistance, substance abuse treatment, and family support) to criminal offenders reentering the community. Second Chance Act of 2007: Community Safety through Recidivism Prevention, Pub. L. No. 110-199, 122 Stat. 657 (2008).

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