EUROPEAN CRIMINAL RECORDS & EX-OFFENDER EMPLOYMENT

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EUROPEAN CRIMINAL RECORDS & EX-OFFENDER EMPLOYMENT

James B. Jacobs and Elena Larrauri

Abstract: This article examines European policies regarding criminal-record-based-employment discrimination, with particular emphasis on the case of Spain. It first provides an overview of the definition of “criminal record” before discussing the confidentiality of information regarding criminal conviction. It then considers employment discrimination in Europe based on criminal record, including private employer discrimination in Spain, Sweden, and the Netherlands. It also highlights the importance of the European Union’s data protection laws on reinforcing the confidentiality of criminal record information and the exception that has been made for sex offenses. Finally, it analyzes the influence of the European Union, Council of Europe, and the European Court of Human Rights on employment.

Keywords: Europe, employment discrimination, criminal record, criminal background check, personal data protection, sex offenses.

I. INTRODUCTION

1 We are grateful for Marti Rovira’s research assistance and for Andreas Wallmer’s explanation of Swedish law and practice. We also thank Miranda Boone and Cyrille Fijnaut for detailed information about employment and criminal records in The Netherlands. Elena Larrauri has carried out this research under Research Grant Recercaixa 2013 and has also been supported by the Spanish Ministry of Economy (Research Project, der 2012–32150 on Community Supervision).
Time and again criminologists have found that legitimate employment is critical for offender desistence from criminality (Sampson and Laub 1995; Uggen 1999; Uggen and Staff 2001; Verbruggen, Blokland and Van der Geest 2012). However, criminal convictions decrease employment opportunity due to laws that disqualify ex-offenders from jobs and to discretionary employment discrimination against ex-offenders.  

The U.S. and European countries have different policies regarding criminal-record-based-employment discrimination (CRB ED). In the U.S., individual criminal history information is publicly available and employers are free to discriminate with respect to hiring and retaining ex-offenders, unless the employer is using the practice as a subterfuge for racial discrimination (Jacobs, 2015). Because Europe is comprised of 28 European Union member states and 8 non-member states, the situation is more complicated. A comprehensive survey of all European countries’ laws and policies pertaining to CRB ED would require an encyclopaedic effort and result in an unreadable text. Even greater effort would be required to document public and private employers’ actual practices in more than 30 countries. While generalizing about Europe ignores many country-specific differences, it allows for useful comparison between Europe and the U.S. (Larrauri and Jacobs, 2013). Different policies on either side of the Atlantic reflect different values, the U.S. emphasizing free speech, the public’s right to know and transparency; Europe emphasizing ex-offender privacy and rehabilitation (Whitman, 2004; Jacobs and Larrauri, 2012).

In generalizing about Europe, we draw heavily on Spain, the European country we know best. However, based upon what we have learned from European colleagues and extensive review of the literature, we believe that Spanish criminal record law and policy is

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2 Reasons other than discrimination contribute to low employment rates for ex-offenders, e.g. lack of skills, poor employment history, drug abuse and mental illness. For a discussion of whether US research results are valid for Europe, see Verbruggen 2015.
quite representative of continental Europe, with the exception of the United Kingdom, whose policies and practices are closer to those of the U.S. (Thomas, 2007; Larrauri, 2014b).

II. DEFINING CRIMINAL RECORD

“Criminal record” is not a self-defining term. Police, prosecutorial, judicial, probation and prison records all contain information about individuals who have been arrested, charged, adjudicated, sentenced and subjected to community and institutional control and punishment. These agencies’ records all contain information that, if disclosed to potential employers and others, would likely have negative consequences for the record-subject. Thus, it might be more accurate to speak of criminal records. However, in this short chapter, for purposes of manageability, we will use the singular “record.”

In the U.S., people usually mean “criminal record” to refer to an individual’s history of arrests as well as convictions (Jacobs 2015). There is a nationwide police-created—and-maintained criminal record system, based on arrests, to which many, but not all employers, have access. However, all employers and everyone else do have access to state-level criminal court records. Today, these court records are digitized. Using this information source, private information vendors copy and sell criminal record information to employers and anyone else willing to pay a modest fee. Each European country has a National Conviction Register (NCR)³ that records information about its citizens’ convictions. Arrests and other contacts with law enforcement agencies are not part of the ‘criminal record’. For England and Wales, the Police National Computer (PNC) records convictions, cautions, reprimands and warnings for any offense punishable by imprisonment and other offenses specified by regulations. (Larrauri, 2014c).

³ We use the term National Conviction Register as a generic one for Europe. In Spain for example this Register only holds convictions, however in other countries it might contain other criminal information.
The continental European NCRs differ somewhat with respect to how serious a conviction must be in order to be recorded. Convictions for “minor” offenses are not recorded, but there is no European-wide policy on what qualifies as minor. There are also differences with respect to certain non-conviction dispositions of criminal matters. In recent decades, a significant percentage of criminal matters are “settled” without convictions. In a number of European countries (like the Netherlands) “transactions” in lieu of prosecution are common. A transaction disposes of a criminal matter with an agreement that the defendant, without pleading guilty, will pay a fine or perform community service. A transaction is considered ‘criminal history information’ in the Netherlands, but is not ordinarily disclosed to agencies, organizations and individuals that have access to convictions records.

Another important question is how long criminal record information is kept. Expungement is a strategy for promoting rehabilitation, although when the waiting period for expungement eligibility is very long it might be better to think of expungement as ‘celebrating’ rather than promoting rehabilitation. (Jacobs, 2015). All European countries keep the most serious convictions (e.g. those punishable by a life sentence) on the record forever, but (as is also true in the U.S.) almost all other convictions are expungable after some number of years have passed without new charges against the record-subject. (The UK is exceptional in treating as non-expungable convictions punished by a sentence exceeding 4 years imprisonment). European countries vary with respect to how much time must pass before different convictions are eligible for expunction, but 10 years is usual for most offenses.

The meaning of “expunction” varies from country to country. It almost never means erasure or destruction of conviction information. Typically, it means that the NCR does not disclose expunged conviction information to public and private employers. However, prosecutors and sentencing judges often have access to expunged information.
In some European countries, expunction occurs automatically when the requisite waiting period has elapsed. Other countries require record-subjects to file expunction petitions with supporting documentation. Germany, Belgium and France have procedures whereby a court has discretion to grant early expunction. Unfortunately, there are no data showing the percentage of convicted persons in various European countries file such petitions, much less how often petitioners are successful.

III. CONFIDENTIALITY OF CONVICTION INFORMATION

If convictions were never disclosed to employers, they would not negatively affect employment opportunity. In the United States, a criminal conviction is considered a matter of public record; 80% of large employers obtain criminal background checks on job applicants (Society for Human Resources Management 2012). (That does not mean that all employers consider every conviction automatically disqualifying, but some do.)


Processing of data relating to offenses, 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. (Article 8.5) (emphasis added).

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Except in Sweden, there are, in Europe, no commercial information vendors selling individual criminal history information.  

European countries also differ from the U.S. with respect to the right of electronic and print media to disclose individual criminal history information and the right of researchers, watchdog groups and the public generally to find out what police, prosecutors and courts have done in particular cases, classes of cases and with respect to people belonging to different demographic, sexual-orientation, political and other groups. Court files, including criminal judgments, are not available for public inspection, except if one can prove a ‘legitimate interest’. In Spain, journalists, academic researchers, criminal justice reformers and others, who want to find out the resolution of a criminal case, cannot obtain that information by attending court proceedings, because criminal judgments are communicated to the parties, but not announced in open court. Except for exceptionally notorious prosecutions, widely reported in the media, criminal judgments never become public. Lower court judges are prohibited from publishing or otherwise disclosing criminal judgments. Only the Supreme Court’s and appellate courts’ decisions are published, but with names and other identifying information anonymized. The Center of Judicial Documentation (CENDOJ) disguises the identity of persons, vehicles and locations so that the defendant, victims and witnesses cannot be identified. Unlike in the U.S., Spanish court decisions are not known or cited by the defendant’s name, but by court and date. The policy of keeping individual’s criminal history confidential is reinforced by Spain’s strong, indeed constitutional, commitment to rehabilitation.

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5 In Sweden, Lexbase sells criminal record information that it obtains by copying publically-available court records. A visitor to Lexbase’s website can find out whether someone has a conviction record. While processing of criminal data violates the Swedish Personal Data Act, Lexbase has a certificate of publication that provides constitutional protection under the Fundamental Law on Freedom of Expression. A government-appointed Committee of Inquiry investigating public disclosure of criminal record information is scheduled to present its findings by fall 2016 (Wallmer, 2015, personal communication).

6 According to the Spanish Constitution, judgments should be pronounced in public. However this rarely occurs. In most European countries verdict is read in public, but in others like Spain or Sweden it is sent to the parties.
European countries recognize rights of privacy, dignity, and honor that protect the individual from governmental and non-governmental disclosure of embarrassing, degrading and humiliating information, including convictions. These rights can be infringed by disclosure of both truthful and untruthful information. European law does not focus on the truth or falsity of the injurious communication, but on whether the communicator had a right to disclose the information.

There is significant tension between protecting the individual from being stigmatized by disclosure of conviction information and respecting press freedom and free speech. Reporters can find out about arrests and charges by monitoring police communications and movements and by attending court proceedings. They can find about convictions by interviewing police officers, prosecutors, judges and court officers, prison personnel, victims, witnesses and defendants. If European newspapers, periodicals and websites were as free to publish this information, as their U.S. counterparts, the right to criminal record confidentiality would be seriously undermined.

To date, no Spanish court has squarely ruled on whether the right to free speech protects from criminal punishment or civil damages a person or entity that publishes, or otherwise discloses, the names of convicted offenders. The Spanish Constitutional Court and Supreme Court have held that free speech prevails 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, i.e. relevant to informing public opinion, and; 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 in cases involving disclosure of criminal record information.
We discern a trend toward interpreting “newsworthy” more broadly than in the past, thereby giving news media greater leeway to report on criminal cases. However, this trend does not include allowing publication of databases or lists of convicted offenders or criminal judgments. Spanish courts would almost certainly not find newsworthy a list of private individuals convicted of a particular crime, but a list of elected officials previously convicted of some offense would present a closer question.

IV. EMPLOYMENT DISCRIMINATION BASED ON CRIMINAL RECORD

If a country desired to increase ex-offenders’ employment opportunities, it could prohibit criminal-record-based employment discrimination (CRBED) and impose civil and/or criminal liability on employer violators. That policy would equate CRBED with racial, gender and religious employment discrimination. The enacting country would certainly not allow employers direct or indirect access to criminal record information. And it would prohibit employers from asking job applicants to reveal prior convictions on job applications and at interviews. However, no European country has adopted those policies. European anti-discrimination laws do not recognize ex-offenders as a disadvantaged group entitled to special employment protection (Louks, Lyner and Sullivan 1998).

European countries do not prohibit employment discrimination based on criminal record. To the contrary, national laws disqualify convicted persons from serving as judges, military officers, high-level executive branch officials, and police officers (Damaska, 1968). In Spain, an individual with a criminal record is ineligible for employment in “public

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7 The trend is toward permitting publication of the name of even private citizens in some criminal cases. See Tribunal Supremo (Sala de lo Civil) Oct. 16, 2008 (No. 948); Tribunal Supremo (Sala de lo Civil) Oct, 28, 2008 (No. 1013); Tribunal Supremo (Sala de lo Civil) Dec. 23, 2009 (No. 868); Tribunal Supremo (Sala de lo Civil) March 9, 2010 (No. 155); Tribunal Supremo (Sala de lo Civil) Apr. 28, 2010 (No. 264).
administration” (approximately 20% of all jobs in Spain)\textsuperscript{8}, i.e. government workers including public school teachers, university professors, medical doctors, clerks and secretaries. In addition, some licensing laws provide that an individual with particular convictions may not be licensed for a particular private employment (e.g. taxi drivers, owners of private schools, truck drivers). Some professional associations (for example, lawyers and notaries) that have authority to license and discipline members require a conviction-free record to practice the profession.

Spanish law disqualifies persons with unexpunged prior convictions from serving in a small number of private sector positions, e.g. bank "officials," private security firm personnel, gambling enterprises and ‘bouncers,’ who control access and keep order in night clubs, discotheques and bars. Reflecting Europe-wide concern about sex offenders obtaining access to children through employment, Spain has a new law (28 July, 2015) providing that anyone seeking employment involving regular contact with children must submit to the employer a criminal record certificate from the National Conviction Register.

Some Spanish government agencies (e.g. police) are explicitly authorized to obtain criminal record information directly from the NCR. Other agencies (like the judiciary or prisons) must ask the job applicant to provide an official certificate of no criminal record. Still other public entities, like universities, may require a job applicant to sign a statement confirming that s/he has no disqualifying convictions, but there is no way for the employer in this latter case to verify the truthfulness of the declaration.

\section*{V. PRIVATE EMPLOYER DISCRETIONARY DISCRIMINATION BASED ON CRIMINAL RECORD}

\footnotesize{\textsuperscript{8} In Spain, 19.9\% of the working population works in the public sector. Source: Personal elaboration based on Encuesta de Población activa (Labour Force Population Survey) IV term 2011. Available at: http://www.ine.es/jaxi/tabla.do?per=03&type=db&divi=EPA&idtab=87&L=0 (visited February 13, 2012)
In Europe, private employers cannot obtain individual criminal history information from police, courts or private information vendors. However, they may require the job applicant himself to submit an official criminal record extract or a certificate of no criminal convictions. A 2011 Directive of the EU Parliament (2011/93/EU) obligates member states to require private employers to ask applicants for jobs involving close and regular contact with children to provide the employer documents regarding prior convictions.

In Spain and other European countries, individuals have an absolute right to obtain from the National Conviction Register (NCR) their own criminal record extract or a certificate indicating no unexpunged convictions. However, Finland and a few other countries protect job seekers from having to disclose a criminal record to employers. Finnish law requires the individual requesting a copy of his criminal record to explain to the NCR the reason for the extract/certificate request (Mäkelä 2005: 158). The agency must deny the request if it determines that a criminal record is not relevant for the job for which it is being requested. In other countries, (e.g. Germany (Morgenstern 2011) some, but not all, convictions are disclosed to the record requester.

“Convictions will not be included in the certificate of conduct in 12 different cases. By far the most important regulation refers to day fines and very short prison sentences: a day fine below 90 units or a prison sentence below three months will not be included in the certificate if no other entry can be found in the register” (Morgenstern 2011).

To our knowledge, European countries have no laws prohibiting or permitting employers from asking a job applicant whether he or she has ever been convicted of a crime.9 There is debate among European jurists whether the absence of positive authorization implies

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9 In June 2014, a Swedish government-appointed commission proposed legislation that would prohibit employers from requesting a job-seeker to provide an Criminal Record extract without statutory authorization. The commission recommended that access to NCR information should only be authorized after a careful analysis of need. The commission found the non-regulated use of a criminal background check to be widespread in various sectors of the labour market, especially in the health care- financial- and transport. The commission did not find sufficient reasons to expand the use of criminal background checks. The commission’s recommendations have not to date lead to legislation (Wallmer, 2015, personal communication).
prohibition, or whether the absence of prohibition implies permission. It may be that the answer differs in different countries.

Related to the question whether a private employer may consider prior convictions in the hiring process is whether a private employer can fire an employee whose prior conviction comes to light after he was hired. There is no clear answer for many European countries, and certainly not for Europe as a whole. In Spain, the employer cannot fire an employee for having falsely denied having a criminal record unless the conviction has a close relation to the job and will interfere with successfully carrying out the job’s requirements.10

The judgment of October 15th, 3304/08 from Tribunal Superior de Justicia de Andalucía provides a good example. A woman obtained a nurse’s position in the prison system.11 She was fired on her first day of work because the employer learned that she was facing criminal charges. The court held that firing her was unlawful because 1) the woman had not been convicted, and 2) lack of a criminal record was not a stated job requirement. A few countries authorize job seeker to lie if asked about prior convictions. (In the UK, if your conviction is “spent”, you do not need to disclose it (Thomas, 2007)). 12

Now suppose that an employee is charged and/or convicted of a criminal offense after he is hired. Surely, an employer would be on strong ground in firing an employee who committed a crime against the employer’s business or the employer’s clients or employees. Such conduct would violate the employer’s work rules (i.e. don’t steal the merchandise; don’t

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10 Professor Consuelo Chacartegui (personal communication)
11 We insert this case in this section because, although the woman was being hired to work in the prison system, she was not hired as a ‘public servant.’ Therefore, the general requirement of having a clean criminal record to work in the public administration did not apply.
12 The Rehabilitation of Offenders Act (ROA 1974) was designed to help rehabilitate persons with convictions, by allowing them, after the passage of some time, not to disclose information about their spent prior convictions. The ROA was soon followed by the ROA 1974 (Exceptions) Order 1975 which allows employers to ask the “excepted question” (i.e. do you have a criminal conviction/caution, even if spent?), in the case of a Standard or Enhanced criminal record check. This means that even if “spent”, criminal convictions/cautions may have to be disclosed. On the other, according to the (reformed) ROA, that came into force on March 9, 2014 a prison sentence of four years or more will never be considered spent.
steal from the till; don’t injure customers, clients or fellow employees). By contrast, could the employer fire an employee who is charged with committing a non-work-related crime, e.g. robbery, burglary, domestic assault or shoplifting? The employer could argue that an employee facing criminal charges has to take off too much time from work to meet with his lawyer and appear in court, and that dealing with the pending charge will necessarily distract the employee from his job responsibilities. If the employee is convicted, the employer might wish to fire him or her because the conviction casts doubt on the employee’s character, integrity, self discipline and psychological stability. Moreover, the employer might argue that having a “known criminal” (assuming that the conviction somehow gets known) representing the company harms the company’s reputation and deters clients and customers.

In response, the employee could say that “my crimes against individuals or institutions unrelated to my employer have no relevance to my ability and capacity to fulfil my job responsibilities” and that any reputational harm causing financial loss is purely speculative. At least in Spain, the employee’s argument prevails. A conviction standing alone does not constitute grounds for firing an employee. The employer would have to show that the conviction offence is incompatible with successfully performing the job’s requirements.

Unfortunately, there is almost no empirical research on the impact of de jure and de facto employment discrimination against ex-offenders – how often government agencies disqualify ex-offenders for prospective employments, how often employers in various European countries ask job applicants about their criminal record or require job applicants to submit criminal history certificates, how often they weigh criminal history information in their hiring decision, how often they fire employees who are convicted of criminal offenses.

For all countries for which we have been able to obtain data, the number of employment-related applications to the NCR is increasing. Although petitions are not classified according to the reason they are asked for, it seems reasonable to assume that most
are for employment purposes. The data provided in Table I cast some doubt on the widely held belief that a criminal record does not limit employment opportunity in Europe.

**Table 1:** Number of Petitions to National Conviction Register for employment purposes in United Kingdom, Sweden, Netherlands, and Spain (1999 – 2013).

<table>
<thead>
<tr>
<th>Year</th>
<th>UK</th>
<th>Sweden</th>
<th>Netherlands</th>
<th>Spain</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>--</td>
<td>--</td>
<td>95,000</td>
<td>--</td>
</tr>
<tr>
<td>2000</td>
<td>--</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>2001</td>
<td>--</td>
<td>153,247</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>2002</td>
<td>1,183,877</td>
<td>127,520</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>2003</td>
<td>2,155,401</td>
<td>122,424</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>2004</td>
<td>2,577,459</td>
<td>136,297</td>
<td>135,487</td>
<td>--</td>
</tr>
<tr>
<td>2005</td>
<td>2,736,652</td>
<td>157,701</td>
<td>254,338</td>
<td>--</td>
</tr>
<tr>
<td>2006</td>
<td>3,182,902</td>
<td>200,767</td>
<td>279,700</td>
<td>--</td>
</tr>
<tr>
<td>2007</td>
<td>3,382,715</td>
<td>208,111</td>
<td>384,724</td>
<td>--</td>
</tr>
<tr>
<td>2008</td>
<td>3,810,614</td>
<td>257,518</td>
<td>474,751</td>
<td>--</td>
</tr>
<tr>
<td>2009</td>
<td>4,269,924</td>
<td>278,788</td>
<td>459,633</td>
<td>--</td>
</tr>
<tr>
<td>2010</td>
<td>4,219,319</td>
<td>345,551</td>
<td>488,631</td>
<td>1,512,166</td>
</tr>
<tr>
<td>2011</td>
<td>4,020,446</td>
<td>--</td>
<td>358,771</td>
<td>1,543,944</td>
</tr>
<tr>
<td>2012</td>
<td>--</td>
<td>--</td>
<td>563,273</td>
<td>1,667,711</td>
</tr>
<tr>
<td>2013</td>
<td>--</td>
<td>--</td>
<td>733,156</td>
<td>--</td>
</tr>
</tbody>
</table>

**Spain**

To determine the extent of de jure CRBED in Spain, we obtained data about government agencies’ CRC requests to the NCR. 2010 data show 1.5 million CRC requests. The first point to emphasize is that petitions to the National Conviction Register for criminal record certificates are much more frequent than commonly assumed. According to Table 2, 64% of criminal record requests were submitted by government agencies to determine

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14 Christel Backman’s PhD thesis provides data on number of requests for criminal records to the Swedish National Criminal Records Registry.


16 These data show the number of petitions to the National Criminal Register of Spain (Larrauri and Jacobs 2013).

17 These data are not public, and do not tend to be classified by the finality of the request. They were provided to us by an officer of the NCR.
whether a non-EU immigrant was eligible for a work permit, which is necessary to remain in Spain. The remainder of these requests came from police, army, and private security companies for hiring purposes. Most of the remaining requests by private citizens were probably filed to confirm eligibility for a civil service position or private employment.

Table 2: Requests to the NCR (2010)

<table>
<thead>
<tr>
<th>Requests from private citizens</th>
<th>176,332</th>
<th>11.7%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Requests from government agencies in order to obtain:</td>
<td>1,335,834</td>
<td>88.3%</td>
</tr>
<tr>
<td>Police Job</td>
<td>139,487</td>
<td>9.2%</td>
</tr>
<tr>
<td>Enter the Army</td>
<td>44,056</td>
<td>2.9%</td>
</tr>
<tr>
<td>Residence/Work Permit</td>
<td>966,249</td>
<td>63.9%</td>
</tr>
<tr>
<td>Nationality</td>
<td>119,250</td>
<td>7.90%</td>
</tr>
<tr>
<td>Firearms permit</td>
<td>66,792</td>
<td>4.4%</td>
</tr>
<tr>
<td>Total</td>
<td>1,512,166</td>
<td>100%</td>
</tr>
</tbody>
</table>

In order to understand private employers’ actual policies, Larrauri and her colleagues at Pompeu Fabra University in Barcelona attempted to answer these questions by launching several empirical studies. They surveyed a random sample of 461 people who requested a copy of their criminal record from the NCR. 24% of the petitions were for employment in Public Administration positions; 6% stemmed from private employers’ discretionary requests for criminal background information.18 This study indicates that, unless it is required by law, Spanish employers rarely ask job applicants to submit criminal record certificates.

However, more light is shed by a qualitative study in which Pompeu Fabra researchers asked 38 young ex-offenders whether they thought their criminal record affected their employment prospects. Most of these men indicated that they believed that employers

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18 Another 23% were immigrants applying for a job and residence permit. So in this small research at least 53% of the petitions are employment related.
would find out about their prior conviction information in one way or another, mainly by friends and acquaintances who recommended the ex-offender to the employer. A criminal conviction might also be indicated by educational and vocational certificates obtained in prison.¹⁹

A third research initiative tried to measure discretionary CRBED. Researchers sent four completed job applications to employers soliciting applications for 601 jobs. The four applicants were perfectly matched, except on two variables: Job Skills (Low/High) and a prison record (Yes/No). The CV for low skills candidates showed a short work experience (two years) with a discontinuous career (five jobs with short contracts) and the certificate of secondary school completion. This is a typical ex-offender profile in Spain (Alós-Moner et al. 2011). The CV for high skill candidates showed six years continuous work experience, consisting of three long-term employment contracts plus certificates of completing high school and a professional course. (These were strong qualifications for the target jobs.) A prison record was indicated by a prison training course and a recommendation from the supervisor of a prison reentry program. The CV without the mark of a prison record showed a similar training course, but one sponsored by an unemployment program; the recommendation came from a supervisor in that program.

The high skills applicants with a criminal record indicator received 35% percent fewer employer positive responses than high skill applicants without a criminal record. The low skill applicants with a criminal record received 21% fewer employer call backs than matched applicants with no criminal record. We conclude from these results that a significant percentage of Spanish employers do indeed practice CRBED (Rodríguez and Rovira 2015). Similar research was carried out in Belgium with similar results (Baert & Verhosfadt 2015).

¹⁹ Even more striking are the cases of the employer being aware because he receives a court order to deduce part of his salary in order to pay his fine. For this example, we are grateful to Eugenia Albani (UAB).
Sweden

In Sweden, 2001 marked the beginning of a trend toward employers’ rights and, for some positions obligations to check job applicants’ criminal histories. Mandatory criminal background checks apply to all child services positions in pre high school grades, including administrative, maintenance and temporary workers. However, the EU Directive of the 13th of December 2011 on Combating the Sexual Abuse of Children extends criminal background checking to applicants for jobs affording "direct and regular contact with children." The background check for teachers and childcare workers is limited to specific crimes. The criminal record abstract disclosed by the NCR only shows convictions for offenses considered relevant to endangering children, including murder, manslaughter, gross assault, kidnapping, and a slew of sexual offenses. While covered employers must consider this information, they retain discretion over the final hiring decision.

Since 2001, Sweden has expanded mandatory criminal background checking to employers hiring staff at care and residential homes for children and young persons, schools for students whose training includes an internship component in schools or preschools, owners of companies conducting motor vehicle inspections and insurance intermediaries, judges and law clerks and individuals applying for a licence to practice a regulated healthcare profession (Backman, 2012). In 2003, the NCR received 40,000 criminal record requests. By 2010, this number had exploded to more than 300,000. The NCR estimates that 90 per cent of these requests are employment-related. In response to this massive increase in criminal background checking, a government-appointed commission concluded that criminal background checking should be regulated so that it only occurs after an

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20 In 2010, there were 161,349 subject requests (46.7%), 150,340 pertained to positions as childcare workers and teachers (43.5%), 8729 for insurance intermediaries (2.5%) and 25,133 for special approved homes for youth care (7.3%). On the other hand, data from SOU 2014:48 [Swedish Government Official Reports], Registerutdrag i arbetslivet [Extracts of Criminal Records in the labour market] establish that, in 2013, the Swedish National Police Agency received more than 220 000 subject requests from individuals requesting their Criminal Records extract.
administrative finding that absence of a criminal record is relevant to successfully performing the job. \(^{21}\)

**Netherlands (Boone and Kurtovic, 2015)**

The Judicial Documentation System keeps judicial data on convictions for thirty years after the criminal sentence becomes irrevocable. Individuals and agencies, other than law enforcement, judicial and corrections personnel, have very limited access to these individual criminal history records. Criminal history information can be disclosed to government agencies for purposes of filling a limited number of positions requiring ‘a high level of integrity and responsibility’. Additional exceptions exist for jobs with police, prisons and security. Even in these cases, convictions more than four years old (with some exceptions) are not disclosed.

All other employers have recourse to the “conduct certificate system” procedure if they want the government to screen a job applicant’s criminal history. The employer submits a form describing the duties and responsibilities of the job for which the applicant is applying. Vetting is carried out by the Central Conduct Certificate Agency. If there is no problem, the Minister of Justice sends the employer a good conduct certificate stating that there is no objection to the job applicant filling a specified position. The advantage of this procedure is that the employer never sees the employee’s criminal record; the vetting agency determines whether the job applicant’s prior convictions are incompatible with the job’s requirements. The disadvantage is that the vetting agency is not in a good position to understand the circumstances and responsibilities of myriad positions in thousands of companies.

\(^{21}\) See Footnote 9.
Like Sweden, the Netherlands experienced a sharp increase in criminal background checking, from 100,000 in 2004 to 700,000 in 2013, a seven-fold increase. There’s no reason to think that the percentage of employment-related background checks has fallen; probably, the opposite because of a major increase in the positions for which a conduct certificate is legally required and because all employers may now request a conduct certificate. And, of course, as in all E.U. member states, the E.U. Directive on Combating the Sexual Abuse of Children (2011) has contributed to increased vetting of applicant for jobs in child services. The massive increase in vetting does not necessarily mean that there is a big increase in employment disqualifications based on criminal record. Even if the job applicant has a criminal record a conduct certificate is issued if the conviction offense(s) is not inconsistent with successful job performance. In fact, the Agency refuses to issue a certificate in fewer than 1% of cases. Nevertheless, Boone and Kurtovic (2015) believe that increased vetting deters ex-offenders from applying for jobs.

VI. THE INFLUENCE OF EUROPE: THE EUROPEAN UNION, COUNCIL OF EUROPE & EUROPEAN COURT OF HUMAN RIGHTS.

We have already noted the importance of the E.U.’s data protection laws on reinforcing confidentiality of criminal record information and the striking exception that has been made for sex offenses (Jacobs and Blitsa, 2012). This exception warrants attention in its own right and for its possible precedential affect on legitimating broader employer access to job applicants’ criminal histories.

The 2004 Framework Decision (2004/68/JHA) on Combating Sexual Exploitation of Children and Child Pornography required member states to: 1) criminalize various forms of

22 https://www.justis.nl/producten/vog/certificate-of-conduct/
sexual exploitation of children and production and distribution of child pornography, and; 2) take measures to ensure that a convicted child sex offender “may, if appropriate, be temporarily or permanently prevented from exercising professional activities related to the supervision of children.” In other words, member states had to authorize (but not require) sentencing judges or administrative personnel to bar convicted child sex offenders from obtaining jobs that entail supervision of children.

In 2004, Belgian police apprehended Michel Fourniret, a French national, for attempted sexual assault of a child. Although, in 1987 a French court had convicted Fourniret of sexual offenses, after release from prison he was hired as a school supervisor in Belgium; neither the school nor Belgian authorities were aware of Fourniret’s French convictions. Eventually, Fourniret admitted to having raped and murdered several girls and women in France and Belgium over the course of two decades. The case made it politically imperative for the EU to take action to improve criminal record sharing among member states.

Belgium proposed a Framework Decision requiring member states to: 1) include in their NCRs any temporary or permanent ban on supervision of children, arising from a conviction related to the offenses listed in Framework Decision 2004/68/JHA; 2) ensure that employment disqualifications related to the supervision of children are communicated to other member states when transmitting criminal record information; and 3) ensure that the member state where the convicted sex offender resides recognizes and enforces employment disqualifications imposed by another member state. That even after Fourniret’s case, the EU did not adopt Belgium’s more far-reaching proposal evidences the practical and political obstacles to aligning diverse member states’ employment vetting and disqualification rules. Member states impose employment disqualifications as part of the criminal sentence, via administrative proceedings and pursuant to occupational licensing laws. The scope and
duration of these disqualifications vary. Moreover, member states differ on how, if at all, to record employment disqualifications in their NCRs.

Paralleling the EU’s efforts, the 2007 Council of Europe’s (COE) Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse commits member states to criminalize sexual abuse and exploitation of children and to ensure that applicants for jobs requiring “regular contacts with children” have not been convicted of acts of sexual exploitation or sexual abuse of children.

In 2009, the EU enacted Framework Decision on the Organization and Content of the Exchange of Information Extracted From the Criminal Record Between Member States (2009/315/JHA). It requires a member state’s NCR, upon receiving notification that another member state convicted one of its nationals, to record that conviction.\(^\text{23}\) The goal is for each member state’s NCR to hold the EU-wide conviction records of its own nationals and thus have capability to provide that information to any member state for any lawful purpose. This Framework Decision achieves the essential purpose of Belgium’s 2004 proposal, i.e. to prevent an individual convicted of a sex offence in one member state from obtaining a job entailing supervision of children in another member state.

In 2010, a COE Parliamentary Assembly Resolution recommended that member countries reinforce protective measures against sex offenders. Rejecting the possibility of creating a European-wide sex offender register, the Assembly recommended that member states “take effective national measures to prevent sexual offenses” such as a national sex offender register; monitor sex offenders’ movements, including foreign travel; and, introduce employment vetting and barring schemes for jobs affording substantial contact with members of vulnerable groups.

\(^{23}\) It also created the European Criminal Record Information System (ECRIS) by FD 2009/316/JHA
The 2011 Directive on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography (2011/92/EU), and replacing Council Framework Decision (2004/68/JHA) introduced minimum definitional requirements and sanctions for offenses related to child sexual abuse and exploitation, child pornography, and solicitation of children for sexual purposes. It is the EU’s most far-reaching initiative to prevent convicted sex offenders from obtaining paid or volunteer positions affording access to children. That Directive:

1) requires Member States to ensure that persons convicted of any offences against children listed in the Directive “may be temporarily or permanently prevented from exercising at least professional activities involving direct and regular contacts with children”. Member States retain discretion regarding what kind of vetting scheme to adopt (e.g. via a criminal/administrative decision or an occupational licensing law) and regarding how to interpret direct and regular contacts with children. Additionally, Member States are encouraged to consider extending disqualifications to positions in voluntary organizations that provide services to children;

2) recognizes, that an employer, who is recruiting staff for professional or voluntary activities involving direct and regular contacts with children, has a right to be informed of job applicants’ convictions for sexual offences against children and of related employment disqualifications. Member States are free to adopt their preferred strategy for complying;

3) requires that Member States, for the application of paragraphs 1) and 2), transmit information, on criminal convictions for the crimes included in the Directive or of any relevant employment disqualifications, when requested by other Member States. In other words, the Directive requires Member States to exchange child sex offence conviction information for the purposes of 1) enabling the requesting Member State to
identify and bar sex offenders convicted in other Member States from working with children and 2) enabling EU employers to make informed decisions about the suitability of EU job applicants for positions affording close contact with children. However, the Directive does not require Member States to enforce other Member States’ employment disqualifications;

encourages Member States to consider adopting additional child-protection measures such as a national child sex offender register, but it adds the caveat that access to such registers shall be in accordance with “national constitutional principles and applicable data protections standards”.

This directive demonstrates a U.S.-like view that a criminal conviction is a reliable predictor of recidivism, and that public safety, at least when it comes to sexual offenses related to children, justifies restricting employment opportunities. This directive might prove crucial because, for the first time, it establishes private employers’ obligation to ask for a criminal record certificate for positions affording close and regular contact with children. Admittedly, the directive only disqualifies sex offenders. It remains to be seen whether criminal background checking will be authorized or required for more types of positions and offenses (Larrauri, 2014a).

A recent case by the Court of Justice of the European Union (Google Inc. v. Agencia Española de Protección de Datos, c-131/12, of 13th May 2014) is worth mentioning. It involved a Spanish citizen’s, Mario C. González complaint that Google’s search engine directed people searching his name to stories about his bankruptcy many years earlier. Gonzalez argued that Google infringed his right to have the bankruptcy forgotten, or at least made not so easily available. The European Court of Justice essentially agreed with Gonzalez, holding that European citizens have a right to request information processors (e.g. Google) to cease providing links to websites carrying information that is inaccurate,
unreliable or “excessive given the purpose for which it was originally recorded.” At its broadest level, the Gonzalez decision demonstrates the Court’s strong commitment to protecting citizens from disclosure of embarrassing, even if truthful, information that “serves no useful purpose.”

The implications of the Gonzalez decision for disclosure of criminal record information are not clear. The court emphasized that, while Google must consider an individual’s request to remove links to embarrassing information, it must consider each requests in light of the sensitivity of the information and the public interest in disclosure. Moreover, even if Google reprogrammed its search algorithm to bypass the privacy-infringing website, the searcher could still visit it directly if she knows which website to visit. The Gonzalez decision does not require a newspaper to remove from the web information an individual considers embarrassing; it just requires Google not to direct searchers to that information if harm caused by disclosure outweighs the interests served by disclosure. Not surprisingly, Google and other IT companies complain that the court’s holding is extremely difficult to apply.

The European Court of Human Rights

The European Union exerts influence over employment through enforcement of the European Convention on Human Rights (ECHR) by both national and European courts. In MM v. United Kingdom (2013), the European Court of Human Rights (ECtHR) held that the U.K. violated Art. 24 In September, 2015, the French Data Processing Authority ruled that, to properly carry out the Gonzalez right to be forgotten ruling, Google must remove a French requester’s name from all Google’s search domains, even those in North America, otherwise, according to the French Authority, the information that should be forgotten could be obtained by conducting a Google search on Google USA. Google strenuously objects, arguing that if the French Authority’s position prevailed, access to information would be governed by the most restrictive regimes in the world. On the other hand the French Data Authority argues that if Google does not remove it from the global domains the judgment of the Court of Justice of the European Union (C-131/2012 of 13th May, 2014) would be useless. See “France Rejects Google’s Efforts to Limit Application of privacy Ruling,” http://bits.blogs.nytimes.com/2015/09/21/france-rejects-googles-efforts-to-limit-application-of-privacy-ruling/?_r=0

24 In September, 2015, the French Data Processing Authority ruled that, to properly carry out the Gonzalez right to be forgotten ruling, Google must remove a French requester’s name from all Google’s search domains, even those in North America, otherwise, according to the French Authority, the information that should be forgotten could be obtained by conducting a Google search on Google USA. Google strenuously objects, arguing that if the French Authority’s position prevailed, access to information would be governed by the most restrictive regimes in the world. On the other hand the French Data Authority argues that if Google does not remove it from the global domains the judgment of the Court of Justice of the European Union (C-131/2012 of 13th May, 2014) would be useless. See “France Rejects Google’s Efforts to Limit Application of privacy Ruling,” http://bits.blogs.nytimes.com/2015/09/21/france-rejects-googles-efforts-to-limit-application-of-privacy-ruling/?_r=0
8 of the Convention by disclosing to a child services employer that MM had, some years before, received a “police caution” pertaining to child abduction. (MM had secreted her granddaughter to prevent the child’s mother from taking her out of the country.)

The ECtHR found that the disclosure of the police caution for child abduction so many years after it was administered violated Article 8 (Larrauri, 2014b).

“The Court observes that the recording system in place in Northern Ireland covers not only convictions, but includes non-conviction disposals such as cautions, warnings and reprimands. A significant amount of additional data recorded by police forces is also retained. It is clear from the available guidance that both the recording and, at least, the initial retention of all relevant data are intended to be automatic. It further appears from the policy documents provided that a general presumption in favor of retention applies, and that as regards data held in central records which have not been shown to be inaccurate, retention until the data subject has attained one hundred years of age is standard in all cases. There can therefore be no doubt that the scope and application of the system for retention and disclosure is extensive.”

“The Court recognises that there may be a need for a comprehensive record of all cautions, convictions, warnings, reprimands, acquittals and even other information of the nature currently disclosed pursuant to the 1997 Act. However, the indiscriminate and open-ended collection of criminal record data is unlikely to comply with the requirements of Article 8 in the absence of clear and detailed statutory regulations clarifying the safeguards applicable and setting out the rules governing, inter alia, the circumstances in which data can
be collected, the duration of their storage, the use to which they can be put and the circumstances in which they may be destroyed.”

“Further, the greater the scope of the recording system, and thus the greater the amount and sensitivity of data held and available for disclosure, the more important the content of the safeguards to be applied at the various crucial stages in the subsequent processing of the data. The Court considers that the obligation on the authorities responsible for retaining and disclosing criminal record data to secure respect for private life is particularly important, given the nature of the data held and the potentially devastating consequences of their disclosure. In R (L), Lord Hope noted that in 2008/2009 almost 275,000 requests were made for Enhanced Criminal Record Certificates alone. This number is significant and demonstrates the wide reach of the legislation requiring disclosure. As Lord Neuberger indicated, even where the criminal record certificate records a conviction or caution for a relatively minor, or questionably relevant, offence, a prospective employer may well feel it safer to reject the applicant. The Court agrees with Lord Neuberger that it is realistic to assume that, in the majority of cases, an adverse criminal record certificate will represent something close to a “killer blow” to the hopes of a person who aspires to any post which falls within the scope of disclosure requirements”.

We do not know how the Court would have ruled if the disclosed record had been a conviction rather than a caution, or had the caution been current rather than many years old. However, the ECtHR has shown concern for the negative consequences of a criminal record on employment opportunity (Larrauri, 2014b).
VII. CONCLUSION

European countries protect individual criminal history information because of respect for the convicted person’s reputation and privacy and strong commitment to offender rehabilitation. The European Union and its member states treat individual criminal history information as personal data that the individual has a right not to have disclosed by government personnel or by private parties. Consequently, police records do not circulate at all, court records are not open for public examination and (except in Sweden) private firms are not permitted to sell criminal record information to employers, even if they could obtain it.

Ultimately, emphasis on free speech and free press may put pressure on European criminal record confidentiality. Will European print and electronic media remain quiescent about restrictions on their freedom to publish articles that include information about named individuals past crimes? Will European national courts be willing to impose civil liability on entities and individuals who unlawfully disclose criminal history information? Will European regulators be able to control the proliferation of arrest and conviction information by means of social media?

While the negative employment consequences of a criminal conviction are less severe in Europe than in the U.S., they are certainly not insignificant. European countries do not prohibit employers from asking job seekers and employees to disclose past convictions. European countries have not chosen to prohibit employers from considering job applicants’ and employees’ criminal convictions. They also do not prohibit employment discrimination based on criminal record. To the contrary, previously convicted persons are disqualified from a wide range of public jobs as well as a small number of private sector employments. Convictions sex offenses are disqualified from a wide range of positions that involve contact with children and vulnerable adults.
While, at the present time, there is deep concern in the U.S. that criminal records are circulating too freely and having too much negative affect on employment, there seems little disquiet in Europe. Its reigning paradigm for regulating criminal record use has attracted little scrutiny. There are, of course, some exceptions. On the one hand, advocates for children and other vulnerable populations lobby for greater restrictions on some ex-offenders’ employment options. On the other hand, some academics and ex-offender advocacy groups campaign for still greater restrictions on criminal record based employment discrimination.

There is a crying need for empirical research. How often do European employers ask job applicants and employees for criminal history? How do employers weigh criminal convictions in making hiring and firing decisions? In short, how does criminal record law, policy and practice affect ex-offender employment opportunity and recidivism?

There are also tough normative issues to be addressed. Convicted criminals should not be punished, penalized or disadvantaged disproportionately to their just deserts. Lengthy or even lifetime exclusion from *all legitimate employment* would be a much more severe penalty than most defendants deserve. The nub of the issue is whether employment disqualification should be considered punishment. An airline or a bus company that does not want to hire pilots and drivers with a string of drunk driving or other drunken conduct convictions is not *punishing* the previously convicted drunk driver, but making a history of safe and sober driving an employment prerequisite. Arguably, a good character requirement is not punishment any more than a PhD requirement “punishes” job applicants who lack a PhD. An employment disqualification imposed by a general employment law is a closer question. Since a law directing judges to include employment disqualification as part of the criminal sentence is clearly punishment, is there a difference if the legislature imposes the same disqualification via a law regulating qualification to practice a profession or occupation?
There is a strong societal interest in convicted persons successfully reintegrating into the societal mainstream. If convicted offenders are relegated to a criminal subculture and a future of repeated offending and punishment, society suffers economically and physically. However, employers have a legitimate interest in hiring and retaining reliable, honest and self-disciplined employees. They are financially liable for damages and injuries their employees cause. The dilemma cannot be made to disappear by insisting that a criminal conviction does not reflect character nor predict future misconduct. Recidivism studies consistently find that ex-offenders present an elevated risk of future offending (see Kurlychek 2007; Blumstein and Nakamura 2009; Soothill and Francis 2009; Bushway et al. 2011). However, recidivism itself is, in part, a consequence of employment discrimination. Moreover, there is no reason to believe that recidivism rates are constant over time and place or for all categories of ex-offenders.

Finally, a fully developed analysis of the justifiability of CRBED should consider the interests of job applicants who have never been convicted of a crime. When an ex-offender is not hired, the position does not disappear. It is filled by another person in need of work, perhaps severely in need. That never-convicted job seeker might well feel, with some justification, that his or her spotless criminal record should count as a plus on his or her curriculum vitae in the same way that superior educational achievement and prior job experience count favorably. If a spotless criminal record does not give a job applicant an advantage over a person with one or more criminal convictions, won’t commitment to law abiding conduct be weakened?

To what extent does or should public policy aim to neutralize the negative employment consequences of a criminal record? How strong are such countervailing interests as employers’ and the public’s right to know about the criminal past of those whom they employ, do business with and associate socially? While, these days, such questions command
a great deal of political and academic attention in the United States (Jacobs 2015; Collateral Consequences Resource Center blog), they are not generating much research and discussion in Europe (but see Louks, Lyner & Sullivan 1998; Thomas, 2007; Jacobs and Larrauri 2012).

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