

Sara Sun Beale and Katherine Boyles – Criminal Case Records – International Comparisons
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	USA	Canada	United Kingdom	Australia
Are criminal records (arrest records, court documents, etc.) made public in the first place?	It depends on what information the media seeks. FBI Rap Sheets are not available to the public. ¹ Federally maintained mug shots are not available to the public. ² Individual arrests, mug shots by state departments, and convictions are often published by news outlets and “crime watch” websites. Publication is typically at discretion of police dept. This information also is uncovered in background checks for employment and housing.	Criminal information may be requested through background check for hiring/housing applications. Discrimination based on criminal records is illegal. ³ However, mug shots for ongoing investigations are found easily online. There does not appear to be a practice of mass-publication of mug shots and/or arrest records. ⁴	Mug shots are published by police departments and republished by news outlets. ⁵ Pictures are published both for ongoing investigations and for “news” of charged suspects. However, there have been critiques of police departments for not releasing <i>enough</i> mugshots. ⁶ Mass-publication of mug shots does not appear to be a trend, but some police departments have elected to begin “name and shame” campaigns. ⁷	No, but criminal records may be disclosed through background checks. Citizens may need to obtain a “police certificate” for employment purposes. ⁸ On the other hand, court proceedings are open, so information on criminal records that are brought up in court can be reported as news. ⁹
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Are there official means to seal records at the request of the subjects of those records? Are individuals able seal/erase an official record or control who may access it?	Yes, but procedures vary widely based on the state. Some states may permit the automatic sealing of certain kinds of records, others require an application. ¹⁰ With non-convictions, states may have automatic protocol for erasing the record ¹¹ or require additional action by the court. ¹² Even when a record is sealed/erased, news media can still keep the information published without committing defamation. ¹³	Yes, there is a strict policy of almost automatic sealing of records after 5 or 10 years depending on the crime, depending on the type of offense, with exceptions for sex offenders and multiple serious offenses. ¹⁴ The process is known as “record suspension,” costs about \$500(US), and does not require a lawyer. ¹⁵ The process does not erase the record but files it separately so that background checks cannot find it. In 2014-2015, 92% of applications were approved. ¹⁶	After 11 years, non-violent, single offense convictions are not disclosed in criminal background checks and are considered “spent convictions.” ¹⁷ In January, the High Court ruled that minor offenses, even when there are multiple offenses, should be kept off of records as well, because there is not a significant difference between an individual who has 1 minor conviction versus someone who has 2 minor convictions. ¹⁸	Australia uses a system of “spent convictions,” which vary to some degree by province. The federal government will consider a conviction spent (and therefore will not release it on a criminal background check) after a waiting period of 10 years, if the individual was incarcerated for less than 30 months. ¹⁹ There are some exceptions for specific employment positions. This system protects convicts from suffering employment consequences from an old conviction. ²⁰
	USA	Canada	United Kingdom	Australia
Can individuals demand removal/correction of negative information disseminated by non-government entities such as the media?	Based on a recent study, news media practices are significantly similar in the US and Canada. Most news sources are unwilling or hesitant to completely unpublish a previously posted story, ²¹ including stories reporting arrests or convictions of persons later found innocent. ²² Some news outlets are open to updating a post to reflect a new disposition. ²³ Others suggest “sunset” policies, exclusion of old articles from Google searches, and adoption of more cautious publication of criminal information online to begin with. ²⁴ Journalists list journalism ethics, the right of the public to know, fairness, authenticity of their archives/history as reasons for avoiding unpublishing. ²⁵		Governed by Costeja ruling (the “Right to be Forgotten”), subject to Brexit negotiations – search engines may have to remove outdated information once an individual submits a request, ²⁶ but this ruling focuses on search engines, not the original website.	The Australia Law Reform Commission initially sought comments on a proposal to incorporate a right to be forgotten in its recommendations in 2014. After receiving commentary, the organization dropped the recommendation from its final report. ²⁷

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Is the government required to release government records that may include criminal justice records?	The federal Freedom of Information Act makes most government records available upon request. ²⁸ Rap sheets compiled by the FBI involve a privacy interest, subject to FOIA exemptions and are not disclosed. ²⁹ States have similar open government acts with various exemptions for law enforcement, privacy, and public safety. ³⁰	The Access to Information Act (1985) makes government records public. ³¹ Requests are analyzed independently from the government, by the Information Commissioner's Office. ³² The law was passed in tandem with the 1983 Privacy Act.	Government documents are made public through the Freedom of Information Act of 2000. ³³	Government documents are made public by the Freedom of Information Act of 1982, amended in 2010. ³⁴ The federal law dictates what information must be released by agencies and requires some information to be published online. Insufficient funding has hampered the implementation of these requirements. ³⁵
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Is there a textual basis for the protection of free speech and free press?	Yes, free speech is protected by the First Amendment. ³⁶ Case law has interpreted the First Amendment to include a presumption of a public right of access to court documents. ³⁷ To overcome this presumption, a party must demonstrate there is a compelling interest for closing court proceedings and that such closure is narrowly tailored to serve that interest. ³⁸	Yes, free speech is protected by the Charter of Rights and Freedoms. ³⁹	Yes, through the UK's incorporation of the European Convention on Human Rights, Article 10, via the Human Rights Act of 1998. ⁴⁰ However, the right to free speech is explicitly curtailed by §2 of the Convention, in contrast to the U.S. Constitution or the Canadian Charter of Rights and Freedoms. ⁴¹ Expression may be limited for a variety reasons, including the protection of the reputations of others. ⁴²	No, but the High Court has recognized an implied right to freedom of political speech in <i>Australian Capital Television Pty Ltd v. Commonwealth</i> ⁴³ and <i>Lange v. Australian Broadcasting Corporation</i> . ⁴⁴ Individual provinces have their own charters protecting the freedom of speech, which also may limit this freedom for reasons such as the protection of others' reputations. ⁴⁵
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How are governments searches and seizures regulated?	The Fourth Amendment prohibits unreasonable searches and seizures without a warrant. ⁴⁶	The Charter of Rights and Freedoms prohibits unreasonable searches and seizures. ⁴⁷	<i>Entick v. Carrington</i> recognized an early form of this protection, "The great end, for which men entered into society, was to secure their property." ⁴⁸ There is no explicit textual protection against search and seizure in the ECHR.	Searches are governed by statute and thus, provincial law. ⁴⁹ Warrants are necessary when there is no general grant of police power, but these statutes are usually construed narrowly. ⁵⁰
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Is there a broader recognition of privacy from the government?	There is no textually-based right to privacy. Privacy to make family and child-rearing decisions has been recognized by the Supreme Court ⁵¹ as inherent to the 3 rd , 4 th , 5 th Amendments. ⁵² The 1974 Privacy Act governs the collection and use of private information. ⁵³	Privacy was recognized by the High Court as "quasi-constitutional" in <i>Lavigne v. Canada</i> . ⁵⁴ The Privacy Act of 1983 limits what information the government may collect, how it may be used, and how it is accessed. ⁵⁵	Article 8 of the European Convention on Human Rights explicitly protects privacy: "Everyone has the right to respect for his private and family life, his home and his correspondence." ⁵⁶ The Data Protection Act of 1998 protects individuals' personal data. ⁵⁷	There is no Constitutional provision for privacy. The Privacy Act of 1988 created 13 Privacy Principles that guide (but do not prescribe) how personal and sensitive information is handled both by government agencies and private organizations. ⁵⁸

¹ United States Dept. of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 780 (1989).

² Of the three U.S. appeals courts that have considered the issue, all three determined that the privacy exemption of the Freedom of Information Act could be used to justify the non-disclosure of federally maintained mug shots. *Detroit Free Press v. United States Dept. of Justice*, No. 14-1670, 2016 WL 3769970, at *1 (6th Cir. July 14, 2016) (“Twenty years and two contrary circuit-level decisions later, we find Free Press I untenable. Individuals enjoy a non-trivial privacy interest in their booking photos”) (overruling 1996 decision of the same name); *World Pub. Co. v. United State Dept. of Justice*, 672 F.3d 825, 831 (10th Cir. 2012); *Karantasilis v. United States Dept. of Justice*, 635 F.3d 497, 503 (11th Cir. 2011) (“A booking photograph is a unique and powerful type of photograph that raises personal privacy interests distinct from normal photographs. A booking photograph is a vivid symbol of criminal accusation, which, when released to the public, intimates, and is often equated with, guilt”).

³ Canadian Human Rights Act, (R.S.C., 1985, c. H-6, art. 3).

⁴ See Jeannie Siglic, *Hard to Check Criminal Records of Others*, CBC News Canada, Jan. 13, 2012, available at <http://www.cbc.ca/news/canada/hard-to-check-criminal-records-of-others-1.1145038>.

⁵ See e.g., Audrey Ingram, *Trial Starts for London man Accused of raping 3-year-old*, The Madison Press, May 25, 2016, available at <http://madison-press.com/news/112290/trial-starts-for-london-man-accused-of-raping-3-year-old>.

⁶ Martin Beck, *New Human Rights Farce as Police Are Afraid to Release Crooks' Mugshots Despite National Guidelines*, The Daily Mail, July 13, 2013, available at <http://www.dailymail.co.uk/news/article-2362640/New-human-rights-farce-police-afraid-release-crooks-mugshots-despite-national-guidelines.html>.

⁷ David Barrett, *Criminals to be Named and Shamed by Home Office*, The Telegraph, October 14, 2012, available at <http://www.telegraph.co.uk/news/politics/9606771/Criminals-to-be-named-and-shamed-by-Home-Office.html>. Publishing mugshots has been the practice of at least the West Yorkshire Police Department. West Yorkshire Police, *Caught on Camera*, available at <http://www.westyorkshire.police.uk/camera-alerts/caught-on-camera>.

⁸ Australian Federal Police, *National Police Checks*, available at <https://www.afp.gov.au/what-we-do/services/criminal-records/national-police-checks>.

⁹ See Bronwyn Naylor, Moira Paterson, & Marilyn Pittard, *In the Shadow of a Criminal Record: Proposing a Just Model of Criminal Record Employment Checks*, 32 Mel. U.L. Rev. 171, 185 (2008).

¹⁰ Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, Symposium, *Beyond the Sentence: Collateral Consequences of Conviction*, 2 Wis. L. Rev. 321, 323.

¹¹ See e.g., CONN. GEN. STAT. § 54-142a (the “Erasure Statute”).

¹² See e.g., OHIO REV. CODE ANN. § 2953.32 (West).

¹³ See *Martin v. Hearst Corp.*, 777 F.3d 546 (2d Cir. 2015).

¹⁴ Parole Board of Canada, *Applying for a Record Suspension?*, available at http://pbc-clcc.gc.ca/infocntr/factsh/pdf/record_suspension-eng.pdf (last accessed July 21, 2016).

¹⁵ See *id.*

¹⁶ Parole Board of Canada, *PBC QuickStats*, available at http://www.pbc-clcc.gc.ca/infocntr/factsh/parole_stats-eng.shtml (last accessed July 21, 2016).

¹⁷ Ministry of Justice, *Rehabilitation of Offenders*, available at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/216089/rehabilitation-offenders.pdf (last accessed July 21, 2016).

¹⁸ *R. v. Secretary of State for the Home Dept.*, (2016) EWHC 89 (Q.B.) (U.K.).

¹⁹ Office of the Australian Information Commissioner, *Privacy Fact Sheet 41: Commonwealth Spent Convictions Scheme*, available at <https://www.oaic.gov.au/individuals/privacy-fact-sheets/general/privacy-fact-sheet-41-commonwealth-spent-convictions-scheme> (last accessed July 21, 2016).

²⁰ See *id.*

²¹ Kathy English, *The Longtail of News: To Unpublish or Not to Unpublish*, Associated Press Managing Editors, at 5 (October 2009).

²² *Id.*

²³ *Id.* at 15–16.

²⁴ *Id.*

²⁵ *Id.* at 4.

²⁶ Case C-131/12, *Google Inc. v. Agencia Española de Protección de Datos, Mario Costeja González*, 2014 E.C.R.

²⁷ See Australian Law Reform Commission, *Serious Invasion of Privacy in the Digital Era* (ALRC Report 123), Sept. 3, 2014.

²⁸ 5 U.S.C. § 552 (2012).

²⁹ United States Dept. of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749, 780 (1989).

³⁰ See e.g., CAL. GOVT. CODE § 6254 (West 2015).

³¹ Access to Information Act (R.S.C., 1985, c. A-1) (Can.).

³² See Access to Information Act (R.S.C., 1985, c. A-1, § 54) (Can.).

³³ Freedom of Information Act, 2000 c. 36 (U.K.).

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- ³⁴ Office of the Australian Information Commissioner, *Rights and responsibilities*, available at <https://www.oaic.gov.au/freedom-of-information/rights-and-responsibilities> (Austl.).
- ³⁵ See Richard Mulgan, *The Slow Death of the Office of the Australian Information Commissioner*, The Canberra Times, Sept. 1, 2015, available at <http://www.canberratimes.com.au/national/public-service/the-slow-death-of-the-office-of-the-australian-information-commissioner-20150826-gj81dl.html> (Austl.).
- ³⁶ U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press.”)
- ³⁷ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).
- ³⁸ *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*, 464 U.S. 501, 510 (1984) (citations omitted).
- ³⁹ CANADA CHARTER OF RIGHTS AND FREEDOMS § 2(b) (“2. Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”).
- ⁴⁰ Humans Rights Act 1998 § (1)(b) (U.K.).
- ⁴¹ See EUROPEAN CONVENTION ON HUMAN RIGHTS, Art. 10 § 2.
- ⁴² EUROPEAN CONVENTION ON HUMAN RIGHTS, Art. 10 §§ 1-2 (“1. Everyone has the right to freedom of expression . . . 2. The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime . . . for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”).
- ⁴³ (1992) 177 CLR 106 (Can.).
- ⁴⁴ (1997) 189 CLR 520 (Can.).
- ⁴⁵ CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006 § 15 (“(1) Every person has the right to hold an opinion without interference. (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds . . . (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—(a) to respect the rights and reputation of other persons; or (b) for the protection of national security, public order, public health or public morality.”) (Victoria, Austl.).
- ⁴⁶ U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).
- ⁴⁷ CANADA CHARTER OF RIGHTS AND FREEDOMS § 8 (“Everyone has the right to be secure against unreasonable search or seizure.”).
- ⁴⁸ (1765) 95 ER 807 (K.B.) (Lord Camden, J.) (U.K.).
- ⁴⁹ Paul Marcus & Wicki Ware, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds*, 12 TUL. J. INT’L & COMP. L. 27, 38–39.
- ⁵⁰ *Id.*
- ⁵¹ See *Griswold v. Conn.*, 381 U.S. 479, 485–86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship. *We deal with a right of privacy older than the Bill of Rights*—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”) (emphasis added).
- ⁵² See *id.* at 484.
- ⁵³ 5 U.S.C. § 552a (2012).
- ⁵⁴ 2 SCR 773 (2002) (Can.).
- ⁵⁵ Privacy Act (R.S.C., 1985, c. P-21) (Can.).
- ⁵⁶ EUROPEAN CONVENTION ON HUMAN RIGHTS, Art. 10 §§ 1-2.
- ⁵⁷ Data Protection Act, 1998 c. 29 (U.K.).
- ⁵⁸ Privacy Act, Act No. 119 of 1988 (Austl.).