

THE MENTALLY ILL WHO MAY KILL GO UNREPORTED STILL: EXPLORATION OF POTENTIAL NEVADA NICS REPORTING REFORM

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INTRODUCTION

*BREAKING NEWS: “A court found that Virginia Tech killer Seung-Hui Cho was ‘mentally ill’ and potentially dangerous. Then it let him go.”*¹

At that time, Cho was simply ordered to seek outpatient treatment—but sadly he never went.² Instead, on two separate occasions after the ruling, he walked into a gun store, found his weapon of choice, and began filling out the necessary permit forms.³ Each of the licensed gun dealers then entered Cho’s information⁴ into Virginia’s background check system.⁵ Under federal law, Cho was clearly prohibited from purchasing a firearm as a person adjudicated mentally ill.⁶ Nonetheless, the check failed to identify any red flags in both cases.⁷ Following protocol, each dealer then proceeded with the transaction and Cho walked out with new lethal semi-automatic handguns within minutes.⁸

Only weeks later, on April 16, 2007, Cho committed one of the deadliest shooting massacres by a single gunman in U.S. history.⁹ Amongst the panic and chaos that consumed the school campus that day, thirty students and faculty lay dead and seventeen more lay suffering from serious injury until, ultimately, the bloodshed ceased when Cho took his own life.¹⁰

Following the tragic event, a national dialogue ensued concerning gun rights. The paramount question that arose in the debate was how a young man recently adjudicated as a person with a mental illness and dangerous in a court

¹ Ned Potter & David Schoetz, *Va. Tech Killer Ruled Mentally Ill by Court; Let Go After Hospital Visit*, ABC NEWS (Apr. 18, 2007), <http://abcnews.go.com/US/story?id=3052278>.

² Brigid Schulte & Chris L. Jenkins, *Cho Didn’t Get Court-Ordered Treatment*, WASH. POST, May 7, 2007, at A1, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/06/AR2007050601403.html>.

³ VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: REPORT OF THE REVIEW PANEL PRESENTED TO GOVERNOR Kaine 73 (2007), *available at* <https://governor.virginia.gov/media/3772/fullreport.pdf>.

⁴ *Id.* Included in these forms was a question that asked Cho whether he had “ever been adjudicated mentally defective?” Cho falsely self-reported “no.” *Id.*

⁵ *Id.*

⁶ See 18 U.S.C. § 922(g)(4) (2012). More specifically, federal law prohibits gun purchases by one “who has been adjudicated as a mental defective or who has been committed to a mental institution.” *Id.* The regulation interpreting the statute then clarifies that “[a]djudicated as mental defective” means there was a “determination by a court . . . that a person, as a result of . . . mental illness . . . [i]s a danger to himself or to others.” 27 C.F.R. § 478.11 (2014).

⁷ VA. TECH REVIEW PANEL, *supra* note 3, at 71.

⁸ *Id.* at 73.

⁹ 25 *Deadliest Mass Shootings in U.S. History Fast Facts*, CNN, <http://www.cnn.com/2013/09/16/us/20-deadliest-mass-shootings-in-u-s-history-fast-facts/> (last updated May 9, 2015, 10:17 AM).

¹⁰ VA. TECH REVIEW PANEL, *supra* note 3, at 98.

of law could so easily obtain the two semi-automatic handguns used to carry out the horrific massacre?¹¹

The answer is devastatingly simple. The background check system in place failed to identify Cho because his name was not reported to the national registry.¹² Cho was not reported due to imprecise language in Virginia state law.¹³ According to the prevalent interpretation of the law at the time, only inpatient commitment orders were required to be reported to the national database—not outpatient orders such as Cho’s.¹⁴ In other words, the federal background check system failed not because the system itself is flawed, but because the data it required to be effective was not provided by the state.

This example underscores every state’s responsibility to have an accurate system in place to report individuals that have been adjudicated or involuntarily committed as a person with a mental illness to the NICS¹⁵ database. The mass shooting at Virginia Tech was not an isolated incident. Similar mass shootings have occurred throughout the United States.¹⁶ As of September 2013, there have been sixty-seven mass shootings since August 1982.¹⁷ Twelve of these have taken place in the last few years alone.¹⁸

Unfortunately, Nevada has not been immune to these tragic events.¹⁹ Eighty-five seconds.²⁰ That is all it took for Eduardo Sencion to jump methodically out of his vehicle, unload the thirty-round clip of his automatic assault weapon into the air, reload while bursting into an IHOP in Nevada’s capital city and spray the unsuspecting diners with bullets—killing four, including three Nevada National Guardsmen, and injuring fourteen more.²¹ Sencion ended the

¹¹ More specifically, Cho purchased two very common and highly accessible handguns—a Glock 19 9mm and a Walther P22 .22 caliber. *Id.* at 71.

¹² *Id.* at 73.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ The National Instant Criminal Background Check System (“NICS”) is run by the Federal Bureau of Investigation. For a general overview, see *National Instant Criminal Background Check System*, FBI, <http://www.fbi.gov/about-us/cjis/nics/> (last visited May 20, 2015).

¹⁶ Mark Follman et al., *US Mass Shootings, 1982–2012: Data from Mother Jones’ Investigation*, MOTHER JONES (Dec. 28, 2012, 5:40 PM), <http://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See Martha Bellisle, *2011 Carson City IHOP Shooting: 85 Seconds That Changed Carson City*, RENO GAZETTE-J., Sept. 2, 2012, at 1A. The “IHOP shooting” took place at 7:15 AM on Tuesday September 6, 2011 in Carson City, Nevada. *Id.* More recently, on Oct. 21, 2013 a middle school student in Sparks, Nevada opened fire on students and faculty killing two and injuring two others. Scott Sonner, *2 Dead, 2 Injured After Shooting at Sparks Middle School in Nevada*, HUFFINGTON POST (Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/2013/10/21/sparks-middle-school-shooting_n_4136452.html.

²⁰ Bellisle, *supra* note 19.

²¹ *Id.*

spree with a single shot to his own head.²² As one resident exclaimed, “I can’t believe this is happening here . . . You read about this happening in big cities, but not in our little town.”²³ Unfortunately, mass shootings in America today can occur anywhere and at any time, but often they are foreshadowed by identifiable events such as the assailant purchasing firearms after having been adjudicated or committed as a person with a mental illness.

For example, prior to the shooting, Sencion, a diagnosed and medicated paranoid schizophrenic, had immersed himself in the Bible because incessant voices told him to do “bad things” to people he saw as demons out to get him.²⁴ He even warned his family that he was “getting sick” and gave his mother keys to his gun safe.²⁵ Sencion was also voluntarily hospitalized on several occasions and once was taken into protective custody by the police after a violent outbreak during a commitment.²⁶ In other words, Sencion was clearly a man who should not have been able to purchase a gun. Nonetheless, he was able to purchase an arsenal ranging from simple handguns to assault rifles.²⁷ Moreover, because Sencion purchased the guns from a private owner, he did not even have to undergo a background check.²⁸

Unfortunately, however, mass shootings with backgrounds similar to the IHOP shooting all too commonly occur—even when the guns are purchased legally through a licensed gun seller. In fact, approximately sixty-three percent of the mass shootings from August 1982 to September 2013 have involved a gunman who showed prior signs of mental illness,²⁹ and eighty-one percent involved firearms that were obtained legally.³⁰ These statistics indicate that if a person with a mental illness could be prevented from obtaining a gun legally, a significant number of these tragic mass shootings could have possibly been prevented or, at the very least, made more difficult to carry out. Consequently,

²² *Id.*

²³ Steve Keegan, *Four Dead in Shooting at Nevada Restaurant*, REUTERS (Sept. 6, 2011, 7:18 PM), <http://www.reuters.com/article/2011/09/06/us-shooting-nevada-idUSTRE78550M20110906> (alteration in original).

²⁴ Sandra Chereb, *Eduardo Sencion, IHOP Shooter, Was Convinced Demons Were After Him*, HUFFINGTON POST (Jan. 3, 2012, 5:12 AM), http://www.huffingtonpost.com/2011/11/03/eduardo-sencion-ihop-shooter_n_1073677.html.

²⁵ *Id.*

²⁶ *Id.*; Sandra Chereb & Oskar Garcia, *Eduardo Sencion IHOP Shooting: Suspect Identified in Rampage That Left 5 Dead, 7 Wounded*, HUFFINGTON POST (Nov. 6, 2011, 5:12 AM), http://www.huffingtonpost.com/2011/09/06/eduardo-sencion-ihop-shooting_n_951431.html.

²⁷ Chereb, *supra* note 24.

²⁸ Ed Vogel, *IHOP Gunman Had Altered AK-47-Like Rifle*, LAS VEGAS REV.-J., Oct. 6, 2011, at 8B, available at <http://www.reviewjournal.com/news/nevada-and-west/ihop-gunman-used-illegally-altered-ak-47-sheriff-says>.

²⁹ Follman et al., *supra* note 16. The percentage was calculated using the number of “Yes” inputs under “Prior Sign of Possible Mental Illness.” Note that the percentage rises to 75 percent if the “Unclear” inputs are also included. *Id.*

³⁰ *Id.* The percentage was calculated using the number of “Yes” inputs under “Weapons Obtained Legally.”

states have an obligation to keep firearms out of the hands of individuals with mental illness that have demonstrated violent tendencies.

With this responsibility likely in mind, Nevada Governor Brian Sandoval issued a written statement after hearing about the tragic IHOP mass shooting in which he “assure[d] all Nevadans . . . that everything is being done to ensure the public’s safety.”³¹ However, is that true? Is enough being done in Nevada to deny those adjudicated or committed as a person with a mental illness access to firearms? Simply put, the answer is a resounding no.

As a result, the focus of this note is to explore how Nevada can decrease the likelihood that a mass shooting ever happens again by improving the state laws and administrative processes designed to prevent those adjudicated or committed as a person with a mental illness from obtaining firearms. Part I will outline the progression of the federal gun possession laws enacted to accomplish this goal. It will then identify how the federal government is overcoming the legal obstacles associated with the national background check system those laws create. Next, it will explain how the states’ noncompliance with these federal laws, based on their over-reliance on federal incentives, is the last major remaining obstacle to realizing background checks that will effectively bar those adjudicated or committed as a person with a mental illness from obtaining firearms.

Part II will then set forth Nevada’s current level of compliance with the federal laws described in Part I and proceed to identify a major reporting failure that highlights the need for improvement. It will then go on to describe both statutory and procedural reforms that would help ensure Nevada’s record-sharing process is accurate, complete, and efficient, and discuss the possible sources of funding that could be used to implement them. Ultimately, the following proposals for Nevada NICS reporting reform are designed to help ensure that those who have been adjudicated or committed as a person with a mental illness do not go unreported.

I. THE FEDERAL BACKGROUND CHECK STRATEGY

The fundamental question at issue is how can society ensure that individuals with a mental illness who may act out violently do not gain access to firearms? Unfortunately, the answer is elusive. After all, prospectively attempting to identify dangerous persons with mental illness from the tens of thousands with mental illness devoid of violent tendencies is fraught with difficulties. Over the last half-century, Washington lawmakers have struggled to enact laws governing gun possession by individuals with mental illness that effectively address this dilemma. As Section A will demonstrate, a background check strategy was ultimately implemented that is dependent upon the states to supply the names of those who have been adjudicated or committed as a person with a mental illness to a national database in order to be effective. It will also explain

³¹ Keegan, *supra* note 23.

how all of the legal obstacles at the federal level that initially plagued its implementation have now largely been overcome. Consequently, Section B will contend that the only real remaining obstacle to an effective background check system is for the states to fulfill their role in providing the records of prohibited individuals to NICS.

A. *Progression of Gun Possession Laws and Potential Flaws*

Three major federal legislative enactments have been involved in shaping the national strategy aimed at curbing firearm possession by individuals with mental illness: (1) The Gun Rights Act of 1968, (2) The Brady Handgun Violence Prevention Act of 1993, and (3) the NICS Improvement Amendments Act of 2007. Each will be discussed in turn to outline the chronological evolution of the federal laws underpinning the current national background check system. Additionally, constitutional, privacy, due process, and noncompliance challenges involved in implementing this strategy will be interspersed throughout the discussion where they logically arise.

1. *The Gun Control Act of 1968 and Its Constitutionality*

Under the Gun Control Act of 1968 (“Gun Control Act”), as amended, persons prohibited from possessing, shipping, transporting, and receiving firearms and ammunition include persons (1) “adjudicated as a mental defective” or (2) who have been “committed to a mental institution.”³² Generally, neither a diagnosis nor the mere treatment of a mental illness by a physician is sufficient to qualify a person as “adjudicated as a mental defective.”³³ Instead, this adjudication relies upon a determination or decision by a court, board, commission, or other lawful authority.³⁴

The definition of “committed to a mental institution” plainly applies to involuntary inpatient commitments.³⁵ In contrast, it clearly does not apply to vol-

³² 18 U.S.C. § 922(g)(4) (2012).

³³ *See, e.g.,* United States v. Vertz, 102 F. Supp. 2d 787, 788 (W.D. Mich. 2000) (“Despite the extensive evidence of mental illness, for purposes of criminal liability under the federal firearms statute, it is not sufficient that the defendant has been diagnosed as mentally ill by his treating physicians. The statute specifically requires that the individual have been ‘adjudicated as a mental defective’ or ‘committed to a mental institution.’”).

³⁴ 27 C.F.R. § 478.11 (2014) (clarifying that “[a]djudicated as a mental defective” entails, “(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs,” or “(b) . . . [a] finding of insanity by a court in a criminal case”).

³⁵ *Id.* (explaining the term means “[a] formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution”).

untary admission in either inpatient or outpatient settings.³⁶ It is unclear, however, whether the definition applies to situations, such as with the Virginia Tech shooter, where there is an involuntary outpatient order.³⁷ In recognition of this federal law ambiguity, several states, such as Virginia, have amended their statutes to require all involuntary commitments—both inpatient and outpatient—to be reported to the NICS.³⁸

Since its adoption in 1968, however, the Gun Control Act has been no stranger to controversy. Advocates for people with mental illness opined that such a law violates the constitution under the Second Amendment.³⁹ In *District of Columbia v. Heller*, it appeared such advocates would finally be vindicated when the Supreme Court strongly upheld an individual right to bear loaded firearms for the first time.⁴⁰ Seemingly, this holding would bolster the argument that individuals with mental illness should have the same fundamental right. However, the *Heller* decision specifically noted that:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.⁴¹

Stated generally, categorical limitations on the right to bear arms can be placed on certain groups (e.g., those adjudicated or committed as a person with a mental illness) or in certain locations.⁴² However, broad bans directed toward the general population, such as the District of Columbia's ban on handguns involved in *Heller*, are not permitted.⁴³ This same scheme was subsequently incorporated against the states making the Second Amendment not only a limit on the federal regulation of firearms, but also on state restrictions.⁴⁴

³⁶ *Id.*

³⁷ EDWARD C. LIU ET AL., CONG. RESEARCH SERV., R43040, SUBMISSION OF MENTAL HEALTH RECORDS TO NICS AND THE HIPAA PRIVACY RULE 3–4 (2013), available at <http://www.fas.org/sgp/crs/misc/R43040.pdf>.

³⁸ VA. CODE ANN. § 37.2-819 (West Supp. 2014). A similar statutory clarification is needed in Nevada as discussed in more detail below. See discussion *infra* Part II.D.1.

³⁹ See, e.g., LIU ET AL., *supra* note 37, at 3, 7–8 (discussing the potential issues arising from state and federal medical privacy laws that may impede states' efforts to submit prohibiting mental health records to NICS); Katherine L. Record & Lawrence O. Gostin, *A Robust Individual Right to Bear Arms Versus the Public's Health: The Court's Reliance on Firearm Restrictions on the Mentally Ill*, 6 CHARLESTON L. REV. 371, 372, 379 (2012) (discussing in detail both the second amendment and privacy rights in terms of confidentiality).

⁴⁰ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

⁴¹ *Id.* at 626–27. The footnote on the quoted dicta indicates: “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.” *Id.* at 627 n.26.

⁴² Record & Gostin, *supra* note 39, at 373.

⁴³ *Heller*, 554 U.S. at 626–27.

⁴⁴ *McDonald v. City of Chi.*, 561 U.S. 742, 750 (2010).

Consequently, although much more could be discussed regarding the Second Amendment rights of the individuals with mental illness,⁴⁵ this note will apply the current state of the law which accepts limitations on their possession of firearms under the general theory that their right to bear arms is outweighed by the government's interest in public safety.⁴⁶ Instead, the focus will be on how best to ensure that the government's goal to increase public safety is actually realized so that the Second Amendment limitations placed on the persons with mental illness are not in vain.

With this in mind, the Gun Control Act's prohibition on the possession of firearms by those adjudicated mentally ill or committed to a mental institution was a necessary first step, but its enforcement has proved difficult. At the time of its passage in 1968, there was no practical way for a licensed gun dealer to verify whether a person had ever been adjudicated or committed as a person with a mental illness.⁴⁷ Instead, the dealer simply had to rely on the gun purchaser's word that he was not mentally ill as declared on Form 4473.⁴⁸ With this simple declaration the licensed gun seller could no longer be held liable for the actions of the gun purchaser.⁴⁹ However, federal prohibitions and record-keeping requirements made it possible to convict purchasers ineligible to have guns if they were later apprehended with a firearm.⁵⁰ In other words, the enforcement mechanism was a weak subsequent punishment. The advent of computers, however, made it possible for the Brady Handgun Violence Prevention Act of 1993 to institute a stricter and potentially more effective prior restraint—pre-purchase background checks.

2. *The Brady Act and NICS*

The Brady Handgun Violence Prevention Act of 1993 ("Brady Act")⁵¹ instituted a federal background check requirement on all firearm purchasers in the United States from licensed gun dealers.⁵² To carry out these background checks, the Brady Act established the National Instant Criminal Background Check System ("NICS").⁵³ The NICS is a computerized system, overseen by the US Attorney General and carried out by the FBI, used to conduct back-

⁴⁵ See, e.g., Record & Gostin, *supra* note 39, at 379–83; Fredrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right to Bear Arms?*, 48 WAKE FOREST L. REV. 1, 3 (2013).

⁴⁶ See Josh Blackman, *The Constitutionality of Social Cost*, 34 HARV. J.L. & PUB. POL'Y 951, 976–77 (2011).

⁴⁷ Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 153 (1975).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 154.

⁵¹ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended in relevant part at 18 U.S.C. § 922 (2012)).

⁵² LIU ET AL., *supra* note 37, at 5.

⁵³ *Id.*

ground checks before every gun sale by a Federal Firearms Licensee (“FFL”) within thirty seconds.⁵⁴

Depending on the desire of a state to act as an intermediate for the NICS, the FFLs, to initiate these background checks, contact either the FBI directly or a designated state Point of Contact (“POC”).⁵⁵ The background check then consults three major databases: the Interstate Identification Index, the National Crime Information Center, and the NICS Index.⁵⁶ The NICS Index is the database consisting of records voluntarily submitted by local, state, and federal agencies on persons who may be disqualified from receiving firearms based on the Gun Control Act’s list of prohibited persons.⁵⁷ As such, its functionality in particular is the primary concern of this note since it is the database that should receive the records of those who have been adjudicated or committed as a person with a mental illness.⁵⁸

Since the NICS background check system is only as effective as the records submitted to the NICS Index,⁵⁹ the Brady Act authorized the Attorney General to “secure directly from any department or agency of the United States” records on anyone who is barred from obtaining a firearm under federal or state law.⁶⁰ Notably, the act does not mandate that federal agencies disclose all relevant records to the system voluntarily.⁶¹ Instead, they are only required to do so “on request of the Attorney General.”⁶² In contrast, states are not required to submit records to the NICS Index at all—even upon request.⁶³ It is entirely voluntary and relies on nominal federal grants that can be used by states to “improve[] . . . State record systems and the sharing [of] . . . the records required by the Attorney General under section 103 of [the Brady Act].”⁶⁴

⁵⁴ *National Instant Criminal Background Check System: Fact Sheet*, FBI, <http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet/> (last visited May 22, 2015).

⁵⁵ *Id.*

⁵⁶ *National Instant Criminal Background Check System: Brady Handgun Violence Prevention Act of 1993*, FBI, <http://www.fbi.gov/about-us/cjis/nics/general-information/nics-overview/> (last visited May 22, 2015).

⁵⁷ LIU ET AL., *supra* note 37, at 5.

⁵⁸ *Id.*

⁵⁹ See U.S. DEP’T OF HEALTH & HUMAN SERVS., U.S. DEP’T OF EDUC. & U.S. DEP’T OF JUSTICE, REPORT TO THE PRESIDENT: ON ISSUES RAISED BY THE VIRGINIA TECH TRAGEDY 10 (2007), available at <http://permanent.access.gpo.gov/lps82670/vtreport.pdf> (stating that in order for the NICS to be maximally effective, all states need to make mental health records available to the NICS).

⁶⁰ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, § 103(e)(1), 107 Stat. 1536, 1542 (1993) (codified as amended in relevant part at 18 U.S.C. § 922 (2012)).

⁶¹ *Id.*

⁶² *Id.*

⁶³ LIU ET AL., *supra* note 37, at 10.

⁶⁴ § 106, 107 Stat. at 1543–44. “This [grant] program is known as the National Criminal History Improvement Program (NCHIP).” LIU ET AL., *supra* note 37, at 6 n.24.

This background check system has been plagued by two major difficulties: (1) privacy rights issues and (2) a weak compliance mechanism.

a. Brady Act Problem #1: Privacy Issues

The first major concern brought about by the need to acquire mental health records for the NICS Index is that they necessarily include protected health information (“PHI”). PHI is defined as “individually identifiable information that relates to the past, present, or future physical or mental health of an individual.”⁶⁵ Thus, a conflict is created because PHI is generally subject to the privacy rule of the Health Insurance Portability and Accountability Act (“HIPAA”) promulgated by the Department of Health and Human Services (“HHS”).⁶⁶ Generally, “the privacy rule prohibits a covered entity from using or disclosing PHI except as expressly permitted or required by the rule.”⁶⁷

Accordingly, “[i]f a state [statutorily] requires covered entities to disclose prohibiting mental health records to NICS, the HIPAA privacy rule does not prohibit that disclosure.”⁶⁸ For example, the records generated by the courts that adjudicate persons as mentally defective or involuntarily commit them to mental health facilities are clearly PHI but courts typically do not fall under the defined entities subject to the HIPAA privacy rule.⁶⁹ Thus, the HIPAA privacy rules do not prohibit these records from being reported to the NICS Index.⁷⁰

Health care providers, such as hospitals and state health departments, on the other hand, are often covered entities under the HIPAA privacy rules of many states and, therefore, may not disclose the PHI to the NICS Index.⁷¹ In other words, if the mental health reporting channel of a state both (1) proceeds through an entity covered under that state’s HIPAA privacy rule and (2) fails to require the covered entity to disclose the PHI to the NICS index, it may act as a bar to NICS reporting.⁷² This is true “even if the state expressly allowed, but did not explicitly require, disclosure of prohibiting mental health records to NICS” since such state laws must be mandatory “to exempt disclosure from the HIPAA privacy rule.”⁷³

As of April 2013, twenty-three states, including Nevada, require reporting to the NICS Index and, thus, the HIPAA privacy rule does not act as a bar.⁷⁴ However, seven states authorize but do not mandate reporting to the NICS In-

⁶⁵ LIU ET AL., *supra* note 37, at 9.

⁶⁶ *Id.* at 8.

⁶⁷ *Id.* at 9 (emphasis added).

⁶⁸ *Id.* at 10; accord 45 C.F.R. § 164.512(a) (2013).

⁶⁹ LIU ET AL., *supra* note 37, at 10.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 11, 13 fig.1. The twenty three states are AL, CO, CT, DE, GA, ID, IL, IN, IA, KS, KY, ME, MN, NV, NC, ND, NY, OR, TN, TX, WA, WI, and VA. *Id.* at 11 n.53.

dex,⁷⁵ eight states gather mental health records but do not address NICS reporting,⁷⁶ and the final thirteen states completely lack laws regarding the reporting of mental health records all together.⁷⁷ In all of these states, the HIPAA privacy rule potentially acts as a bar to reporting to the NICS Index.⁷⁸

Given the above, this problem can logically be resolved in one of two ways. First, each state in which the HIPAA privacy rule still acts as a bar could pass a law that definitively requires reporting to the NICS Index and thereby become exempt from the rule. Logistically, this option would be time-consuming and difficult since it would require separate voting acts by the governing bodies of the twenty-seven states in which the privacy rule may still act as a bar.⁷⁹ Alternatively, HHS, the agency charged with enforcing the HIPAA privacy rule, could simply modify the rule not to apply to the reporting of mental health records to NICS.⁸⁰

Fortunately, on February 14, 2013, HHS announced that it would seek to do just that.⁸¹ It has taken the first step in this modification process by publishing an advance notice of proposed rule and opening the issue up to public comment.⁸² This change should be implemented because it will potentially ensure that the HIPAA privacy rule will not act as a barrier to NICS reporting throughout the United States.

Admittedly, the above discussion makes the presumption that circumventing the HIPAA privacy rule with regard to mental health record reporting to the NICS Index is a desirable policy goal and is thus aimed at exploring how that objective could be achieved. In fact, one of the underlying objectives of this note is to ensure that all those who have been adjudicated or committed as a person with a mental illness are reported to the NICS Index so that the background checks that utilize the database can be more effective at preventing them from obtaining guns. Such a task is difficult and is unavoidably in tension with the privacy rights of individuals with mental illness.

However, by including those individuals adjudicated or committed as a person with a mental illness on the list of those prohibited from obtaining a firearm, by creating NICS, and by instituting background checks, Congress has

⁷⁵ *Id.* at 11, 13 fig.1. The seven states that authorize but do not mandate reporting to NICS Index are AZ, FL, MO, NE, NJ, PA, and WV. *Id.* at 11 n.54. Note that with some of these states it is ambiguous as to whether the reporting is mandated or not. *Id.* Nonetheless, this lack of clarity alone can act as a bar to NICS reporting. *Id.*

⁷⁶ *Id.* at 11, 13 fig.1. The eight states that gather mental health records but do not address NICS reporting are AR, CA, HI, MA, MD, MI, OH and UT. *Id.* at 11 n.58.

⁷⁷ *Id.* at 12, 13 fig.1.

⁷⁸ *Id.* at 11–12.

⁷⁹ *See id.* at 11, 13 fig.1.

⁸⁰ *See* 42 U.S.C. § 1320d-3(b)(1) (2012).

⁸¹ Press Release, U.S. Dep't of Health & Human Servs., Obama Administration Takes Additional Steps to Strengthen the Federal Background Check System (Jan. 3, 2014), available at <http://www.hhs.gov/news/press/2014pres/01/20140103a.html>.

⁸² *Id.*

clearly made the policy determination that such an intrusion is necessary to ensure public safety. The Supreme Court has also upheld these restrictions on access to firearms based on involuntary commitment or adjudication as a person with a mental illness for similar reasons.⁸³ Furthermore, as of January 2013, eighty percent of US citizens agree that persons with a mental illness should be prevented from purchasing guns.⁸⁴ Consequently, although not a settled policy issue,⁸⁵ this note will align with the overwhelming present acceptance of minimal breaches of the privacy of individuals with mental illness to secure public safety.

b. Brady Act Problem #2: Weak Compliance Mechanism

The second major issue is that an extremely weak NICS compliance mechanism, in which submission of mental health records is voluntary, led to a shortage of submitted records.⁸⁶ By the end of 2005, the NICS had received only 234,628 records of individuals with disqualifying mental health histories under the Gun Control Act.⁸⁷ Yet, there was an estimated 2.7 million people who had been involuntarily committed for mental health disorders.⁸⁸ In fact, as of April 2007, twenty-eight states had not even submitted a single mental health record to the federal NICS Index.⁸⁹ In other words, there was an almost complete absence of communication between the states and the federal government that left major gaps in the NICS Index.⁹⁰

3. NICS Improvement Amendments Act of 2007

Unfortunately, the consequences of these gaps in the NICS Index soon became a fatal reality. As discussed above, the gunman in the Virginia Tech shooting, Cho, could likely have been prevented from obtaining his firearms

⁸³ *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 116–17 (1983).

⁸⁴ PEW RESEARCH CTR., GUN RIGHTS PROPONENTS MORE POLITICALLY ACTIVE: IN GUN CONTROL DEBATE, SEVERAL OPTIONS DRAW MAJORITY SUPPORT 1 (2013), available at <http://www.people-press.org/files/legacy-pdf/01-14-13%20Gun%20Policy%20Release.pdf>.

⁸⁵ See, e.g., Record & Gostin, *supra* note 39, at 379–81 (advocating for the privacy rights of individuals with mental illness and maintaining the HIPAA privacy rule with regard to mental health record disclosures to NICS).

⁸⁶ Joseph R. Simpson, *Bad Risk? An Overview of Laws Prohibiting Possession of Firearms by Individuals with a History of Treatment for Mental Illness*, 35 J. AM. ACAD. PSYCHIATRY & L. 330, 333 (2007).

⁸⁷ FBI, U.S. DEP'T OF JUSTICE, NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS): OPERATIONS 2005, at 30, fig.14 (2006), available at http://www.fbi.gov/about-us/cjis/nics/reports/2005-operations-report/ops_report_2005.pdf.

⁸⁸ Donna M. Norris & Marilyn Price, *Firearms and Mental Illness*, PSYCHIATRIC TIMES (Oct. 30, 2009), <http://www.psychiatristimes.com/articles/firearms-and-mental-illness>.

⁸⁹ Press Release, FBI, Response to Inquiries on the FBI's National Instant Criminal Background Check System (April 19, 2007), <http://www.fbi.gov/news/pressrel/press-releases/response-to-inquiries-on-the-fbis-national-instant-criminal-background-check-system>.

⁹⁰ Simpson, *supra* note 86.

through legal channels if Virginia would have reported him to the NICS Index as a result of his adjudication as a person with a mental illness.⁹¹ Instead, thirty students and faculty are dead.⁹² These potentially preventable deaths provided the impetus for Congress to pass the NICS Improvement Amendments Act of 2007 (“NIAA”)⁹³ to address the public’s legitimate concerns over the government’s failure to curb the growing number of mass shootings. The NIAA implements two main improvements to the Brady Act: the NICS Act Record Improvement Program (“NARIP”)⁹⁴ and its prerequisite Gun Rights Restoration Program.⁹⁵

NARIP’s stated program goal is to “address the gap in information available to NICS about such prohibiting mental health adjudications and commitments” by “improv[ing] the completeness, automation, and transmittal of records to state and federal systems used by the NICS.”⁹⁶ The program attempts to do so by providing federal grants to states so that they can automate and streamline their reporting processes.⁹⁷ To receive this funding a state must satisfy two requirements: (1) provide a “reasonable estimate” and (2) establish a Gun Rights Restoration Program.⁹⁸

First, a state must provide the Attorney General who oversees the NICS Index a “reasonable estimate” of the number of records generated in a state that qualify for inclusion in the NICS Index so that progress may be tracked and penalties imposed.⁹⁹ Failure to submit a designated percentage of this “reasonable estimate” incurs a percentage of grant withholding that would otherwise be allocated to a state under the DOJ Edward Byrne Memorial Justice Assistance Program based on the time elapsed from when NIAA was enacted on January 8, 2008.¹⁰⁰ More specifically, NARIP dictates that 3 percent could have been withheld if records were less than 50 percent complete as of January 2011, 4 percent may be withheld if records are less than 70 percent complete by January 2013, and 5 percent shall be withheld if the records are less than 90 percent complete by January 2018.¹⁰¹ Unfortunately, these penalties are not mandato-

⁹¹ *The NICS Improvement Amendments Act of 2007*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=tp&tid=49#goals> (last visited May 23, 2015).

⁹² VA. TECH REVIEW PANEL, *supra* note 3, at 98.

⁹³ NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (2008) (codified at 18 U.S.C. § 922).

⁹⁴ *Id.* §§ 103, 105.

⁹⁵ *Id.* § 101(c)(2).

⁹⁶ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, OMB No. 1121-0329, FY 2013 NICS ACT RECORD IMPROVEMENT PROGRAM (NARIP) 4, 7 (2013) [hereinafter NARIP GRANT INSTRUCTIONS], available at http://bjs.gov/content/pub/pdf/narip13_sol.pdf.

⁹⁷ *Id.* at 4.

⁹⁸ *Id.* at 5.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 7.

¹⁰¹ *Id.*

ry.¹⁰² Rather, the Attorney General may ignore the penalty by simply finding a state is making a “reasonable effort” to comply with the NIAA.¹⁰³ As an additional incentive, if the states submit 90 percent of their “reasonable estimate,” the 10 percent matching of funds by states required to receive significant grants through the DOJ’s National Criminal History Improvement Program (“NCHIP”) will be waived.¹⁰⁴

The second requirement to receive a NARIP grant is that the state must pass a Gun Rights Restoration Program into law.¹⁰⁵ This program must establish an appeal process for persons whose mental health records have been disclosed to the NICS Index as a result of being adjudicated a mental defective or committed to a mental institution.¹⁰⁶

This [appeal process] must be based on a finding, in accordance with principles of due process, by a state court, board, commission, or other lawful authority, that the circumstances of the disability and the person’s record and reputation are such that the person will not be likely to act in a manner dangerous to the public safety and that the granting of relief would not be contrary to the public interest.¹⁰⁷

A successful appeal will result in the reinstatement of the appellant’s gun rights by removing his or her name from the NICS database such that he or she will legally be permitted to purchase and possess firearms.¹⁰⁸

According to the First Circuit’s interpretation of *Heller*,¹⁰⁹ a Gun Rights Restoration Program is likely necessary to ensure those whose right to bear arms is taken away due to mental illness receive adequate due process.¹¹⁰ As explained by the First Circuit, this is true because the Gun Control Act’s restrictions on access to firearms are currently permanent, whereas mental illness can be a temporary condition or can be brought under control.¹¹¹ Thus, an appeals process should be required in order to give those adjudicated or commit-

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-684, GUN CONTROL: SHARING PROMISING PRACTICES AND ASSESSING INCENTIVES COULD BETTER POSITION JUSTICE TO ASSIST STATES IN PROVIDING RECORDS FOR BACKGROUND CHECKS 7 (2012) [hereinafter GAO, GUN CONTROL], available at <http://www.gao.gov/assets/600/592452.pdf>.

¹⁰⁵ NARIP GRANT INSTRUCTIONS, *supra* note 96, at 5.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

¹¹⁰ *United States v. Rehlander*, 666 F.3d 45, 48–49 (1st Cir. 2012). However, critics argue that the program was merely a concession made by lawmakers to gain the National Rifle Association’s support for the NIAA and argue that the program is letting those adjudicated or committed as a person with a mental illness to regain access to firearms. See Michael Luo, *Mixing Guns and Mental Illness: As More States Restore Rights, Process Is Often Haphazard*, N.Y. TIMES, July 3, 2011, at A1, available at <http://www.nytimes.com/2011/07/03/us/03guns.html>.

¹¹¹ *Rehlander*, 666 F.3d at 48–49.

ted as a person with a mental illness an avenue by which they can show they are no longer a danger to society. After all, the goal of the background check is not to ban all individuals with mental illness from obtaining firearms. Its objective is to restrict access to the persons with mental illness that have been adjudicated or involuntarily committed as a result of their violent tendencies.

If the states meet these two requirements they will be eligible for federal funding that can be utilized to implement NICS reporting reforms.¹¹² Overall, the NIAA is the latest step the federal government has taken to remove potential constitutional issues and incentivize states to get on board with a federal strategy that envisions a comprehensive national database of those prohibited from obtaining firearms.

B. Justifiable Non-Compliance or Inexcusable Over-Reliance?

As demonstrated above, the federal strategy to keep firearms out of the hands of the dangerous individuals with mental illness has overcome three major potential federal impediments: (1) Second Amendment constitutional obstacles,¹¹³ (2) privacy issues,¹¹⁴ and (3) due process concerns.¹¹⁵ The Second Amendment is likely no longer a major obstacle because *Heller* specifically notes that nothing in its decision should be construed “to cast doubt on longstanding prohibitions on the possession of firearms by . . . the mentally ill.”¹¹⁶ The conflict of laws between the Brady Act and the HIPAA privacy rule will also likely be resolved when the privacy rule is modified by HHS not to apply to the reporting of mental health records to NICS. Finally, the major due process concerns will likely be alleviated if each state passes a Gun Rights Restoration program.¹¹⁷ In other words, from a federal perspective, the national background check system should be able to function properly.

Yet, despite the removal of these hurdles, the background check strategy has struggled to be fully implemented. As set forth in more detail above, the Gun Control Act of 1968’s compliance mechanism revolved around an “on your honor” declaration accompanied by a subsequent punishment if any perjury was discovered.¹¹⁸ The Brady Act then created a national system of background checks that required the support of all state and local governments to provide names of prohibited individuals to a national database in order to be effective.¹¹⁹ Unfortunately, its compliance mechanism was so weak that for more than a decade most states refused to participate at all, leaving gaping holes in the national database, which allowed those adjudicated or committed

¹¹² NARIP GRANT INSTRUCTIONS, *supra* note 96, at 5.

¹¹³ See *supra* text accompanying notes 40–46.

¹¹⁴ See *supra* Part I.A.2.a.

¹¹⁵ See *supra* notes 110–12 and accompanying text.

¹¹⁶ *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

¹¹⁷ *United States v. Rehlander*, 666 F.3d 45, 49 (1st Cir. 2012).

¹¹⁸ Zimring, *supra* note 47, at 151–54; see also *supra* text accompanying notes 47–50.

¹¹⁹ LIU ET AL., *supra* note 37, at 5.

as persons with a mental illness to obtain firearms.¹²⁰ Consequently, the latest scheme of incentives and penalties incorporated into the NIAA were specifically drafted to encourage greater state participation in contributing to the NICS Index.¹²¹

These latest improvements have had mixed results. On a positive note, “[t]he total number of mental health records that states made available to the NICS Index increased by approximately 800 percent—from about 126,000 records in October 2004 to about 1.2 million records in October 2011—according to FBI data.”¹²² The majority of this increase came in the years following the enactment of the NIAA in 2007, indicating that to some extent it is working.¹²³ This increase in records has also directly correlated to fewer individuals with mental illness falling through the cracks. In 2005, only 0.5 percent of all the prospective purchasers who were denied following a background check were denied for mental health reasons.¹²⁴ By 2010, this number increased to 1.8 percent.¹²⁵

However, the increase in records submitted is largely the reflection of a dramatic increase in compliance by only twelve states.¹²⁶ This begs the question that if twelve states can significantly comply with the Brady Act given the current federal framework and incentives, then why can’t the other thirty-eight states? The logical conclusion is that it is a lack of state lawmaker priority or state agency motivation—rather than the insufficiency of federal incentives—that is truly the root cause of the gap-ridden NICS index. This argument is bolstered by the fact that, as of 2014, twenty-four states¹²⁷ have failed even to take

¹²⁰ See *supra* Part I.A.2.b.

¹²¹ NARIP GRANT INSTRUCTIONS, *supra* note 96; see also *supra* text accompanying notes 100–04.

¹²² GAO, GUN CONTROL, *supra* note 104, at 9. As of 2013, more than 1.8 million mental health records have been submitted to the NICS database. *National Instant Criminal Background Check System (NICS) Operations 2012*, FBI, <http://www.fbi.gov/about-us/cjis/nics/reports/2012-operations-report> (last visited May 23, 2015) [hereinafter 2012 NICS REPORT].

¹²³ GAO, GUN CONTROL, *supra* note 104, at 9. See also Figure 1, graphically showing the dramatic increase in record submission starting in 2008 after the enactment of the NIAA. *Id.* at 10 fig.1.

¹²⁴ MICHAEL BOWLING ET AL., U.S. DEP’T OF JUSTICE, NCJ 214256, BULLETIN: BACKGROUND CHECKS FOR FIREARM TRANSFERS, 2005, at 5 (2006), available at <http://www.bjs.gov/content/pub/pdf/bcft05.pdf>.

¹²⁵ RONALD J. FRANSDEN ET AL., U.S. DEP’T OF JUSTICE, NCJ 238226, BACKGROUND CHECKS FOR FIREARM TRANSFERS, 2010—STATISTICAL TABLES 1 (2013), available at <http://www.bjs.gov/content/pub/pdf/bcft10st.pdf>.

¹²⁶ GAO, GUN CONTROL, *supra* note 104, at 9.

¹²⁷ *NICS Act Record Improvement Program (NARIP) Awards FY 2009–2014*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=tp&tid=491> (last visited May 23, 2015) [hereinafter *NARIP Awards*]. This is true even though the strings attached to these funds are admittedly unenforceable:

DOJ has not administered the . . . penalty provisions of the NICS Improvement Amendments Act of 2007 because of limitations in state estimates of the number of records they possess that could be made available to NICS. DOJ officials were unsure if the estimates, as cur-

advantage of the available federal grant money through NARIP when all those states must do to qualify for these funds is satisfy the two relatively easy NARIP requirements discussed above.¹²⁸

This is disconcerting because according to a Government Accountability Office congressional report, “[t]he national system of criminal background checks relies first and foremost on the efforts of state and local governments to provide complete and accurate records to the FBI [NICS Index].”¹²⁹ As one observer noted, NICS headquarters “seems a highly efficient operation” that “has the look and feel of a finely honed retail operation.”¹³⁰ If a prohibiting record is provided to the NICS Index by the states, the national background check system is well equipped to ensure that person is not legally able to purchase a gun from a licensed gun dealer.¹³¹ Furthermore, beyond grants, the federal government also conducts training of state officials on NIAA related topics, sponsors conferences, and facilitates the sharing of compliance ideas between states in an effort to increase state submissions to the NICS Index.¹³²

Now, could the federal government do more to incentivize the states? Of course. It always can. But it should not have to go any further because states ought not require their arms to be twisted by the federal government to do what is clearly in the best interest of their citizens. Ultimately, the time has come for all states to stop pointing a finger at Washington, look in the mirror, and take the initiative to comply with the Brady Act—the life of their citizens very literally may depend on it.

II. NEVADA NICS REPORTING REFORM

With this mindset, the ways in which Nevada can rise to the occasion and dramatically improve its compliance with the Brady Act—utilizing nothing more than the current federal framework discussed in Part I—will now be explored. Section A will first present the current Nevada laws and processes designed to enable the reporting of records of prohibited persons to the NICS Index. Section B will then highlight a recent Nevada reporting failure to demonstrate that its current record sharing system, although better than some states’, is in desperate need of further improvements. Section C will begin the discussion of the solution by first explaining that it is in Nevada’s best interest

rently collected, could reach the level of precision needed to serve as the basis for implementing the provisions.

GAO, GUN CONTROL, *supra* note 104, at intro.

¹²⁸ NARIP GRANT INSTRUCTIONS, *supra* note 96, at 5; *see also supra* text accompanying notes 98–108.

¹²⁹ GAO, GUN CONTROL, *supra* note 104, at 34.

¹³⁰ Rick Schmitt, *Badly Flawed Background Check System Fails to Contain Firearms Sales*, CENTER FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM), <http://www.publicintegrity.org/2011/06/23/4982/badly-flawed-background-check-system-fails-contain-firearms-sales>.

¹³¹ *See generally* 2012 NICS REPORT, *supra* note 122.

¹³² GAO, GUN CONTROL, *supra* note 104, at 15–18.

to remain a POC state. Section D will focus on three statutory reforms that would facilitate NICS reporting. Section E will go on to examine some of the processes and techniques other states are utilizing effectively at the administrative and clerical levels and discuss how, if implemented in Nevada, they could help streamline its reporting system. Finally, Section F will discuss possible sources of the funding needed to implement these reforms.

A. *Current State of Nevada NICS Reporting Law and Processes*

The best way to describe the current state of Nevada with respect to its NICS reporting laws is that it got a late start, has made some great strides, and now needs to step back and ensure the laws are being correctly implemented. More specifically, Nevada did not even attempt to comply with the aspects of the Brady Act involving those adjudicated or committed as a person with a mental illness until after the passage of the NIAA in 2007.¹³³ Then in 2009, the state passed AB46, which implemented two new laws regarding reporting of individuals with mental illness to NICS.¹³⁴

The first law requires Nevada courts to transmit to the Central Repository for Nevada Records of Criminal History a record of any court order, judgment, plea or verdict that: (1) finds a criminal defendant guilty but mentally ill;¹³⁵ (2) accepts a plea of guilty but mentally ill in a criminal case;¹³⁶ (3) issues an order involuntarily admitting a person to a public or private mental health facility;¹³⁷ (4) finds a criminal defendant incompetent;¹³⁸ (5) accepts a verdict acquitting a criminal defendant by reason of insanity;¹³⁹ or (6) finds that a proposed ward is a person with a mental defect.¹⁴⁰ Each must be accompanied by a statement that the record will be sent to the state Division of Public Safety Brady Unit, and that the Brady Unit will subsequently submit the record to NICS.¹⁴¹ The necessity of this roundabout reporting method stems from Nevada being a POC state, which is discussed in more detail below.¹⁴²

The second law implemented was essentially a Gun Rights Restoration Program that “grants authority to the [Nevada] Pardons Board to open a sealed criminal history record to determine whether or not an individual should have

¹³³ See MAYORS AGAINST ILLEGAL GUNS, FATAL GAPS: HOW MISSING RECORDS IN THE FEDERAL CHECK SYSTEM PUT GUNS IN THE HANDS OF KILLERS 44 (2011), available at <http://everytown.org/wp-content/uploads/2014/04/Fatal-Gaps-Report.pdf>.

¹³⁴ See *id.*

¹³⁵ NEV. REV. STAT. § 175.533(3) (2013).

¹³⁶ *Id.* § 174.035(8).

¹³⁷ *Id.* § 433A.310(5).

¹³⁸ *Id.* § 178.425(6).

¹³⁹ *Id.* § 175.539(4).

¹⁴⁰ *Id.* § 159.0593(1).

¹⁴¹ See sources cited *supra* notes 135–40.

¹⁴² *Infra* Part II.C.

his firearms rights restored.”¹⁴³ These two laws represent the strides Nevada has made in making NICS reporting a greater priority.

These two improvements to Nevada law also qualified the state to receive NARIP funding.¹⁴⁴ As of 2014, Nevada has received \$1,157,409 in NARIP grants.¹⁴⁵ The state has utilized these funds, among other things, to fund a NARIP task force.¹⁴⁶ The task force seeks to identify ways to streamline the reporting of criminal history record information—particularly with respect to getting disqualifying mental health information in the national NICS index.¹⁴⁷ The task force has also “recognized the need to develop a state-wide plan involving all the pieces of the puzzle, from law enforcement agencies, to the prosecutors and finally to the Records Bureau for final disposition.”¹⁴⁸ Hopefully, this note will aid the task force in this endeavor.

However, currently it appears the administrative processes essential to successful NICS reporting are still in disarray. As noted above, Nevada has reporting laws in place, but it is having difficulty implementing and enforcing them. The following excerpt from a conversation at a Nevada Criminal Justice Information System Committee Meeting on December 3, 2013, sheds light on how informal the true nature of NICS reporting is at the root level:

Senator Justin Jones [Nevada State Senator]:

Madam Chair . . . are you comfortable now with the reporting or is there still more work to be done.

Bonnie McCabe [Supervisor of the Brady Unit]:

Now that everyone and all the courts are aware of what they should be doing and submitting those forms to us. . . . What’s really encouraging is I do get calls from different courts asking me what the procedure is, what forms they should submit, and just different questions. I’m really encouraged compared to three years ago that they are showing more diligence to get those to us.

. . . .
Assemblyman Tyrone Thompson [Nevada State Assemblyman]:

Also . . . [w]hen will this [reporting] be as complete as it can so we can really use this data for day to day challenges that we have in our communities and really say that these are as close to the numbers as we know that they are?

¹⁴³ Minutes of the Nevada Criminal Justice Information System Advisory Committee Meeting 2 (Oct. 6, 2011) [hereinafter *NCJIS Meeting Minutes 2011*], available at http://nvrepository.state.nv.us/Agendas/2011/NCJIS/2011-10-06_Minutes_NCJIS.pdf; see *Assemb. B. 66, 76th Leg., Reg. Sess. (Nev. 2011)*; *Assemb. B. 46, 75th Leg., Reg. Sess. (Nev. 2009)* (codified as amended at *NEV. REV. STAT. §§ 159.0593(1), 174.035(8), 175.533(3), 175.539(4), 178.425(6), 179A.163(1), 179A.165(1), 433A.310(4), (5) (2013)*).

¹⁴⁴ *NARIP Awards*, *supra* note 127.

¹⁴⁵ *Id.*

¹⁴⁶ *NCJIS Meeting Minutes 2011*, *supra* note 143, at 3.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

Julie Butler [Division Administrator, Department of Public Safety, General Services Division]:

That's a really good question. I don't know. We are at the mercy of the courts to report that to us. We're just the data dumping ground and the transmission mechanism to the . . . FBI NICS System. We are confident now that the courts know the responsibility to report to us, they have been made aware of it. We have done some outreach efforts and sending letters and phone calls but I don't know if we can ever say with certainty that we've got everybody. That's the ideal and that's the goal but we don't know what we don't know. If they don't report it we don't have it.¹⁴⁹

Despite Bonnie McCabe's optimism, it is not encouraging that courts have to call in to figure out how to submit a mental health record for inclusion in NICS more than three years after the law mandating it came into effect. Additionally, Julie Butler's remarks illustrate how a lack of designated accountability in a process leads to finger pointing, while at the same time making the valid point that court clerks and administrators play a crucial role in the record-sharing process. The meeting then turned to how the committee could confirm all qualifying mental health records were being submitted:

Senator Justin Jones [Nevada State Senator]:

Have you done any auditing of the courts to ensure, as the reporter had done in Clark and Washoe, to ensure the reporting is complete?

Bonnie McCabe [Supervisor of the Brady Unit]:

There would be no way I can audit the courts. I don't know what's on their side of it, what their procedure is. But looking at the form that you have, the submission form with the chart on it, this is how I can audit it. It's court by court and year by year.¹⁵⁰

Julie Butler [Division Administrator, Department of Public Safety, General Services Division]:

Is the AOC [Administrative Offices of the Courts] doing any sort of auditing process with the courts? Are you staffed to do that?

Scott Sosebee [Deputy Director for Information Technology, AOC]:

We're not, to my knowledge, staffed to do that or conducting a specific targeted audit on this specifically. . . .

. . . .

James Taylor [Deputy Chief, Gaming Control Board]:

Is there anything we can do if they fail? Is [sic] there any sanctions? Do we have any teeth here?

. . . .

¹⁴⁹ Minutes of the Advisory Committee on Nevada Criminal Justice Information System Meeting 8–9, 10 (Dec. 3, 2013) [hereinafter NCJIS Meeting Minutes 2013], available at http://nvrepository.state.nv.us/Agendas/2013/2013-12-03_Minutes_NCJIS.pdf.

¹⁵⁰ To view the referenced table that includes the number of mental health records provided by each of the ten Nevada District Courts, please see NEV. DEP'T OF PUB. SAFETY, MENTAL HEALTH SUBMISSIONS INTO THE NATIONAL INSTANT CRIMINAL BACKGROUND CHECK SYSTEM (NICS) 1–2 (2013), available at http://nvrepository.state.nv.us/Agendas/2013/2013-12-03_NCJISmeeting12032013Bonnie.pdf.

Julie Butler:

We do not. There were not any provisions or mechanisms in AB46 to sanction or otherwise discipline or what have you for failure to report. We do this with our annual crime in Nevada book, you just list who reports and who doesn't and that's about it.¹⁵¹

In other words, there is no auditing at the court level, no auditing at the Brady Unit depository level, and no way for the advisory committee to discipline or sanction either one for reporting failures.¹⁵² As the federal framework suffered from a lack of incentives, the state level suffers from a lack of accountability. Alarming, as a result, the current Nevada record-sharing system is just waiting for the next Cho or Sencion to fall through its cracks.

B. Nevada Reporting Failures

One such gap uncovered by a Reno Gazette-Journal (“RGJ”) Report in August of 2013, found that potentially thousands of qualifying mental health records had not been reported to NICS as required under state law.¹⁵³ In response to this RGJ report, the Chief Justice of the Nevada Supreme Court, Justice Kristina Pickering, ordered a statewide audit at each of the ten district courts.¹⁵⁴ The audit found 1,945 guardianship cases in which a person was adjudicated or committed as mentally ill but not reported to NICS.¹⁵⁵

A follow-up report by the RGJ investigated further into some of these cases and found that many of those who were not reported “were considered violent, including a woman who wanted to kill her daughter-in-law, a man arrested dozens of times for assaults and a student arrested twice this year for violence at school and once for attacking his mother.”¹⁵⁶ This led Washoe County Assistant Sheriff Marshall Emerson to comment that “[w]hen a person is not lawfully allowed to purchase a firearm and his name is not entered on a list that is designed to prevent a sale of a firearm to that person, that’s a concern for us in law enforcement and for public safety.”¹⁵⁷ Consequently, the following proposals are designed to ensure that every person prohibited from possessing firearms under the Gun Control Act is on the “list”—especially the individuals with mental illness who have been deemed dangerous.

¹⁵¹ NCJIS Meeting Minutes 2013, *supra* note 149, at 9, 11.

¹⁵² *Id.*

¹⁵³ Martha Bellisle, *Justice Orders Court Review*, RENO GAZETTE-J., Aug. 9, 2013, at 1A, available at <http://www.rgj.com/article/20130808/NEWS/308080056/>.

¹⁵⁴ *Id.*

¹⁵⁵ Martha Bellisle, *Review: 1,945 Cases Missed: Violent Offenders Among Those Left Off No-Gun Registry*, RENO GAZETTE-J., Nov. 13, 2013, at 1A, available at <http://www.rgj.com/article/20131112/NEWS/311120071/>.

¹⁵⁶ *Id.*

¹⁵⁷ Martha Bellisle, *Northern Nevada Courts Not Complying with Gun-Ban Notification on Mentally Ill*, RENO GAZETTE-J., Sept. 4, 2012, available at <http://www.rgj.com/article/20111127/NEWS01/109040001/>.

C. *Should Nevada Stay a POC State?*

The baseline question a state must ask when setting up its record-sharing system is how it will interact with NICS. Nevada is a full point of contact (“POC”) state, meaning that when a background check is conducted in Nevada the FFL contacts the Nevada Brady Unit directly, which then consults both state records and the federal NICS databases.¹⁵⁸ If a prohibiting record “hits,” then Nevada’s POC staff (The Brady Unit) must carry out the necessary additional research.¹⁵⁹ In non-POC states, on the other hand, FFLs directly contact NICS’s FBI staff, which then conducts a background check consulting only the federal databases.¹⁶⁰ If a record “hits,” NICS’s FBI staff performs the further research.¹⁶¹

In considering which approach is best, both the costs and the effectiveness of running the background check must be considered. With regard to costs, Nevada, as a POC state, charges twenty-five dollars per background check to maintain the Brady Unit’s Point of Sale Program including its salaries, benefits, and overhead.¹⁶² Often the cost of the maintaining the POC is not completely covered by the assessed fees, resulting in the state having to subsidize its costs.¹⁶³ In the end, the major disadvantage associated with being a POC state is increased cost due to the fact that the state is essentially duplicating the federal NICS system in many respects.

For non-POC states, however, the cost to run the background check is free, due to Congressional appropriations to the FBI that allow it to waive any fee.¹⁶⁴ Moreover, the state need not incur the expense of maintaining its own POC.¹⁶⁵ As a result, there has been internal pressure in states such as Georgia to reconsider their POC status to cut costs.¹⁶⁶ In response, Georgia asked the Bureau of Justice Statistics for help justifying their POC’s costs.¹⁶⁷ The Bureau then gave Structured Decisions Corporation a research grant to conduct a detailed study to determine “what value, if any, does state POC access to files unavailable to NICS add to the overall efficacy of firearm eligibility background checks, and

¹⁵⁸ See JAMES M. TIEN ET AL., STRUCTURED DECISIONS CORP., Doc. No. 222674, COST-BENEFIT OF POINT-OF-CONTACT (POC) VERSUS NON-POC FIREARM ELIGIBILITY BACKGROUND CHECKS, at ii, iii (2003), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/222674.pdf>.

¹⁵⁹ *Id.* at iii.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Brady Point of Sale Information*, NEV. DEP’T PUB. SAFETY, <http://www.nvrepository.state.nv.us/pos.shtml> (last visited May 24, 2015).

¹⁶³ TIEN ET AL., *supra* note 158, at iii.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

at what cost?”¹⁶⁸ The study, which compares federal NICS data and two POC states (Oregon and Georgia), explains:

- [O]ne can consider the state-only files [checked only by POC states] to add value if they enhance the likelihood of *denials* to those prospective firearm purchasers who should be denied. It is estimated that POCs are able to increase deniability by 19.5%, in comparison to non-POC denials. This *added benefit percent* is significant
- The costs of performing firearm eligibility background checks across the two state POCs and the non-POC states are derived in terms of a parameter S, the percent of total NICS costs that are common to all POC and non-POC checks Given these costs, one can also determine an *added benefit-cost percent* as a function of S, assuming an added benefit percent of 19.5%. For example, assuming a plausible S of 25%, the added benefit-cost percent is 27.8%, thus justifying the maintenance of POCs.¹⁶⁹

In other words, under the above parameters based off of POC states Georgia and Oregon, the greater number of denials produced by POC states checking their own records is cost effective as compared to the average costs of denials of non-POC states.

Given the above calculations, this added benefit-cost percent is greatest when the percentage of increased denials resulting from POCs also checking their own state records (added benefit percent) is high and the percent of total NICS costs that are common to all POC and non-POC checks S is low. Thus, it is possible that the added benefit-cost of Nevada being a POC may be less than that of Georgia and Oregon. For one, Oregon has five disqualifying misdemeanor conviction categories beyond the list of those federally prohibited from possessing firearms,¹⁷⁰ which presumably significantly increases its percentage of denials (added benefit percent). However, in Nevada the list of categories of prohibited persons is *less* stringent than its federal counterpart.¹⁷¹ For example, unlike federal law, Nevada does not prohibit those who have been convicted of domestic violence or who have restraining orders against them by their intimate partner or child of such partner.¹⁷² Consequently, any increase in the percentage

¹⁶⁸ *Id.* at iii, iv.

¹⁶⁹ *Id.* at iv, vi.

¹⁷⁰ *Id.* at 3–4; OR. REV. STAT. ANN. § 166.470 (West Supp. 2014).

¹⁷¹ *Compare* 18 U.S.C. § 922(d) (2012), *with* NEV. REV. STAT. § 202.362 (2013). Federal prohibitions include anyone who: (1) is an ex-felon; (2) is a fugitive from justice; (3) is an unlawful user of or addict to any controlled substance; (4) has been adjudicated as mentally defective or has been involuntarily committed to a mental institution; (5) is an illegal alien; (6) has been dishonorably discharged from the Armed Forces; (7) has renounced U.S. citizenship; (8) is the subject of a court order restraining them from harassing, stalking, or threatening an intimate partner or the child of such a partner; or (9) has been convicted of a misdemeanor crime of domestic violence. 18 U.S.C. § 922(d) (2012).

¹⁷² NEV. REV. STAT. § 202.362. Nevada prohibitions include anyone who: (1) has been convicted of a felony; (2) is a fugitive; (3) unlawfully uses, or is addicted to, a controlled substance; (4) has been adjudicated as mentally ill or has been committed to a mental health facility; or (5) is illegally or unlawfully in the United States. *Id.* Recently, however, Nevada

of denials (added benefit percent) would likely be less and largely the result of gaps in state reporting to NICS.

Ultimately, in order to truly know whether Nevada being a POC state is cost effective, a study should be conducted to determine Nevada's added benefit-cost percent.

D. Needed Statutory Reforms to Facilitate Greater Compliance

The correct state statutory structure is the next crucial aspect to effective NICS reporting. In fact, “[a]mong the ten states with the greatest increase in records submitted between August 31, 2010 and October 31, 2011, nine have laws . . . requiring or permitting the sharing of mental health data with NICS.”¹⁷³ However, all mental health reporting laws are not created equal. The three following potential reforms will help ensure that Nevada's statutory framework is properly designed to prevent those who have been adjudicated or committed mental ill from obtaining firearms: (1) expanding the definition of “committed to a mental institution,” (2) modifying the record-sharing laws to require reporting within five days of the person being adjudicated mentally ill, and (3) adding an auditing system to increase accountability.

1. Expanding the Definition of “Committed to a Mental Institution”

State definitions of “committed to a mental institution” revolve around three main types of commitments: (1) involuntary inpatient commitment, (2) involuntary outpatient commitment, and (3) voluntary inpatient or outpatient commitment.¹⁷⁴ Federal law and every state addressing mental health record reporting, including Nevada, require that individuals involuntarily committed for inpatient care at a mental institution be reported to NICS.¹⁷⁵ Fortunately, Nevada is also among the eighteen states that specifically mandate the reporting of certain individuals involuntarily ordered to receive outpatient mental

Senate Bill 175, which prohibits those who have been convicted of domestic violence from possessing firearms, was unanimously approved by a Senate committee. S.B. 175, 78th Leg., Reg. Sess. (Nev. 2015); see also Sean Whaley, *Nevada Gun Bill Makes It Illegal for Domestic Violence Convicts to Own Guns*, LAS VEGAS REV.-J., Mar. 14, 2015, at 3B, available at <http://www.reviewjournal.com/news/nevada-legislature/nevada-gun-bill-makes-it-illegal-domestic-violence-convicts-own-guns>.

¹⁷³ MAYORS AGAINST ILLEGAL GUNS, *supra* note 133, at 15.

¹⁷⁴ See *Mental Health Reporting Policy Summary*, LAW CENTER TO PREVENT GUN VIOLENCE (Sept. 16, 2013), <http://smartgunlaws.org/mental-health-reporting-policy-summary>. Note also that:

In the 113th Congress, Senator Lindsey Graham introduced S. 480, the NICS Reporting Improvement Act of 2013, that would revise 18 U.S.C. 922(g)(4) to replace references to “mental defective” with “mentally incompetent” and “mental institution” with “psychiatric hospital.” The bill would also expressly define the type of hearings that qualify for purposes of being “adjudicated mentally incompetent or . . . committed to a psychiatric hospital.”

LIU ET AL., *supra* note 37, at 2 n. 6 (alteration in original). However, a full discussion of the nature and effects of these amendments is beyond the scope of this note.

¹⁷⁵ *Mental Health Reporting Policy Summary*, *supra* note 174.

health treatment.¹⁷⁶ Such a law in Virginia at the time of the Virginia Tech tragedy may have been able to prevent Cho from obtaining his two handguns.¹⁷⁷

However, unlike other states, Nevada has not required voluntary outpatients (e.g., those that periodically see a psychiatrist of their own free will and choice) or voluntary inpatients (e.g., those that decide to commit themselves to a mental health facility) to be reported to NICS in *any circumstances*.¹⁷⁸ Although not all voluntary patients should be reported, Nevada should statutorily recognize two exceptions to this general rule that have been promulgated in other states.

First, in California:

[I]f a person communicates to a licensed psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims, the psychotherapist must report the person to local law enforcement, which must in turn report the person to the California Department of Justice for the purposes of firearm purchaser background checks.¹⁷⁹

This reporting is required “even though the patient has consented to that treatment.”¹⁸⁰ This law should be adopted in Nevada because a specific threat creates such a compelling risk to the public that it outweighs the right to bear arms and privacy interest of the person with the mental illness.

Second, in Florida, a person that voluntarily commits himself to a mental institution and is subjected to an involuntary examination¹⁸¹ by a judge’s order may still be reported to NICS if the following four criteria are met:

- (A) An examining physician f[inds] that the person is an imminent danger to himself or herself or others.
- (B) The examining physician certifie[s] that if the person did not agree to voluntary treatment, a petition for involuntary outpatient or inpatient treatment would have been filed . . . or the examining physician certifie[s] that a petition was filed and the person subsequently agreed to voluntary treatment prior to a court hearing on the petition.
- (C) Before agreeing to voluntary treatment, the person receive[s] written notice of that finding and certification, and written notice that as a result of such finding, he or she may be prohibited from purchasing a firearm, and may not be eligible to apply for or retain a concealed weapon or firearms license . . . and the person acknowledged such notice in writing

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*; see CAL. WELF. & INST. CODE §§ 8100, 8105 (West Supp. 2015). As of 2014, the person is prohibited from possessing any firearms whatsoever for five years, unless that person petitions the court for restoration of firearms eligibility sooner. *Id.* § 8100(b)(1), (3). Similarly, in 2013, Tennessee enacted a law requiring mental health professionals to report to law enforcement. TENN. CODE ANN. § 33-3-210 (West Supp. 2015).

¹⁸⁰ CAL. WELF. & INST. CODE § 8100(a).

¹⁸¹ See FLA. STAT. ANN. § 394.463 (West 2011).

(D) A judge or a magistrate . . . review[s] the record of the finding, certification, notice, and written acknowledgment classifying the person as an imminent danger to himself or herself or others, and order[s] that such record be submitted to the department.¹⁸²

In other words, Florida prevents individuals who know they will likely be committed as mentally ill from simply saying they will go willingly so that they retain their gun rights by not being reported to NICS. The notice requirement counteracts any resulting due process concerns, and the finding and certification requirements ensure that not all those who voluntarily commit themselves and broke no laws will still retain their gun rights. Accordingly, Nevada should act to close this glaring loophole in its current statutory framework.

Ultimately, both laws should be enacted in Nevada as important caveats to the general exclusion of reporting to NICS those that voluntary commit themselves to a mental institution.

2. *The Five-Day Reporting Requirement*

Existing Nevada law, as noted above, requires the courts to transmit to the Central Repository for Nevada Records of Criminal History certain mental health records for inclusion in NICS.¹⁸³ However, it fails to identify when these records must be sent, meaning that currently the courts have an indefinite period of time in which to comply. Thus, when the Supervisor of the Brady Unit, Bonnie McCabe, was asked when courts are reporting the prohibiting mental health records to the repository, she responded, “[t]hat all depends on the court.”¹⁸⁴ To fix this problem, a bill was introduced in 2013 to amend the Nevada statutes involving reporting of those adjudicated or committed as mentally ill, and to require courts to make mandated reports within five business days of adjudicating a person mentally ill.¹⁸⁵ Yet, it was vetoed by Governor Brian Sandoval because the bill also required background checks for private gun sales, including gun shows.¹⁸⁶

Ultimately then, the five-day reporting requirement should be reintroduced so it can be passed and signed into law. Although of immense importance, the major battle to close the biggest loophole in the background check system—the fact they are not required for private gun purchases—should be left for another

¹⁸² FLA. STAT. ANN. § 790.065(2)(A)(4)(b)(II)(A)–(D) (West Supp. 2015).

¹⁸³ See sources cited *supra* notes 135–40 and accompanying text (describing situations in which Nevada law requires NICS reporting in cases of mental illness).

¹⁸⁴ NCJIS Meeting Minutes 2013, *supra* note 149, at 11.

¹⁸⁵ S.B. 221, 75th Leg., Reg. Sess. (Nev. 2013).

¹⁸⁶ David Phillips, *Gov. Sandoval Says No to Nevadans, Vetoes Background Checks on Gun Sales*, EXAMINER.COM (June 13, 2013, 4:00 PM), <http://www.examiner.com/article/gov-sandoval-says-no-to-nevadans-vetoes-background-checks-on-gun-sales>. The Governor vetoed the bill even though a poll indicated that 86 percent of Nevadans are in favor of backgrounds checks, even for private gun sales. *Id.*

day so as not to stand in the way of other necessary improvements.¹⁸⁷ Ultimately, requiring the records to be reported within five business days would create greater uniformity and consistency amongst the courts' reporting processes and help ensure that it is done in a timely manner.

3. *Auditing to Increase Accountability*

As discussed above, there is a lack of accountability in the current Nevada record-sharing process. The logical solution to a lack of accountability is to codify an auditing system that has teeth. The utility of audits was proven when, in just one month, an internal audit of Nevada's courts—mandated by the Nevada Supreme Court in response to the RGJ report—was able to produce 2,092 of the 3,043 total mental health records that Nevada has submitted to NICS to date.¹⁸⁸ This audit was only conducted in relation to guardianship mental health determinations.¹⁸⁹ Who knows if thousands of other names have also fallen through the cracks in other areas?

Consequently, all Nevada courts that make mental health determinations should be required to routinely conduct an internal audit of their NICS reporting compliance. An external spot check audit should then be periodically conducted by the Brady Unit to ensure that the courts are complying with Nevada record-sharing statutes. If problems are discovered, the Nevada Criminal Justice Information System ("NCJIS") Advisory Committee should have the authority to sanction the court and demand any necessary procedural or administrative corrections.¹⁹⁰ This measurement of performance will increase accountability and thus accelerate NICS reporting improvement.

E. *Implementation of Helpful Procedural and Administrative Techniques*

Not all reporting improvements need be statutory. Sometimes simple procedural or administrative changes can make all the difference. An exploration of techniques used by other states reveals several ideas that could help Nevada

¹⁸⁷ Currently, the most devastating and potentially dangerous gap in the background system is that approximately forty percent of U.S. gun sales are conducted by unlicensed private sellers that are not required to conduct background checks under federal and most states laws. See PHILIP J. COOK & JENS LUDWIG, NAT'L INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, GUNS IN AMERICA: NATIONAL SURVEY ON PRIVATE OWNERSHIP AND USE OF FIREARMS 5–6 (1997), available at <http://www.ncjrs.gov/pdffiles/165476.pdf>. Unfortunately, a full discussion of this loophole is beyond the scope of this note. Instead, the focus is on how to improve the effectiveness of background checks used during the sixty percent of guns sales conducted by FFLs. *Id.* at 6. After all, the utility of requiring additional background checks for private sales is diminished if those background checks are unreliable in keeping guns out of the hands of the Gun Control Act's list of "prohibited persons."

¹⁸⁸ NEV. DEP'T OF PUB. SAFETY, *supra* note 150.

¹⁸⁹ See Bellisle, *supra* note 155.

¹⁹⁰ A member of the NCJIS Advisory Committee asked at its meeting if the committee had any type of teeth in the form of sanctions to ensure reporting compliance. NCJIS Meeting Minutes 2013, *supra* note 149, at 11. He was told currently the committee did not. *Id.*

streamline its record-sharing process. Although only techniques from three states—Connecticut, Texas, and Virginia—will be discussed below due to their particular relevance, Nevada should continually communicate with other states through conferences and other events to find out what they are doing to improve their NICS reporting and vice versa.

1. *Connecticut: Visual Flow Charts*

In Connecticut, to foster a shared understanding across departments about where records reside and how they are transmitted to the NICS Index, “business analysts developed flow charts that document current ‘as is’ business processes from local to state to federal levels.”¹⁹¹ This would clearly be helpful in Nevada since the Supervisor of the Brady Unit, Bonnie McCabe, noted she could not audit the courts since she did not “know what’s on their side of it, what their procedure is.”¹⁹² The professional creation of visual flow charts would help her and other clerks and administrators to identify gaps, increase cross-organizational understanding, and clarify processes involving multiple steps.¹⁹³ In turn, the number of records submitted will likely increase.

2. *Texas: Training & Outreach with Court Clerks*

Texas recognized that their court clerks were having trouble determining which records should be sent to the repository for inclusion in the NICS Index.¹⁹⁴ As the RGJ report discovered, Nevada clerks clearly had the same problem because they failed to report an entire category of those adjudicated as mentally ill—those produced in the guardianship context.¹⁹⁵ To resolve this problem, Texas instituted an intensive clerk record-sharing training program.¹⁹⁶ This strategy significantly increased the number of records reported.¹⁹⁷ Consequently, Nevada’s Brady Unit should be given the means to, among other things, train court clerks in person or by telephone, create a manual outlining NICS mental health reporting requirements, craft a list of frequently asked questions, and create newsletters to keep clerks up to date. A few reminder letters—the apparent current extent of Nevada clerk “training”—are insufficient.¹⁹⁸

¹⁹¹ *Promising Practices for Improved Record Reporting: Using Visual Flow Charts to Document “As Is” Data Flow*, BUREAU JUST. STAT., <http://www.bjs.gov/content/pub/pdf/practices/Connecticut.pdf> (last visited May 24, 2015) [hereinafter *Visual Flow Charts*].

¹⁹² NCJIS Meeting Minutes 2013, *supra* note 149, at 9.

¹⁹³ *Visual Flow Charts*, *supra* note 191.

¹⁹⁴ *Promising Practices for Improved Record Reporting: Conducting Training & Outreach with Court Clerks*, BUREAU JUST. STAT., <http://www.bjs.gov/content/pub/pdf/practices/Texas.pdf> (last visited May 24, 2015) [hereinafter *Conducting Training*].

¹⁹⁵ See Bellisle, *supra* note 155.

¹⁹⁶ *Conducting Training*, *supra* note 194.

¹⁹⁷ *Id.*

¹⁹⁸ See NCJIS Meeting Minutes 2013, *supra* note 149, at 10.

3. *Virginia: Automate Record Transfer to the Brady Unit*

Virginia is using NARIP funding to install infrastructure at all of its district courts that will automate the record transfer from the courts to the repository.¹⁹⁹ Such a process can be designed to impose quality control and thus increase the availability and accuracy of records.²⁰⁰ It also increases efficiency by reducing the extensive time commitment that manual entry requires.²⁰¹ Ultimately, establishing a similar infrastructure should be Nevada's goal.

F. *Possible Sources of Nevada Funding*

Each of the above reforms requires funds to implement and maintain. Thus, in taking the initiative to comply with the Brady Act, states should utilize the resources the federal government is already providing. This includes participating in NIAA trainings, attending national NIAA conferences, and, importantly, taking advantage of the offered grants.²⁰² There are four main ways Nevada can fund the above reforms: (1) NARIP grants, (2) NCHIP grants, (3) revenue from fees paid for background checks and concealed weapons permits, and (4) general state tax funds.

First, as discussed above, Nevada has already received three NICS Act Record Improvement Program Grants in 2009, 2013, and 2014 for a total amount of \$1,157,409.²⁰³ Thus far it has been used to enhance infrastructure, digitize fingerprints, and fund a NARIP task force. Nevada should continue to draft proposals and apply for these funds on a yearly basis to continue to improve its reporting infrastructure.

Second, National Criminal History Improvement Program grants are offered to "states seeking to improve the collection and distribution of criminal history record information used in a wide range of criminal justice and non-criminal justice background check systems."²⁰⁴ Therefore, unlike NARIP grants, which must only be used for NICS reporting improvement, NCHIP grants may be dedicated to other purposes as well.²⁰⁵ Conveniently, since many of the same systems are utilized to report mental health records and criminal history records to NICS, Nevada can use these grants for a variety of beneficial NICS purposes.

Third, Nevada could generate money by charging fees to conduct background checks or to obtain a concealed weapon permit. For example, Georgia

¹⁹⁹ *Promising Practices for Improved Record Reporting: Automate Mental Health Record Transfer to Repository*, BUREAU JUST. STAT, <http://www.bjs.gov/content/pub/pdf/practices/Virginia.pdf> (last visited May 24, 2015).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² GAO, GUN CONTROL, *supra* note 104, at 15–18.

²⁰³ *NARIP Awards*, *supra* note 127.

²⁰⁴ MAYORS AGAINST ILLEGAL GUNS, *supra* note 133, at 18.

²⁰⁵ *Id.*

started such a program and it now provides roughly a third of the funds necessary to support its record-sharing system.²⁰⁶ Furthermore, Kentucky has “already adopted the practice of allocating \$10 of each \$60 concealed carry permit application or renewal fee to the state courts to fund background checks.”²⁰⁷

Finally, Nevada could dip into its general state tax funds. Of course, it would be ideal for the background check to be self-sustaining through grants and fees to gun users. However, often times grant funds are low and fees only trickle in gradually. Thus, Nevada may consider fronting the money to make some of the significant changes, such as automating NICS reporting, needed to make its record-sharing process more efficient.

Thus far, Nevada appears to be doing an adequate job at obtaining federal grant money. Hopefully, in the future, Nevada will continue on this path and consider implementing fees and utilizing state tax funds as needed to verify that mental health records are being reported.

CONCLUSION

BREAKING NEWS: A recent study finds that since states have begun successfully reporting those adjudicated or involuntarily committed as mentally ill to NICS, thousands of violent people with mental illness have been denied legal access to firearms, and mass shootings have declined in frequency.

The ultimate goal of this note is to make the preceding headline a reality. Nevada must do its part to ensure that those who have been adjudicated or committed as a person with a mental illness are prevented from accessing guns by implementing the reforms suggested above. Fortunately, it is likely that many of the proposed Nevada reporting improvements would receive broad community and political support. A recent national poll found that 80 percent of Americans are in favor of preventing those with a mental illness from purchasing guns—the ultimate goal of NICS.²⁰⁸ Therefore, it is up to every lawmaker, administrator, and court to make Nevada NICS reporting a state priority and improvement a demonstrable reality. In this way, Nevada can ensure that the mentally ill who may kill do not go unreported still.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ PEW RESEARCH CTR., *supra* note 84.