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CONCEALED FIREARM LICENSING AND THE NEED FOR EXPANDED DISCRETION IN THE USE OF CRIMINAL RECORDS

INTRODUCTION

In 2015, Richard Idrovo possessed a license to carry a concealed firearm in Illinois for less than two years¹ before he murdered his girlfriend and turned the gun on himself inside of a busy business in Chicago's downtown "Loop" area.² Idrovo held a lawful concealed carry permit despite his history of domestic violence.³ The Illinois State Police conducted a background check in perfect accordance with the law, but Idrovo's criminal records from the mid-1990s did not show up through the normal channels; no warning signs emerged, so nobody objected.⁴ Unfortunately, this situation is not unique to Illinois.⁵ In the year 2000, the Los Angeles Times published a study finding that hundreds of criminals, including felons, were licensed to carry a concealed firearm in Texas.⁶ Although society cannot predict who will commit heinous crimes using a lawfully licensed firearm, we can limit those with violent pasts from gaining access to firearms in the first place.⁷

A variety of entities other than the criminal justice system now utilize criminal history record⁸ searches.⁹ The inescapable reality of mod-

1. Illinois began accepting applications for concealed carry licenses in January of 2014, less than two years before the murder-suicide in August 2015. Press Release, Ill. State Police, Illinois State Police Release Concealed Carry License Application Numbers (Jan. 7, 2014), <http://www.isp.state.il.us/media/pressdetails.cfm?ID=776>.

2. *See 2 Dead in Murder-Suicide at Chicago Loop Business*, ABC7 CHI. (Aug. 14, 2015), <http://abc7chicago.com/news/2-shot-to-death-inside-loop-loan-store/930752/>.

3. *Editorial: Concealed Gun Law Allowing Questionable People to Carry*, CHI. SUN-TIMES (Aug. 27, 2015, 7:05 PM), <http://chicago.suntimes.com/opinion/editorial-concealed-gun-law-allowing-questionable-people-to-carry/> [hereinafter *Editorial: Concealed Gun Law*].

4. *Id.*

5. William C. Rempel & Richard A. Serrano, *Felons Get Concealed Gun Licenses Under Bush's 'Tough' Law*, L.A. TIMES (Oct. 3, 2000), <http://articles.latimes.com/2000/oct/03/news/mn-30319>.

6. *Id.*

7. Thirty-nine states require a license before an individual is legally allowed to carry a firearm in public. *Concealed Weapons Permitting*, LAW CTR. TO PREVENT GUN VIOLENCE, <http://smartgunlaws.org/concealed-weapons-permitting-policy-summary/#state> (last visited Jan. 7, 2017).

8. Federal law defines "criminal history records" as "information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, in-

ern society is that individuals can now expect that a criminal records check will be used to evaluate them for noncriminal justice purposes throughout their lifetime.¹⁰ Eligibility for both government and private employment, government licensing, and public assistance often hinge on the results of a background check.¹¹ Such is the case particularly in the context of regulating firearm ownership.¹² All fifty states allow individuals to carry a loaded firearm in public,¹³ but as of 2017 only thirty-nine states actively regulate the activity.¹⁴

In July 2013, the Seventh Circuit Court of Appeals issued a mandate ordering the state of Illinois to adopt legislation permitting the concealed carriage of firearms in public,¹⁵ making Illinois the final state in the union to legalize the activity.¹⁶ Illinois, wishing to maintain strict control over the proliferation of handguns in public, constructed a permitting scheme that scrupulously examines each applicant. The scheme requires the Illinois State Police to conduct a criminal background check on every applicant,¹⁷ and the scheme allows for local law enforcement's discretionary input during licensing determinations.¹⁸ Local law enforcement officials, however, have raised policy concerns with Illinois' concealed carry licensing program.¹⁹ Cook County Sheriff Tom Dart expressly advocated for

cluding acquittal, sentencing, correctional supervision, or release" 42 U.S.C. § 14616(b)(4)(A) (2012).

9. See James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 177-78 (2008).

10. Federal law defines "noncriminal justice purposes" as "uses of criminal history records for purposes authorized by Federal or State law other than purposes relating to criminal justice activities, including employment suitability, licensing determinations, immigration and naturalization matters, and national security clearances." 42 U.S.C. § 14616(b)(18).

11. Federal, state, and local governments often mandate a background check for certain positions of public employment and occupational licensing. See, e.g., 225 ILL. COMP. STAT. 46/5 (2014) ("The General Assembly finds that it is in the public interest to protect the . . . citizens of the State of Illinois from possible harm through a criminal background check of certain health care workers . . .").

12. The Brady Handgun Violence Prevention Act mandated all federally licensed firearm dealers conduct a background check on transferees before finalizing the transfer. Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended at 18 U.S.C. § 922 (2012)); see also *National Instant Criminal Background Check System (NICS)*, FBI, <https://www.fbi.gov/about-us/cjis/nics> (last visited Jan. 9, 2017).

13. *Concealed Weapons Permitting*, *supra* note 7.

14. *Id.*

15. 702 F.3d 933, 942 (7th Cir. 2012).

16. Mary Ann Ahern & Lauren Petty, *Illinois Becomes Last State to Approve Concealed Carry*, NBC CHI. (July 9, 2013), <http://www.nbcchicago.com/blogs/ward-room/springfield-show-down-concealed-carry-quinn-214723811.html>.

17. 430 ILL. COMP. STAT. 66/25 (2014).

18. *Id.* § 15.

19. See *Dart: Concealed Carry Approval Process Flawed*, ABC7 CHI. (Dec. 17, 2013, 3:34 PM), <http://abc7chicago.com/archive/9363967/>; see also Rich Miller, *No Excuse for this Loop-*

changes to the Illinois Firearm Concealed Carry Act²⁰ that would allow law enforcement agencies access to the Law Enforcement Agency Database System (LEADS) while evaluating concealed firearm applications.²¹ Federal law, however, prohibits the use of criminal records similar to those available in LEADS for noncriminal justice purposes like concealed carry licensing.²² Under current law, state licensing bodies may only consider criminal records with “positive identification”—records verified by fingerprints—in conjunction with the licensing determination.²³

This Comment argues in favor of an exception for concealed firearm licensing to the federal requirements that criminal justice records must be supported by positive identification when used in the context of noncriminal justice purposes. This exception would manifest through state and federal recognition of the unique nature of concealed firearm licensing and the states’ interest in unfettered access to the full range of criminal history records related to prospective concealed firearm licensees.

Part II discusses the federal databases used for storing, searching, and disseminating criminal records, as well as the regulations restricting the use of these databases. Part II focuses on the rationale behind these regulations, including how the regulations impact state laws and practices, particularly Illinois’ concealed firearms licensing framework.²⁴ Part III contends that federal regulations should be amended to make way for the permissive use of criminal records not based on positive identification during concealed carry licensing determinations by the states, and further analyzes the public policy implications of limiting the background check systems through which law enforcement may access an applicant’s criminal history records and use the records as foundation for their objection to, or denial of, a concealed firearm permit.²⁵ Part IV discusses the implications of these reforms on the actual process of administering a concealed firearm program and its associated costs.²⁶ Part V of this Comment concludes by offer-

hole, CAPITOL FAX (Aug. 28, 2015), <http://capitolfax.com/2015/08/28/no-excuse-for-this-loophole/>.

20. 430 ILL. COMP. STAT. 66/1–999 (2014).

21. See *Dart*, *supra* note 19.

22. 28 C.F.R. § 20.33 (2016) (showing that there is no provision allowing use of criminal history for concealed carry licensing). The regulation applies to all government licensing purposes. *Id.* This Comment discusses the distinguishing features between concealed carry licensing and the majority of other regulated activities.

23. See *infra* note 62 and accompanying text.

24. See *infra* notes 28–165 and accompanying text.

25. See *infra* notes 166–233 and accompanying text.

26. See *infra* notes 234–55 and accompanying text.

ing suggestions as to how interested parties can reconcile these reforms to achieve mutually beneficial results.²⁷

II. BACKGROUND

Each state maintains a criminal record repository responsible for collecting and centralizing criminal record data.²⁸ Criminal justice agencies within each jurisdiction generate criminal records through policing, investigations, and general operations.²⁹ The collected data includes fingerprints, arrests records, criminal charges, and dispositions.³⁰ In 1967, the federal government launched the National Crime Information Center (NCIC) to serve as an “electronic clearinghouse of crime data.”³¹ The state repositories serve as the main source of data for the NCIC.³² Criminal justice agencies around the country may access the entire NCIC database, twenty-four hours a day, 365 days a year, in exchange for providing and maintaining the criminal records data.³³ The criminal justice agency that created the record is responsible for the entry, modification, and removal of records; the federal government merely serves as the custodian of the computer network and NCIC files.³⁴ By 2014, NCIC contained approximately twelve million records.³⁵

Similarly, the federal government developed the Integrated Automated Fingerprint Identification System (IAFIS), which assembles fingerprint data sourced by each state.³⁶ Today, IAFIS is the largest

27. See *infra* note 254 and accompanying text.

28. U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 13 (2006), https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf.

29. *Id.*

30. Jacobs & Crepet, *supra* note 9, at 180.

31. *National Crime Information Center (NCIC)*, FBI, <https://www.fbi.gov/services/cjis/ncic> (last visited Jan. 9, 2017).

32. U.S. DEP’T OF JUSTICE, *supra* note 28, at 13.

33. *National Crime Information Center*, *supra* note 31.

34. *Id.*

35. *Id.* The NCIC database consists of several components housing files of many different natures:

The NCIC database currently consists of 21 files. There are seven property files containing records of stolen articles, boats, guns, license plates, parts, securities, and vehicles. There are 14 persons files, including: Supervised Release; National Sex Offender Registry; Foreign Fugitive; Immigration Violator; Missing Person; Protection Order; Unidentified Person; Protective Interest; Gang; Known or Appropriately Suspected Terrorist; Wanted Person; Identity Theft; Violent Person; and National Instant Criminal Background Check System (NICS) Denied Transaction.

Id.

36. U.S. DEP’T OF JUSTICE, *supra* note 28, at 14.

single biometric database in the world.³⁷ IAFIS stores digital, high-resolution images of both paper fingerprint cards³⁸ and “live-scanned” records.³⁹ As with the other shared databases, nearly every criminal justice organization in the country has constant access to data contained in IAFIS.⁴⁰

The Federal Bureau of Investigation maintains the Interstate Identification Index (III), an index of criminal history records of federal and state offenders.⁴¹ The III is called a “pointer-system” because it allows the FBI “to direct [criminal records] searchers to the states containing records on the subject of the search . . . and allows searchers to obtain this information directly from the state repository where the information is located.”⁴² In effect, the III allows criminal justice agencies to quickly and efficiently determine if a particular individual has a criminal record anywhere in the country.⁴³ The III includes identification data such as name, birth date, race, sex, and fingerprint records.⁴⁴ The III also cross-references and groups data created by multiple states regarding the same individual.⁴⁵ Every record indexed in the III is associated with a fingerprint submission to IAFIS.⁴⁶

Finally, the FBI maintains the National Instant Criminal Background Check System (NICS), to “instantly determine whether a prospective buyer [of a firearm] is eligible to buy firearms.”⁴⁷ Almost every firearm transfer is first subject to a name check through NICS.⁴⁸ This section discusses the findings regarding the reliability of criminal

37. *Privacy Impact Assessment Integrated Automated Fingerprint Identification System (IAFIS)/Next Generation Identification (NGI) Biometric Interoperability*, FBI, <https://www.fbi.gov/services/records-management/foipa/privacy-impact-assessments/iafis-ngi-biometric-interoperability> (last visited Jan. 9, 2017) [hereinafter *Privacy Impact Assessment*].

38. This process involves the “ink stain” method by which the subject transfers an imprint of their fingerprints onto a paper card. U.S. DEP’T OF JUSTICE, *supra* note 28, at 92.

39. *Id.* at 14. The “live-scanned” method means “the original fingerprint is collected on a machine that captures the fingerprint image digitally, without the involvement of paper prints.” *Id.*

40. *Privacy Impact Assessment, supra* note 37.

41. U.S. DEP’T OF JUSTICE, *supra* note 28, at 15.

42. Jacobs & Crepet, *supra* note 9, at 182.

43. NAT’L TASK FORCE ON INTERSTATE IDENTIFICATION INDEX NAME CHECK EFFICACY, INTERSTATE IDENTIFICATION INDEX NAME CHECK EFFICACY: REPORT OF THE NATIONAL TASK FORCE TO THE U.S. ATTORNEY GENERAL 21 (1999), www.bjs.gov/content/pub/pdf/iiince.pdf [hereinafter NAT’L TASK FORCE].

44. *Id.*

45. U.S. DEP’T OF JUSTICE, *supra* note 28, at 15.

46. *Id.* The III requires a complete set of ten rolled fingerprints (one for each finger). *Id.* at 15–16.

47. *National Instant Criminal Background Check System, supra* note 12. More than two hundred million checks have been conducted through the NICS system since its creation in 1998. *Id.*

48. The Brady Handgun Violence Prevention Act mandates all federally licensed firearm dealers to conduct a background check on transferees before finalizing the transfer. 18 U.S.C.

records searches, efforts to maximize that reliability, and the constitutionality of concealed firearm regulations. It concludes by explaining the scheme Illinois employs to conduct background checks and make the determination whether to issue or deny a concealed firearm license.

A. *Reliability of Criminal Records Searches*

Criminal records in the III may be accessed by two methods: name checks and fingerprint searches.⁴⁹ Name checks may be conducted by utilizing any of the personal identifiers stored by the III such as birth date, race, sex, Social Security Number, and the subject's name.⁵⁰ The drawback of name-based searches is the degree of inaccuracy in the results.⁵¹ The National Task Force on Interstate Identification Index Efficacy issued a study of error rates in background checks for Florida employment or occupational licensing, public housing, and volunteer applicants between October 1998 and January 1999.⁵² The study had two error types: "false negatives," which incorrectly indicate the subject of the search does not have a criminal record, and conversely "false positives," which incorrectly associate a subject with a criminal record.⁵³ The study found that III name checks returned false negatives in 11.7% of all applicants with a verified criminal background (1.3% of total searches) and false positives in 5.5% of all applications without a criminal background (4.9% of total searches).⁵⁴ Fingerprint searches, on the other hand, compare the biometric data of the fingerprint files and are believed to produce a more reliable and true result.⁵⁵ The study does not report its findings as to the accuracy of fingerprint searches, but it suggests they could be 94% to 98% accurate.⁵⁶ The study also suggests newer computerized fingerprint systems may reach 99% to 99.5% accuracy.⁵⁷ The federal government responded to the concern of inaccurate criminal records with policies creating onerous restrictions on the use of all criminal records.

§ 922 (2012). Section 922(g)(1) was held unconstitutional as applied in *Binderup v. Attorney Gen. U.S.*, 836 F.3d 336 (3d Cir. 2016), *petition for cert. filed*, No. 16-983 (U.S. Feb. 6, 2017).

49. NAT'L TASK FORCE, *supra* note 43, at 21–22.

50. *Id.* at 21.

51. *Id.* at 21–22.

52. *Id.* at 3.

53. *Id.* at 22.

54. *Id.* at 6–7. The study reported that 1252 out of 10,673 positively identified files were returned as false negatives (1.3% of all 93,274 applicants in the study).

55. NAT'L TASK FORCE, *supra* note 43, at 22.

56. *Id.*

57. *Id.* at 22 n.4.

B. *The National Crime Prevention and Privacy Compact*

In October of 1998, President Clinton signed into law the National Crime Prevention and Privacy Compact (the “Compact”).⁵⁸ The Compact created the legal framework for a reciprocal interstate infrastructure through which the federal government and states can request and exchange criminal records for noncriminal justice purposes.⁵⁹ The Compact requires criminal records for use with non-criminal justice purposes to be based on “positive identification” techniques.⁶⁰ “Positive Identification” is defined as a “determination, based upon a comparison of fingerprints or other equally reliable biometric identification techniques, that the subject of a record search is the same person as the subject of a criminal history record or records indexed in the III System.”⁶¹ The technique relied upon most commonly is fingerprint comparison.⁶² Therefore, a criminal history records search is considered to satisfy “positive identification” once verified against a fingerprint record.⁶³ A record is not based on positive identification when the identification is “based solely upon a comparison of subjects’ names or other non-unique identification characteristics or numbers, or combinations thereof”⁶⁴

The Department of Justice maintains, as a matter of policy, that fingerprint-confirmed searches are more desirable than the alternative name-based search method.⁶⁵ The Compact and related federal regulations promote this policy by generally limiting name checks of the III to criminal justice purposes.⁶⁶ Federal law defines “criminal justice” to include “activities relating to the detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders.”⁶⁷ The policy of limiting name checks to criminal justice purposes aims to reduce the dual risk of false positives and false

58. Pub. L. No. 105-251, tit. II, § 127, 112 Stat. 1870, 1876 (codified at 42 U.S.C. § 14616 (2012)).

59. 42 U.S.C. § 14616(a).

60. U.S. DEP’T OF JUSTICE, *supra* note 28, at 3–5.

61. 42 U.S.C. § 14616(b)(20).

62. *Id.* The fingerprint comparison is the gold standard of positive identification techniques because it is the only method explicitly approved by the Compact. “Positive identification” is also achievable by “equally reliable biometric identification techniques,” though the Compact does not define what such an “equally reliable” technique may be. *Id.*

63. *Id.*

64. *Id.*

65. A recent report by former United States Attorney General Alberto Gonzalez made this position clear. See U.S. DEP’T OF JUSTICE, *supra* note 28, at 26.

66. *Id.* at 16.

67. 42 U.S.C. § 14616(b)(6).

negatives in noncriminal justice purposes while allowing law enforcement to quickly assess an individual's criminal history in situations where time is of the essence.⁶⁸ In effect, the policy "balances the need for expediency with the added risk that the name-based search will result in a false positive or false negative match."⁶⁹ Name checks may also be used for noncriminal justice purposes so long as the record is considered to have been positively identified.⁷⁰ Name checks of records supported by positive identification will most typically be used during investigations regarding "employment suitability, licensing determinations, immigration and naturalization matters, and national security clearances."⁷¹ The policies implemented through the Compact have helped reduce inaccuracy in the national system, but small flaws in the system's design remain, and the potential for errors still exists.

C. *Right to Correct a Criminal Record*

Federal regulations place additional burdens on a noncriminal justice agency attempting to use criminal records in a noncriminal justice context.⁷² Federal regulations require that a noncriminal justice agency making a licensing determination must allow an applicant the opportunity to correct the record before the agency makes the final determination.⁷³ This right reflects the broad policy goal of ensuring that criminal records are as complete and accurate as possible.⁷⁴ The subject of a criminal record may submit a request to correct the record through the FBI, and the FBI will direct the request to the originating agency⁷⁵ or state.⁷⁶ States generally maintain more complete files than the federal government.⁷⁷ For example, roughly fifty percent of the FBI-maintained records contain information about the disposition of the underlying criminal charge, compared with between seventy and eighty percent of state records.⁷⁸

68. U.S. DEP'T OF JUSTICE, *supra* note 28, at 26.

69. *Id.*

70. *Id.*; see also NAT'L TASK FORCE, *supra* note 43, at 21.

71. 42 U.S.C. § 14616(b)(18).

72. 28 C.F.R. § 50.12(b) (2016).

73. *Id.* (referencing 28 C.F.R. § 16.34 (2016)).

74. "This policy is intended to ensure that all relevant criminal record information is made available to provide for the public safety and, further, to protect the interests of the prospective employee/licensee who may be affected by the information or lack of information in an identification record." 28 C.F.R. § 50.12(b).

75. 28 C.F.R. § 16.34.

76. See, e.g., *Updating an Existing Criminal History Record*, WASH. ST. PATROL, <http://www.wsp.wa.gov/crime/chupdates.htm#compromised> (last visited Jan. 15, 2017).

77. U.S. DEP'T OF JUSTICE, *supra* note 28, at 27.

78. *Id.*

D. *Constitutionality of Concealed Carry Regulations*

Between 1939 and 2008, the U.S. Supreme Court decision of *United States v. Miller*⁷⁹ controlled the general understanding of Second Amendment protections.⁸⁰ In *Miller*, the Court held that the constitutional right to possess a weapon is protected only so long as it has “some reasonable relationship to the preservation or efficiency of a well regulated militia”⁸¹ In 2008, *District of Columbia v. Heller*⁸² expanded that understanding and held that the Second Amendment protected the right to possess a firearm for the purpose of self-defense.⁸³ The holding in *Heller* was explicitly limited to self-defense inside your home.⁸⁴ Two years later in *McDonald v. City of Chicago*,⁸⁵ the Court held that the Second Amendment is applicable to the states.⁸⁶ Together, the Court established a new line of Second Amendment jurisprudence expanding the scope of how courts interpret and apply the Second Amendment; however, these limited decisions did not address the issue of whether the Second Amendment protected the right to possess a firearm outside the confines of the home.⁸⁷

Soon after *Heller*, the Circuit Courts of Appeals began to address the constitutionality of heightened statutory restrictions for the issuance of concealed carry licenses.⁸⁸ The Circuits are currently split as to whether the Second Amendment protections extend beyond the home.⁸⁹ Four of the five circuit courts to address this issue have held heightened requirements such as “good cause” or “justifiable need”

79. 307 U.S. 174 (1939).

80. *Id.* at 178.

81. *Id.*

82. 554 U.S. 570 (2008).

83. *Id.* at 635.

84. *Id.* (“[T]he District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”).

85. 561 U.S. 742 (2010).

86. *Id.* at 750.

87. Justine E. Johnson-Makuch, Note, *Statutory Restrictions on Concealed Carry: A Five-Circuit Shoot-Out*, 83 *FORDHAM L. REV.* 2757, 2766–67 (2015).

88. *Peruta v. Cty. of San Diego*, 824 F.3d 919, 927 (9th Cir. 2016) (en banc), *rev’g* 742 F.3d 1144 (9th Cir. 2014); *Drake v. Filko*, 724 F.3d 426, 428 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 868 (4th Cir. 2013); *Peterson v. Martinez*, 707 F.3d 1197, 1201 (10th Cir. 2013); *Moore v. Madigan*, 702 F.3d 933, 934 (7th Cir. 2012); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 83 (2d Cir. 2012); *United States v. Marzarella*, 614 F.3d 85, 87 (3d Cir. 2010).

89. Johnson-Makuch, *supra* note 87, at 2775.

are constitutionally permissible restrictions on the right to carry a firearm in public.⁹⁰

In *United States v. Marzzarella*,⁹¹ the Third Circuit Court of Appeals interpreted *Heller* to require a two-prong test when analyzing Second Amendment challenges: (1) whether the challenged law burdens conduct falling within the scope of the Second Amendment, and if it does, (2) whether the law survives some form of means-end scrutiny.⁹² Courts typically apply one of three levels of means-end scrutiny when reviewing cases concerning regulation of the Second Amendment: rational-basis review, intermediate scrutiny, or strict scrutiny.⁹³ The *Heller* decision explicitly forbids the use of the rational-basis test when evaluating regulations of the Second Amendment.⁹⁴ In *Heller*, the Supreme Court also noted that the opinion “should not 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.”⁹⁵ The Court noted that this list is not exhaustive.⁹⁶

Prior close analysis of the circuit split suggests that courts tend to rely on intermediate scrutiny when determining the constitutionality of regulations restricting the right to carry a firearm in public.⁹⁷ If courts apply intermediate scrutiny to regulations of the Second Amendment, the issue becomes whether a regulation is justified by a “significant, substantial, or important” state interest with a “reasonable fit between that asserted interest and the challenged law.”⁹⁸ Courts generally agree the states have “undoubtedly, a significant,

90. *Id.* at 2784–91. While the focus of this Comment does not seek to resolve the dispute among the circuits, a discussion of the split does lend itself to this Comment’s general proposition that states have a strong interest in regulating concealed carry licensing.

91. 614 F.3d 85.

92. *Id.* at 89. The first prong of the *Marzzarella* test is outside the scope of this Comment, so instead the Comment follows the analysis of the courts in *Drake*, 724 F.3d at 430, and *Woollard*, 712 F.3d at 876, and proceeds directly to the means-end analysis. For a thorough discussion as to whether the protections of the Second Amendment extend beyond the home, see generally Johnson-Makuch, *supra* note 87.

93. *Drake*, 724 F.3d at 435.

94. *District of Columbia v. Heller*, 554 U.S. 570, 628 n.27. Outside of this footnote, the Court purposefully avoided determining the issue of which level of scrutiny would apply. *Id.* at 634–35.

95. *Id.* at 626–27.

96. *Id.* at 627 n.26 (suggesting the Second Amendment allows for the regulation of firearms based on individualized factors such as prior criminal history).

97. Johnson-Makuch, *supra* note 87, at 2781.

98. *Drake*, 724 F.3d at 436.

substantial and important interest in protecting its citizens' safety."⁹⁹ Not all courts agree, however, as to the extent that states may restrict the Second Amendment to satisfy that interest.

E. Illinois' Concealed Carry Statute

In December 2012, the Seventh Circuit applied the *Heller* and *McDonald* frameworks and declared Illinois' wholesale ban on the right to carry a firearm in public unconstitutional for violating the right to self-protection outside the home.¹⁰⁰ In doing so, the court struck down Illinois' statutes for Unlawful Use of Weapons (UW)¹⁰¹ and Aggravated Unlawful Use of Weapons (AUW),¹⁰² both of which criminalized carrying a loaded firearm in public outside of the home.¹⁰³ The court stayed its mandate for 180 days to allow the Illinois General Assembly to develop a program that allowed for lawful possession of a concealed firearm in public consistent with its opinion.¹⁰⁴ Illinois did not appeal the decision to the Supreme Court, so as a federal matter, the issue is closed.

On the state level, in *Illinois v. Aguilar*,¹⁰⁵ the Illinois Supreme Court affirmed a lower court's opinion and also declared both the Illinois UW and AUW statute unconstitutional.¹⁰⁶ In response to the federal and state decisions, the Illinois General Assembly enacted a plan on the final day of the Spring Legislative Session.¹⁰⁷ Governor Pat Quinn issued an Amendatory Veto,¹⁰⁸ which in turn, the General Assembly promptly overrode.¹⁰⁹ The Veto Override, however, came

99. *Id.* at 437 (citing *United States v. Salerno*, 481 U.S. 739, 755 (1987)).

100. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

101. 720 ILL. COMP. STAT. 5/24-1 (2012) (amended 2015), *prior version invalidated by Moore*, 702 F.3d at 942. For concealed carry purposes, this statute criminalized to "knowingly . . . carr[y] or possess[] in any vehicle or concealed on or about his person . . . any pistol, revolver, stun gun or taser or other firearm," except in limited prescribed circumstances. *Id.* § 24-1(a)(4).

102. 720 ILL. COMP. STAT. 5/24-1.6 (2012), *invalidated by Moore*, 702 F.3d at 942.

103. *Moore*, 702 F.3d at 942.

104. *Id.*

105. 2013 IL 112116, 2 N.E.3d 321.

106. *Id.* ¶ 22.

107. See H.B. 183, 98th Gen. Assemb., Reg. Sess. (Ill. 2013). The Illinois General Assembly regular session runs from early January until May 31st of each year. See ILL. HOUSE OF REPRESENTATIVES, 100TH GENERAL ASSEMBLY SPRING SESSION SCHEDULE (2017), http://www.ilga.gov/house/schedules/2017_Session_Calendar.pdf.

108. *Governor's Message to the Honorable Members of the Illinois House of Representatives, 98th General Assembly*, ILL. GEN. ASSEMBLY (July 2, 2013), <http://ilga.gov/legislation/fulltext.asp?DocName=09800HB0183gms&GA=98&SessionId=85&DocTypeId=HB&LegID=69231&DocNum=183&GAID=12&Session=>

109. See *Bill Status of HB0183, 98th Gen. Assembly*, ILL. GEN. ASSEMBLY, <http://ilga.gov/legislation/billstatus.asp?DocNum=183&GAID=12&GA=98&Doc>

after the 180-day stay of the *Moore* decision had expired.¹¹⁰ The Illinois General Assembly left the law unclear as to what form of protections the Second Amendment provided citizens to carry in public for one month in between the expiration of the stay and the date the new act took effect.

The product of the General Assembly's plan was the Firearm Concealed Carry Act (the "Act"),¹¹¹ which implemented Illinois' first statute regulating the lawful carry of a concealed firearm in public. The Act stipulates a number of minimum requirements each applicant must satisfy in order to qualify for a conceal carry license.¹¹² These requirements include that the applicant (1) is at least twenty-one years of age; (2) has a currently valid Firearm Owner's Identification Card (FOID); (3) has not been convicted of "a misdemeanor involving the use or threat of physical force or violence . . . within the [five] years preceding the date of the license application; or [two] or more violations [of] driving while under the influence;" (4) is not the subject of a pending arrest warrant; (5) has not been in residual or court-ordered treatment for alcoholism or drug abuse; and (6) has completed the prescribed firearms training component.¹¹³

The application for a FOID Card can be accessed through the same website and portal as the concealed carry license, but the two remain separate endorsements.¹¹⁴ As such, applicants may qualify for a FOID Card but not qualify for the concealed carry permit.¹¹⁵

All final applications are then submitted to the Illinois State Police.¹¹⁶ From there, the State Police conduct a comprehensive background check of each applicant.¹¹⁷ The criminal background check is

TypeID=HB&LegID=69231&SessionID=85 (last visited Jan. 16, 2017) [hereinafter *Bill Status of HB0183*].

110. The court stayed its decision for 180 days beginning December 11, 2012, making Illinois' UUW and AUW statutes unenforceable on and after June 9, 2013. See *Moore*, 702 F.3d at 942. The General Assembly did not override the Governor's Amendatory Veto until July 9, 2013. *Bill Status of HB0183*, *supra* note 109.

111. 430 ILL. COMP. STAT. 66/1-999 (2014).

112. *Id.* § 25.

113. *Id.*

114. *Id.* The Illinois State Police has created a single webpage through which applicants can file each application, but it remains two distinct applications. Press Release, Ill. State Police, Officials Aim to Modernize and Expedite Licensing Process for Efficiency (Mar. 6, 2015), <http://www.isp.state.il.us/media/pressdetails.cfm?ID=837>.

115. For example, the concealed carry license requirements disqualify an applicant with two convictions for driving under the influence, whereas as the Firearm Owners Identification Card requirements do not. Compare 430 ILL. COMP. STAT. 66/25 (2014), with 430 ILL. COMP. STAT. 65/8 (2014).

116. 430 ILL. COMP. STAT. 66/10, 66/30.

117. *Id.* § 35.

conducted through a series of state and federal databases including the NICS mental health reporting databases,¹¹⁸ and “all other available records . . . likely to contain information relevant” to an applicant’s qualification to possess a firearm in public.¹¹⁹ If a background check concludes that an applicant is ineligible based on one of the factors listed above,¹²⁰ the State Police must deny the applicant a license.¹²¹ However, the Act provides that if an applicant’s background check is free of disqualifying results, any law enforcement agency—typically a County Sheriff or the municipal police department of the applicant’s current or recent hometown¹²²—may submit an objection to the applicant being issued a license.¹²³

The Act provides two justifications for which a law enforcement agency may object to an application.¹²⁴ First, an objection may be based “upon a reasonable suspicion that the applicant is a danger to himself or herself or others, or a threat to public safety.”¹²⁵ “‘Reasonable suspicion’ means more than a mere suspicion, but less than prima facie proof.”¹²⁶ The Act does not impose further limitations or thresholds on such an objection other than to require the objecting agency to provide “any information relevant to the objection.”¹²⁷ Second, the State Police must object when an applicant has five or more arrests, for any reason, within the seven years preceding the application, or has three or more arrests within the seven years preceding the application for “any combination of gang-related offenses”¹²⁸

118. One of the primary databases maintained by the state is the Illinois Department of Human Services’ Firearm Owner’s Identification (FOID) Mental Health Reporting System, which allows “mandated [mental health] reporters . . . [the ability] to report an individual that is receiving mental health treatment or is determined to be a clear or present danger.” *Illinois Firearm Owners Identification (FOID) Mental Health Reporting System*, ILL. DEP’T HUM. SERVS. (Oct. 25, 2015), <http://www.dhs.state.il.us/page.aspx?item=37393> (last visited Jan. 16, 2017).

119. 430 ILL. COMP. STAT. 66/35.

120. *Id.* § 25.

121. *Id.* § 10(f).

122. The Act provides that the State Police shall maintain a database of all applications, and the database must be accessible and searchable to all federal, state, and local law enforcement agencies, State’s Attorneys, and the Attorney General. *Id.* § 10(i). From this database, local law enforcement is able to search for all applications filed by residents within its jurisdiction and can compare it to relevant internal records for objectionable history. *Id.*

123. *Id.* § 15(a).

124. *Id.* § 15(a)–(b).

125. 430 ILL. COMP. STAT. 66/15(a).

126. Peter Petrou, Note, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822, 825 (1984).

127. 430 ILL. COMP. STAT. 66/10(a).

128. *Id.* § 15(b). All arrests must have been entered into the Criminal History Records Information (CHRI) System. *Id.*

Upon passing all necessary background checks, the Illinois State Police must issue the applicant a license to carry a concealed firearm where no objection is filed and the applicant is deemed eligible.¹²⁹ It should be noted that the Illinois State Police is the only agency bound by statute to object if it determines any of the proscribed disqualifying criteria are satisfied.¹³⁰ Local law enforcement agencies have no such affirmative obligation, though they are certainly free to exercise their discretionary authority to file an objection to any application.¹³¹

Some local law enforcement agencies have expressed displeasure with the tools they are allowed to use in determining whether to object based on an applicant's criminal background.¹³² For example, Cook County Sheriff Tom Dart believes his department cannot properly make a determination of public safety based on the background check services statutorily allowed.¹³³ Dart suggests granting law enforcement permission to access LEADS for the purposes of evaluating concealed firearm applicants.¹³⁴ State and federal law jointly prohibit the use of LEADS for any licensing purpose because some of the data available through LEADS derives from criminal records not based on positive identification.¹³⁵ Illinois cannot unilaterally grant permission in light of the federal requirements.

The Illinois State Police operates and maintains the Illinois LEADS database.¹³⁶ LEADS allows certified operators access to Computerized Hot Files which contain criminal history records, Illinois Secretary of State data (e.g., motor vehicle registrations and licensed drivers' information), the FBI's National Crime Information Center (NCIC), and the International Justice and Public Safety Network.¹³⁷ LEADS is only available to criminal justice agencies within Illinois, and these agencies constantly update old records and add new records.¹³⁸ Information that is unique to LEADS includes records re-

129. *Id.* § 10(a).

130. *Id.*

131. *See id.*

132. *Editorial: Concealed Gun Law, supra* note 3.

133. *Id.*

134. *Id.*

135. "Law enforcement officials who wish to raise an objection to an FCCL applicant shall not use LEADS to run background checks to determine FCCL eligibility." ILL. ADMIN. CODE tit. 20, § 1231.70(a) (2016).

136. *Id.* § 1240.10(a).

137. ILL. INTEGRATED JUSTICE INFO. SYS., LAW ENFORCEMENT AGENCIES DATA SYSTEM 1 (2002), www.icjia.state.il.us/ijjis/public/word/SJIS/SJIS_LEADS.doc; *see also* ILL. STATE POLICE, PREPARING TO APPLY FOR LEADS 2000 ACCESS 1 (2013), <http://www.isp.state.il.us/docs/9-056.pdf>.

138. ILL. INTEGRATED JUSTICE INFO. SYSTEM, *supra* note 137, at 1.

garding missing persons, wanted persons, gang membership or affiliations, orders of protection, and FOID holders.¹³⁹ As will be discussed below, Illinois restricts the use of LEADS to maintain compliance with federal regulations.

Illinois regulations reflect federal regulations by first requiring users to satisfy the federal regulatory definition of a “criminal justice agency.”¹⁴⁰ As a government licensing purpose, investigations into a concealed carry applicant’s background do not satisfy a “criminal justice purpose.”¹⁴¹ As such, Illinois and federal law prohibit law enforcement agencies from accessing LEADS for concealed firearm application purposes.¹⁴² A collateral result of this constriction is that law enforcement agencies are statutorily prohibited from using information obtained from a LEADS name-check as the foundation of an objection or even to further support an otherwise freely standing objection.¹⁴³

1. *Concealed Carry Licensing Review Board*

The Act established the Concealed Carry Licensing Review Board (the “Board”) to review and issue a final decision on all applications subject to a law enforcement objection.¹⁴⁴ The Governor appoints seven commissioners to the Board, each with varying legal and medical expertise.¹⁴⁵ The Board’s directive is to review each application in light of the objection(s), review the relevant evidence, and make a determination as to whether the objection should be sustained or

139. *Id.* at 4. Some of this information is available through the NCIC, but that information only relates to criminal history files originating out of state. *Id.* Similar information stored the LEADS Computerized Hot Files is the main source of information derived by Illinois criminal justice agencies. *Id.* at 2–3.

140. “The candidate organization must be a criminal justice agency as defined in the U.S. Department of Justice Regulations on Criminal Justice Information Systems (28 CFR 20, Subpart A)” ILL. ADMIN. CODE tit. 20, § 1240.30(c)(1)(A).

141. *See* 42 U.S.C. § 14616(b)(6) (2012).

142. ILL. ADMIN. CODE tit. 20, § 1231.70(a). To an even greater extent, Illinois forbids the use of LEADS data for other agencies’ licensing decisions as well. For example, the Illinois Department of Children and Family Services (DCFS) is prohibited from using LEADS in licensing decisions for childcare providers. ILL. DEP’T OF CHILDREN & FAMILY SERVS., ADMINISTRATIVE PROCEDURE #6: USE OF THE LAW ENFORCEMENT AGENCY DATABASE SYSTEM (LEADS) 7 (2009), https://www.illinois.gov/dcf/aboutus/notices/Documents/administrative_procedure_6.pdf.

143. ILL. ADMIN. CODE tit. 20, § 1231.70(a).

144. 430 ILL. COMP. STAT. 66/20(a) (2016).

145. Of the seven commissioners, the Board must consist of (1) a former federal judge, (2) two attorneys with experience in the United States Department of Justice, (3) three federal agents or employees with criminal justice investigative experience, and (4) one licensed physician or clinical psychologist with experience in diagnosis or treatment of mental illness. *Id.* All commissioners must have at least five years of experience in their respective qualifying roles. *Id.*

overruled.¹⁴⁶ The Board's primary determination is whether the applicant "poses a danger to himself or herself or others, or is a threat to public safety."¹⁴⁷ The Act provides that the Board's operative standard of review is "by a preponderance of the evidence."¹⁴⁸ Therefore, the Board may only sustain a law enforcement objection if it finds that the applicant is more likely than not to pose a danger to himself or herself or others, or is a threat to public safety.¹⁴⁹ Absent this showing, the Board must overrule the objection and instruct the State Police to issue the license.¹⁵⁰ Each applicant denied a license is granted an automatic right to administrative and judicial review.¹⁵¹

2. *Constitutionality of the Illinois Firearm Concealed Carry Act*

Courts have addressed the constitutional validity of the Board's function and role within Illinois' concealed firearm licensing framework.¹⁵² The plaintiffs in *Bolton v. Bryant*¹⁵³ and *DeServi v. Bryant*¹⁵⁴ challenged the validity of the Act, claiming that it denied procedural due process rights conferred by the Second and Fourteenth Amendments.¹⁵⁵ Both courts denied the defendant's motion to dismiss and held the respective plaintiffs sufficiently alleged a claim for violation of procedural due process.¹⁵⁶ Perhaps anticipating impending constitutional invalidity, the Illinois State Police adopted emergency administrative rules creating new notice requirements for applicants under review by the Board.¹⁵⁷ These emergency amendments required the Board to send notice to the applicant regarding the nature of the objection, as well as the date, time, and location of the hearing.¹⁵⁸ These emergency regulations were only activated if the objections "appears

146. *Id.* § 20(e).

147. *Id.* § 20(g).

148. *Id.*

149. *Id.*

150. 430 ILL. COMP. STAT. 66/20(g).

151. *Id.* § 10(f).

152. See generally *Berron v. Ill. Concealed Carry Licensing Review Bd.*, No. 14-CV-2839, 2015 WL 1275834 (N.D. Ill. Mar. 16, 2015); *Bolton v. Bryant*, 71 F. Supp. 3d 802 (N.D. Ill. 2014); *DeServi v. Bryant*, 70 F. Supp. 3d 921 (N.D. Ill. 2014).

153. 71 F. Supp. 3d 802.

154. 70 F. Supp. 3d 921.

155. *Bolton*, 71 F. Supp. 3d at 813; *DeServi*, 70 F. Supp. 3d at 927.

156. *Bolton*, 71 F. Supp. 3d at 812-13; *DeServi*, 70 F. Supp. 3d at 925-27.

157. ILL. ADMIN. CODE tit. 20, § 1231.230 (2014) (emergency amendment), <http://www.isp.state.il.us/docs/FirearmsActEmergencyRules.pdf>; see Press Release, Ill. State Police, Illinois State Police Post Emergency Rules to Address Statutory Framework of the Firearm Concealed Carry Act (July 14, 2014), <http://www.isp.state.il.us/media/pressdetails.cfm?ID=810>. Emergency rules may be in effect for a maximum of 150 days. ILL. ADMIN. CODE tit. 1, §100.640 (2016).

158. ILL. ADMIN. CODE tit. 20, § 2900.140(d) (2016).

sustainable on its face or in light of any information the [Board] has obtained.”¹⁵⁹ Shortly thereafter, and as a result of the enactment of these emergency rules, the federal District Court for the Northern District of Illinois rejected a procedural due process challenge similar to those previously cited.¹⁶⁰ The Board continues to operate as presumptively constitutional.

Tensions boiled over after an Illinois concealed carry license holder was involved in a murder-suicide inside of a downtown Chicago business.¹⁶¹ Richard Idrovo possessed a valid concealed carry license despite his criminal record history, which included a past order of protection against him, an arrest for violation of an order of protection, and an arrest for misdemeanor assault.¹⁶² Idrovo was not statutorily prohibited from obtaining a concealed firearm permit because those incidents occurred outside of the five-year period preceding his application.¹⁶³ Nevertheless, the Cook County Sheriff contends that access to LEADS would have alerted law enforcement to Idrovo’s criminal background and could have served as a basis for an objection to his application.¹⁶⁴ Law enforcement agencies were blind to Idrovo’s complete criminal history record without access to the information located exclusively in LEADS, and without that access no law enforcement agencies had reason to object to his application.

Federal regulations do not allow criminal justice agencies to use criminal records generated through everyday policing if those records are not supported by fingerprint-based “positive identification” techniques.¹⁶⁵ In the case of concealed firearm licensing schemes, this creates a hole in the overall criminal history background of applicants. This Comment argues in favor of changes to the polices that bridge this coverage gap.

III. ANALYSIS

The regulations restricting the use of certain criminal records for noncriminal justice purposes are well intended, but in practice, and when applied to concealed firearm licensing, these regulations appear

159. *Id.* § 2900.140(e). It logically follows that the Board is not required to notify applicants of every objection if it determines the objection is not likely to result in the denial of the application.

160. *Berron v. Ill. Concealed Carry Licensing Review Bd.*, No. 14-CV-2839, 2015 WL 1275834, at *6 (N.D. Ill 2015).

161. *See 2 Dead in Murder-Suicide at Chicago Loop Business*, *supra* note 2.

162. *Editorial: Concealed Gun Law*, *supra* note 3.

163. *Id.*; *see* 430 ILL. COMP. STAT. 66/25(3) (2014).

164. *Editorial: Concealed Gun Law*, *supra* note 3.

165. *See supra* notes 58–71 and accompanying text.

to be shortsighted.¹⁶⁶ Under certain conditions, reforming these regulations will allow concealed firearm licensing authorities greater access to pertinent criminal data without sacrificing the individual's right to privacy.¹⁶⁷ This Part argues that privacy standards can be maintained through the use of intermediary administrative review boards like the Illinois Concealed Carry Licensing Review Board. Next, this Part contends that allowing criminal records not verified by positive identification will improve public safety in light of the structural deficiencies of the national criminal records databases. Finally, this Part suggests methods by which to amend the regulations and justifications for those particular vehicles.

A. *Maintaining Privacy Standards*

The 1998 Report of the National Task Force on Interstate Identification Index Name Check Efficacy examined the issues relevant to the United States Attorney General's position on restrictive use of criminal records not supported by positive identification.¹⁶⁸ The Attorney General's privacy concerns at the time primarily revolved around the use of criminal records for private employment decisions; concealed firearm licensing was generally not a focus on which that position is centered or justified.¹⁶⁹ While the privacy implications at stake in concealed firearm licensing are not less significant than those of private employment, the risk of erroneous harm to the individual, in government licensing context, is mitigated by the availability of administrative and judicial review of government action.¹⁷⁰ A central focus of the Attorney General's report was on the societal risk of haphazardly allowing the use of criminal records in private employment decisions.¹⁷¹ This risk is twofold: (1) adverse employment determinations based on false positives reported to an employer, and (2) the lack of a fair opportunity for the subject to correct the record.¹⁷² As the Attorney General correctly observed, "Individuals have a strong interest in ensuring that fair information practices are followed when employers and other organizations obtain and use criminal history information to screen a person for employment or volunteer suitability."¹⁷³

166. Miller, *supra* note 19.

167. The federal regulations in question are, generally, found in 28 C.F.R. § 20.

168. U.S. DEP'T OF JUSTICE, *supra* note 28, at 25.

169. *See id.* at 10.

170. 430 ILL. COMP. STAT. 66/87 (2014).

171. U.S. DEP'T OF JUSTICE, *supra* note 28, at 107–08.

172. *Id.*

173. *Id.* at 1.

Concealed firearm licensing determinations are not subject to the same risk and finality as that of unjustified rejections of private employment. In Illinois, for example, applications under objection by a law enforcement agency are sent directly to the Concealed Carry Licensing Review Board.¹⁷⁴ The Board notifies the applicant of the objection and gives the applicant an opportunity to present new evidence to correct the record or suggest that the Board should overrule the objection despite the evidence provided by law enforcement.¹⁷⁵ Illinois structured the review process anticipating the same concerns raised by the Attorney General (i.e., the risks of false positive background checks and fairness).¹⁷⁶ The review process requires notification of the applicant, a request for additional materials relevant to the nature of the objection, and a potential for the applicant to even offer live testimony before the Board.¹⁷⁷ If an applicant is denied a license by final decision of the Board, the aggrieved applicant may then petition the courts for judicial review of the administrative decision.¹⁷⁸ The risk of an erroneous deprivation based on a false positive criminal background check result is accounted for and mitigated by the multiple procedural mechanisms in the Illinois licensing scheme.¹⁷⁹ In the recent federal litigation of *Moustakas v. Margolis*,¹⁸⁰ the court found that with additional involvement of the applicant under Illinois' licensing system, "the risk of erroneous deprivation" is low because the process allows for layers of review and potential involvement of the applicant.¹⁸¹ Considering as much, this Comment argues that national regulatory policies that do not account for local mitigation of risk unduly restrict a state from exercising its authority over matters implicitly reserved to its control.¹⁸²

One troubling aspect of this position is that the acceptance of a certain degree of false positives would likely act as a de facto burden shifting mechanism.¹⁸³ Illinois is a "shall issue" state, meaning that the state may not refuse to issue a license to an applicant who satisfies

174. 430 ILL. COMP. STAT. 66/20(a).

175. ILL. ADMIN. CODE tit. 20, § 2900.140 (2016).

176. See *supra* notes 152–56 and accompanying text.

177. ILL. ADMIN. CODE tit. 20, § 2900.140.

178. 430 ILL. COMP. STAT. 66/87(a).

179. Such an argument would lend itself to a procedural due process claim, but it would not account for both pre- and post-deprivation procedures built into the concealed carry licensing scheme.

180. 154 F. Supp. 3d 719 (N.D. Ill. 2016).

181. *Id.* at 730.

182. U.S. CONST. amend. X.

183. "De facto" is defined as "actual; existing in fact; having effect even though not formally or legally recognized." *De Facto*, BLACK'S LAW DICTIONARY (10th ed. 2014).

all of the prescribed qualifications.¹⁸⁴ This, of course, is a legal fallacy; the mere allowance for subjective law enforcement objection after the applicant satisfies the objective statutory requirements makes Illinois a “limited discretion shall issue” state.¹⁸⁵ To further understand this issue, it is helpful to apply familiar tort law principles to this analysis; “but-for”¹⁸⁶ the law enforcement agency’s objection, the applicant would not be in the position of defending his or her application before the Board. The Board is limited in what it may consider when reviewing an objection: information submitted by (1) the Illinois State Police; (2) a law enforcement agency; and (3) the applicant.¹⁸⁷ As the Illinois Firearm Concealed Carry Act stands, the initial burden on a law enforcement agency is extremely low.¹⁸⁸ The standard of “based upon a reasonable suspicion” is in effect a burden shifting mechanism¹⁸⁹—once the state satisfies its burden of establishing a reasonable suspicion, the burden shifts from the state to the applicant to provide evidence sufficient to overcome the state’s objection.¹⁹⁰

Notwithstanding, the concern of burden shifting should not overcome this Comment’s argument in favor of expanding the scope of access to criminal records for concealed firearm licensing determinations. Burden shifting is a foreseeable impact of a simultaneous increase in local law enforcement participation and the access to criminal records, but the net benefits from a positive impact on public safety—most significantly reduced gun violence and fewer overall occurrences of firearm discharge in public—greatly outweighs the burden on any one citizen.

To this point, one commentator has offered insightful perspective through an analysis of the use of local law enforcement in New

184. 430 ILL. COMP. STAT. 66/10(a) (2014).

185. *Concealed Weapons Permitting*, *supra* note 7.

186. “But-for test” is defined as “[t]he doctrine that causation exists only when the result would not have occurred without the party’s conduct.” *But-For Test*, BLACK’S LAW DICTIONARY (10th ed. 2014).

187. 430 ILL. COMP. STAT. 66/20(e). The statute does not restrict the applicant in what they may submit in order to appeal the Board’s decision.

188. *Id.* A law enforcement agency may object based on a “reasonable suspicion” that the applicant poses a danger, *id.* § 15(a), but the Board operates on a “preponderance of the evidence” standard. *Id.* § 20(g).

189. *See* Petrou *supra* note 126, at 825 (demonstrating how another statute using “reasonable suspicion” is in fact a burden shifting measure).

190. The Board will notify the applicant of the objection and invite them to submit evidence in support of their application. ILL. ADMIN. CODE tit. 20, § 2900.140(d) (2016). The most direct reform to address this concern would be to raise the threshold over which a law enforcement agency may file an objection or to raise the Board’s standard of proof beyond a “preponderance of the evidence,” but this is merely offered as a remark secondary to the overarching theme of this Comment.

Jersey's concealed carry firearm process.¹⁹¹ The author believed that resting the exclusive licensing authority in local law enforcement posed a significant threat to applicants' interests in a fair review of applications. Fairly so, the primary drawbacks of local input are the potential for abuse and a wide degree of variation in the application process based on the locale of the applicant.¹⁹² On the other hand, a process that lacks local input would degrade the ability to "screen out unstable or 'trouble prone' individuals."¹⁹³ The complete absence of local input would put public safety in jeopardy because "[t]he same rationale . . . which supports background checks for criminal convictions and psychological problems serves to justify some local input to reduce the possibility that as-yet-unconvicted troublemakers will be issued permits."¹⁹⁴

If we accept that local law enforcement has an important role in the practice of firearm licensing, then we should also recognize its unique position to fairly offer evidence otherwise restricted from consideration in other licensing determinations.¹⁹⁵ Concealed firearm licensing is different than almost every other noncriminal justice purpose for which a background check is required because law enforcement is the entity charged with overseeing its implementation in most of the states that regulate the activity; Midwestern states like Indiana, Iowa, Minnesota, and Missouri all require citizens to file concealed firearm applications with their chief local law enforcement officer, usually the County Sheriff.¹⁹⁶ Even more so, Illinois requires law enforcement to conduct only one variety of licensing—firearms.¹⁹⁷

Indications that concealed firearm licensing is a unique function of law enforcement are also apparent in the Attorney General's Report.¹⁹⁸ The Attorney General expressed that "many law enforcement agencies do not believe that the capture and submission of high volumes of fingerprints for civil employment and licensing purposes is

191. John C. Lenzen, Note, *Liberalizing the Concealed Carry of Handguns by Qualified Civilians: The Case for "Carry Reform,"* 47 RUTGERS L. REV. 1503, 1552–53 (1995).

192. *Id.*

193. *Id.* at 1552.

194. *Id.*

195. Law enforcement does not have an equal role in similar government licensing determinations other than to serve as a custodian of criminal records. See U.S. DEP'T OF JUSTICE, *supra* note 28, at 113.

196. IND. CODE §§ 35-47-2-1 to -6, 35-47-6-1, 35-47-6-1.3, 35-47-9-1, 35-47-9-2 (2016); IOWA CODE §§ 724.4, 724.4B, 724.7-.13 (2016); MINN. STAT. § 624.714 (2016); MO. REV. STAT. § 571.101 (2016).

197. This includes issuing Firearm Owners Identification Cards and Concealed Carry Licensing.

198. See U.S. DEP'T OF JUSTICE, *supra* note 28, at 117.

related to their law enforcement mission.”¹⁹⁹ For most licensing functions, law enforcement is merely a point of access for fingerprinting acquisition and storage;²⁰⁰ however, in many states, the role of concealed firearm licensing is exclusively within the purview of law enforcement agencies.²⁰¹ In this context, law enforcement agencies are responsible for every step in the chain—from fingerprinting and conducting background checks to the final determination regarding each applicant, law enforcement agencies are traditionally the only administrative body involved in the process. It serves a much greater function in concealed firearm licensing that merely serving as a point of access for fingerprint searches. This unique nature of concealed firearm licensing is enough to distinguish it from other governmental licensing functions such as professional licensure or issuing a Driver’s License. Despite the unique nature of law enforcement’s role in this particular noncriminal justice context, states can minimize risks of false positives by scaling back the exclusive authority of local law enforcement and raising the burden on the state.²⁰²

A state should be allowed to employ the use of criminal records not based on positive identification so long as it simultaneously employs procedural safeguards designed to reduce the negative effects of false positives. These procedural safeguards should only apply to subjective determinations like an objection based on a reasonable suspicion. They would not apply to objective determinations based on statutes mandating automatic disqualification. States that wish to grant access to more criminal records could mirror those procedures employed in Illinois, including automatic review by an administrative body²⁰³ and the applicant’s right to supplement an application with additional information to be considered along with all relevant materials.²⁰⁴ These recommended safeguards would promote the reliability of final licensing determination more efficiently than procedures employed by other states. Missouri, for example, requires all appeals to go directly to a circuit court of the state system for review on the judge’s small claims docket.²⁰⁵ The tens of thousands of applications filed every year would flood courts and waste valuable judicial resources.

199. *Id.*

200. *Id.*

201. *See supra* note 196 and accompanying text.

202. Lenzen, *supra* note 191, at 1552.

203. 430 ILL. COMP. STAT. 55/15(f) (2014).

204. ILL. ADMIN. CODE tit. 20, § 2900.140(e) (2016).

205. MO. REV. STAT. §§ 571.114, 571.300, 571.482. (2016).

B. Structural Flaws in the National Reporting Systems and How the Positive Identification Requirement Perpetuates the Problem

“No single source exists that provides complete and up-to-date information about a person’s criminal history.”²⁰⁶ Major flaws exist throughout the network of databases that make up our national criminal background check system.²⁰⁷ Even though large investments into system upgrades have led to smarter, faster, and more accurate databases,²⁰⁸ the patchwork nature of the NCIC, III, and NICS tends to leave much wanted by way of completeness.²⁰⁹ This is, in part, because not all criminal records are submitted to the III.²¹⁰ First, the states are primarily responsible for determining their initial reporting requirements and then actually reporting criminal records to the III.²¹¹ Inconsistent reporting requirements among the states means some criminal records never get reported to the FBI.²¹² Other records, such as some fingerprint submissions, do not meet the quality standards required for submission to IAFIS or the III.²¹³ Modern technological standards dictate the use of electronic “live-scan” devices to capture and transmit fingerprints to the III.²¹⁴ Traditional fingerprint technology of rolling ink-blotted fingerprints on to paper cards can provide low-quality fingerprint impressions and may be rejected under the III’s quality standards.²¹⁵ As a result, the informational integrity of the III is poor, and it calls for more uniformity.²¹⁶

When the discussion comes to concealed firearm licensing, these inconsistencies may result in deadly consequences. The patchwork system of linking criminal records may fail to properly deposit and connect criminal records to the searchable databases, and if so, certain disqualifying criminal records will not be found using the currently employed background check procedures.²¹⁷

One solution to this inconsistency is to enact narrow reforms allowing criminal justice agencies to fill the coverage gaps in the III with

206. U.S. DEP’T OF JUSTICE, *supra* note 28, at 6.

207. *Id.* at 16–17.

208. *Id.* at 17–18.

209. *Id.* at 18.

210. *Id.* at 27.

211. *National Crime Information Center*, *supra* note 31.

212. U.S. DEP’T OF JUSTICE, *supra* note 28, at 17.

213. *Id.*

214. *Id.* at 92–93.

215. *Id.*

216. *Id.*

217. *Id.* at 17.

non-positive identification criminal records. In Illinois, law enforcement agencies constantly update LEADS to include, among other things, new warrants, orders of protection, and “information about individuals who have demonstrated that they are dangerous to themselves or others, or are suspected of being involved in activities that constitute a violation of the criminal laws of the State of Illinois or the national government.”²¹⁸ Files contained in LEADS will not always be supported by a fingerprint record, but they are among the variety of records that can disqualify an applicant from receiving a concealed firearm license.²¹⁹ The sweeping regulations prohibiting access to databases such as LEADS have already resulted in failed background investigations of concealed firearm applicants, and the reforms suggested here could help prevent future tragedy.

C. *How to Implement These Reforms*

The most direct method by which the federal government could adopt these policy recommendations is to amend the definition of “noncriminal justice purpose” in the National Crime Prevention and Privacy Compact.²²⁰ The new definition could read:

The term “noncriminal justice purposes” means uses of criminal history records for purposes authorized by Federal or State law other than purposes relating to criminal justice activities, including employment suitability, licensing determinations not including those related to an applicant’s suitability to carry a concealed firearm so long as the applicant has a right of appeal, immigration and naturalization matters, and national security clearances.

This proposed definition would specify that criminal records not supported by positive identification could still be used in concealed firearm determinations. One benefit of adopting this amendment to the definition is that it would maintain the protections in place for other noncriminal justice purposes that cannot be readily protected by procedural safeguards of the administrative appeal process. Decisions regarding private employment following a background check, for example, should not become subject to a government administrative appeals process; it is simply beyond the scope of effective government. Unfortunately, this proposed definition creates a procedural requirement in an otherwise straight forward definition. The question of what constitutes a right of appeal may be best handled by creating an entirely new subsection of the Compact or its regulations.

218. ILL. INTEGRATED JUSTICE INFO. SYS., *supra* note 137, at 1–2.

219. Compare ILL. INTEGRATED JUSTICE INFO. SYS., *supra* note 137, with 430 ILL. COMP. STAT. 66/35 (2014).

220. 42 U.S.C. § 14616(b)(18) (2012).

Another effective, though less direct, method of allowing the use of criminal records not supported by positive identification during the concealed firearm licensing determination could be to classify concealed carry licensing as a function of the “administration of criminal justice.”²²¹ This amendment could be achieved by regulatory changes similar to those proposed in 2007 by the United States Attorney General and the FBI.²²² The rule proposed several changes to the Code of Federal Regulations in accordance with the Law Enforcement Officers Safety Act of 2004.²²³ The Law Enforcement Officers Safety Act exempts eligible retired Law Enforcement Officers from state laws that require a license to carry a concealed firearm.²²⁴ Under this exemption, criminal justice agencies must issue photographic identification to the retired law enforcement officers.²²⁵ Various criminal justice agencies requested access to the III in order to conduct background investigations of the agencies’ retirees before issuing the required documentation.²²⁶ In response, the Department of Justice proposed changing the regulatory definition of “administration of criminal justice”²²⁷ to include “issuance of identification documents to current and retired law enforcement officers.”²²⁸

The Department of Justice intended to grant criminal justice agencies explicit permission to access the III because current regulations only allow access to the III for background checks in the screening of *current* or *prospective* employees of a criminal justice agency.²²⁹ A plain language interpretation of current regulatory definitions does

221. See *infra* notes 222–28 and accompanying text.

222. Carriage of Concealed Weapons Pursuant to Public Law 108-277; The Law Enforcement Officers Safety Act of 2003, 72 Fed. Reg. 2817 (proposed Jan. 23, 2007). The proposed regulation’s title seemingly contains a typographical error by referencing the “Law Enforcement Officers Safety Act of 2003” because Public Law 108-277 is actually titled the “Law Enforcement Officers Safety Act of 2004.” 18 U.S.C. §§ 921, 926B–C (2012).

223. Carriage of Concealed Weapons, 72 Fed. Reg. at 2818.

224. 18 U.S.C. § 926C (2012).

225. *Id.* § 926C(d).

226. Carriage of Concealed Weapons, 72 Fed. Reg. at 2818.

227. The Code of Federal Regulations defines “[a]dministration of criminal justice” as “performance of any of the following activities: Detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The administration of criminal justice shall include criminal identification activities and the collection, storage, and dissemination of criminal history record information.” 28 C.F.R. § 20.3(b) (2016). Alternatively, the U.S. Code defines it as “criminal identification activities and the collection, storage, and dissemination of criminal history records.” 42 U.S.C. § 14616(b)(6) (2012).

228. Carriage of Concealed Weapons, 72 Fed. Reg. at 2819. Other, less substantive, amendments were also proposed, but these simply relocated existing definitions for the sake of continuity within the regulation. *Id.* at 2818.

229. *Id.* at 2818; see also 28 C.F.R. § 20.33(a)(1).

not allow access to the III for background checks of *retired* employees.²³⁰

In a similar fashion, the definition of “administration of criminal justice”²³¹ could be amended to include reference to law enforcement’s function of carrying out concealed firearm licensing. The impact of this amendment would flow through layers of statutory and regulatory definitions such that concealed firearm licensing would become a implied facet of a law enforcement agency’s “criminal justice activities,” thus allowing states to employ the use of criminal records without positive identification during concealed firearm licensing determinations.²³² One cause for concern arises in states where law enforcement does not conduct the review of concealed firearm applications. For example, Georgia requires applicants to file with their local probate court.²³³ These proposed amendments, admittedly, would require a detailed, specific fix for every state-licensing scheme that does not operate through state, county, or local law enforcement. While this may not be ideal, it represents only one potential avenue to fix the coverage gap in using criminal records to promote public safety.

IV. IMPACT

Granting an exception for the use of non-positive identification criminal records in concealed firearm licensing determinations will have beneficial and significant public safety implications. Expanding the states’ authority to consider criminal records without positive identification during firearm licensing determinations will (1) help fill the informational gaps in the III, (2) provide designated firearm licensing authorities a more accurate and holistic view of each applicant’s criminal history, and (3) promote public safety by preventing dangerous individuals from lawfully possessing firearms in public.

A. Use of Non-Positive Identification Criminal Records Will Supplement the III and Minimize Risk of Incomplete Data

States largely control the creation, handling, and reporting of criminal records to the III.²³⁴ The various state reporting requirements and an undetermined number of procedural hiccups have resulted in a national criminal records system stricken with inconsistency and gaps in

230. Carriage of Concealed Weapons, 72 Fed. Reg. at 2818.

231. 28 C.F.R. § 20.3(b).

232. 42 U.S.C. § 14616(b)(6).

233. GA. CODE ANN. § 16-11-129 (2016).

234. National Crime Information Center, *supra* note 31.

coverage.²³⁵ The federal government could help supplement the data in the III by allowing states to access their own criminal records databases.²³⁶ Allowing law enforcement to fill in these gaps with local data will form a more complete record of certain individuals with criminal records scattered across different jurisdictions,²³⁷ and a more comprehensive criminal background record of potential firearm licensees is essential to the states interest in promoting public safety.²³⁸

With greater access to criminal records information, law enforcement agencies may see an increased expectation in their ability to accurately conduct background investigations and manage firearm application systems. Illinois, for example, may place more scrutiny on objections. The “reasonable suspicion” standard may receive heightened treatment so that what was once reasonable is now unreasonable. With more data and knowledge, law enforcement’s level of suspicion may in turn be more scrupulously questioned.

B. Give Law Enforcement Tools to Carry Out Its Duty

Firearm licensing tends to exist as a responsibility unique to local and law enforcement agencies.²³⁹ Society grants some level of deference to local law enforcement by entrusting it with the responsibility of firearm licensing and granting a subjective authority in the licensing process.²⁴⁰ The total number of concealed carry applications filed in Illinois during the year 2015 was approximately 55,500.²⁴¹ Law enforcement professionals in the state have suggested that agencies cannot evaluate every one of the 55,000 applicants consistent with the standards of the Firearm Concealed Carry Act without access to LEADS, the state’s most comprehensive criminal records database, to supplement their findings (or lack thereof).²⁴² The Illinois system was designed with a focus on local input, but by denying access to LEADS, law enforcement cannot access its go-to database that contains the very information the Illinois General Assembly intended law enforcement to access. While well-intentioned, the policies in place

235. U.S. DEP’T OF JUSTICE, *supra* note 28, at 17.

236. *Id.*

237. *Id.*

238. See *National Crime Information Systems*, U.S. DEPT. OF JUSTICE, <https://www.justice.gov/tribal/national-crime-information-systems> (last visited Jan. 13, 2017).

239. See *supra* notes 193–97 and accompanying text.

240. 430 ILL. COMP. STAT. 66/15 (2014).

241. *Concealed Carry Permit Applications Drop Across Illinois*, CHI. TRIB. (Feb. 1, 2016, 11:56 AM), <http://www.chicagotribune.com/news/local/breaking/ct-concealed-carry-permit-applications-drop-across-illinois-20160201-story.html>.

242. *Editorial: Concealed Gun Law*, *supra* note 3.

hamstringing law enforcement's ability to do the job it has been delegated as it relates to concealed firearm licensing.

C. Reducing the Frequency of False Negative Background Checks

The III and its related criminal record databases remain fraught with inconsistencies despite cooperative agreements and massive infrastructure investments made toward technological upgrades.²⁴³ One study suggests name checks alone produce an inordinate amount of false negatives—background searches that do not find a criminal record where one actually exists.²⁴⁴ This Comment, however, suggests that by allowing the use of criminal records without positive identification (not verified by a fingerprint record) in conjunction with fingerprint-verified records, agencies can minimize false negatives by accessing to records not otherwise retrievable through the III. The inadequacies of the III are structural deficiencies of the system's design, and the deficiencies cannot be accounted for or corrected by advancing the system's technology or simply reducing human error. The patchwork of jurisdictions and various reporting standards make a comprehensive and uniform system nearly impossible.²⁴⁵ The Department of Justice should allow concealed carry firearm licensing entities to address these deficiencies by widening the scope of inquiry to records left unreported to the III.

The obvious implication of this discussion is the promotion of factors that tend to maintain high levels of public safety. Law enforcement's careful and accurate scrutiny of concealed carry applications will tend to reduce false negatives and prohibit dangerous individuals from obtaining a concealed firearm permit. Again, consider the tragic case of Richard Idrovo. Idrovo's prior arrests and orders of protection were not reported to the III, and without those records, law enforcement believed he was a qualified applicant and approved his concealed carry application. It was only after he committed a murder-suicide that law enforcement searched LEADS and uncovered his troubling history of domestic violence.²⁴⁶ In this case, the false negative result of a national background check proved deadly. While granting law enforcement access to LEADS does not necessarily guarantee a different result, the outcome is likely significant when replicated across all concealed firearm applications.

243. U.S. DEP'T OF JUSTICE, *supra* note 28, at 16–18.

244. NAT'L TASK FORCE, *supra* note 43, at 81.

245. See U.S. DEP'T OF JUSTICE, *supra* note 28, at 17.

246. See *supra* notes 1–7 and accompanying text.

D. The Cost of Expansion

Implementation of the reforms suggested in this Comment will instantly allow states with robust, appellate-like review mechanisms to access non-positive identification criminal records for concealed carry licensing purposes.²⁴⁷ States already maintain databases containing criminal records without positive identification; so many if not all fifty states would not be required to incur new expenditures or additional appropriations to develop the digital infrastructure used to employ the use of this data.²⁴⁸ Again, Illinois provides a strong organizational model example for this implementation. The Illinois State Police already manages the LEADS database for other purposes; allowing previously authorized users to access the files may result in a marginal increase in network traffic, but expanding operations will not be a burdensome undertaking.²⁴⁹

The true monetary cost of these reforms, however, will develop incidentally to the implementation. States that begin to utilize expanded criminal records access will likely see an increase in objections, which, in turn, will require more man hours spent reviewing individual applications. This cost will express itself through overtime, newly added staff to handle increase caseloads for administrative bodies, and actual physical resources dedicated to the operation of these units.

These reforms would necessitate the development of a qualified administrative review system in many states, particularly those that only allow for judicial review of an adverse concealed carry decision.²⁵⁰ These states that only allow for judicial review risk flooding court dockets.²⁵¹ Crowded federal courts are not a new phenomenon,²⁵² but policy makers should avoid steps that would tend to perpetuate the reality that is the overcrowded system of federal courts.²⁵³ For several states, simple modifications to existing state administrative bodies can fully equip states to provide review of concealed firearm application decisions. Expansion of the access to non-positive identification crim-

247. See, e.g., 430 ILL. COMP. STAT. 66/20(a) (2014).

248. See U.S. DEP'T OF JUSTICE, *supra* note 28, at 13.

249. ILL. ADMIN. CODE tit. 20, § 1240.10(a) (2016).

250. See, e.g., COLO. REV. STAT. § 18-12-207 (2015).

251. "Opening the floodgates" is a common rationale for judicial action, or inaction, but defining a "flood" can be difficult. Toby J. Stern, Comment, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 407-08 (2003).

252. *Crowded Docket Awaits Judges in Federal Court*, CHI. TRIB. (July 21, 1940), <http://archives.chicagotribune.com/1940/07/21/page/16/article/crowded-docket-awaits-judges-in-federal-court>.

253. *Overloaded Courts, Not Enough Judges: The Impact on Real People*, PEOPLE FOR AM. WAY, http://www.pfaw.org/sites/default/files/lower_federal_courts.pdf (last visited Jan. 16, 2017).

inal records must be met with higher standards of administrative review to quell the adverse risks associated with the individual discussed in Part II.

V. CONCLUSION

The federal regulations regarding the use of criminal history records in concealed firearm licensing determinations are well-intentioned, but as this Comment contends, they are short-sighted considering the states' abilities to balance the risk to the individual of erroneous deprivation with the states' interest in maintaining high levels of public safety. Federal law should be amended to provide states a narrow exception to these rules, and so states could begin accessing vital criminal history records with minimal structural changes to their concealed firearm licensing processes. The data is available; the federal government now needs to give states the discretion to use it.

As one author so aptly stated, "Whether a reader agrees or disagrees with the Article's policy recommendations, the Article can lay the foundation for a better-informed debate, and a more realistic analysis of the issue."²⁵⁴ This Comment is intended to highlight and offer analysis on a relatively new concern for law enforcement professionals that has otherwise received little attention.

Differences in opinion can and should be fleshed out through vigorous public debate. The end result may lead interested parties to discover several commonalities between the two opposing arguments. Those of the public wary of concealed carry may tend to find the practice more favorable as they see applications become subject to more comprehensive review. In return, expanded access to criminal history records will similarly afford applicants greater due process protections. Stronger and more reliable due process protections should build confidence that the review process will not be used to arbitrarily deny highly qualified applicants the opportunity to exercise their closely held Second Amendment rights.

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254. David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 517 (2009).

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