

HIPAA: CAUGHT IN THE CROSS FIRE

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ABSTRACT

The Health Insurance Portability and Accountability Act (HIPAA) is nearly synonymous with patient privacy. In contrast, the National Instant Criminal Background Check System (NICS), a provision of the Gun Control Act of 1968, demands the disclosure of information about individuals, including mental-health information, that may prohibit their purchase of firearms.

These two statutes raise the following question: what if NICS requires or recommends the reporting of information protected by HIPAA? In the wake of recent gun violence by mentally disabled individuals, governmental and nongovernmental organizations have questioned whether HIPAA's privacy provisions have stultified national gun-control measures by prohibiting the reporting of mental-health information. In early 2014, the Department of Health and Human Services responded to these concerns by proposing a rule that would grant an exception to HIPAA's privacy protection to allow the reporting of relevant mental-health records to NICS.

This Note questions whether there is an insurmountable conflict between HIPAA and the Gun Control Act that warrants the proposed exception. It analyzes the NICS-reporting practices of certain states to explain how existing federal NICS-reporting laws can be used to clarify federal NICS-submission standards and argues that the proposed rule is legally trivial.

INTRODUCTION

“[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 . . .” – *District of Columbia v. Heller*¹

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On a Tuesday morning in March 2002,² Peter J. Troy, a thirty-four-year-old “sporadic college student,”³ walked into morning Mass at a church in Lynbrook, New York, removed a .22-caliber rifle from his coat, and fatally shot Reverend Lawrence M. Penzes, fifty, and Eileen Tosner, seventy-three.⁴ Troy’s list of twenty-four names on the “Lynbrook Church Death List”—a list of the parishioners he planned to kill—was one of the few pieces of information revealed about him.⁵ Troy was arraigned on March 13, 2002, at Nassau County District Court in Hempstead, New York, and pled not guilty to the charges.⁶ On June 26, 2003, after only about one hour of deliberation, a jury found him guilty on two counts of first-degree murder,⁷ and he was sentenced to two life sentences without parole.⁸

In the years before the shooting at the Lynbrook church, Troy had been diagnosed with paranoid schizophrenia and committed to inpatient psychiatric wards in both New York City and Nassau County.⁹ Following his discharge, Troy was taking psychotropic medication and was supposed to be checked on regularly by mental-health workers; they failed to do so, however, and his case was eventually closed.¹⁰ Despite his prior commitment,¹¹ Troy was able to legally purchase the gun he used in the shooting and had passed the mandatory federal background-check system, known as the National

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

2. Short Form Order at 2, *Tosner v. Nassau Cnty.*, No. 3283/04 (N.Y. Sup. Ct. Apr. 23, 2007), available at http://decisions.courts.state.ny.us/10jd/nassau/decisions/index/index_new/lamarca/2007jun/003283-04.pdf.

3. Daniel J. Wakin & Bruce Lambert, *Police Say Suspect in Church Killings Kept a ‘Death List,’* N.Y. TIMES, Mar. 14, 2002, at B1.

4. *Id.*

5. *Id.*

6. *Id.*

7. Bruce Lambert, *L.I. Man Convicted in Killing of a Priest and a Parishioner*, N.Y. TIMES, June 26, 2003, at B8.

8. Short Form Order, *supra* note 2, at 2.

9. Lambert, *supra* note 7, at B8.

10. *Id.*; see also Short Form Order, *supra* note 2, at 2 (claiming that Troy, “an individual with a long history of mental illness,” had been “improperly released from the care” of a hospital after representing a “clear and present danger to himself and others”).

11. NICS Improvement Amendments Act of 2007 (NIAA), Pub. L. No. 110-180 § 2, 121 Stat. 2559, 2560 (codified as amended at 18 U.S.C. § 922 note (2012)) (citing the Lynbrook Church shooting incident and the shooter’s improper purchase of a gun—due to his prior mental-health commitment—as indicative of a need to increase the amount of mental-health information provided to NICS).

Instant Criminal Background Check System (NICS).¹² At trial, Troy's attorney urged him to enter a plea of not guilty by reason of insanity, but Troy refused.¹³

The shooting at the Lynbrook church is one of a handful of high-profile cases in which an individual with a history of mental illness fatally shot someone after slipping through the cracks of the federal background-check system.¹⁴ Along with the Virginia Tech shooting in April of 2007,¹⁵ Congress cited the Lynbrook church shooting as a key impetus for passing the NICS Improvement Amendments Act of 2007 (NIAA).¹⁶ Since the passage of the NIAA, however, additional shootings by individuals suffering from mental illness have led American citizens, lawmakers, and policy advocates to question whether there are corollaries between mental illness and fatal violence,¹⁷ and to look critically at the effectiveness of NICS.¹⁸

Government agencies and private organizations, such as the Government Accountability Office (GAO) and Mayors Against Illegal Guns have independently concluded that one of the main weaknesses with NICS is the dearth of mental-health records.¹⁹ These

12. *Id.* Section 103 of the Brady Handgun Violence Prevention Act (Brady Act) mandates the creation of NICS. Pub. L. No. 103-159 § 103, 107 Stat. 1536, 1536 (1993) (codified at 18 U.S.C. § 922(9)(t)(1) (2012)).

13. Lambert, *supra* note 7, at B8.

14. NIAA § 2.

15. In 2007, a student at Virginia Polytechnic Institute shot and killed thirty-two students and faculty before taking his own life. *Id.* Over a year earlier, a special justice, designated by the Circuit Court of Montgomery County, Virginia, had ruled that the student, Seung Hui Cho, "present[ed] an imminent danger to himself as a result of mental illness," and ordered that he receive outpatient treatment and "follow all recommended treatments." VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH: REPORT OF THE REVIEW PANEL 48 (2007), available at http://www.schoolshooters.info/PL/Official_Reports_files/FullReport.pdf.

16. *See* NIAA § 2 (discussing Congress's findings on NICS's effectiveness in keeping guns out of the hands of those who are considered dangerous and mentally ill).

17. *See, e.g.*, Lindsey Lewis, *Mental Illness, Propensity for Violence, and the Gun Control Act*, 11 HOUS. J. HEALTH L. & POL'Y 149, 150-54 (2011) (examining whether individuals with mental illness have a propensity for violence); Katherine L. Record & Lawrence O. Gostin, *Dangerous People or Dangerous Weapons: Keeping Arms Away from the Dangerous in the Wake of an Expansive Reading of the Second Amendment*, 37 ADMIN. & REG. L. NEWS 8, 8-10 (2012).

18. *See, e.g.*, Jeff Brady, *States Aren't Submitting Records to Gun Database*, NAT'L PUB. RADIO (Apr. 16, 2012, 12:44 PM), <http://www.npr.org/2012/08/16/158932528/states-arent-submitting-records-to-gun-database> (questioning NICS's effectiveness and asking why states do not submit mental-health records).

19. *See* 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 13 (2012) (explaining

entities found that states have purportedly failed to submit mental-health records due in part to concerns that the Health Insurance Portability and Accountability Act's Privacy Rule²⁰ (HIPAA Privacy Rule) forbids such action.²¹ Reports issued by these organizations also describe the technological, legal, and coordination challenges of reporting as having impacted states' ability to make mental-health records available to NICS.²² Although some states and media sources noted in response to the GAO's report that HIPAA's privacy restrictions might be an impediment to NICS reporting,²³ it was not until the shootings in Aurora, Colorado,²⁴ and Newtown, Connecticut,²⁵ that the federal executive branch became concerned with the possible barriers to reporting created by HIPAA.²⁶

that "states that have not enacted laws requiring state agencies to share their mental health records" might face reporting challenges due to HIPAA); MAYORS AGAINST ILLEGAL GUNS, FATAL GAPS: HOW MISSING RECORDS IN THE FEDERAL BACKGROUND CHECK SYSTEM PUT GUNS IN THE HANDS OF KILLERS, at 32, 42, 43, 46, 50, 58 (2011), *available at* <https://ia601004.us.archive.org/20/items/542982-fatal-gaps-mayors-against-illegal-guns/542982-fatal-gaps-mayors-against-illegal-guns.pdf> (noting that some states are concerned that HIPAA serves as a barrier to mental-health-prohibitor reporting).

20. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C. (2012)); The HIPAA Privacy Rule, 45 C.F.R. §§ 160, 164 subpart A, E (2014).

21. *See supra* note 19.

22. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 19, at 11; MAYORS AGAINST ILLEGAL GUNS, *supra* note 19, at 14–21.

23. *See, e.g.*, James B. Jacobs & Jennifer Jones, *Keeping Firearms out of the Hands of the Dangerous Mentally Ill*, 37 ADMIN. & REG. L. NEWS 11, 11–12 (2012) (noting that although states are concerned that HIPAA acts as a barrier to NICS reporting, it does not); John DiStaso, *Pro-Gun Attorney: NH Not Keeping Guns from Mentally Ill*, N.H. UNION LEADER (Dec. 17, 2012, 9:57 PM), <http://www.unionleader.com/article/20121218/NEWS03/121219235> (describing New Hampshire Assistant Commissioner of Safety's concern that when an arms seller calls for a NICS check, HIPAA often prevents the department from determining whether a potential buyer has been released from the "State Hospital" or is "in intensive treatment for mental health" (quotations omitted)). It should be noted, however, that the concern here is with not knowing about voluntary, not involuntary, commitments; Michael S. Schmidt & Charlie Savage, *Gaps in F.B.I. Data Undercut Background Checks for Guns*, N.Y. TIMES, Dec. 21, 2012, at A1 (identifying state privacy laws as a barrier). Most of the sources published before President Obama's January 2013 executive action—which demanded that HIPAA not be a barrier to mental-health submission, *see infra* note 26 and accompanying text—focused on barriers to mental-health submission besides HIPAA. *Id.*

24. Dan Frosch & Kirk Johnson, *Gunman Kills 12 at Colorado Theater; Scores Are Wounded, Reviving Debate*, N.Y. TIMES, July 21, 2012, at A1.

25. James Barron, *Gunman Massacres 20 Children at School in Connecticut; 28 Dead, Including Killer*, N.Y. TIMES, Dec. 15, 2012, at A1.

26. OFFICE OF THE WHITE HOUSE, NOW IS THE TIME: GUN VIOLENCE REDUCTION EXECUTIVE ACTIONS 2 (2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_actions.pdf.

Following the 2012 Newtown shooting, Leon Rodriguez, Director of Health and Human Services's (HHS's) Office for Civil Rights (OCR), responded to concerns about HIPAA's impact on the reporting of mental-health data by reiterating that the HIPAA Privacy Rule struck the appropriate balance between protecting the privacy of patients' health information and disclosing the necessary information to treat the patient and "protect the nation's public health."²⁷ Rodriguez emphasized that under HIPAA, a provider is allowed to disclose information to a third party that his patient is threatening him with serious harm if necessary to protect the health and safety of the third party.²⁸ Despite Rodriguez's assurances, soon thereafter President Barack Obama published twenty-three executive actions dedicated to reducing gun violence.²⁹ These actions included the removal of any unnecessary legal barriers in HIPAA that "may prevent states from making information available"³⁰ to NICS, such as "relevant information on people prohibited from gun ownership for mental-health reasons."³¹

In light of the President's executive actions, the OCR issued an advance notice of proposed rulemaking (ANPRM) on April 23, 2013.³² The ANPRM proposed creating an express permission in the HIPAA Privacy Rule allowing HIPAA-covered entities responsible for involuntary commitments or formal adjudications to disclose to NICS the identities of persons who had been involuntarily committed or formally adjudicated as having a "serious mental condition."³³

27. Letter from Leon Rodriguez, Dir. Office of Civil Rights, Dep't of Health and Human Servs., to the Nation's Health Care Providers (Jan. 15, 2013) (citing 45 C.F.R. 164.512(j)(1)(i) (2012)), available at <http://www.hhs.gov/ocr/office/lettertonationhcp.pdf>.

28. *Id.* *Tarasoff v. Regents of the University of California* first established the duty of licensed mental-health professionals to warn individuals who have been specifically threatened by a patient. *Tarasoff v. Regents of the Univ. of Cal.*, 529 P.2d 553, 559 (Cal. 1974), *vacated*, 551 P.2d 334 (Cal. 1976); *see also* *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 345 (Cal. 1976) (en banc) (establishing that the duty to warn includes the broader "duty to protect"). Most states now recognize a duty to protect or warn targeted potential victims. George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 WASH. L. REV. 33, 47 (1999).

29. OFFICE OF THE WHITE HOUSE, *supra* note 26, at 4.

30. *Id.*

31. OFFICE OF THE WHITE HOUSE, NOW IS THE TIME: THE PRESIDENT'S PLAN TO PROTECT OUR CHILDREN AND OUR COMMUNITIES BY REDUCING GUN VIOLENCE 4 (2013), available at http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_full.pdf.

32. HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS), 78 Fed. Reg. 23,872 (proposed Apr. 23, 2013) (to be codified at 45 C.F.R. pts. 160, 164).

33. *Id.*

Currently, NICS uses the information regarding involuntary commitments and adjudications of mental deficiency, which is reported from non-HIPAA-covered courts, states, and entities,³⁴ to recognize and tag in the NICS database those individuals who cannot purchase a gun due to mental-health concerns.³⁵ This tag—known in NICS as a “prohibitor”—represents “the condition or factor that prohibits an individual from possessing or receiving firearms.”³⁶

After an opportunity for public comment and response, a notice of proposed rulemaking (NPRM), calling for the same HIPAA exception for NICS reporting, was published in the Federal Register on January 7, 2014 (HIPAA-NICS NPRM).³⁷ As of this Note’s

34. Non-HIPAA-covered courts, states, and entities are those that do not use or transmit electronic medical information. 45 C.F.R. § 160.103 (2012). For a more in-depth discussion, see *infra* notes 130–35 and accompanying text.

35. HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS), 78 Fed. Reg. at 23,875. When states or other entities submit mental-health information to NICS, they provide demographic information about the individual. This information is run through several federal databases, see *infra* notes 61–62 (describing other federal databases that NICS searches, which have compiled federal, state, and international data), to determine almost instantaneously if there is a block on the individual such that he is unable to purchase a firearm. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 19, at 2 n.4. The actual treatment records, other health-care records, and any specifics concerning the individual’s mental-health condition are not provided to NICS. *Id.* The term “mental-health records,” as used throughout this Note, should be understood in this context.

36. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 19, at 6. Other prohibitors apply in the following situations: when the individual is “under indictment for, or [has] been convicted in any court of a crime, punishable by imprisonment for a term exceeding one year,” 18 U.S.C. § 922(d)(1) (2012); is “a fugitive from justice,” *id.* § 922(d)(2); is “an unlawful user of or addicted to any controlled substance,” *id.* § 922(d)(3); has “been adjudicated as a mental defective or committed to any mental institution,” *id.* § 922(d)(4); is “illegally or unlawfully in the United States,” *id.* § 922(d)(5)(A); has “been discharged from the Armed Forces under dishonorable conditions,” *id.* § 922(d)(6); “having been a citizen of the United States,” renounces his or her U.S. citizenship, *id.* § 922(d)(7); is “subject to a court order that restrains [him or her] from harassing, stalking, or threatening an intimate partner” or the child of an intimate partner, *id.* § 922(d)(8); or has “been convicted in any court of a misdemeanor crime of domestic violence,” *id.* § 922(d)(9).

37. Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS), 79 Fed. Reg. 784 (proposed Jan. 7, 2014) (to be codified at 45 C.F.R. pt. 164). Any textual revisions between the ANPRM and the NPRM were minor and did not alter the substance of the original ANPRM. This Note addresses only those comments that are most pertinent to the arguments presented here. In addition, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) issued a proposed rule that has since been codified clarifying the definition of “adjudicated as a mental defective” and amending the definition of “committed to a mental institution” to include “both inpatient and outpatient treatment.” Amended Definition of “Adjudicated as a Mental Defective” and “Committed to a Mental Institution,” 79 Fed. Reg. 774, 775 (proposed Jan. 7, 2014) (codified at 27 C.F.R. pt. 478 (2014)).

publication, HHS has taken no additional action to finalize this regulation,³⁸ and governmental and nongovernmental organizations continue to question its legality and usefulness.³⁹ This Note focuses on this proposed exception to HIPAA and its questionable effectiveness at remedying the relationship between the Gun Control Act of 1968⁴⁰ and HIPAA.

This Note argues that any perceived conflict between the HIPAA Privacy Rule and the Gun Control Act—which the HIPAA-NICS NPRM seeks to remedy—is more or less imagined. Although states’ failure to report mental-health information to NICS raises valid concerns, this dearth of reporting is due not to any reporting limitations embedded in HIPAA. Rather, it is due to a lack of clarity from the federal government as to what information should be reported under the Gun Control Act and NICS, and as to the roles of the federal and state governments in coordinating the submission of mental-health data to NICS. This Note shows that the proposed regulation is unnecessary and does nothing to clarify the circumstances under which a state may submit mental-health records to NICS. Instead, it is a rushed example of rulemaking that points the proverbial finger at a vague statute, HIPAA, without determining whether HIPAA, specifically, the HIPAA Privacy Rule, actually serves as a barrier to states’ submission of mental-health records to NICS.

This Note proceeds in five parts. Part I provides background information on NICS by exploring its statutory history—including the Gun Control Act, the Brady Handgun Violence Prevention Act of 1993 (Brady Act), and the NIAA. Part II examines the corresponding roles of the state and federal governments in submitting NICS information. Part III provides an overview of the HIPAA Privacy Rule and outlines existing HIPAA exceptions that might alleviate concerns of a HIPAA–NICS conflict. In light of this information, Part

38. *HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS)*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/oct/privacy/hipaa/understanding/special/NICS> (last visited Nov. 18, 2014).

39. *See, e.g.*, Letter from Herbert W. Titus, attorney at William J. Olson, P.C., on behalf of the Gun Owners Found., to the U.S. Dep’t of Health and Human Servs. 3–4 (Mar. 10, 2014), available at <http://gunowners.com/pdf/GOF.HIPAA.NICS.20140310.pdf> (critiquing the proposed rule as “[u]nnecessary and [u]nenforceable,” and suggesting that states’ low reporting to NICS may be better explained by “disagree[ment] with the Obama administration’s high-handed anti-gun policies” than by a HIPAA-based barrier).

40. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–928 (2012) and in scattered sections of 26 U.S.C. (2012)).

IV analyzes the helpfulness of the HIPAA-NICS NPRM, setting forth the strongest arguments against its publication as a final rule. Part V moves beyond the HIPAA-NICS NPRM and offers recommendations as to how the federal government can improve NICS reporting based on current state solutions, as well as alternative proposals that might address NICS's weaknesses more effectively.

I. NICS: ENCOURAGING DISCLOSURE TO INCREASE PUBLIC SAFETY

Looking at the statutory history and underlying premise of NICS—to increase information sharing, in seeming contradiction to the privacy concerns underlying the HIPAA Privacy Rule—sheds light on whether a conflict exists between the two statutory provisions. Section A details the history of the Gun Control Act. Section B examines the history of the Brady Act and the NICS provision specifically. Finally, Section C provides an overview of the NIAA.

A. *The Gun Control Act of 1968*

The Gun Control Act is the federal gun-control statute from which the Brady Act⁴¹ and the NICS provision⁴² of the Brady Act developed. To understand current concerns relating to HIPAA and NICS, it is imperative to look at the origins and evolution of federal gun-control measures, including the Gun Control Act, the Brady Act, NICS, and the NIAA.⁴³

Before the 1930s, state and local governments were the primary regulators of firearms.⁴⁴ In 1934, however, Congress passed the first federal gun-control act, the National Firearms Act of 1934, as part of President Franklin D. Roosevelt's "New Deal for Crime."⁴⁵ Since the

41. Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536 (codified at 18 U.S.C. §§ 921-924 (2012)).

42. 18 U.S.C. § 922 (2012) (establishing the NICS requirement); 28 C.F.R. § 25.1-11 (2009) (outlining the purpose, definitions, and process of NICS).

43. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559 (codified as amended at 18 U.S.C. § 922 note (2012)).

44. ADAM WINKLER, *GUNFIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA* 187 (2011) (noting that from the Revolutionary period to the 1930s, states and municipalities controlled firearm regulation, and that gun control only became a "federal issue in the 1930s because President Franklin Delano Roosevelt . . . had a crime problem").

45. *History of Gun-Control Legislation*, WASH. POST, Dec. 22, 2012, <http://www.washingtonpost.com/national/history-of-gun-control-legislation/2012/12/22/80c8d624-4ad3->

passage of the National Firearms Act, Congress has similarly tended to enact gun-control laws in the wake of tragic and nation-shaking events involving firearms or threats of violence.⁴⁶ In fact, the next major piece of gun-control legislation, the Gun Control Act, was passed in 1968 following the assassinations of Dr. Martin Luther King, Jr. and Senator Robert F. Kennedy.⁴⁷ “As enacted, the Gun Control Act . . . banned the interstate shipment of firearms (handguns and long guns) and ammunition to private individuals.”⁴⁸ The Gun Control Act also excludes certain at-risk groups from owning guns, and prohibits the transfer of guns from federally licensed dealers to individuals of such groups.⁴⁹ One group specifically excluded is those with serious mental health conditions. The Gun Control Act contains two measures to achieve these exclusionary and prohibitory objectives that are specific to this group: it prohibits the sale of firearms to anyone “adjudicated as a mental defective” or “committed to any mental institution,” and it prohibits the possession of firearms by such individuals.⁵⁰

Although the Gun Control Act represented a significant advance in federal gun-regulation efforts, it provided no means to enforce these prohibitions on the sale and possession of firearms—a dealer generally had no reason to question a purchaser’s claim of eligibility to purchase a gun.⁵¹ It was also unclear to many federal and state courts as well as health providers what Congress meant by the terms “adjudicated as a mental defective” and “committed to any mental

11e2-9a42-d1ce6d0ed278_story.html. President Roosevelt’s “New Deal for Crime” was “[s]purred by the bloody ‘Tommy gun’ era . . . [of] Al Capone, John Dillinger, Baby Face Nelson, Pretty Boy Floyd, and Bonnie and Clyde.” *Id.*

46. Jana R. McCreary, “*Mentally Defective*” *Language in the Gun Control Act*, 45 CONN. L. REV. 813, 831 (2013). For an interesting analysis of the parallel relationship between horrific acts of gun violence and federal gun-control legislation, see generally Josh Blackmun, *The Shooting Cycle*, 46 CONN. L. REV. 1513 (2014).

47. McCreary, *supra* note 46, at 832.

48. ROBERT J. SPITZER, *THE POLITICS OF GUN CONTROL* 115 (3d ed. 2004).

49. McCreary, *supra* note 46, at 832.

50. 18 U.S.C. § 922(d)(4), (g)(4) (2012). It “shall be unlawful for any person to sell” or give a firearm to anyone the seller knows, or has reasonable cause to know, “has been adjudicated as a mental defective or has been committed to any mental institution.” *Id.* Further, any person “who has been adjudicated as a mental defective or who has been committed to a mental institution” shall not “ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or . . . receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” *Id.* § 922(g)(4).

51. McCreary, *supra* note 46, at 833 (citing Franklin E. Zimring, *Firearms and Federal Law: The Gun Control Act of 1968*, 4 J. LEGAL STUD. 133, 152–53 (1975)).

institution.”⁵² Frustrated by the Gun Control Act’s relatively narrow scope,⁵³ proponents of gun control sought to strengthen the Act through additional legislation.⁵⁴

B. *The Brady Handgun Violence Prevention Act and NICS*

The Brady Act was passed by Congress in response to this gun-control advocacy.⁵⁵ The Brady Act mandated that the Attorney General establish a computerized databank with information regarding an individual’s eligibility to purchase a gun.⁵⁶ The databank would automatically search for prohibitory information whenever an individual sought to obtain firearms from a federal firearms licensee (FFL).⁵⁷ Under the Brady Act, FFLs were obligated to request a background check on the prospective purchaser through this computerized system, known as NICS, and determine whether the firearm transfer would violate federal or state law.⁵⁸

During a NICS check, the purchaser is required by law to complete and sign the Bureau of Alcohol, Tobacco, Firearms, and

52. *See id.* at 844–52, 854 (discussing state and federal courts’ and mental-health professionals’ confusion surrounding the definitions of “mentally defective” and “committed to a mental institution”); *see also* Tom Wiehl, *The Presumption of Dangerousness: How New York’s SAFE Act Reflects Our Irrational Fear of Mental Illness*, 38 SETON HALL LEGIS. J. 35, 62 (2014) (noting the ability of courts and legislatures to “manipulat[e] their definitions of mental illness as liberally or conservatively as they wish”).

53. SPITZER, *supra* note 48, at 116. “[T]he Gun Control Act was the most sweeping federal gun regulation enacted up to that time. Yet its scope”—regulating only gun imports but not the importation of gun parts—“was modest, and as a consequence, its impact was minimal.” *Id.*

54. *Id.*

55. Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, §§ 101–106, 107 Stat. 1536, 1536–44 (codified as amended at 18 U.S.C. §§ 921–925A (2012)); 42 U.S.C. § 3759 (2012)). The Brady Act was passed after a mentally unstable man attempted to assassinate President Ronald Reagan. MAYORS AGAINST ILLEGAL GUNS, *supra* note 19, at 6.

56. *See* 18 U.S.C. § 922(t)(1) (noting that the “Attorney General notifies licensees . . . that the national instant criminal background check system is established,” implying that it is the Attorney General’s responsibility to ensure NICS’s establishment); EDWARD C. LIU, ERIN BAGALMAN, VIVIAN S. CHU & C. STEPHEN REDHEAD, CONG. RESEARCH SERV., SUBMISSION OF MENTAL HEALTH RECORDS TO NICS AND THE HIPAA PRIVACY RULE 5 (2013).

57. *See* sources cited *supra* note 56. The lawful selling of firearms is limited almost entirely to FFLs by the Gun Control Act’s licensing provision. *See* 18 U.S.C. § 923(a) (“No person shall engage in the business of importing, manufacturing, or dealing in firearms, or importing or manufacturing ammunition, until he has filed an application with and received a license to do so from the Attorney General.”). However, there is an exception for persons making “occasional sales” or “sell[ing] all or part of his personal collection.” 18 U.S.C. § 921(a)(21)(C); *see generally* Andrew Goddard, *A View Through the Gun Show Loophole*, 12 RICH. J.L. & PUB. INT. 357 (2009) (explaining the reasoning for this exception).

58. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 19, at 4–5.

Explosives (ATF) Form 4473.⁵⁹ The information on this form is coded as data⁶⁰ and passed through three national databases—the National Crime Information Center (NCIC),⁶¹ the Interstate Identification Index (III),⁶² and the NICS Index.⁶³ “The NICS Index contains information [that] may not be available in the NCIC or the III,” such as disqualifying prohibitors based on federal or state law, including the mental-health prohibitor.⁶⁴ Importantly, the mental-health records reported to NICS “include only individual identifiers and no *actual* medical information.”⁶⁵

A valid match of a potential firearm purchaser with a NICS Index record “results in an immediate determination of firearm disqualification.”⁶⁶ Conversely, if the NICS Index search does not match any records, the FFL can proceed with the transfer of the firearm.⁶⁷ With a potential match, personnel from the Federal Bureau of Investigation’s (FBI’s) NICS section investigate the case by reaching out to judicial or law-enforcement agencies for information as to whether the firearm purchase should be permitted.⁶⁸ If the FFL does not receive sufficient information from the FBI to make a decision within three business days of initiating the background

59. See 27 C.F.R. § 478.124 (2014) (outlining the use of ATF Form 4473 in the NICS process).

60. *Firearms Transaction Record Part I—Over-the-Counter*, U.S. DEP’T OF JUSTICE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (Apr. 2012), available at <http://www.atf.gov/files/forms/download/atf-f-4473-1.pdf>. ATF Form 4473 requires basic demographic information and also asks specific questions pertaining to the mental-health prohibitors, including the following: “[h]ave you ever been adjudicated mentally defective (which includes a determination by a court, board, commission, or other lawful authority that you are a danger to yourself or to others or are incompetent to manage your own affairs) OR have you ever been committed to a mental institution.” *Id.*

61. *National Instant Criminal Background Check System: NICS Overview*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/nics/general-information/nics-overview> (last updated Dec. 26, 2013). This database contains information on state, federal, and international wanted persons and protection orders. *Id.*

62. *Id.* This database contains state-reported criminal-history records and may include mental-health prohibitors if the individual was found not guilty by reason of insanity or incompetence to stand trial. *Id.*; see Crime Identification Technology Act of 1998, Pub. L. No. 105-251, 112 Stat. 1870 (codified at 42 U.S.C. §§ 5101, 5119a–5119b, 14601–14616) (describing the III system).

63. *National Instant Criminal Background Check System: NICS Overview*, *supra* note 61.

64. *Id.*

65. LIU ET AL., *supra* note 56, at 7 (emphasis added).

66. *Id.*

67. *Id.*

68. *Id.*

check, the Brady Act gives the FFL the option of deciding whether or not to transfer the firearm, subject to any state-law limitations.⁶⁹ The entire NICS process generally takes place within minutes, and often within seconds.⁷⁰ Importantly, the FFL does not receive any information as to which prohibitor is responsible for a “deny” or “hold” decision.⁷¹

C. *NICS Improvement Amendments Act of 2007*

Following the tragic Virginia Tech shootings,⁷² Congress passed the NIAA, which requires “executive departments and agencies . . . [to] provide relevant information, including criminal history records, certain adjudications related to the mental health of a person, and other information, to databases accessible by the NICS.”⁷³ In particular, the NIAA seeks to increase the amount of probative mental-health data to more effectively “keep guns out of the hands of persons prohibited by federal or state law from receiving or possessing firearms.”⁷⁴ To achieve this aim, the NIAA mandates the Attorney General to

make grants to each State, consistent with State plans for the integration, automation, and accessibility of criminal history records, for use by the State court system to improve the automation and transmittal of criminal history dispositions, records relevant to determining whether a person has been convicted of a misdemeanor . . . and mental health adjudications or commitments.⁷⁵

69. 18 U.S.C. § 922(t)(1)(B)(ii) (2012); *National Instant Criminal Background Check System: Fact Sheet*, FED. BUREAU INVESTIGATION, <http://www.fbi.gov/about-us/cjis/nics/general-information/fact-sheet> (last visited Nov. 18, 2014).

70. *National Instant Criminal Background Check System: NICS Overview*, *supra* note 61.

71. HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS), 78 Fed. Reg. 23,872, 23,874 (proposed Apr. 23, 2013) (to be codified at 45 C.F.R. pts. 160, 164).

72. *See supra* note 15 and accompanying text.

73. Presidential Memorandum, Improving Availability of Relevant Executive Branch Records to the National Instant Criminal Background Check System, 78 Fed. Reg. 4297, 4297 (Jan. 22, 2013).

74. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB NO. 1121-0329, FY 2013 NICS ACT RECORD IMPROVEMENT PROGRAM (NARIP) 4 (2013), *available at* http://bjs.gov/content/pub/pdf/narip13_sol.pdf.

75. NICS Improvement Amendments Act of 2007, Pub. L. No. 110-180, 121 Stat. 2559, 2571 (codified as amended at 18 U.S.C. § 922 note (2012)) (describing the authorization of grants).

The NIAA established the NICS Act Record Improvement Program (NARIP) to grant money to states to improve the reporting of mental-health records, to set record-completion goals, and to prescribe grant penalties⁷⁶ for failure to meet these goals.⁷⁷ NARIP grants are specifically aimed at aiding the “completeness, automation, and transmittal of records used during NICS background checks.”⁷⁸ From its inception until the end of December 2013, NARIP has awarded about \$60 million in grants to twenty-two states.⁷⁹ Qualifying⁸⁰ states have used NARIP grants to create or enhance database records that track which individuals have been disqualified from gun ownership due to mental-health reasons.⁸¹ Due in part to the

76. OFFICE OF MGMT. & BUDGET, *supra* note 74, at 7.

[T]he Act provides for discretionary and mandatory . . . funding penalties unless the penalties are waived by the Attorney General for good cause. The penalties are specified in relation to meeting record completeness requirements and the time lapsed from January 8, 2008, when NIAA was enacted. . . . In 2013, 4 percent may be withheld if records are less than 70 percent complete. In 2018, 5 percent shall be withheld if the records are less than 90 percent complete, unless the Attorney General waives the penalty upon a finding that a State is making a reasonable effort to comply with the NIAA.

Id. “Record completeness” refers to the NIAA’s goal of amassing all NICS-applicable records. *Id.* at 6–7.

77. *Id.* at 4.

78. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 19, at 15.

79. *State Profiles: NICS Act Record Improvement Program (NARIP) Awards FY 2009–2013*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=tp&tid=491#funding> (last modified Sept. 13, 2010). The twenty-two states that have received NARIP grant awards include New York in 2009, 2010, and 2011; Oregon in 2009, 2010, 2011, and 2013; Florida, Idaho, and Texas in 2010, 2011, 2012, and 2013; Arizona in 2011, 2012, and 2013; Connecticut, Kentucky, and North Dakota in 2011 and 2012; Illinois in 2010, 2012, and 2013; Nevada in 2009 and 2013; New Jersey and Wisconsin in 2010 and 2011; Indiana, Missouri, Nebraska, and West Virginia in 2012 and 2013; Virginia in 2011; and Louisiana, Maryland, and Utah in 2013. *Id.*

80. To qualify for these grants, states must satisfy two conditions. NICS Improvement Amendments Act of 2007 (NIAA), Pub. L. No. 110-180 § 2, 121 Stat. 2559 (codified as amended at 18 U.S.C. § 922 note (2012)). First, they must give the Attorney General a “reasonable estimate . . . of the number of the records subject to the NIAA completeness requirements.” OFFICE OF MGMT. & BUDGET, *supra* note 74, at 4. Second, states must allow individuals to contest denials of permission to purchase a firearm on account of having been “adjudicated as a mental defective or committed to a mental institution.” *Id.*

81. See Jenny Wilson, *State Announces Initiative to Improve Mental Health Reporting to NICS*, HARTFORD COURANT, May 8, 2013, <http://www.courant.com/news/connecticut/hc-guns-mental-health-reporting-20130507,0,4262201.story>. Using federal grant money, Connecticut is assembling “a database of individuals who are disqualified from owning a gun for mental health reasons” as “part of a nationwide effort to strengthen the federal background check system by improving state reporting.” *Id.* Illinois passed a similar law that went into effect in June 2013, requiring “private sellers to process transactions—whether online or in-person—through a licensed dealer or law enforcement agency so that the background check takes place before the sale.” Mark Guarino, *Gun Control: Illinois Law Requiring Background Checks Among ‘Most*

NARIP grants, many states have passed laws either authorizing or requiring submission of mental-health records to NICS, but some states have faltered in passing NICS-reporting laws.⁸² More problematically, states remain confused as to their responsibilities in supporting the federal aim of prohibiting firearm possession by the mentally disabled.⁸³ These issues will be addressed in the following Part.

II. THE ROLE OF THE STATES AND THE FEDERAL GOVERNMENT IN NICS REPORTING

In light of the history and development of NICS, this Part reviews the roles of the states and the federal government in defining the boundaries of NICS reporting. Section A assesses the impact of the *Printz v. United States*⁸⁴ decision on the federal government's ability to enforce the states' compliance with federal NICS-reporting requirements. Section B considers how, in the wake of *Printz*, actions by the federal government and the judiciary—including by the ATF, the Supreme Court, and various circuit courts—have failed to establish uniformly the federal requirements states must follow when submitting mental-health records to NICS. This Part concludes that states' failure to submit appropriate mental-health information to NICS is not due to a barrier within the HIPAA Privacy Rule, but is rather a result of states' confusion—stemming from the imprecision and vagueness of the federal judiciary, HHS, and ATF—as to what information can be shared.

Stringent, CHRISTIAN SCI. MONITOR (Aug. 19, 2013), <http://www.csmonitor.com/USA/Politics/2013/0819/Gun-control-Illinois-law-requiring-background-checks-among-most-stringent>.

Colorado also passed a statute in 2013 expanding required background checks to encompass individuals purchasing firearms from a private seller. *Background Checks Kept 72 Criminals from Buying a Gun in Colorado*, HUFFINGTON POST (Dec. 12, 2013, 2:33 PM, updated Jan. 23, 2014 1:38 AM), http://www.huffingtonpost.com/2013/12/12/colorado-background-check-law-private-sale_n_4428828.html. See *infra* Part V.A. for further analysis of the laws passed by New York, Connecticut, and Virginia since 2007.

82. LIU ET AL., *supra* note 56, at 7–8.

83. See MAYORS AGAINST ILLEGAL GUNS, *supra* note 19, at 15 (explaining that despite many states' passage of laws requiring the submission of mental-health records to NICS, the varied state interpretations of federal law and the requirements of states' record-sharing statutes might undermine the success of NICS); see also Michael Luo & Mike McIntire, *When Right to Bear Arms Includes the Mentally Ill*, N.Y. TIMES, Dec. 22, 2013, at A1 (profiling the legal ambiguities that law-enforcement officials face when dealing with “mentally unstable people with guns”).

84. *Printz v. United States*, 521 U.S. 898 (1997).

A. *The Impact of the Printz Decision on States' Federal NICS-Reporting Requirements*

Originally, the Brady Act commanded the “chief law enforcement officer” (CLEO) of each local jurisdiction to ensure the performance of NICS background checks for every firearms purchase.⁸⁵ But in *Printz v. United States*, the Supreme Court found this enforcement measure to be unconstitutional commandeering by which the federal government compels the states “to implement, by legislation or executive action, federal regulatory programs.”⁸⁶ The Court based this anticommandeering principle on the federalism concept of “dual sovereignty,”⁸⁷ which recognizes that the “separation of the two spheres”—state and federal—“is one of the Constitution’s structural protections of liberty” akin to that of the separation of powers within the three branches of the federal government.⁸⁸ The majority avoided considering the extent to which the federal government can influence states’ compliance with federal regulations through conditional funding and taxing schemes,⁸⁹ but held that the

85. 18 U.S.C. § 922(s)(2) (1996) (outlining the federal NICS-enforcement duties of CLEOs).

86. *Printz*, 521 U.S. at 925.

87. *Id.* at 918–19 (explaining that “[a]lthough the States surrendered many of their powers to the new federal government, they retained ‘a residuary and inviolable sovereignty’” (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (E.H. Scott ed., 1898))).

88. *Id.* at 921.

89. *Id.* at 917–18. *But see id.* at 960 (Stevens, J., dissenting) (“Congress may require the States to implement its programs as a condition of federal spending”); *New York v. United States*, 505 U.S. 144, 167, 171 (1992) (holding that the Secretary of Energy’s collection of a percentage of the surcharge is “no more than a federal tax on interstate commerce,” and that under the Spending Clause, “Congress may attach conditions on the receipt of federal funds” as long as “such conditions . . . bear some relationship to the purpose of the federal spending” (quoting *South Dakota v. Dole*, 483 U.S. 203, 206–08 (1987))). In support of Congress’s power to influence state compliance through federal spending and taxing schemes, the Constitution states that “[t]he Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” U.S. CONST. art. I, § 8, cl. 1. Over time, the Supreme Court has recognized that this power includes the ability to place conditions on grants to state and local governments to influence states’ actions. *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579, 2584 (2012) (noting that Congress’s ability to “tax and spend” gives the federal government “considerable influence even in areas where it cannot directly regulate” and allows it to “offer funds to the States and . . . condition [them] on compliance with specified conditions”); *Sabri v. United States*, 541 U.S. 600, 605 (2004) (holding that the Spending Clause gives Congress broad power to appropriate federal money to promote the general welfare); *Dole*, 483 U.S. at 206 (holding that Congress can place conditions on grants to state and local governments to shape state action, provided that the conditions are unambiguous, insufficiently

federal government cannot “commandeer[]” states through mandates that force them to participate in the administration of a federal program.⁹⁰ Under this interpretation, the Brady Act’s provisions outlining CLEOs’ responsibilities and mandating states’ participation in the Brady Act and NICS reporting were found to be unconstitutional.⁹¹

The *Printz* decision posed two challenges to the implementation and success of the Brady Act and the NICS provision. First, although the Court did not strike down the Brady Act completely, it suggested that Congress might be able to enforce the NICS provision through monetary incentives such as conditional grants.⁹² *Printz* also implicitly recognized that states could independently determine whether they wanted to participate in NICS and allowed states to provide prohibitor information in excess of that required by the federal government.⁹³

B. States’ Confusion About Federal NICS Requirements

After the *Printz* decision, states had to decide whether to engage in NICS reporting, including the reporting of information relating to the mental-health prohibitor. Once they decided to participate in NICS, however, states found themselves more or less in the dark for two reasons. First, Congress provided minimal guidance regarding the scope of the definitions of “mental defective” and “committed.”⁹⁴

coercive, not otherwise unconstitutional, and beneficial to the general welfare and a particular federal interest).

90. *Printz*, 521 U.S. at 925. “Congress cannot compel the States to enact or enforce a federal regulatory program,” and furthermore, “cannot circumvent that prohibition by conscripting the States’ officers directly.” *Id.* at 935.

91. *Id.* The Court also noted that the Brady Act provisions outlining CLEOs’ responsibilities and mandating states’ participation in the Brady Act and NICS reporting were unconstitutional as a matter of separation of powers between the three branches of the federal government. *Id.* at 922.

92. *Id.* at 917–18. For a discussion of NARIP grants, see *supra* notes 75–81.

93. *Printz*, 521 U.S. at 917–18, 925–28. The Court’s holding in *Printz* that “the Federal Government may not *compel* the States to implement . . . regulatory programs,” the Court’s recognition of Congress’s power to condition the grant of federal funding on statutory adherence, and its discussion of states’ discretion in policymaking, imply that while the state cannot be forced to adhere to a federal law, it may determine that it is in its best interests to follow the law. *Id.* at 925, 935.

94. See *United States v. Hansel*, 474 F.2d 1120, 1123 (8th Cir. 1973) (noting that Congress did not offer any “revealing guides” to define “mental defective” in the Gun Control Act). For a discussion of the ambiguity regarding the definition of “committed” among federal courts interpreting state laws, see *infra* notes 107–19 and accompanying text.

And second, Congress failed to consider whether the admissibility of information relating to the mental-health prohibitor differed based on whether the information originated or was maintained in a hospital or judicial setting.⁹⁵

Furthermore, although the Supreme Court had the opportunity to clarify this critical language from the Brady Act in a few early cases,⁹⁶ the Court merely restated Congress's intent to keep "lethal weapons out of the hands of criminals, drug addicts, mentally disordered persons, juveniles, and other persons whose possession of them is too high a price in danger to us all to allow"⁹⁷—in other words, those "classified as potentially irresponsible and dangerous."⁹⁸ The Court has not specifically analyzed the meanings of "mentally defective" and "committed" for purposes of gun-purchase prohibitions⁹⁹—this definitional work has been undertaken by the ATF and the circuit courts.

95. See Lewis, *supra* note 17, at 155–57 (discussing differing federal courts of appeals' holdings on whether a commitment order's permissibility depends on where the order originates); McCreary, *supra* note 46, at 851 (discussing cases in which the admissibility of information to NICS depended on whether there was a "formal judicial process").

96. *Barrett v. United States*, 423 U.S. 212, 214–16 (1976); *Huddleston v. United States*, 415 U.S. 814, 825 (1974).

97. *Huddleston*, 415 U.S. at 825 (identifying which individuals Congress intended to disqualify from possessing or purchasing firearms (quoting 114 CONG. REC. 13,219 (1968) (statement of Sen. Tydings))).

98. *Barrett*, 423 U.S. at 218.

99. In *Huddleston v. United States*, the petitioner lied on his gun-purchase application at a pawnshop, stating that he had not been "convicted in any court of a crime punishable by imprisonment for a term exceeding one year." 415 U.S. at 816–17. The petitioner argued that "acquisition," as used in 18 U.S.C. § 922(a), did not include the temporary "bailment of personal property" that occurs in pawnshop transactions. *Id.* at 819–20. The Court noted that "[t]here is no indication in either the committee reports or in the congressional debates that the scope of the statute was to be in any way restricted." *Id.* at 825 (citing S. REP. NO. 90-1097, at 115 (1968)). As the Court in *Huddleston* noted, there was "no doubt of Congress' intention to deprive the juvenile, the mentally incompetent, the criminal, and the fugitive of the use of firearms," *Huddleston*, 415 U.S. at 827, but in areas in which Congress's intent was not specifically enumerated, the Court "[would] not blindly incant the rule of lenity to destroy the spirit and force of the law which the legislature intended to [and did] enact," *id.* at 833 (citations omitted). In *Barrett v. United States*, the Supreme Court parroted back Congress's intent in passing the Gun Control Act to "keep[] firearms out of the hands of categories of potentially irresponsible persons" and to broadly "make it possible to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *Barrett*, 423 U.S. at 220 (quoting S. REP. NO. 90-1501, at 22 (1968)). Rather than clarify who would be considered "potentially irresponsible persons," the Court held that the language of the Gun Control Act was purposefully "broad" but also "unambiguous"—Congress had intended to "maximize the possibility of keeping firearms out of the hands of such persons." *Id.* at 220–21 (citing *Huddleston*, 415 U.S. at 828).

1. *The ATF's Regulations.* The ATF defines “adjudicated as a mental defective” to include findings of mental illness by “a court, board, commission, or other lawful authority.”¹⁰⁰ A recently passed ATF rule amends this definition to clarify that individuals found “not guilty by reason of mental disease or defect are [also] included in the definition.”¹⁰¹ Further, a presiding official in an adjudication must find the individual not only to be mentally incompetent or to have a mental illness, but also to pose a danger to himself or others, or be incapable of managing his own affairs.¹⁰²

The term “committed to a mental institution”¹⁰³ is perhaps even less clear than “adjudicated as a mental defective.” The ATF defines a “commitment,” for the purposes of “committed to a mental institution,” as a “formal commitment . . . to a mental institution by a court, board, commission, or other lawful authority,” which, depending on the state, might include admitting physicians or psychiatrists.¹⁰⁴

Under federal law, “committed to a mental institution” includes only involuntary commitments, including those for mental defectiveness, mental illness, or drug use, but it “does not include a person in a mental institution for observation or a voluntary

100. 27 C.F.R. § 478.11(a) (2014).

101. Amended Definition of “Adjudicated as a Mental Defective” and “Committed to a Mental Institution,” 79 Fed. Reg. 774, 775 (proposed Jan. 7, 2014) (amending 27 C.F.R. § 478.11).

102. See *United States v. Vertz*, 102 F. Supp. 2d 787, 788 (W.D. Mich. 2000) (finding that although the defendant had received court-ordered treatment, the process by which he was committed did not count as an “adjudication” under the Gun Control Act because there was no determination that the defendant was a danger to himself or others or was incapable of managing his own affairs). A judge’s determination of “dangerousness,” however, might involve issues that would be better tackled by a psychologist. See generally Harris, *supra* note 28 (describing the various concerns courts face when determining whether an individual is a danger to himself or others).

103. 18 U.S.C. § 922(d)(4), (g)(4) (2012).

104. 27 C.F.R. § 478.11 (2014). For example, under Michigan law, “a person may be involuntarily hospitalized upon the filing of a petition and a physician’s or licensed psychologist’s clinical certificate,” but his hospitalization continues only if a different psychiatrist examines the patient twenty-four hours later and certifies that the patient needs treatment, “pending court hearings.” *Vertz*, 102 F. Supp. 2d at 791 (citing MICH. COMP. LAWS ANN. §§ 330.1423, 330.1430 (West 1999)). Under Louisiana law, “The physician’s emergency certificate provides legal authority to transport a patient to a legal treatment facility and shall permit the director of such treatment facility to detain the patient,” but the certificate also stipulates that “[w]ithin 72 hours of this initial admission . . . a second examination by the coroner is a ‘necessary precondition to a person’s continued confinement.’” *United States v. Giardina*, 861 F.2d 1334, 1336 (5th Cir. 1988) (quotation mark omitted) (citing LA. REV. STAT. ANN. § 28:53(F), (G)(2) (2011 & Supp. 2014)).

admission.”¹⁰⁵ The new ATF rule amends the definition of “committed to a mental institution” to clarify that involuntary commitment includes both inpatient and outpatient treatment.¹⁰⁶ Although this new rule will help clarify some of the existing confusion surrounding the definition of this key term, questions will likely remain. For example, jurisdictions may disagree about the required process for an involuntary commitment, as well as who can serve as the “lawful authority” under these federal guidelines.

2. Circuit Courts’ Efforts to Define Gun-Control Language. Like the ATF, several circuit courts have labored to define the meanings of the Gun Control Act’s mental-health provisions. The Fourth Circuit’s decision in *United States v. Midgett*¹⁰⁷ suggested that under federal law, a “commitment” does not require a formal procedure such as a full-blown adversary hearing; a bench hearing to determine an individual’s mental state and a subsequent commitment order are sufficient to define someone as “committed.”¹⁰⁸ In support of its holding, the Fourth Circuit noted that “[s]everal of [its] sister circuits [had] reached similar conclusions in interpreting the meaning of ‘committed’” under § 922(g)(4) of the Gun Control Act.¹⁰⁹ The Maryland Court of Special Appeals—although not a federal court—distinguished its facts from those in *Midgett*, finding that a “commitment” had not occurred because the procedures were not

105. 27 C.F.R. § 478.11.

106. Amended Definition of “Adjudicated as a Mental Defective” and “Committed to a Mental Institution,” 79 Fed. Reg. at 775.

107. *United States v. Midgett*, 198 F.3d 143 (4th Cir. 1999).

108. *Id.* at 145–46 (holding that *Midgett* was “committed to a mental institution” pursuant to § 922(g)(4) of the Gun Control Act because he was legally committed by a judge after an adjudicatory hearing that determined his competency to stand trial, and concluding that this process was sufficiently formal).

109. *Id.* at 146. The court in *Midgett* agreed with the argument in *United States v. Chamberlain*, 159 F.3d 656 (1st Cir. 1998), that a person can be “committed” under the Gun Control Act even if the commitment hearing does not include the “provision of counsel, a full-blown adversary hearing, a finding by clear and convincing evidence that the person suffers from a mental illness, and a judicial order of commitment,” *id.* at 663, as listed under Maine’s Involuntary Hospitalization law, 34–B M.R.S.A. § 3864. *Midgett*, 198 F.3d at 146–47; *see also* *United States v. Whiton*, 48 F.3d 356, 358 (8th Cir. 1995) (holding that a hearing in which a state-court judge found the defendant mentally ill and issued an oral order for his commitment for temporary mental-health services constituted a commitment). *But see* *United States v. Waters*, 23 F.3d 29, 36 (2d Cir. 1994) (finding that the defendant was “committed” within the meaning of the Gun Control Act without a formal commitment process or judicial order).

sufficiently formal to warrant an involuntary commitment.¹¹⁰ The case was remanded to the Circuit Court of Montgomery County for further proceedings.¹¹¹

The Second Circuit's commitment requirements seem even less formal than those addressed by the Fourth Circuit in *Midgett*. The Second Circuit has held that under New York law, an involuntary hospitalization of the defendant based on two physicians' certificates was a "commit[ment] to a mental institution" within the meaning of the Gun Control Act,¹¹² and that a formal, adversarial adjudication or judicial determination to establish a commitment was not necessary.¹¹³

The First Circuit initially followed the approach of the Fourth and Second Circuits.¹¹⁴ The First Circuit held that an involuntary commitment on an emergency basis without a commitment hearing was sufficient to qualify as an involuntary admission within the meaning of the Gun Control Act.¹¹⁵ As the court further explained, Congress "deemed the *potential* for misuse of firearms or violence sufficient to bring various categories of individuals within the firearms ban," such that "a full-scale adversary proceeding and a finding . . . that a person is mentally ill and poses a likelihood of harm

110. *Furda v. State*, 997 A.2d 856, 881–82 (Md. Ct. Spec. App. 2010) (comparing *Midgett*, in which there were more formal proceedings, and noting that Furda was not given an attorney, afforded a hearing or factual findings, or detained pursuant to a judicial or administrative order). The court heard the appellant's appeal after the Fourth Circuit had concluded that the appellant was prohibited from possessing firearms under 18 U.S.C. § 922(g)(4) because the appellant had previously been involuntarily committed to a mental institution. *Midgett*, 198 F.3d at 860. The Court of Special Appeals analyzed "whether an involuntary hospital admission under Maryland law, for the purpose of an emergency mental-health evaluation, constitutes a 'commitment' under federal law, so as to bar the admittee's right to possess a regulated firearm in Maryland." *Id.* at 859. Because the court chose not to follow the Fourth Circuit's holding, its decision is arguably precedent, at least in Maryland.

111. *Id.* at 888.

112. 18 U.S.C. § 922(g)(4).

113. *United States v. Waters*, 23 F.3d 29, 34–35 (2d Cir. 1994) (holding that under New York law, a "commitment" did not require a judicial determination that the defendant was "committed" pursuant to New York's required procedures, and that New York's system of involuntary admission "comports with federal policy"). *Contra* *United States v. Giardina*, 861 F.2d 1334, 1136–37 (5th Cir. 1988) (holding that "temporary, emergency detentions for treatment of mental disorders or difficulties," without formal commitments or "formal adjudication that a person suffers a mental defect" do not constitute the commitment envisioned by 18 U.S.C. § 922); *States v. Hansel*, 474 F.2d 1120, 1123 (8th Cir. 1973) (holding that there was no commitment because the superintendent of the state mental hospital had not "determined . . . that the defendant was mentally ill or had conveyed any certification to the [Mental Health] Board").

114. *United States v. Chamberlain*, 159 F.3d 656, 663, 665 (1st Cir. 1998).

115. *Id.*

to himself or others before giving effect to the firearms ban would undermine Congress's judgment[.]”¹¹⁶ Despite this language, following the *District of Columbia v. Heller* and *McDonald v. City of Chicago*¹¹⁷ decisions, both of which limited federal and state gun-control options, the First Circuit reversed course, holding that the Gun Control Act “does not bar firearms possession for those who are or were mentally ill and dangerous, but (pertinently) only for any person ‘who has been adjudicated as a mental defective’ or ‘has been committed to a mental institution.’”¹¹⁸ Thus, in the First Circuit, at least, a temporary hospitalization does not constitute a “commitment” under the Gun Control Act; more process (such as a full, adversarial hearing) is required before the state can take away an individual’s right to purchase or possess a firearm.¹¹⁹

The Gun Control Act, including the Brady Act and the NICS provision, is itself an arguably vague statute—leaving much flexibility as to the federal requirements for mental-health-prohibitor information. The confusion as to what should be submitted under the federal mental-health prohibitors is not, however, the only problem surrounding the submission of mental-health information to NICS. There is still the concern that even if the federal government specifically defines what is required for these submissions,¹²⁰ as addressed in Part V.B, health-care providers, states, and federal courts of appeals must then determine whether such information is admissible under HIPAA.¹²¹ Before getting to this question, however, one must consider whether HIPAA actually impedes the reporting of such information in the first place.

116. *Id.* at 664.

117. *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

118. *United States v. Rehlander*, 666 F.3d 45, 50 (1st Cir. 2012). The court noted that “in section 922, Congress did not prohibit gun possession by those who were or are mentally ill and dangerous, and such a free floating prohibition would be very hard to administer, although perhaps *not* impossible.” *Id.* (emphasis added). The court did not discuss, however, whether such a prohibition would be legally feasible in the current, post-*Heller* environment, nor did it suggest any strategies to support this general prohibition against the purchase and possession of guns by those who are “mentally ill *and* dangerous.” *Id.* at 50–51 (emphasis added).

119. *Id.* at 50.

120. The Department of Justice and the ATF released an amendment to this language that clarifies some, but not all, of the confusion surrounding the Gun Control Act. Amended Definition of “Adjudicated as a Mental Defective” and “Committed to a Mental Institution,” 79 Fed. Reg. 774, 774 (proposed Jan. 7, 2014) (amending 27 C.F.R. § 478.11).

121. State privacy laws may also affect the admissibility of information. The issue of admissibility under state privacy laws is not addressed in this Note.

III. AMELIORATING THE “TENSION” BETWEEN THE GUN CONTROL ACT AND HIPAA

Following several atrocious acts of gun violence by individuals with mental-health disabilities or disorders,¹²² governmental and nongovernmental organizations have analyzed why states have failed to gather and transmit to NICS the mental-health information of individuals adjudicated as “mentally defective” or committed to an institution.¹²³ Although these critics have pointed to various weaknesses in NICS reporting, including states’ “technological barriers”¹²⁴ (such as antiquated electronic-submission systems) and their lack of appropriate and necessary reporting infrastructures,¹²⁵ some states and policymakers are also concerned that the HIPAA Privacy Rule precludes states from submitting mental-health information to NICS. In an effort to show that this is not the case, this Part first reviews the history of HIPAA and the basic structure and privacy protections within the HIPAA Privacy Rule. Next, this Part examines the exceptions to the HIPAA Privacy Rule that should arguably allow for reporting to NICS.

A. *HIPAA and the HIPAA Privacy Rule*

Perhaps an unexpected bedfellow of the Gun Control Act, the Brady Act, and the NICS provision, HIPAA was passed to amend the Internal Revenue Code by improving the “portability and continuity of health insurance coverage in the group and individual markets.”¹²⁶ Its aim was “to combat waste, fraud, and abuse in health insurance and health care delivery, to promote the use of medical savings accounts, to improve access to long-term care services and coverage, to simplify the administration of health insurance, and for other purposes.”¹²⁷

Although HIPAA did not originally cover health-information privacy, the HIPAA Privacy Rule, which HHS published in 2000,¹²⁸

122. See *supra* notes 14–15, 24–25 and accompanying text.

123. See *supra* notes 21–23 and accompanying text.

124. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 19, at 12.

125. MAYORS AGAINST ILLEGAL GUNS, *supra* note 19, at 22.

126. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936, 1937 (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C. (2012)).

127. *Id.*

128. 65 Fed. Reg. 82,462, 82,462 (proposed Dec. 28, 2000) (to be codified at 45 C.F.R. pts. 160, 164).

concerns the privacy of individually identifiable health information.¹²⁹ As it currently stands, the HIPAA Privacy Rule applies to “covered entities” that transmit health information electronically.¹³⁰ “Covered entities” include health plans,¹³¹ health-care clearinghouses,¹³² and health-care providers who transmit health information electronically.¹³³ For purposes of HIPAA, protected health information (PHI) is any information that independently identifies the individual and is “transmitted by electronic media,” “maintained in electronic media,” or “transmitted or maintained in any other form or medium.”¹³⁴ PHI, which includes demographic data, can be anything that relates to “the individual’s past, present[,] or future physical or mental health or condition,” the “provision of health care to the individual,” or “the past, present, or future payment for the provision of health care to the individual.”¹³⁵ Thus, while the mental-health records reported to NICS should not include medical

129. *Id.*

130. 45 C.F.R. § 160.103 (2014).

131. *See id.* § 160.103 (explaining that a “health plan” may include any individual or group plan that provides or pays for medical care, and may encompass both private and government plans, specifically health-maintenance organizations (HMOs) and high-risk pools).

132. *Id.* “Health-care clearinghouse” is a term of art under the HIPAA Privacy Rule. It refers to an entity (for example, a claims processor) that translates health information received from health-care organizations or other HIPAA-covered units either to or from the standard format that is required for electronic transactions. *Id.*

133. *Id.* “Health-care providers” include any person (such as a physician, nurse, or pharmacist) or entity (for example, a hospital or clinic) that “furnishes, bills, or is paid for health care in the normal course of business.” *Id.* To be a covered entity, providers must do at least one of the following: verify insurance coverage, file a health claim, or transmit health information electronically in a standard format required by HIPAA. Beverly Cohen, *Reconciling the HIPAA Privacy Rule with State Law Regulating Ex Parte Interviews of Plaintiffs’ Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 HOUS. L. REV. 1091, 1097 (2006) (citing 42 U.S.C. § 1320d-2(a)(2) (2000)). Providers relying on third-party billing services to conduct electronic transactions must also comply with the HIPAA Privacy Rule. 45 C.F.R. § 160.103; *see also* OFFICE FOR CIVIL RIGHTS, U.S. DEP’T. OF HEALTH & HUMAN SERVS., SUMMARY OF THE HIPAA PRIVACY RULE 2 (2003) (defining the types of health-care providers that would be considered “covered entities” under the HIPAA Privacy Rule). This means that providers who do not submit insurance claims electronically are not subject to the rule. 45 C.F.R. § 160.103 (“Certain transmissions, including of paper, via facsimile, and of voice, via telephone, are not considered to be transmissions via electronic media . . .”).

134. 45 C.F.R. § 160.103.

135. OFFICE FOR CIVIL RIGHTS, *supra* note 133, at 4. Examples of PHI include common identifiers such as name, address, birth date, and social-security number, but exclude “employment records that a covered entity maintains in its capacity as an employer” as well as educational and other records “subject to, or defined in, the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) [(2012)].” *Id.*

information, but only individual identifiers,¹³⁶ the information reported still may be subject to the HIPAA Privacy Rule if it is processed by a covered entity.

The HIPAA Privacy Rule prohibits a covered entity from using or disclosing PHI, except as expressly permitted or required by the Rule itself.¹³⁷ Under the Rule, a covered entity may use or disclose PHI for treatment purposes, payment, and general health-care operations.¹³⁸ In addition, the HIPAA Privacy Rule permits disclosure of PHI when disclosure is *required* by state law,¹³⁹ when disclosure supports certain specified law-enforcement purposes,¹⁴⁰ when disclosure averts a serious threat to health or safety,¹⁴¹ or when disclosure is needed for specialized government functions.¹⁴² Further, as courts and administrative bodies do not generally handle electronic PHI, they are not included within the blanket definition of a “covered entity,”¹⁴³ such that the health information produced in the process of a judicial or administrative procedure is not considered PHI.

B. Applicable HIPAA Exceptions to NICS Reporting

It makes some sense that there is a growing concern among lawmakers, politicians, and organizations that HIPAA is partially responsible for the failure of states to submit mental-health-prohibitor information to NICS.¹⁴⁴ The two statutes’ philosophies seem almost completely opposed: the Gun Control Act and NICS stand for disclosure, at least of the information required to ascertain whether someone should be prohibited from owning a gun, whereas

136. *See supra* note 65 and accompanying text.

137. 45 C.F.R. § 164.502(a) (2014). The two circumstances in which PHI must be disclosed are when the individual who is the subject of the information requests his or her medical records, and when HHS officials investigating potential HIPAA Privacy Rule violations request the information. *Id.*

138. LIU ET AL., *supra* note 56, at 9.

139. 45 C.F.R. § 164.512(a). Use or disclosure of PHI by covered entities must also “compl[y] with and [be] limited to the relevant requirements of such law.” *Id.*

140. *Id.* § 164.512(f).

141. *Id.* § 164.512(j). A health-care provider may use or disclose PHI if the provider believes in good faith that the use or disclosure “is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public.” *Id.*

142. *Id.* § 164.512(k). These specified essential government functions include military and veteran activities, national-security and intelligence activities, protective services for the president, and certain law-enforcement-custody situations. *Id.*

143. 45 C.F.R. § 160.103 (2014).

144. *See supra* notes 19–23 and accompanying text.

HIPAA stands for protection and nondisclosure (subject to some exceptions) of health information.¹⁴⁵ Certain HIPAA Privacy Rule exceptions to the disclosure of health records, however, undermine this assumed conflict, and suggest that HIPAA already allows states to submit the necessary information to NICS, either directly or through a state records center.

1. *The Judicially Created Records Exception.* As previously noted, individuals subject to the federal mental-health prohibitor include those who have been involuntarily committed to a mental institution, found incompetent to stand trial or not guilty by reason of insanity, or otherwise determined through an adjudication to be a danger to themselves, a danger to others, or unable to manage their own affairs.¹⁴⁶ The criminal-justice system generates (and frequently maintains) the records of persons adjudicated as guilty by reason of insanity or as incompetent to stand trial. Because the HIPAA Privacy Rule generally does not apply to records that are created or produced in the course of a judicial or administrative procedure,¹⁴⁷ such records are not covered by HIPAA.¹⁴⁸ Similarly, involuntary civil commitments and adjudications of an individual's danger (or his ability to manage his own affairs), often occur through a judicial or administrative process, and so are not subject to HIPAA restrictions.¹⁴⁹

There are instances, however, where involuntary civil commitments and adjudication of an individual's danger or mental incompetence are covered by HIPAA. For example, the record of an involuntary commitment or mental-health adjudication might have initiated with a HIPAA-covered entity. Or, the state repository for such records might be a HIPAA-covered entity, in which case pertinent prohibitor information would be subject to HIPAA protections. Despite these seeming limitations, however, the HIPAA

145. See 45 C.F.R. § 164.512 (listing the exceptions to nondisclosure of PHI).

146. 27 C.F.R. § 478.11 (2014) (defining the terms "adjudicated as a mental defective" and "committed to a mental institution").

147. See *supra* note 143 and accompanying text.

148. HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS), 78 Fed. Reg. 23,872, 23,874 (proposed Apr. 23, 2013) (to be codified at 45 C.F.R. pts. 160 and 164).

149. *Id.*

Privacy Rule may, through exceptions, provide ways for even covered entities to report prohibitor information to NICS, as outlined below.¹⁵⁰

2. *The Required-Reporting Exception.* The HIPAA Privacy Rule allows covered entities to disclose information to NICS if the state has a law *requiring* such reporting.¹⁵¹ There are currently more than thirty states with laws that explicitly require NICS reporting.¹⁵²

150. *Id.* at 23,875.

151. 45 C.F.R. § 164.512(a) (2014).

152. These states include Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and Wisconsin. *See* LIU ET AL., *supra* note 56, at 11 n.53 (listing twenty-three states as requiring NICS reporting). Since the Liu study, many other states have passed legislation requiring such reporting. *See* An Act Relating to reporting on involuntary mental health commitment to the National Instant Criminal Background Check System; relating to the sealing of records of mental health proceedings; and relating to relief from a disability resulting from an involuntary commitment or an adjudication of mental illness or mental incompetence, 2014 Alaska Sess. Laws ch. 73 (to be codified at ALASKA STAT. § 47.30.907) (requiring reporting of an involuntary commitment or finding of mental incompetence); ARIZ. REV. STAT. ANN. § 13-609(A) (Supp. 2014) (mandating that effective January 1, 2015, “If a person is found incompetent by a court, the court shall transmit the case information . . . to the supreme court. The supreme court shall transmit the case information . . . to the department of public safety. The department of public safety shall transmit the case information . . . to the [N]ational [I]nstant [C]riminal [B]ackground [C]heck [S]ystem”); Mental Health—Gun Control, 2014 Haw. Sess. Laws 87 (to be codified at Haw. Rev. Stat. § 134-6.5) (requiring reporting of an involuntary commitment or finding of mental incompetence); MD. CODE ANN., PUB. SAFETY § 5-133.2(b) (LexisNexis Supp. 2014) (“A court shall promptly report . . . if a court . . . finds that a person is not criminally responsible . . .”); MISS. CODE ANN. § 45-9-101(2) (West Supp. 2014) (requiring the Department of Public Safety to establish a reporting procedure); Preclusions Related to Oklahoma Self-Defense Act, 2014 Okla. Sess. Law Serv. ch. 259 (West) (to be codified at OKLA. STAT. tit. 21, § 1290.27) (mandating that effective July 1, 2015, “When a court adjudicates a person mentally incompetent or orders the involuntary commitment of a person due to a mental illness . . . the clerk of the Court *shall* forward a certified copy of the order or adjudication to the Federal Bureau of Investigation or its successor agency for the sole purpose of inclusion in the National Instant Criminal Background Check System database” (emphasis added)); S.D. CODIFIED LAWS § 23-7-48 (Supp. 2014) (“The attorney general shall transmit to the National Instant Criminal Background System . . . the name and other identifying information of any person who is prohibited from possessing a firearm under 18 U.S.C. 922(g)(4) because . . . the person was determined to be incompetent to stand trial . . . , or the person was involuntarily committed . . .”). New Jersey passed a bill clarifying that the state is *required* to submit certain mental-health information to NICS. Gen. Assemb. 3717, 2013 Leg., Reg. Sess. (N.J. 2013). Florida amended its code to require the state’s Department of Law Enforcement to “compile and maintain an automated database of persons who are prohibited from purchasing a firearm based on court records of adjudications of mental defectiveness or commitments to mental institutions.” FLA. STAT. ANN. § 790.065(2)(a)4.c. (West 2007 & Supp. 2013). South Carolina also recently passed a bill, which became effective on August 1, 2013, requiring courts to submit records to the South Carolina Law Enforcement Division of persons

However, states that permit (but do not require) covered entities to disclose records,¹⁵³ and states without laws requiring the reporting of mental-health records to NICS,¹⁵⁴ are probably not covered by this particular exception to HIPAA.¹⁵⁵ For most of these states, however, the prohibitor information is unaffected by HIPAA-reporting prohibitions because it is created and kept in the judicial system, and therefore, HIPAA does not serve as a barrier to mental-health-prohibitor submission.¹⁵⁶

who have “been adjudicated as a mental defective” or who, via court order, have “been committed to a mental institution.” H. 3560, 2013 Gen. Assemb., 120th Sess. (S.C. 2013). Louisiana enacted legislation that went into effect January 1, 2014, requiring clerks to submit records of court orders requiring individuals to be “judicially committed, receive involuntary outpatient treatment, or receive mental health treatment or services” as well as the records of court determinations “that a person does not have the mental capacity to proceed with a criminal trial.” H. 21, 2013 H., Reg. Sess. (La. 2013).

153. There are five states that permit, but do not require, reporting to NICS: California, Missouri, Nebraska, Pennsylvania, and West Virginia. *See* LIU ET AL., *supra* note 56, at 11 n.54 (listing Missouri, Nebraska, Pennsylvania, and West Virginia); CAL. PENAL CODE § 28220(b) (West Supp. 2014) (“[T]he Department of Justice *may* participate in the National Instant Criminal Background Check System” (emphasis added)). In most of these states, the prohibitor information is not PHI, nor is it affected by HIPAA. In Missouri, the mental-health-prohibitor information comes from court proceedings and “shall be . . . available . . . to the Missouri state highway patrol for reporting to the National Instant Criminal Background Check System (NICS).” MO. ANN. STAT. § 630.140(5) (West 2014). In Nebraska, court clerks update HHS and the Nebraska State Police when individuals have received mental-health-based commitment orders by a mental-health board or court. Because they originate with the court and are held by the police and health department, the records are likely not PHI. NEB. REV. STAT. ANN. § 69-2409.01(1) (LexisNexis 2014). In West Virginia, mental-health-prohibitor information originates and is held with the circuit courts and is compiled by the court clerks, so it is not PHI. W. VA. CODE ANN. § 61-7A-3(a) (LexisNexis 2010). In Pennsylvania, as well, persons who have “been adjudicated as an incompetent” or “involuntarily committed” cannot possess a gun. 18 PA. CONS. STAT. ANN. § 6105(c)(4) (West 2000 & Supp. 2014). It is not clear whether the Pennsylvania commitment records are kept in or originate from a covered entity. Since January 2013, however, Pennsylvania has been sending mental-health records to NICS. Moriah Balingit, *Pa. Sends Mental Health Data for Gun Checks*, PITTSBURGH POST-GAZETTE (Jan. 19, 2013), <http://www.post-gazette.com/news/state/2013/01/19/Pa-sends-mental-health-data-for-gun-checks/stories/201301190192>. There is also a pending rule requiring the disclosure of mental-health-prohibitor information. H. 921, 2013 Gen. Assemb., Reg. Sess. (Pa. 2013) (referred to judiciary Mar. 11, 2013).

154. These include the District of Columbia and Arkansas, Massachusetts, Michigan, Montana, New Hampshire, New Mexico, Ohio, Rhode Island, Utah, Vermont, and Wyoming. Everytown for Gun Safety, *Closing the Gaps: Strengthening the Background Check System To Keep Guns Away from the Dangerously Mentally Ill*, at 13 (2014), available at <http://everytown.org/documents/2014/10/closing-the-gaps.pdf>.

155. *Id.* at 11–12.

156. *See supra* notes 153–54 and accompanying text.

3. *The Hybrid-Entity Exception.* Alternatively, if (1) there is no state law, or if the existing state law authorizes but does not require such disclosure; and (2) the records of an involuntary commitment or mental-health adjudication originate with a HIPAA-covered entity, or the HIPAA-covered entity is the state repository for such records, the HIPAA Privacy Rule permits a covered entity that performs both health-care and non-health-care functions (such as NICS reporting) to become a hybrid entity such that the HIPAA Privacy Rule applies only to its health-care functions.¹⁵⁷ A covered entity can achieve hybrid status by separating its health-care components from its other components, “documenting that designation, and implementing policies and procedures to prevent unauthorized access to protected health information by the entity’s non-covered components.”¹⁵⁸ This would allow a covered entity to report prohibitor information through its non-HIPAA-covered unit without potentially being restricted by the HIPAA Privacy Rule.¹⁵⁹

Although it might seem somewhat complicated to separate a NICS-reporting section from other parts of a health-care organization, a key requirement of the HIPAA Privacy Rule is that it covers PHI electronically created, maintained, or received by an entity.¹⁶⁰ If the records of “mentally defective” adjudications and decisions to commit someone involuntarily are housed separately from the day-to-day transactions of a health-care organization, and are not transferred electronically, there is no HIPAA Privacy Rule violation.¹⁶¹ This “hybrid-entity exception” is a potentially viable solution for states that cannot or do not wish to pass mandatory-reporting laws.¹⁶²

157. 45 C.F.R. § 164.103 (2014) (defining a “hybrid entity”); *id.* § 164.105(a)(2)(D)(ii) (2014) (detailing the safeguard requirements for hybrid entities with regard to the health-care and non-health-care components); *see* HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS), 78 Fed. Reg. 23,872, 23,875 (proposed Apr. 23, 2013) (to be codified at 45 C.F.R. pts. 160 and 164) (summarizing the basic functionality and requirements of a hybrid entity and its relation to NICS reporting).

158. Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS), 79 Fed. Reg. 784, 787 (proposed Jan. 7, 2014).

159. HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS), 78 Fed. Reg. at 23,875 (citing 45 C.F.R. §§ 164.103, 164.105 (2014)).

160. 45 C.F.R. § 160.103.

161. *See* HIPAA Privacy Rule and the National Instant Criminal Background Check System (NICS), 78 Fed. Reg. at 23,875 (outlining briefly the hybrid-entity option for states).

162. *Id.*

4. *The Public-Health Exception.* The public-health exception is an additional HIPAA exception for states that do not require the submission of records to NICS and whose applicable mental-health information is not created and housed within the court system. The organic HIPAA statute and the HIPAA Privacy Rule allow covered entities to disclose PHI to a public-health authority, or to an agent of a public-health authority, when that authority is “authorized by law to collect or receive such information for the purpose of preventing or controlling disease, injury, or disability.”¹⁶³ This is perhaps the most applicable exception to HIPAA for NICS purposes. If state laws that authorize, but do not require, the submission of records to NICS are viewed as related to public-health measures, HIPAA’s federal preemption of state PHI privacy laws might be negated.¹⁶⁴

Further, although the HIPAA Privacy Rule is fairly narrow as to the enumerated exceptions for its preemption of state laws, the HIPAA statute is broader and includes not only exceptions to state preemption,¹⁶⁵ but a rule of construction¹⁶⁶ that potentially allows state and federal public-health laws to trump state and federal privacy laws.¹⁶⁷ Thus, a state privacy law that would otherwise be saved from preemption by HIPAA’s exception clauses—a stricter privacy law,¹⁶⁸

163. 42 U.S.C. § 1320d-7(b) (2012); 45 C.F.R. § 164.512(b)(i) (2014).

164. Barbara J. Evans, *Institutional Competence to Balance Privacy and Competing Values: The Forgotten Third Prong of HIPAA Preemption Analysis*, 46 U.C. DAVIS L. REV. 1175, 1200 (2013); see also H.R. REP. NO. 104-496, pt. 1, at 37 (1996) (separating “public health reporting” from the “general effect” of the statute on state law, as later adopted in full in the HIPAA statute).

165. 42 U.S.C. § 1320d-7(a)(2)(A).

166. See *id.* § 1320d-7(b) (“Nothing in this part shall be construed to invalidate or limit the authority, power, or procedures established under any law providing for the reporting of disease or injury, child abuse, birth, or death, public health surveillance, or public health investigation or intervention.”).

167. See Evans, *supra* note 164, at 1200 (arguing that Congress’s use of the phrase “any law” as opposed to “[s]tate law” in HIPAA provision 42 U.S.C. § 1320d-7, as well as the overall structure of the law, indicates that 42 U.S.C. § 1320d-7(b) is not a saving clause, or an exception clause, but “a rule of construction that, among other things, limits the reach of the saving clauses” when public health is involved).

168. For example, the Massachusetts Department of Mental Health is a covered entity (that is, not a hybrid) and is subject to all HIPAA constraints. MASS. DEP’T OF MENTAL HEALTH, DMH PRIVACY HANDBOOK INTRODUCTION (2014), available at <http://www.mass.gov/eohhs/docs/dmh/hipaa/handbook/ainroduction.pdf>. In addition to following the HIPAA requirements, the Department is governed by stricter state laws limiting HIPAA exceptions to disclosures from a “proper judicial order” that requests disclosure to the “patient, resident, or attorney” if it is in the best interest of the patient. MASS. ANN. LAWS ch. 123, § 36 (LexisNexis Supp. 2014). Although this more stringent state law would normally be an exception to HIPAA, a federal or state public-health law may preempt it. 42 U.S.C. § 1320d-7(a)(2)(B).

for example—might be preempted in the event that the issue concerns public health.¹⁶⁹

One major problem with this exception is the potentially vast scope of the type of public-health activities that Congress intended § 1320d-7(b) of HIPAA to protect. This concern could be addressed by allowing the Secretary of HHS to determine piecemeal whether the provision of state law, if normally preemptable by HIPAA, is “necessary . . . for other purposes.”¹⁷⁰ The Secretary of HHS could provide an interpretive rule or policy statement—a nonlegislative rule, not subject to the Administrative Procedure Act¹⁷¹—provided that the statement does not announce or add substantive content to the Privacy Rule and is within a fair reading of the statute’s intent.¹⁷² If the new interpretive rule’s main function is to allow agencies to “explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings,” it may be considered an interpretive rule or policy statement dictating the extent of a public-health designation.¹⁷³

IV. THE PROPOSED HIPAA EXCEPTION—A VIABLE SOLUTION?

In light of the Gun Control Act and the Brady Act’s NICS provision, the roles of state and federal governments in defining NICS-reporting requirements, and the various HIPAA exceptions applicable to states’ NICS reporting, the recently proposed HIPAA exception—announced by the HIPAA-NICS NPRM¹⁷⁴—seems to have been formulated in response to fears that NICS and the HIPAA Privacy Rule are in conflict, when in fact, no such conflict exists. Nonetheless, might this HIPAA exception in some way help states and health-care professionals provide appropriate mental-health

169. Evans, *supra* note 164, at 1200–01.

170. 42 U.S.C. § 1320d-7(a)(2)(A)(i)(IV).

171. Administrative Procedure Act, 5 U.S.C. §§ 551–559 (2012).

172. *See* Am. Hosp. Ass’n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (separating cases in which an “agency is merely explicating Congress’ desires” from those in which the agency adds its own substantive content to the statute).

173. *See id.* at 1045 (explaining that such rules need not go through the process of notice and comment); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311, 1313 & n.5 (1992) (explaining that an agency may issue a rule or policy statement without notice and comment if its interpretation is true to the underlying statute or rule and does not add any legal substance).

174. Notice of Proposed Rulemaking, 78 Fed. Reg. 784 (proposed Jan. 7, 2014) (to be codified at 45 C.F.R. pt. 164).

information to NICS? Or, is it unnecessary given the trend in state NICS-reporting legislation, and perhaps even deleterious to the interests of states?

This Part first expands upon the discussion in Part III.B.4, detailing more fully how the public-health provision of the HIPAA Privacy Rule already contains an exception for the submission of information pertaining to an individual's mental-health records. This Part then examines how the HIPAA-NICS NPRM is unnecessary, and perhaps even harmful, to the goal of increasing the submission of records given the trend among states to pass laws requiring NICS reporting. It concludes by questioning whether, in addition to weakening national gun-control efforts, the HIPAA-NICS NPRM might also undermine states' ability to control what information is reported to NICS.

A. *The Existing Public-Health Exception*

As this Note previously outlined, perhaps the strongest legal argument against this proposed regulation is that the new exception it offers is unnecessary given existing HIPAA exceptions and provisions.¹⁷⁵ Namely, although the HIPAA Privacy Rule prohibits a covered entity from using or disclosing PHI except as *expressly* permitted or required by the HIPAA Privacy Rule,¹⁷⁶ there is an exception for rules that are related to public-health measures.¹⁷⁷ The Secretary of HHS could interpret "public health" so as to allow states with laws that authorize, but do not require, the submission of mental-health-prohibitor information to submit records to NICS if the information is covered by HIPAA. The public-health interest would be defined as the protection of Americans from unnecessary gun violence, and the protection of those who should not be able to obtain a gun based on federal standards from their own potentially fatal actions.¹⁷⁸

The Supreme Court has recognized a general public-health exception to the right of privacy in one's medical information.¹⁷⁹ Over

175. *See supra* Part III.B.

176. 45 C.F.R. § 164.502(a) (2013).

177. *See supra* notes 163–69 and accompanying text.

178. For a description of the characteristics that make up the mental-health prohibitors, see 18 U.S.C. § 922(g), (n) (2012); 27 C.F.R. § 478.11 (2014).

179. *See Whalen v. Roe*, 429 U.S. 589, 591–603 (1977) (finding that a patient and his physician's rights to privacy were not violated by a New York statute that required health-care facilities to report to a centralized computer system the issuance of specific prescription drugs

time, other federal courts of appeals have adopted this exception and have created a test that weighs various factors, including patient privacy and public-health interests, in determining whether a patient's medical records should be disclosed.¹⁸⁰ In New York, there has been backlash against the use of the HIPAA public-health exception to justify the disclosure of the records of individuals with mental disabilities.¹⁸¹ The facts of the only New York case to look squarely at this issue,¹⁸² however, are likely too narrow to apply to the use of the public-health exception for NICS reporting.¹⁸³

(for which there was an illegal market), because sufficient privacy protections were built into the computer database and there was a minimal risk to individuals that their identity would be exposed).

180. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 572, 578 (3d Cir. 1980) (noting, in reconciling the privacy interests of the employees of Westinghouse Electric Corp. with the “significant public interest in research designed to improve occupational safety and health,” that “[g]enerally, the reporting requirements which have been upheld have been those in which the government has advanced a need to acquire the information to develop treatment programs or control threats to public health”); *Patients of Dr. Solomon v. Bd. of Physician Quality Assurance*, 85 F. Supp. 2d 545, 546, 548 (D. Md. 1999) (denying a “Petition for Temporary Restraining Order/Preliminary Injunction” to enjoin the Board of Physician Quality Assurance and the Maryland State Department of Health and Mental Hygiene from seizing Dr. Solomon’s medical records until there was a “‘full and fair hearing’ with regard to [the patients’] privacy rights,” as “allowing individual patients to block Board investigations . . . would hinder the Board’s ability to protect public health”).

181. *See Miguel M. v. Barron*, 950 N.E.2d 107, 109 (N.Y. 2011) (holding that “the Privacy Rule adopted by the federal government pursuant to the Health Insurance Portability and Accountability Act (HIPAA) prohibits the disclosure of a patient’s medical records to a state agency that requests them for use in a proceeding to compel the patient to accept mental health treatment, where the patient has neither authorized the disclosure nor received notice of the agency’s request for the records”).

182. In this case, at a hearing to order assisted outpatient treatment (AOT), Dr. Barron offered into evidence health records relating to Miguel’s (his patient’s) hospitalizations. Miguel had not authorized the release of the records and no court order for their disclosure had been sought. *Id.* Barron argued that the disclosure was acceptable under the public-health exception to HIPAA given that the “disclosure of a mentally ill person’s hospital records . . . protect[ed] the public health, because mentally ill people might kill or injure other people . . . who, of course, are members of the public.” *Id.* at 110. The court held that this reading of the HIPAA public-health exception was too narrow, because the “apparent purpose of the public health exception is to facilitate government activities that protect large numbers of people . . . or that advance public health by accumulating valuable statistical information.” *Id.* at 111.

183. In *Barron*, an individual took it upon himself, albeit while working under the purview of the state, to disclose the records of an individual to a court without going through the existing legal process of obtaining a court order to acquire these records. *Id.* at 109. Barron offered the patient’s entire record—not just his demographic information—and it was used to force the patient to accept AOT. *Id.* By contrast, with NICS reporting, the information remains in a central computerized database that is not accessible to the general public. *See supra* notes 59–69 and accompanying text. Barron’s argument—that he was protecting public health by preventing the potentially dangerous actions of an individual—seems parallel to the public-health reason

Moreover, numerous legal scholars have discussed the public-health exception's possible use for NICS mental-health reporting,¹⁸⁴ and Leon Rodriguez, the head of the OCR, has specifically suggested that if there *is* a conflict between the HIPAA Privacy Rule and NICS, it would be mitigated by this public-health exception.¹⁸⁵ To utilize this exception, the Secretary of HHS would have to weigh the public-health aim of reducing gun violence nationally with the competing aim of protecting patient privacy, and determine whether there is a feasible alternative that states could use—such as the creation of a hybrid entity or the passage of a law requiring NICS reporting.¹⁸⁶ If NICS-reporting procedures ensure that only necessary prohibitor information is submitted, and if the creation of a hybrid entity or passage of a law requiring NICS submission proves too onerous, the public-health interest would likely be deemed weightier. In such a case, select mental-health-prohibitor information could be submitted to NICS regardless of whether it is required or authorized by state law.

B. A Lack of Necessity for the Proposed Regulation, Its Potential To Undermine the Goals of National Gun Control, and Its Possible State Sovereignty Problem

The HIPAA-NICS NPRM is arguably not only unnecessary given the existing public-health exception, but unnecessary given the reality that states have increasingly passed legislation that *requires* the submission of prohibitor information (including mental-health information) to NICS. The HIPAA-NICS exception might also act to

for allowing the exception to NICS. The NICS database, however, is more analogous to a large “accumulat[ion] [of] valuable statistical information.” *Barron*, 950 N.E.2d at 111. The NICS database is used by NICS for the broader federal goal of stymying the purchase of firearms by individuals who have been deemed incapable for mental-health reasons. *Scarborough v. United States*, 431 U.S. 563, 571 (1977) (“The legislative history [of the Gun Control Act] in its entirety, while brief, further supports the view that Congress sought to rule broadly.”).

184. See, e.g., Evans, *supra* note 164, at 1225–26 (noting that the “Privacy Rule’s public health exception is widely—and sometimes wildly—misunderstood” and that “[c]onfusion about the Privacy Rule continues to thwart access to data for the enumerated public health activities” (footnote omitted)); Andrea Wilson, *Missing the Mark: The Public Health Exception to the HIPAA Privacy Rule and Its Impact on Surveillance Activity*, 9 HOUS. J. HEALTH L. & POL’Y 131, 140–41 (2008) (discussing covered entities’ uncertainty as to when it is appropriate under the public-health exception to turn over the records of patients and customers).

185. Letter from Leon Rodriguez, Dir. Office of Civil Rights, Dep’t of Health and Human Servs., to the Nation’s Health Care Providers, *supra* note 27.

186. See *supra* notes 157–62 and accompanying text.

undermine the goal of uniform mental-health submission and to undermine states' control over record submission.

1. *State Trends and the Goal of Uniform Submission.* As previously mentioned, under *Printz*, states must opt in to NICS participation—and are therefore responsible for formulating laws that address NICS reporting as long as they abide by base-level federal requirements.¹⁸⁷ If one understands the public-health exception as a solution to the perceived conflict between NICS and the HIPAA Privacy Rule, states should be free to create reporting laws—whether mandatory or discretionary—as they see fit.

Nevertheless, perhaps unaware of the public-health exception's applicability, many states have passed legislation requiring the submission of mental-health-prohibitor information. More than thirty states now require that federal prohibitor information be submitted to NICS, and more states continue to introduce bills requiring such disclosure.¹⁸⁸ Furthermore, in most, if not all, of the five states that authorize but do not require the disclosure of mental-health-prohibitor information, information relating to mental-health adjudications comes from the judicial system and is therefore not affected by the HIPAA Privacy Rule restrictions.¹⁸⁹ In proposing the HIPAA-NICS NPRM, therefore, the federal government appears to have rushed to create an exception that is unnecessary given the current trend of states to pass their own NICS-reporting requirements.

In light of this trend, only those states without laws requiring the reporting of prohibitor information to NICS,¹⁹⁰ and whose prohibitor information is classified as PHI,¹⁹¹ would be affected by the new HIPAA-NICS NPRM exception. However, these states should be encouraged to follow the trend of their sister states—passing laws requiring submission—as the increase in NICS records resulting from such laws will improve the overall success of the NICS program. The HIPAA-NICS NPRM will likely undermine this trend, however, as the creation of a HIPAA exception—as dictated by the NPRM—

187. *See supra* note 93 and accompanying text.

188. *See supra* note 152.

189. *See supra* note 153.

190. *See supra* note 154.

191. *See supra* Part III.B.

allowing *any* type of reporting legislation, discretionary or required, may encourage lax and disparate reporting laws across the states.

It might be argued that such federal encouragement of required-reporting legislation in place of a blanket HIPAA-NICS exception is contrary to the holding in *Printz v. United States*.¹⁹² However, states would not be forced to report prohibitor information to NICS. Rather, the federal government might be able to require a state—as a necessary condition of enrollment in the NICS program—to pass mandatory-reporting laws to allow for full compliance with the Gun Control Act.¹⁹³ In addition, the federal government could condition the issuance of federal NARIP grants on states' use of these funds to research whether prohibitor information in the given state is covered by HIPAA, and if it is, to support the passage of legislation requiring the submission of only the necessary PHI to NICS.¹⁹⁴

2. *Usurpation of State Control over Information Sent to NICS.*

Furthermore, in opposition to the holding in *Printz*, the HIPAA-NICS NPRM¹⁹⁵ could actually reduce states' sovereignty to decide whether to report to NICS and subsequently, what information to report to NICS.¹⁹⁶ The NPRM recommends that the HIPAA Privacy Rule be amended to create a new use or disclosure¹⁹⁷ within the “uses and disclosures for specialized government functions” section of the HIPAA Privacy Rule.¹⁹⁸ Importantly, however, this section is *not*

192. For an overview of the holding of *Printz* that the federal government cannot directly require state officials to enforce federal regulatory programs, and a discussion of its implications for NICS reporting, see *supra* notes 86–91 and accompanying text.

193. This is a necessary consequence of *Printz's* holding. See *Printz v. United States*, 521 U.S. 898, 917–18 (1997) (holding that federal statutes that place “conditions upon the grant of federal funding” are not the same as “forced participation of the States’ executive in the actual administration of the federal program”).

194. Subject to certain constitutional limits, Congress may use its taxing and spending powers to induce state compliance with federal regulatory programs. See *supra* note 89 and accompanying text.

195. Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS), 79 Fed. Reg. 784 (proposed Jan. 7, 2014) (to amend 45 C.F.R. § 164.512(k)).

196. See *Printz*, 521 U.S. at 918–19 (1997) (explaining that states maintain a “residuary and inviolable sovereignty” (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (E.H. Scott, ed., 1898))).

197. Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS), 79 Fed. Reg. at 792.

198. 45 C.F.R. § 164.512 (2014). “A covered entity may use or disclose protected health information without the written authorization of the individual . . . or the opportunity for the

addressed to states and their disclosure of records, but rather to “covered entit[ies].”¹⁹⁹ Covered entities must abide by the exceptions in this section unless a stricter state privacy law exists,²⁰⁰ or unless there is a public-health rationale for abiding by the HIPAA Privacy Rule.²⁰¹ Despite these limitations, however, if the NPRM comes into effect, and no stricter state law applies, covered entities, such as private hospitals, might not be controlled by the state’s reporting laws and would be able to determine what and when to report to NICS.²⁰² If not governed by state laws, therefore, covered entities might report not only pertinent information to NICS, but also unnecessary PHI.

HHS has responded to this fear, arguing that the HIPAA-NICS NPRM poses no federalism concerns because HIPAA-covered entities would not be *required* to disclose information if the disclosure of such information is contrary to state law.²⁰³ HHS’s response, however, ignores the fact that simply allowing covered entities to act in the absence of state law or against state law by reporting to NICS would completely undermine states’ authority and decisionmaking regarding the submission of information to NICS.²⁰⁴

Although states may supplement the federal requirements describing who may own a gun, states, with the encouragement of the federal government, should strive to achieve at least uniform policies regarding the submission of federal prohibitor information in a way that maintains respect for individuals with mental disabilities. A HIPAA exception to NICS that allows a wide variety of reporting does not foster uniformity, or reflect or respect states’ trend toward passing NICS-reporting laws. And, by placing the exception in a section of the HIPAA Privacy Rule aimed at covered entities, the HIPAA-NICS NPRM could serve to undermine states’ control over

individual to agree or object . . . in the situations covered by this section, subject to the applicable requirements of this section.” *Id.*

199. *Id.*

200. See 45 C.F.R. § 160.203 (2014) (outlining preemption-rule exceptions, including when “[t]he provision of State law . . . is more stringent than a standard, requirement, or implementation specification” of HIPAA).

201. *Id.* (noting that “a standard, requirement, or implementation specification . . . that is contrary to a provision of State law preempts the provision of State law” unless the Secretary of HHS deems the state-law provision necessary because it “serv[es] a compelling need related to public health, safety, or welfare”).

202. See Notice of Proposed Rulemaking, 79 Fed. Reg. at 792 (noting that the proposed modification would “merely permit, and not require, covered entities to report to the NICS”).

203. *Id.* at 795.

204. See *supra* notes 86–91 and accompanying text.

NICS reporting. Perhaps more importantly, by avoiding the use of an existing exception, the HIPAA-NICS NPRM proposes a solution that is unnecessary and likely to draw more negative attention to the mental-health community.

V. ALLEVIATING STATES' CONCERN OF AN OVERLAP BETWEEN HIPAA AND NICS

This Note contends that the HIPAA-NICS NPRM is unnecessary—despite states' and policymakers' concerns, there is no meaningful collision between the NICS provision and the HIPAA Privacy Rule. Rather than finalize this unnecessary regulation, the federal government should specify, and perhaps reconsider, what kinds of information *are* reportable to NICS. This Part examines the reporting laws of Connecticut and Virginia as possible examples that other states and the federal government can use to fashion NICS-reporting laws and regulations. It then outlines additional areas that should be addressed by federal NICS regulations that are overlooked by the HIPAA-NICS NPRM.

A. *The Virginia and Connecticut NICS-Reporting Laws as a Model for Federal and State Governments*

As previously explained, although the federal government cannot force states to submit records to NICS,²⁰⁵ once a state agrees to do so, it must then abide by a floor of reporting standards established by the federal government.²⁰⁶ But the federal government need not come up with these standards in isolation. As Justice Brandeis remarked in *New State Ice Co. v. Liebmann*,²⁰⁷ states may “serve as . . . laborator[ies]” for federal legislation.²⁰⁸ Thus, not only can other states benefit from looking at the recent NICS-reporting laws of states like Virginia and Connecticut, but the federal government

205. *See supra* notes 89–90.

206. Under federal law, information that must be submitted to NICS includes whether an individual “has been adjudicated as a mental defective or has been committed to any mental institution,” 18 U.S.C. § 922(d)(4) (2012), and information as to any person “who has been adjudicated as a mental defective or who has been committed to a mental institution,” *id.* § 922(g)(4).

207. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

208. *See id.* at 311 (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

might also learn from observing the results of these laboratories of democracy.

This Section provides a brief overview of recent NICS-reporting laws. It then probes the specific requirements of the Connecticut and Virginia mental-health reporting laws, identifying them as potential state-law experiments that the federal government might follow.

1. *The Increase in Mental-Disability NICS-Reporting Laws.* As previously noted, recent events have highlighted the potential dangers of gun possession by the mentally ill, despite the dubious legitimacy of this fear.²⁰⁹ States have responded by passing their own NICS legislation, some with more expansive reporting requirements than those required by the federal statute. Some states, such as Connecticut²¹⁰ and Virginia,²¹¹ have passed laws that more effectively balance the privacy rights of individuals with mental illnesses with the aim of lowering the rate of shootings by such individuals. Others, such as New York,²¹² might have overstepped constitutional limits by

209. Scientific studies have shown no clear connection between gun violence and mental illness, absent additional characteristics. *See* Luo & McIntire, *supra* note 83, at 30 (explaining that research has shown that people with serious mental illnesses “like schizophrenia, major depression or bipolar disorder, do pose an increased risk of violence,” and that substance abuse is a particularly “powerful predictor of violence”); Donna M. Norris, Marilyn Price, Thomas Gutheil, & William H. Reid, *Firearm Laws, Patients, and the Roles of Psychiatrists*, 163 AM. J. PSYCHIATRY 1392, 1394–95 (2006) (explaining that although “mentally ill persons are often one focus of firearms legislation,” research suggests that such a relationship only exists in the context of “major mental illness” when combined with substance abuse and a history of violence).

210. CONN. GEN. STAT. § 17a-500 (Supp. 2014). In Connecticut, the Commissioner of Mental Health and Addiction Services works with the courts to keep a record of the “cases relating to persons with psychiatric disabilities.” *Id.* § 17a-500(a). Specifically, “Each court of probate shall keep a record of the cases relating to persons with psychiatric disabilities . . . and the disposition of them” and these records shall be “sealed and available only to the respondent or his or her counsel unless the Court of Probate, after hearing held with notice to the respondent, determines such records should be disclosed for cause shown.” *Id.* § 17a-500(a). The Commissioner of Mental Health and Addiction Services shall maintain information on commitment orders by the probate court as well as on voluntary admissions, and “shall provide such information to the Commissioner of Emergency Services and Public Protection . . . in such a manner as to report identifying information on the commitment or voluntary admission status . . . for a person who applies for or holds a permit or certificate” for a gun. *Id.* § 17a-500(b).

211. VA. CODE ANN. § 37.2-819 (2014) (mandating that mental-health diagnosis and treatment information should *not* be disseminated to the state’s criminal-records exchange along with involuntary- or voluntary-commitment records or certifications of temporary detention orders for gun possession).

212. N.Y. Secure Firearms and Ammunition Enforcement (SAFE) Act, S.B. 2230, 2388 S. Assemb. (N.Y. 2013) (amending multiple New York laws to better enforce the submission of mental-health-prohibitor information to NICS).

requiring providers of mental-health care to report “as soon as practicable” to NICS if a patient is likely to hurt himself or others. This directive potentially intrudes upon individuals’ constitutional right to privacy.²¹³

2. *Connecticut’s Law on Mental-Health Reporting.* After the Virginia Tech shooting, Connecticut passed a law requiring that mental-health records be sent to NICS in accordance with the federal standards.²¹⁴ For the past fourteen years, Connecticut has sent to NICS the records of persons involuntarily committed to a mental-health facility, found incompetent to stand trial, or found not guilty due to insanity.²¹⁵ In 2013, however, Connecticut amended its firearm-permit law to also exclude from obtaining the required firearm permit those who have “been *voluntarily* admitted on or after October 1, 2013, to a hospital for persons with psychiatric disabilities.”²¹⁶ Thus, in addition to individuals who have been involuntarily committed, individuals who have voluntarily admitted themselves to an inpatient psychiatric facility cannot receive a firearm permit or eligibility certificate, nor can they possess any firearm for six months following

213. N.Y. MENTAL HYG. LAW § 9.46(b) (McKinney Supp. 2014). New York’s law has received attention and backlash from the press and citizens for its unusually extreme approach to the reporting of mental-health information. *See, e.g.*, McCreary, *supra* note 46, at 859 (describing New York’s gun-control law as potentially going too far in infringing the confidentiality of patients who seek mental-health treatment); Jessica Bakeman, *Mental-health Officials Clash on N.Y. Gun Law Reporting*, USA TODAY (Mar. 24, 2013 12:03 AM), available at <http://www.usatoday.com/story/news/nation/2013/03/24/mental-health-new-york-gun-law/2011399> (last visited Nov. 18, 2014) (noting that psychiatrists and law-enforcement officials objected to the New York law, which could require them to report patients who are a danger to themselves or others); *see generally* Luo & McIntire, *supra* note 83 (chronicling the difficult law-enforcement issues raised by gun ownership among the mentally ill, but also giving voice to the concern among “mental health professionals . . . that new seizure laws might stigmatize many people who have no greater propensity for violence than the broader population”).

214. Maureen Groppe, *Checking Gun Buyers for Mental Illness Hinges on States*, USA TODAY (Mar. 28, 2013, 11:03 PM), available at <http://www.usatoday.com/story/news/nation/2013/03/28/gun-control-background-checks-mentally-ill/2028689>. Before the Virginia Tech incident, only four states had laws explicitly requiring agencies to share relevant mental-health records with NICS. MAYORS AGAINST ILLEGAL GUNS, *supra* note 19, at 14. These states were Alabama (whose law had been in place since 2004), Colorado (since 2002), Connecticut (since 2005), and Georgia (since 2005). *Id.*

215. Wilson, *supra* note 81.

216. CONN. GEN. STAT. § 29–28(b)(5)(B) (Supp. 2014) (emphasis added). Compare the language in CONN. GEN. STAT. § 29–28(b)(5)(B), which *does* include “voluntarily committed,” with that of CONN. GEN. STAT. § 29–28 (2009) (current version at CONN. GEN. STAT. § 29–28 (Supp. 2014)), which does not include the “voluntarily committed” language of the 2013 version.

discharge from the hospital.²¹⁷ The inclusion of individuals who voluntarily choose to be committed might seem somewhat overinclusive, but it arguably supports the underlying aim of the Gun Control Act—to keep firearms out of the hands of those deemed unfit or dangerous.²¹⁸

One argument against the Connecticut law and in favor of allowing the purchase and possession of firearms by individuals who have been voluntarily committed is that if a person is rational enough to seek treatment, he is rational enough to decide whether to purchase a gun.²¹⁹ Often, however, those who submit voluntarily to mental-health treatment have the support of family and friends who encourage or financially induce them to seek treatment. If individuals who voluntarily commit themselves were to possess a gun, they might be just as dangerous as someone who had been involuntarily committed.²²⁰

Connecticut's NICS-submission infrastructure and its inclusion of voluntary commitments may serve as an important example of how a state or federal government can structure its NICS-reporting laws to avoid a potential HIPAA violation and exclude potentially dangerous individuals who voluntarily committed themselves. Further, its limit of six months postdischarge for the reporting of said information serves as a reminder to state and federal governments to consider individuals' privacy and Second Amendment rights in the creation of NICS-reporting laws.

3. *Virginia's Law on Mental-Health Reporting.* Virginia's NICS-reporting legislation has also been successful in increasing the amount of relevant prohibitor information submitted to NICS, and thus serves as an example for other states and the federal government to follow.

217. CONN. GEN. STAT. § 29-28(b)(5)(B); see also Mary E. O'Leary, *Connecticut Gun Law: Breakdown of When New Rules Go into Effect*, NEW HAVEN REG. (Apr. 6, 2013, 12:00 AM), <http://www.nhregister.com/general-news/20130406/connecticut-gun-law-breakdown-of-when-new-rules-go-into-effect-2> (explaining the mental-health-eligibility component of the gun-permit bill). Recall that the ATF's NICS regulatory definitions state that "committed to a mental institution" does not include anyone who has "been in a mental institution for observation or a voluntary admission to a mental institution." 27 C.F.R. § 478.11 (2014).

218. See 114 CONG. REC. 21,784 (1968) (statement of Rep. Celler) ("No one can dispute the need to prevent drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses, from buying, owning, or possessing firearms.").

219. McCreary, *supra* note 46, at 860.

220. *Id.*

As with the federal prohibitor requirements, Virginia's NICS-submission requirements track Virginia's laws as to who is unable to purchase or own a gun in Virginia—"any person who has been adjudicated . . . mentally incapacitated."²²¹ Virginia amended its gun control law in 2008²²² to clarify that "involuntarily committed" includes not only inpatient commitments, but also orders requiring "mandatory outpatient treatment," as well as voluntary admissions from "temporary detention orders."²²³ Because NICS-reporting requirements parallel the state's gun laws, following the passage of this law, individuals like Seung Hui Cho, who was committed to an outpatient facility before his shooting spree at Virginia Tech,²²⁴ would no longer be exempted from NICS reporting.

Virginia also recognizes that, in some cases, even voluntary commitments should be reported to NICS. Virginia's 2008 amendments also clarified that an individual will be denied the ability to purchase, possess, or transport a firearm if he was voluntarily admitted, and the voluntary admission "was the subject of a temporary detention order . . . [in which he] subsequently agreed to voluntary admission."²²⁵ These changes seem to have increased the number of mental-health records sent to NICS; by October 2012, Virginia had submitted more mental-health-prohibitor records (per capita) to NICS than any other state.²²⁶

In June 2014, Virginia again amended its NICS-reporting law to address the concern that the reporting of both involuntary and voluntary admissions to the Virginia Central Criminal Records Exchange (CCRE)—the point of contact for NICS—would undermine the confidentiality of patients' mental-health records.²²⁷

221. VA. CODE ANN. § 18.2-308.1:2 (2014).

222. VA. CODE ANN. § 18.2-308.1:3(A) (2008) (current version at VA. CODE ANN. § 18.2-308.1:3(A) (2014)) (noting, without greater detail, that the purchase of a firearm will be denied to "any person involuntarily committed").

223. *Id.* § 18.2-308.1:3 (2014) ("It shall be unlawful for any person involuntarily admitted to a facility or ordered to mandatory outpatient treatment pursuant to § 19.2-169.2, involuntarily admitted to a facility or ordered to mandatory outpatient treatment as the result of a commitment hearing . . . to purchase, possess or transport a firearm.").

224. VA. TECH REVIEW PANEL, *supra* note 15, at 48.

225. VA. CODE ANN. § 18.2-308.1:3A (2008) (current version at VA. CODE ANN. § 18.2-308.1:3(A) (2014)).

226. Groppe, *supra* note 214.

227. VA. CODE ANN. § 37.2-819 (Supp. 2014); *see generally* Behavioral Health and Development Services, VA. CODE ANN. § 37.2 (Supp. 2014) (failing to mention that an adjudication of mental "deficiency" or disability should be reportable to NICS).

The law now maintains that for orders from a commitment hearing for involuntary admission or mandatory outpatient treatment, and “certification[s] of any person who has been the subject of a detention order” based on a judge or special justice’s determination “that he will be prohibited from possessing a firearm” and will “subsequently agree[] to voluntary admission,” must also be sent by the court clerk to the CCRE.²²⁸ Importantly, the statute added a section stating that “[n]o medical records shall be forwarded to the Criminal Records Exchange with any form, order, or certification.”²²⁹ By mandating that submission will include *only* information pertaining to the NICS prohibitor and not the *actual* medical records, this stipulation alleviates health-care providers’ concerns that PHI will be inappropriately submitted to the CCRE and NICS.

One might consider, however, whether a finding of dangerousness should accompany a commitment for purposes of NICS submission. Currently, a finding of dangerousness or inability to manage one’s affairs is required for an adjudication “as a mental defective.”²³⁰ Virginia’s law and others like it could be strengthened by federal legislation requiring such a finding in commitments as well as adjudications to prohibit an individual from purchasing or possessing a firearm. The HIPAA-NICS NPRM would do nothing to ensure that states find a condition of “dangerousness” in both situations before reporting the names of such individuals to NICS.

B. Additional Recommendations for Federal NICS-Reporting Guidelines

State laws provide some helpful suggestions for the federal government to consider in fleshing out the federal NICS-reporting requirements. These laws also highlight areas in which the federal government must pay special attention when creating or amending existing NICS legislation or regulations. In January 2014, the ATF responded to the states’ confusion on the federal NICS-reporting requirements by suggesting an amendment to the definition of “committed to a mental institution” that would clarify that involuntary commitment includes both inpatient and outpatient

228. *Id.* § 37.2-819(A).

229. *Id.* § 37.2-819(D).

230. *See supra* notes 100–02 and accompanying text.

treatment.²³¹ This proposal has since been codified, but as previously mentioned,²³² although these amendments will resolve some confusion, it will remain unclear under these federal guidelines precisely what process is necessary for an involuntary commitment as well as who can be the “lawful authority.”

This Section addresses how the federal government must further elucidate the definition of “commitment.” It then considers the due-process concerns inherent in the current federal reporting structure, and suggests ways in which the federal government might ameliorate such concerns. Finally, this Section highlights non-HIPAA-related NICS issues that the federal government should address to increase the amount of mental-health reporting to NICS and thereby improve NICS’s success rate in preventing individuals who fall under the mental-health prohibitor from purchasing firearms.

1. *Further Defining “Commitment” and “Other Lawful Authority.”* Although the ATF has clarified the Gun Control Act’s commitment requirement,²³³ the meaning of “commitment” is still uncertain. The ATF should elucidate whether a temporary or emergency commitment can constitute a “commitment” under the Gun Control Act and, in addition to explaining what is required for an adjudication, detail what process is required for a commitment to satisfy the federal requirements.²³⁴ In addition, both the “commitment” and “adjudicated as a mental defective” provisions include language authorizing “other lawful authority” to legally determine whether an individual is committed or adjudicated for the purposes of NICS submission.²³⁵ However, there is no guidance in the ATF regulations as to who “other lawful authority” includes. The ATF or HHS should also clarify whether a commitment decision by an attending provider, rather than a judge, should be classified as

231. Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS), 79 Fed. Reg. 784, 775 (proposed Jan. 7, 2014) (to be codified at 45 C.F.R. pt. 164).

232. *See supra* Part II.B.1.

233. *See* Amended Definition of “Adjudicated as a Mental Defective” and “Committed to a Mental Institution,” 79 Fed. Reg. 774, 775 (proposed Jan. 7, 2014) (amending 47 C.F.R. § 478.11).

234. *Id.*

235. *See supra* note 100 and accompanying text.

PHI, and if so, whether it can be exempted from HIPAA for NICS-reporting purposes.²³⁶

A solution to the confusion as to what constitutes “commitment” and “other lawful authority” for purposes of NICS reporting should be promulgated at the federal level, whether by the ATF, HHS, another governmental agency, or Congress, to allow for consistency. In the interim, states and federal courts must ensure there is a controlled process in place to determine the dangerousness of those who voluntarily accept treatment or who are committed temporarily on an emergency basis. Alternatively, the Secretary of HHS could determine that this commitment information is necessary to public health and therefore not in violation of the HIPAA Privacy Rule.²³⁷ Either proposal would support the aims of the Gun Control Act, clarify the process for taking away an individual’s Second Amendment right to bear arms, and prevent further stigmatization of individuals seeking mental-health treatment.

2. *Potential Due-Process Concerns.* Some courts have also held that *Heller* and *McDonald* add a constitutional due-process component to the right to possess firearms.²³⁸ Ordinarily, to deprive an individual of liberty or property there must be an adjudicatory hearing in which the parties may “offer and test evidence if facts are in dispute.”²³⁹ Therefore, the ATF, HHS, or Congress should

236. See LIU ET AL., *supra* note 56, at 4 (questioning whether a health-care provider “would be considered an ‘other lawful authority,’” thereby allowing the individual committed by a physician (rather than by a judge) to fall within the definition of “committed to a mental institution” for purposes of the Gun Control Act).

237. See *supra* notes 169–73 and accompanying text; OFFICE FOR CIVIL RIGHTS, *supra* note 133, at 17 (explaining the role of the Secretary of HHS in determining whether a state law “is necessary for purposes of serving a compelling public health, safety, or welfare need”).

238. See *United States v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012) (noting that the right to possess firearms is “no longer something that can be withdrawn by government on a permanent and irrevocable basis without due process”).

239. *Id.*; see also *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970) (holding that “the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard,” and that in some cases, written submissions are not enough to satisfy an individual’s due-process requirements); *United States v. Emond*, 2:12-cr-44, 2012 WL 4964506, at *6 (D. Me. Oct. 17, 2012) (quoting *Rehlander*, 666 F.3d at 48). “The defendant argue[d] that his status as an ‘unlawful user of drugs’ ha[d] not been adjudicated, and he ha[d] not been provided with notice or an opportunity to be heard regarding the applicability of § 922(g)(3) to him.” *Id.* at 7. The court recognized the due-process requirement for an adjudication under *Heller* and *Rehlander* to turn on whether an individual has the Second Amendment right to possess a gun. Nevertheless, the court determined that the defendant had been provided with the necessary notice and opportunity to be heard on § 922(g)(3)’s application to him. *Id.*

determine what process is required for adjudications that decide whether an individual is capable of possessing a firearm.²⁴⁰

Although procedural protections are necessary to afford due process, one might also question whether courts' focus on the formal procedures that must occur before an individual is reported under the mental-health prohibitor might stray from the Gun Control Act's aim. This aim, as expressed in *Chamberlain*, ensures that individuals who are "mentally unstable" or "irresponsible" cannot purchase or possess firearms.²⁴¹ If the focus of gun control is to remain on the *types* of people who should or should not possess guns, then a rigid preoccupation with procedural requirements might ignore or stymie the success of this aim. Perhaps additional focus should be given to ensuring that in all proceedings, regardless of formality, those who have been deemed "dangerous" (by a judge, attending physician, or other legal authority) are prohibited from purchasing a gun—at least until such a finding has been overturned.

3. *Non-HIPAA-Related Failings of the NICS Program.* Finally, the federal government should attend to the non-HIPAA-related reasons for states' failure to submit mental-health records.²⁴² These include requiring organizations to update aging computer systems and to integrate existing record systems—a task that is particularly pertinent to mental-health records, given that they often come from various sources within the state, including courts, private hospitals, and mental-health departments.²⁴³ The federal government should also encourage states to examine the efficacy of their privacy laws, which are likely more of an impediment to NICS-information submission than is the HIPAA Privacy Rule.²⁴⁴ In addition, the federal government can more effectively use NARIP grants to qualifying states by including in them state-specific advice and assistance to help qualifying states remove barriers to NICS submission.²⁴⁵

240. For a discussion of how federal courts of appeals have undertaken this task, see *supra* Part II.B.2.

241. *United States v. Chamberlain*, 159 F.3d 656, 660 (1998) (citing H.R. 17735, 90th Cong. 2d Sess. (1968), 114 CONG. REC. 21,780, 21,791, 21,832, 22,270 (1968)).

242. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 19, at 11.

243. *Id.* at 11–12.

244. *Id.* at 12–14.

245. *Id.* at 12.

CONCLUSION

The HIPAA Privacy Rule is generally understood to stand for the protection of health records from disclosure to outside parties—a goal that seems diametrically opposed to the Gun Control Act’s purpose of encouraging the reporting of information to NICS. It is easy to see, therefore, why some states, governmental and nongovernmental organizations, and politicians fear that the HIPAA Privacy Rule prevents states from reporting mental-health information to NICS, and thus, why HHS has proposed an exception in the HIPAA-NICS NPRM. As this Note argues, however, the relationship between the Gun Control Act, NICS, and the HIPAA Privacy Rule is more nuanced than a strict comparison of their general aims would imply. The current HIPAA Privacy Rule is not a barrier to states’ submission of mental-health information to NICS. NICS requires only that certain mental-health information be admitted, and the HIPAA Privacy Rule pertains only to covered entities, which, for the most part, do not create or house this information and are not responsible for submitting it to NICS. Furthermore, the HIPAA Privacy Rule’s exceptions to disclosure allow states to remain HIPAA compliant.²⁴⁶

Existing alternatives to the creation of a NICS exception to the HIPAA Privacy Rule will likely be more effective at meeting the reciprocal aims of strengthening NICS and decreasing national gun violence. The HIPAA-NICS NPRM therefore seems to be predicated on a misappraisal of the HIPAA Privacy Rule’s relation to NICS and an overarching desire to address the national fear of gun violence by those who are mentally ill without engaging in a thorough analysis of the rule’s necessity and impact.

246. HHS has also not been able to identify any states with laws authorizing, but not requiring, the submission of mental-health-prohibitor information to NICS in which the mental-health-prohibitor information originates in, or is stored by, a covered entity. *See* HIPAA Privacy Rule and NICS, 79 Fed. Reg. 784, 792 (proposed Jan. 7, 2014) (amending 45 C.F.R. § 164.512(k)) (proposing the NICS exception to the HIPAA Privacy Rule to permit covered entities to report to NICS if necessary in the given state, but naming no states to which it would apply).