

Spring 2013

Walking Firearms to Gunrunners: ATF's Flawed Operation in a Flawed System

Michael Krantz

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#)

Recommended Citation

Michael Krantz, *Walking Firearms to Gunrunners: ATF's Flawed Operation in a Flawed System*, 103 J. CRIM. L. & CRIMINOLOGY 585 (2013).

<https://scholarlycommons.law.northwestern.edu/jclc/vol103/iss2/5>

This Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

COMMENTS

WALKING FIREARMS TO GUNRUNNERS: ATF'S FLAWED OPERATION IN A FLAWED SYSTEM

Michael Krantz*

On December 14, 2010, Customs and Border Patrol Agent Brian Terry was shot and killed in a gun battle near the United States–Mexico border.¹ Near the scene, investigators found two AK-47 assault rifles,² regular tools of the trade for Mexican drug-trafficking organizations (DTOs). Over time, Congress discovered that these weapons were part of the elaborate Operation Fast and Furious, conducted by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).³

* J.D., Northwestern University School of Law, 2013. I would like to thank my former colleagues at the Department of Justice, Valinda Jones and Christopher Dana among others, for helping to develop this Comment and fueling my interest in issues facing international criminal law enforcement. Thank you also to my family for their eternal support.

¹ James V. Grimaldi & Sari Horwitz, *ATF Probe Strategy Is Questioned*, WASH. POST, Feb. 2, 2011, at A4.

² *Id.*

³ *Id.* ATF's website describes the agency as a "law enforcement agency in the United States Department of Justice that protects our communities from violent criminals, criminal organizations, the illegal use and trafficking of firearms, the illegal use and storage of explosives, acts of arson and bombings, acts of terrorism, and the illegal diversion of alcohol and tobacco products." See *About ATF: Our Mission*, ATF, <http://www.atf.gov/about/> (last visited Apr. 16, 2013). ATF is also tasked with upholding the licensing scheme for the national firearms market. *Firearms Enforcement*, ATF, <http://www.atf.gov/content/Firearms/firearms-enforcement> (last visited Apr. 16, 2013). The agency began as an arm of the Treasury Department tasked with collecting taxes on imported and domestic spirits, and its predecessors played a role in the Whiskey Rebellion of 1794. *History of ATF from*

It is standard procedure for ATF agents to track high-powered firearms, which are sometimes illegally purchased by straw purchasers,⁴ to determine the flow of illegal weapons. Procedure also dictates that agents interdict these weapons when possible to prevent them from ending up on the black market.⁵ According to documents and testimony before Congress, however, the Fast and Furious agents allowed the weapons to “walk” into the hands of drug cartel members certain to use the weapons for harming others.⁶ Agents hoped that they could ultimately follow the weapons to leadership in the Mexican drug cartels, thus connecting illicit U.S. weapons purchases to the cartels.⁷ The agents could then build cases against specific cartel leaders.⁸ Contrary to the plan, ATF lost track of the weapons, and Mexican law enforcement subsequently found some at crime scenes of gruesome violence in Mexico. Once called to their attention, U.S. lawmakers immediately questioned the extremely risky operation that allowed weapons to be transported to dangerous Mexican cartels, putting both Mexican and American lives at risk.⁹ Most recently the Office of the Inspector General in the U.S. Department of Justice issued a report

Oxford University Press, Inc.—1789–1998, ATF, <http://www.atf.gov/about/history/atf-from-1789-1998.html> (last visited Apr. 16, 2013).

⁴ A straw purchaser is a buyer who may legally purchase a weapon for his own purposes but who is in reality purchasing the weapon for another person who may not legally purchase or possess the firearm under U.S. law. JOINT STAFFS OF H. COMM. ON OVERSIGHT & GOV'T REFORM & S. COMM. ON THE JUDICIARY, 112TH CONG., THE DEPARTMENT OF JUSTICE'S OPERATION FAST AND FURIOUS: ACCOUNTS OF ATF AGENTS 4 (2011) [hereinafter ACCOUNTS OF ATF AGENTS]. The straw purchaser has a legal right to purchase the weapon for himself, but this transaction is technically illegal because a buyer is not allowed to purchase a weapon for another person who is not himself legally permitted to purchase or possess the weapon. See 18 U.S.C. § 922(d)(1)–(9) (2006). This includes a prohibition on selling weapons to a purchaser who is not a U.S. citizen, or at least who is unlawfully in the United States. *Id.* § 922(d)(5).

⁵ ACCOUNTS OF ATF AGENTS, *supra* note 4, at 12.

⁶ Agents “walk” guns when they choose to let the weapons pass into the hands of a person barred from possessing the weapons by the federal criminal code rather than interdict them. Grimaldi & Horwitz, *supra* note 1; see also James V. Grimaldi, *ATF Faces Federal Review over Tactics to Foil Gunrunning Rings*, WASH. POST, Mar. 10, 2011, at A4.

⁷ See *infra* notes 149–153 and accompanying text.

⁸ See *infra* notes 149–153 and accompanying text.

⁹ As a result of the scandal and the subsequent congressional investigations, the U.S. Attorney for the District of Arizona, who tacitly approved the operation, resigned, and the Acting Chief of ATF in Washington, D.C., was reassigned to another position. See Evan Perez & Devlin Barrett, *Two Fall in Gun Scandal: Management Shake-Up Follows Troubled Operation Targeting Weapon Trafficking*, WALL ST. J., Aug. 31, 2011, at A3. Attorney General Eric Holder has also been the subject of significant congressional scrutiny for his tangential knowledge of the operation; the House of Representatives even held him in contempt for allegedly withholding pertinent documents. Richard A. Serrano, *House Finds Atty. Gen. Eric Holder in Contempt of Congress*, L.A. TIMES (June 28, 2012), <http://articles.latimes.com/2012/jun/28/nation/la-na-holder-contempt-20120629>.

determining that the Department of Justice did not carefully oversee the operations conducted by the ATF and failed to provide completely accurate information during the scandal's aftermath.¹⁰

Every day United States law enforcement faces an uphill battle in its efforts to control the trafficking of weapons throughout the United States and across the southern border into Mexico.¹¹ In 2006, Mexican President Felipe Calderón launched a war against the Mexican drug cartels, deploying military regiments to crime-ridden areas, increasing arrests and prosecutions of traffickers, and extraditing more traffickers to face charges in the United States.¹² The Mexican cartels responded to the declaration of war by ramping up violence across Mexico.¹³ The violence in Mexico has been largely indiscriminate, with cartels targeting Mexican law enforcement, rival cartels, and innocent civilians, all in an effort to control the drug routes into the United States and to intimidate opponents into submission.¹⁴

Mexican weapons laws are far more stringent than those in the United States. The Mexican Constitution contains a provision similar to the Second Amendment to the United States Constitution espousing a right to bear arms,¹⁵ but the Mexican Constitution also restricts possession of many high-powered weapons for citizens who are not members of the military or law enforcement.¹⁶ Article Ten of the Constitution of the United Mexican

¹⁰ U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., A REVIEW OF ATF'S OPERATION FAST AND FURIOUS AND RELATED MATTERS 397–99 (2012) (alleging that high officials in the Department of Justice failed to accurately research the scandal and relied instead on lower ranking officials for information that turned out to be inaccurate).

¹¹ This Comment will focus exclusively on the unique challenges facing U.S. law enforcement regarding international weapons trafficking—namely, when weapons are purchased in the United States and smuggled across the border into Mexico. Issues with illegal weapons trafficking from states in the United States with lenient gun-control laws, such as those in the south and southwest, to states and cities with stronger prohibitions on weapons, such as Washington, D.C., or Chicago, are the subject of other scholarship. See, e.g., MAYORS AGAINST ILLEGAL GUNS, THE MOVEMENT OF ILLEGAL GUNS IN AMERICA: THE LINK BETWEEN GUN LAWS AND INTERSTATE GUN TRAFFICKING 2 (2008) (examining “the relationship between a state’s gun regulations and the likelihood that it will be a source of guns recovered in out-of-state crimes”).

¹² THE BRADY CTR. TO PREVENT GUN VIOLENCE, EXPORTING GUN VIOLENCE: HOW OUR WEAK GUN LAWS ARM CRIMINALS IN MEXICO AND AMERICA 8 (2009).

¹³ *Id.* (explaining that most violence occurs along the border and along drug-trafficking corridors—paths into the United States through which the cartels traffic illegal narcotics).

¹⁴ See *id.*; Evan Perez, *Mexican Guns Tied to U.S.*, WALL ST. J., Jun. 10, 2011, at A3.

¹⁵ The text of the Second Amendment reads, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. For a brief discussion of the Second Amendment right pertaining to this Comment, see *infra* Part IV.C.

¹⁶ The United States Consulate General in Tijuana, Mexico, counsels United States

States declares:

The people of the United Mexican States have the right to possess weapons in their homes, for their security and legitimate defense, with the exception of those prohibited by federal law and those reserved for the exclusive use of the Army, Navy, Air Force, and National Guard. Federal law will determine the cases, conditions, requirements and places in which the carrying of firearms shall be authorized.¹⁷

Mexico's Federal Law of Firearms and Explosives determines which high-powered weapons individual citizens may not possess.¹⁸ As a result, most of the high-powered weapons employed by the Mexican cartels, such as AK-47 assault rifles and Barrett .50-caliber sniper rifles, are not manufactured or legally sold in Mexico and must instead come from outside of Mexico via illicit trafficking. The weapons usually come from the United States.

Cartels use an elaborate and diffuse web of straw purchasers and transactions in order to avoid detection as they smuggle firearms south into Mexico.¹⁹ Cartels hire buyers to purchase a few weapons at a time and those weapons may then pass through four or five additional middlemen to throw U.S. authorities off track.²⁰ This process of passing firearms from a legal primary market into an illegal secondary market is known as weapons trafficking.²¹ Once a weapon is swallowed into the secondary market, it is easy to smuggle across the U.S. border with Mexico.

A 2009 report by the U.S. Government Accountability Office estimated that 90% of traceable weapons recovered in Mexico between

citizens not to bring guns or knives into Mexico due to Mexico's strict gun laws. *See Guns Are Illegal in Mexico*, CONSULATE GEN. OF THE U.S., <http://tijuana.usconsulate.gov/tijuana/warning.html> (last visited Apr. 16, 2013).

¹⁷ Constitución Política de los Estados Unidos Mexicanos, *as amended*, tit. I, art. X, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

¹⁸ Restricted weapons include any fully automatic weapons, some semiautomatic handguns, rifles larger than .30 caliber, and revolvers .357 caliber and up. *See Ley Federal de Armas de Fuego y Explosivos* [Federal Law of Firearms and Explosives], *as amended*, tit. I, art. 11, D.O., 11 de Enero de 1972 (Mex.).

¹⁹ *See, e.g.*, Evan Perez, *An American Gun in Mexico: How Does a Weapon Made in Tennessee, Sold in Missouri and Traded in Texas End up at a Drug Shootout in Chihuahua?*, WALL ST. J., May 21, 2011, at C1 (reporting that straw purchasers may "for a few hundred dollars, buy firearms on behalf of others who can't pass background checks or who don't want records of their purchases").

²⁰ *Id.*

²¹ 18 U.S.C. § 554 (2006) prohibits the act of fraudulently or knowingly exporting any object contrary to any U.S. law or regulation. This includes smuggling weapons out of the United States, which is distinct from trafficking weapons. Smuggling is a problem that implicates greater border control (and resulting coordination) on both sides, whereas trafficking, i.e., preventing weapons from disappearing into an illegal market, is a problem solely for U.S. law enforcement, where improvement can directly alleviate the weapons-smuggling problem.

2006 and 2008 came from the United States.²² This number could be taken out of context because 90% of total *traceable* weapons is a significantly smaller number than the total number of weapons actually recovered.²³ When viewed as a fraction of the total number of weapons recovered, the percentage *affirmatively traced* to the United States is thus much lower. This quantity, however, is also underinclusive since it does not include weapons manufactured abroad and then smuggled into Mexico through the United States.²⁴ The numbers unequivocally show, however, that the flow of weapons from the United States plays a large role in the weaponry amassed by Mexican drug cartels.²⁵ Preventing weapons trafficking along the border would undoubtedly alleviate some of the violence in the area.

Recent budget cuts have left ATF understaffed along the border and unable to grapple adequately with the enormous problem of weapons trafficking.²⁶ Moreover, ATF has difficulty recruiting personnel for dangerous operations in Mexico and in southwestern border states.²⁷ Although the number of special agents working gunrunning cases along the

²² U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-709, FIREARMS TRAFFICKING: U.S. EFFORTS TO COMBAT ARMS TRAFFICKING TO MEXICO FACE PLANNING AND COORDINATION CHALLENGES 15 (2009) [hereinafter GAO FIREARMS TRAFFICKING REPORT].

²³ For example, in 2008, approximately 30,000 weapons were seized by Mexican law enforcement, but only 7,200 were subsequently traced by ATF. *See id.* at 16. In 2009, 21,313 guns were submitted for tracing and 10,945 (51.35%) were manufactured in the United States. Perez, *supra* note 14, at A3.

²⁴ For example, ATF determined that of 7,971 firearms recovered in Mexico in 2010 and traced by ATF, 4,186 were manufactured in the United States and 2,105 were imported into the United States. Perez, *supra* note 14, at A3. The origin of 1,680 firearms is unknown. *Id.* The origin of the untraceable weapons is thus a matter of dispute, but it seems most likely that they would also be from the United States, which is “[c]onsistent with . . . [anecdotal reports by] U.S. law enforcement officials who had worked on arms trafficking in Mexico . . . that most of the firearms in Mexico had originated in the United States.” *See* GAO FIREARMS TRAFFICKING REPORT, *supra* note 22, at 16. The National Rifle Association ardently denies the accuracy of these numbers and asserts that ample evidence exists to show that the vast majority of weapons used by drug cartels in Mexico come from Russia and China via Guatemala and other Latin American countries. Perez, *supra* note 19, at C1. This allegation is not entirely inconsistent, however, with the story of weapons being manufactured abroad and then smuggled to persons in the United States who carry the weapons into Mexico. The problem is thus still encompassed in the larger dilemma of preventing weapons from flowing from the United States into Mexico.

²⁵ Some have estimated that every day, approximately 2,000 guns flow into Mexico from the United States. THE BRADY CTR., *supra* note 12, at 7.

²⁶ James V. Grimaldi & Sari Horwitz, *Cuts Threaten ATF's Efforts to Stem Flow of Guns South*, WASH. POST, Jan. 31, 2011, at A1 (explaining that the most recent White House budget proposal sought 12.8% cuts in ATF spending).

²⁷ Kim Murphy, *Understaffed and Under the Gun*, L.A. TIMES, Mar. 8, 2011, at A8 (“We don’t have the ability to follow up on investigations because we don’t have the resources to do so” (quoting an anonymous ATF agent)).

border has significantly increased from just eighty-four agents in 2006 to 224 in 2010, the number remains insufficient to combat the problem without dismantling the top cartel leadership.²⁸ Additionally, due to stringent opposition from the National Rifle Association (NRA), the lobbying organization that most ardently stands up for unqualified gun rights for individuals, the ATF has not had a Senate-confirmed director since 2006.²⁹ The resulting ATF manpower is not sufficient to carry out the stated goal of stemming the tide of weapons smuggled daily into Mexico.

One way to make up for insufficient resources is to ensure that the criminal laws afford law enforcement the necessary means to dismantle the organizations that threaten public safety. But law enforcement presently does not have the necessary legal tools to combat gun trafficking from the United States into Mexico. The current statutory regime, which consists of the federal criminal code and sentencing guidelines that criminalize and punish weapons offenses, is insufficient to dismantle gun-smuggling organizations operating with near impunity along the U.S.–Mexico border. The level of knowledge required to prove weapons offenses and the inflexibility of the criminal elements make even clear-cut cases difficult to prove. As a result, insufficient and inconsistent penalties ensure that the punishment does not fit the crime and that the crimes are not taken seriously enough.

In response to the *Fast and Furious* scandal, the House of Representatives has proposed H.R. 2554, a statute that would for the first time criminalize weapons trafficking in the United States and punish offenders more severely than the federal code currently punishes violators of weapons offenses.³⁰ Although it solves many of the current problems, a trafficking statute alone, in the absence of more comprehensive measures, will not do enough to stem the flow of weapons into Mexico.

This Comment will explain the deficiencies in the current regime and describe how H.R. 2554 fails to solve the entire problem. Part I explains the current tools in the law enforcement arsenal by examining what conduct the penal code criminalizes and what penalties exist for buyers and sellers of weapons. Part II examines why high knowledge requirements and low,

²⁸ U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., REVIEW OF ATF'S PROJECT GUNRUNNER 6 (2010) [hereinafter REVIEW OF ATF'S PROJECT GUNRUNNER].

²⁹ This means that neither the Republican Bush Administration nor the Democratic Obama Administration has been able to come up with an appointee who has passed Senate confirmation. Evan Perez & Devlin Barrett, *ATF Chief Likely to Be Ousted*, WALL ST. J., June 18, 2011, at A2; see also Sari Horwitz, *Gun Regulator Lacks Resources, Leadership*, WASH. POST, Dec. 18, 2012, at A10; Editorial, *A Better Gun Agency*, WASH. POST, June 27, 2011, at A16.

³⁰ Stop Gun Trafficking and Strengthen Law Enforcement Act of 2011, H.R. 2554, 112th Cong. (2011).

ungraduated penalties are insufficient to combat weapons trafficking on the border. Part III illustrates the consequences of the current regime in three ways: (1) by contrasting an atypical weapons prosecution, where the sentencing judge departed upward from the federal sentencing guidelines, with an example of how the current statutes lead to prosecutors bringing extremely odd charges; (2) by describing the ultimate breakdown in enforcement of the weapons statutes—Operation Fast and Furious—which has contributed to countless deaths in Mexico and the death of Agent Terry; and (3) by examining international implications for maintaining the current statutory regime. Part IV analyzes the proposed legislation in the wake of the Fast and Furious scandal and speculates whether the statute could ultimately become law. Part IV also proposes additional statutory measures that comprehensively focus on international trafficking in an effort to curb abuses along the border. Part V concludes by calling upon Congress to debate openly how to balance the Second Amendment right to bear arms with a need to keep Americans, and our international neighbors, safe from violence perpetrated by drug traffickers along the United States–Mexico border.

I. CURRENT TOOLS IN THE LAW ENFORCEMENT ARSENAL

United States law enforcement is vastly underequipped to battle international weapons trafficking. The archetypal trafficking situation involves the following two transactions, each with its own problems for law enforcement. First, a straw purchaser buys weapons either from a federally licensed weapons dealer (a federal firearm licensee, or FFL) or from an unlicensed dealer legally selling his personal collection, possibly at an unregulated gun show.³¹ Second, the straw purchaser sells or delivers the weapons to individuals who illegally possess and smuggle them across the border into Mexico.³² A trafficker is thus involved in both a purchase and a sale.

Federal law enforcement is limited to investigating only those actions criminalized under the federal criminal code. Because there is no federal law³³ that criminalizes trafficking weapons, the most common arrests and

³¹ See, e.g., Perez, *supra* note 19, at C1 (“Many traffickers prefer to tap small-time buyers for a handful of purchases at a time.”).

³² This stage could involve a single person or it could involve a “sophisticated network[]” of transfers until the weapons reach their final destination. *Id.*

³³ This Comment’s scope is limited to federal laws and federal law enforcement. State laws generally involve state permitting systems that regulate whether citizens may be further restricted, on top of federal restrictions, by states that wish to prevent the carrying of weapons by certain persons or in certain locations. See, e.g., *Right-to-Carry 2012*, NAT’L RIFLE ASS’N-INST. FOR LEGIS. ACTION (Feb. 28, 2012), <http://www.nraila.org/gun-laws/>

investigations involve persons who lie on federal forms in order to obtain weapons. The sentences for violating those laws are determined by both the federal sentencing guidelines and judicial precedent.³⁴ An examination of the regime suggests that penalties are too lenient to put pressure on domestic straw purchasers, meaning that most domestic buyers are more willing to accept an unsubstantial penalty (usually probation) than to provide information to law enforcement on other members of a dangerous drug-trafficking organization.

The law pertaining to weapons sellers allows for the unregulated sale of weapons from one's personal collection. This both assists straw purchasers in obtaining weapons and allows the straw purchasers to legally liquidate "all or part of [their] personal collection[s]"³⁵ to another party who will then smuggle the weapons across the border. The law is thus excessively weak with respect to both purchasers and sellers.

A. FEDERAL CRIMINAL ACTIONS AND PENALTIES FOR WEAPONS PURCHASERS

Law enforcement officers utilize two main tools—18 U.S.C. §§ 922 and 924—in order to investigate and prosecute weapons purchasers. The most commonly used provisions in fighting weapons trafficking are the "lying and buying" provisions.³⁶ The first of these makes it illegal to "knowingly . . . make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive . . . with respect to any fact material to the lawfulness of the sale."³⁷ The second criminalizes "knowingly mak[ing] any false statement or representation with respect to the information required" to be kept under 18 U.S.C. §§ 922 and 924.³⁸ All firearm sales involving a federal firearm licensee require the purchaser to fill out ATF Form 4473, and the most common violations of these two provisions occur when a purchaser provides false information on the form.³⁹ Charges

articles/2012/right-to-carry-2012.aspx.

³⁴ See discussion *infra* Part I.C.

³⁵ 18 U.S.C. § 921(a)(21)(C) (2006).

³⁶ See, e.g., Press Release, U.S. Attorney's Office for the N. Dist. of Ga., Two Charged for "Lying and Buying" Firearms Scheme (Apr. 29, 2011), available at <http://www.justice.gov/usao/gan/press/2011/04-29-11.html>.

³⁷ 18 U.S.C. § 922(a)(6).

³⁸ *Id.* § 924(a)(1)(A). The difference between this subsection and § 922(a)(6) is that the latter requires that the false statement be material to the legality of the firearm purchase—a more stringent requirement than simply any false statement made in connection with the purchase. See REVIEW OF ATF'S PROJECT GUNRUNNER, *supra* note 28, at 59–60 n.81.

³⁹ See MINORITY STAFF OF S. COMM. ON OVERSIGHT & GOV'T REFORM, OUTGUNNED: LAW ENFORCEMENT AGENTS WARN CONGRESS THEY LACK ADEQUATE TOOLS TO COUNTER

brought against straw purchasers are thus not usually for trafficking or even illegally possessing weapons, but for merely lying on a federal form.⁴⁰

The penalties for violating these laws are as unsubstantial as the act of falsifying a form. Whoever violates the lying and buying provision and makes a false statement in purchasing a weapon is subject to a maximum penalty of five years in prison and a fine.⁴¹ The penalty increases to a maximum of ten years' imprisonment for giving false information material to the legality of the weapon purchase.⁴² Moreover, possession by a prohibited person is punishable by a maximum of ten years in prison.⁴³ Sentences actually delivered however, are far lower.⁴⁴

B. FEDERAL CRIMINAL ACTIONS AND PENALTIES FOR WEAPONS SELLERS

Section 922 first makes it a crime for anyone not a “licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms,” thus restricting sales of weapons and ammunition to those who have a government license.⁴⁵ Notably, however, this statute does not require everyone who sells a weapon to have a federal firearm license, just those who are “engage[d] in the business” of selling weapons.⁴⁶ This is defined as:

[A] person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit . . . but . . . shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.⁴⁷

ILLEGAL FIREARMS TRAFFICKING 8–9 (2011) [hereinafter OUTGUNNED].

⁴⁰ *Id.* at 9 (“[B]order state U.S. attorneys have complained that district court judges view these prosecutions as mere paper violations.”) (quoting Rep. Carolyn Maloney).

⁴¹ 18 U.S.C. § 924(a)(1)(A).

⁴² *Id.* § 924(a)(2).

⁴³ *Id.*

⁴⁴ See *infra* Part II.B for a discussion of the average range of sentences for weapons crimes.

⁴⁵ 18 U.S.C. § 922(a)(1)(A). Further provisions pertaining to the licensing of FFLs are contained in 18 U.S.C. § 923.

⁴⁶ *Id.* § 922(a)(1)(A).

⁴⁷ *Id.* § 921(a)(21)(C) (emphasis added). “[P]rincipal objective of livelihood and profit” is further defined to emphasize the limited scope of the term firearms dealers, whose motivation must be “predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection” *Id.* § 921(a)(22). Putting these provisions together, a seller can “liquidate” an entire collection of an indiscriminate number of weapons without needing an FFL so long as this is not the seller’s livelihood.

Known as the “gun show loophole” because private collections are often sold off at unregulated gun shows, this allows a person to sell his or her private collection without being subject to the reporting or documentary requirements of the criminal code.⁴⁸

Additionally, the criminal code penalizes the sale of weapons to certain classifications of people. This includes persons who are unlawfully or illegally in the United States,⁴⁹ felons or those under indictment,⁵⁰ drug addicts,⁵¹ and those who have been adjudicated to be mentally deficient,⁵² among others. The code also prevents these same categories of persons from owning a weapon.⁵³

Sellers of firearms may face a year in prison for lying about information that must be kept in sales records pursuant to the United States Code.⁵⁴ Sale to a prohibited purchaser is punishable by a maximum of ten years in prison.⁵⁵ The ultimate sentences, however, end up being much lower.⁵⁶

Apart from criminal prosecutions, the Attorney General possesses administrative power to suspend or revoke any firearms licenses or apply a civil penalty if an FFL “willfully” violates the provisions of the United States Code or pertinent regulations promulgated by the Justice Department.⁵⁷ Generally, these involve recordkeeping requirements that notify ATF of potential traffickers, such as falsification of purchase records, missing inventory, or failure to alert authorities to certain purchaser conduct.⁵⁸ For example, under the Gun Control Act, gun sellers are

⁴⁸ See, e.g., Press Release, Office of Congressman Mike Quigley, U.S. Representatives Convene Chicago Forum on Gun Show Loophole (Aug. 19, 2010), *available at* http://quigley.house.gov/index.php?option=com_content&task=view&id=368&Itemid=9 (describing “a gap in federal law that allows private gun dealers to sell weapons to anyone—including terrorists, felons, and the mentally disabled—without performing background checks”).

⁴⁹ 18 U.S.C. § 922(d)(5).

⁵⁰ *Id.* § 922(d)(1).

⁵¹ *Id.* § 922(d)(3).

⁵² *Id.* § 922(d)(4).

⁵³ See *id.* § 922(g).

⁵⁴ *Id.* § 924(a)(3).

⁵⁵ *Id.* § 924(a)(2).

⁵⁶ See the discussion of average sentences issued for violations of gun-sale laws at *infra* Part II.B.

⁵⁷ See 18 U.S.C. § 924(p)(1)(A); *id.* § 923(e); see also BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, DEP’T OF THE TREASURY, COMMERCE IN FIREARMS IN THE UNITED STATES 30 (2000) [hereinafter COMMERCE IN FIREARMS IN THE UNITED STATES] (observing that one result of certain violations might be to “strongly encourage the dealer to voluntarily surrender the license”).

⁵⁸ See COMMERCE IN FIREARMS IN THE UNITED STATES, *supra* note 57, at 30 (“[H]onest

required to notify ATF when a purchaser buys multiple handguns within a five-day span.⁵⁹

The Obama Administration has recently pushed to increase the regulatory tools available to ATF. In July 2011, the Administration promulgated a rule that instituted similar reporting requirements for semiautomatic long rifles in certain states along the Mexican border.⁶⁰ FFLs who sold weapons defined as assault weapons by the Violent Crime Control and Law Enforcement Act of 1994 were formerly subject to penalty, but no longer. Commonly known as the Assault Weapons Ban, Title XI, Section A of the Act defined assault weapons and prohibited their “manufacture, transfer, or possess[ion].”⁶¹ The law expired in 2004 and Congress has not reinstated it, despite a request from the Obama Administration.⁶²

C. FEDERAL SENTENCING GUIDELINES

The nonbinding federal sentencing guidelines also play a role in the punishments that judges give to violators of the United States’ gun laws.⁶³ Base offense levels under the guidelines take into account facts such as the caliber and strength of the weapons involved and the number of prior felony

errors should not be a basis for revocation . . .”). For more information on potential indicators of trafficking by gun dealers, see, e.g., Bruce Reinhart, *Implementing a Firearms Trafficking Strategy—Prosecuting Corrupt Federal Firearms Licensees*, 50 U.S. ATT’Y BULL. 40–47 (2002).

⁵⁹ This portion of the Gun Control Act, codified at 18 U.S.C. § 923(g)(3)(A), requires FFLs to “report multiple sales [two or more within five days] of handguns to their local ATF field office.” REVIEW OF ATF’S PROJECT GUNRUNNER, *supra* note 28, at 36.

⁶⁰ The rule applies to sales of semiautomatic rifles greater than .22 caliber with detachable magazines in the states of California, Arizona, New Mexico, and Texas. The National Rifle Association immediately vowed to sue over the Administration’s right to pass the regulation. James V. Grimaldi & Sari Horwitz, *4 Border States Face New Rule on Gun Sales*, WASH. POST, July 12, 2011, at A3.

⁶¹ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110102(a), 108 Stat. 1796, 1996.

⁶² See Jason Ryan, *Obama to Seek New Assault Weapon Ban*, ABC News (Feb. 25, 2009), <http://abcnews.go.com/Politics/story?id=6960824&page=1#.TxryqW9STwA> (quoting Eric Holder: “I think that will have a positive impact in Mexico, at a minimum”).

⁶³ The federal sentencing guidelines are not mandatory and judges are not required to levy sentences within the guidelines. See *United States v. Booker*, 543 U.S. 220, 259 (2005) (invalidating “the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range”). Given the inability of higher courts to make sure district courts deliver sentences within the sentencing guidelines, using the sentencing guidelines to make up for deficiencies in the United States Code is an inefficient and unpredictable way to increase penalties on convicted weapons traffickers. It remains a useful tool, however, given the way in which judges look to the guidelines in handing out sentences, even if they are not entirely consistent.

convictions of the person charged. Violation of either of the two lying and buying provisions results in an offense level of 14 and carries a suggested sentence of 15–21 months if the defendant “committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person.”⁶⁴ The offense level could jump to 20, with a suggested sentence of 33–41 months, if the violation involved a semiautomatic weapon.⁶⁵ The highest base offense level is given for an illegal action involving a semiautomatic firearm committed by a person with two or more prior felony convictions.⁶⁶

Once the base offense level is calculated, the guidelines allow for certain increases that are specifically pertinent to weapons trafficking. These include situations where the transaction involves a large number of weapons,⁶⁷ the weapons are extremely high powered,⁶⁸ the serial numbers are somehow altered or damaged,⁶⁹ the defendant was engaged in “trafficking,”⁷⁰ the defendant knew or believed that the weapons would be transported out of the United States,⁷¹ or the recordkeeping offense “reflected an effort to conceal a substantive offense involving firearms.”⁷² The federal sentencing guidelines thus have the potential to increase punishment for high-volume straw purchasers, even though the offenses are for paper, rather than substantive, violations. They do not, however, assist in punishing the leaders of trafficking organizations. These persons are largely unreachable under current law and can continue coordinating the trafficking of weapons through new straw purchasers willing to risk a short

⁶⁴ U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(6) & ch. 5, pt. A (2012). In this and all subsequent descriptions, I will note the suggested sentences for first-time offenders only since these are the persons generally recruited as straw purchasers given that individuals with a criminal history are not permitted to purchase weapons.

⁶⁵ § 2K2.1(a)(4)(B) & ch. 5, pt. A.

⁶⁶ This situation provides for a base offense level of 26, which results in a 63-to-78-month sentence. *See* § 2K2.1(a)(1) & ch. 5, pt. A.

⁶⁷ For conduct involving 3–7 weapons, the guidelines add 2 levels; for conduct involving 8–24 weapons, they add 4 levels; for conduct involving 25–99 weapons, they add 6 levels; for conduct involving 100–199 weapons, they add 8 levels; and for conduct involving 200 or more weapons, they add 10 levels. Using a base level of 14, this results in an increase of six, twelve, eighteen, twenty-six, or thirty-six months, respectively. § 2K2.1(b)(1) & ch. 5, pt. A.

⁶⁸ This includes missiles and portable rockets, and results in an increase of 15 levels, or seventy-two months. § 2K2.1(b)(3) & ch. 5, pt. A.

⁶⁹ An altered serial number would make tracing the source of the weapon much more difficult. This adds 4 levels or twelve months. § 2K2.1(b)(4)(B) & ch. 5, pt. A.

⁷⁰ Trafficking is not defined within the guidelines, however. The result is an increase of 4 levels or twelve months. § 2K2.1(b)(5) & ch. 5, pt. A.

⁷¹ This increases 4 levels to at least level 18, which adds twelve months. § 2K2.1(b)(6)(A) & ch. 5, pt. A.

⁷² The judge may increase the sentence to the level of the substantive offense. § 2K2.1(b)(7).

probation sentence for a quick payment.

II. SHORTCOMINGS OF THE CURRENT STATUTORY REGIME

Overall, the present statutory regime is insufficient to combat the problem of international weapons trafficking across the United States–Mexico border for two reasons. First, the level of knowledge required by the code to prove mere paper violations is too high, making it difficult for prosecutors to bring and win these cases. The amount of legwork and information required to prove knowing violations is disproportionate to the reward of obtaining a paperwork violation. Second, the penalties are too low and are not graduated enough to deter weapons violations adequately.

Minimal penalties that require significant evidence of knowledge ensure that prosecutors will not expend the resources necessary to conduct these types of cases. Without a statute that explicitly criminalizes weapons trafficking, prosecutors have problems proving cases against straw purchasers and have no way to pursue leaders of trafficking organizations. Consequently, law enforcement faces a continuous stream of straw purchasers—recruited by narco-trafficking organizations operating in Mexico—who can legally purchase weapons and pass them along to traffickers who will smuggle the weapons across the border.

A. STRICT INTENT REQUIREMENT MAKES CASES DIFFICULT TO PROSECUTE

The intent requirement for the weapons violations involving straw purchasers established by 18 U.S.C. §§ 922 and 924 is “knowing.”⁷³ The intent requirement pertaining to violations made by sellers of weapons is either “knowing” or “reasonable cause to believe.”⁷⁴ In other words, prosecutors must show that the straw purchaser knew, at the time he made the statement at issue, that it was false. The law thus requires a subjective determination that allows defendants to carefully craft legal excuses for illegal behavior.⁷⁵ These difficulties mean that many prosecutions are dropped or result in weak sentences.⁷⁶ Data is rarely compiled, but a report

⁷³ See 18 U.S.C. §§ 922(a)(6), 924(a)(1)(A) (2006); *supra* Part I.A.

⁷⁴ See *supra* Part I.B.

⁷⁵ As an example, the federal form requires purchasers to check a box that indicates whether the purchase is being made on behalf of another party. For a prosecutor to show that the purchaser lied, thus violating 18 U.S.C. § 922(a)(6), the prosecutor must show that the purchaser, at the time of purchase, knew that he was purchasing the weapon for another person yet indicated on the form that the weapon was for the purchaser himself. It is easy to claim that a decision to sell personal stock occurred *after* this initial purchase, such that the purchaser did not lie on the form.

⁷⁶ See, e.g., James C. McKinley Jr., *Prosecutors Seek Appeal in Dismissal of Gun Case*,

on Project Gunrunner cases shows that out of 607 total cases referred to U.S. Attorneys' Offices by ATF agents, prosecutors rejected approximately one out of four lying and buying cases.⁷⁷ In one Arizona case, even though the defendants knew that they had made false statements about the ultimate recipient of the weapons purchased, the false statements were not sufficiently material to uphold the charge, much less a conviction.⁷⁸ The court there required the prosecutors to show that the ultimate recipient of the weapons—the person who hired the charged straw purchasers—was himself a “prohibited possessor.”⁷⁹

Another example is illustrative of the difficulty that prosecutors have in proving these types of violations. In 2008, a .50-caliber Barrett rifle sold by former FBI agent John Shipley was found at a crime scene in the state of Chihuahua, Mexico.⁸⁰ As a result, federal law enforcement raided Shipley's home, seizing twenty-eight firearms as well as sales records and cash.⁸¹ Prosecutors charged Shipley with six counts, including dealing in firearms without a license and knowingly lying on the ATF form by stating that he was purchasing weapons for his own personal use.⁸² Shipley explained that he used gun sales to build his private collection and did not sell the weapons to make a living.⁸³ During the investigation, Shipley turned over to agents false sales records, which prosecutors believed created a strong case “of deceit.”⁸⁴ At trial, Shipley was found guilty of all six counts against him, but not before he made an ardent defense. As an ATF agent admitted during the trial, it is not illegal to sell any part of one's “private collection,” and there is no definition or time limit for when a weapon becomes a part of one's private collection.⁸⁵ According to the

N.Y. TIMES, Mar. 20, 2009, at A13 (discussing a state case in Arizona in which charges of violating federal gun laws were dismissed by the court).

⁷⁷ REVIEW OF ATF'S PROJECT GUNRUNNER, *supra* note 28, at 65. Prosecutors rejected 32% of referrals for knowingly making a false statement material to a gun purchase and 21% of referrals for knowingly making a false statement. *Id.* By comparison, prosecutors only rejected possession with intent to distribute charges 7% of the time and drug conspiracy cases 9%. *Id.* Twenty-nine percent of total referrals were pending a decision. *Id.*

⁷⁸ McKinley, *supra* note 76, at A13.

⁷⁹ *Id.* (explaining that federal agents possessed documents indicating that the defendant “sold hundreds of weapons” over a two-year span that were “in turn smuggled . . . to the Beltrán Leyva cartel in Mexico”).

⁸⁰ Perez, *supra* note 19, at C1.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at C2 (“What he was doing was seeking to enhance his collection and seeking to advance his professional skills . . .,” said Mr. Pérez, the lawyer . . .”).

⁸⁴ *Id.* (explaining also that private sellers are not required to keep accurate records of sales from their personal collections or even to maintain records at all).

⁸⁵ *Id.* (“The straw-purchase statute is very vague,” he says. ‘You have to prove the

agent, “[b]uyers can easily explain their actions even if they buy and sell firearms over short periods of time.”⁸⁶ Despite being convicted on six counts of violations, Shipley was sentenced to just two years in prison.⁸⁷

Even though prosecutors successfully obtained a conviction, Shipley’s trial shows the difficulty in prosecuting cases involving weapons violations. To demonstrate knowing violations, agents must procure a wealth of information including potentially detailed information about where the weapons will go *after* the straw purchase. The statutory requirements raise the bar on agents and prosecutors attempting to build cases against gunrunners, forcing a large infusion of resources that is oftentimes not available. The requirements also necessitate that judges and juries determine the seller or purchaser’s intent, which allows sophisticated organizations to circumvent the law easily.

B. LOW, UNGRADUATED PENALTIES DO NOT ALLOW FOR FLEXIBILITY

A second flaw in the present statutory regime is a sentencing structure that is oftentimes too lenient when compared to the potential consequences of the illicit actions. Maximum sentences for the most commonly charged crimes are either five or ten years.⁸⁸ However, the actual sentences imposed on illegal purchasers are generally much more lenient. Using data compiled between 2004 and 2009, those charged with knowingly making a false statement in violation of 18 U.S.C. § 924(a)(1)(A) received sentences averaging just fourteen months even though the maximum sentence is five years.⁸⁹ The sentences imposed for knowingly making a false statement in connection with a firearm purchase in violation of 18 U.S.C. § 922(a)(6) averaged just *twelve months*, even though the maximum sentence possible is ten years.⁹⁰ In fact, over this time period, 40% of those convicted of violating 18 U.S.C. § 922(a)(6) received nothing more than probation.⁹¹

The very structure of the sentencing guidelines ensures that straw purchasers will receive lower sentences. One key aspect of the sentencing guidelines is increased punishment for repeat offenders; first-time offenders receive lighter sentences.⁹² Yet convicted felons may not legally purchase

person went in with the intention of deceiving the government and the gun dealer by saying they were buying for themselves but were really buying for someone else.”).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *supra* Parts I.A & I.B for a discussion of the criminal statutes.

⁸⁹ REVIEW OF ATF’S PROJECT GUNRUNNER, *supra* note 28, at 62.

⁹⁰ *Id.*

⁹¹ *Id.* at 62–63.

⁹² *Id.*

firearms, so trafficking organizations must hire straw purchasers with no prior convictions.⁹³ The penalties for straw purchasers are thus guaranteed to be on the lenient side of the guidelines. Unless they depart upward from the sentencing guidelines, judges will often not be able to impose lengthy prison sentences on straw purchasers.⁹⁴ Sellers do not get any more stringent attention. The United States Code allows for civil penalties or up to one year in prison for failing to maintain adequate records as required.⁹⁵

As an example, the ATF Deputy Director, in testimony before Congress in 2010, described a case where ATF had dismantled a gun-trafficking ring. The ring involved twenty-three suspects who trafficked 336 firearms over a span of thirteen months.⁹⁶ The group made ninety-six different firearms purchases from ten different firearms dealers, spending \$367,419, mainly in cash.⁹⁷ ATF traced many of the firearms during the investigation and connected the weapons to the deaths of eighteen law enforcement officers and civilians.⁹⁸ Despite the scope of this operation, the members of the organization received sentences ranging from three months' to eight years' imprisonment for their various roles.⁹⁹

The penalties are also somewhat inflexible. For example, the criminal code does not allow for a higher penalty when more firearms are involved, like the code allows for varying quantities of illegal drugs. There is also no distinction as to whether the gun involved is a handgun or an automatic assault weapon. Instead a prosecutor must rely on the nonbinding sentencing guidelines to take these factors into consideration.¹⁰⁰ As for the law pertaining to illicit purchases, the only real distinction is whether the straw purchaser lied about a fact material to the legality of the weapons purchase, which carries a maximum penalty of ten years,¹⁰¹ or whether the straw purchaser merely lied, which carries a penalty of five years.¹⁰² The law also allows for either a suspension or revocation of a seller's firearm license,¹⁰³ but leaves almost no penalty for minor or first-time-seller offenses other than a potential one-year prison sentence for lying on

⁹³ *Id.* at 62.

⁹⁴ *But see* United States v. Hernandez, 633 F.3d 370, 371 (5th Cir. 2011), *cert. denied*, 131 S. Ct. 3006 (2011); *infra* Part III.A.

⁹⁵ See 18 U.S.C. §§ 923(e), 924(a)(3), 924(p)(1)(A) (2006).

⁹⁶ REVIEW OF ATF'S PROJECT GUNRUNNER, *supra* note 28, at 39.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See United States v. Booker, 543 U.S. 220 (2005).

¹⁰¹ 18 U.S.C. § 924(a)(2) (2006).

¹⁰² *Id.* §§ 922(a)(6), 924(a)(1)(D).

¹⁰³ See *id.* §§ 923(e), 924(p)(1)(A).

necessary records.¹⁰⁴ The criminal code does not distinguish between one weapon illegally bought or sold and dozens illegally bought or sold.

This regime is quite contrary to the criminal punishments available for the possession or sale of illegal narcotics.¹⁰⁵ Punishments for violations of the federal narcotics laws are determined by an elaborate scheduling system. Different substances are categorized into five schedules based on likelihood of abuse and legitimate, legal reasons for use.¹⁰⁶ In addition to determining punishment by the type of drug involved, the punishment differs by amount, so that a person illegally possessing greater quantities of a drug receives a larger punishment.¹⁰⁷ These graduated penalties based on varying levels of criminal behavior allow prosecutors to tailor charges to both higher-level drug dealers and lower-level drug dealers accordingly. It also appropriately provides the opportunity to lower charges in exchange for information should the defendant be willing to turn on those above him in the criminal organization.¹⁰⁸

Gun laws also contain no lower penalty for diminished mens rea, like

¹⁰⁴ See *id.* § 924(a)(3). A study conducted by ATF in 2000 reviewed administrative compliance mechanisms. COMMERCE IN FIREARMS IN THE UNITED STATES, *supra* note 57, at 31. The study found that of 1,700 compliance inspections of FFLs in fiscal year 1999, 400 resulted in violations. *Id.* Of these 400 violations, ATF took the following actions: license revocation for 3%; license surrender or denial of renewal for 19%; warning conferences or warning letters for 39%. *Id.* While most violations brought added scrutiny in the form of subsequent inspections, less than a quarter (22%) led to a loss of license, whereas 39 resulted in merely a warning. *Id.* More recent data suggests that both inspections and criminal referrals have increased in the recent years, by 133% and 47%, respectively. REVIEW OF ATF'S PROJECT GUNRUNNER, *supra* note 28, at iii.

¹⁰⁵ The United States Code does penalize the illegal possession of a firearm, but, considering that it is easy to recruit straw purchasers who can legally purchase a firearm, those statutes are irrelevant for fighting international weapons trafficking. Lying and buying statutes are the main tool in the fight against trafficking, much like possession with intent to distribute statutes are most commonly used to fight drug trafficking, making it appropriate to compare these two regimes.

¹⁰⁶ These range from some preparations of cough syrup (Schedule V) to heroin (Schedule I). *Controlled Substance Schedules*, U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMIN., OFF. DIVERSION CONTROL, <http://www.dea/diversion.usdoj.gov/schedules/> (last visited Apr. 22, 2013).

¹⁰⁷ See 21 U.S.C. § 841(b) (2006) (punishing, for example, possession of five kilograms or more of cocaine with ten years in prison, but possession of 500 grams or more with five years' imprisonment). For further discussion of the complexity of U.S. controlled-substance laws, see Benton Brooks Bodamer, Note, *Psychoactive Substances, Dietary Supplements, and the War on "Drugs": Law, Myth, and Tradition as the Social Control of Consciousness*, 66 OHIO ST. L.J. 1311, 1317–25 (2005).

¹⁰⁸ While the sentencing guidelines do include a provision that allows judges to lower sentences based on the defendant's cooperation with authorities, reliance on the nonbinding guidelines is less reliable and uniform than changes to the criminal code itself. See discussion *supra* note 63.

there is with homicide in most state criminal codes. Under federal weapons statutes, prosecutors must prove a “knowing” violation of weapons laws in all cases.¹⁰⁹ But often in criminal law, the same action can be punished differently based on the level of mens rea with which that action was carried out. For example, most state criminal codes distinguish between accidental and intentional killings, designating one negligent or accidental homicide and the other first-degree murder.¹¹⁰ The action and the accompanying mens rea are both punished, and penalties are graduated based on the level of intent involved.¹¹¹ While there is some logical dissonance to a crime called negligent or reckless weapons trafficking, there is also a sense that one can differentiate between a defendant who actively purchases weapons for cartels and one who acts as a middleman for weapons purchasers who, unbeknownst to the middleman, are members of a drug-trafficking organization. In both instances, the harm to society is equal, since the weapons fall into the hands of dangerous individuals that the law has determined cannot possess weapons. Society may also find these actions morally reprehensible given the great potential for harm, and thus deserving of criminal punishment. The current law as written does not allow for penalties for those who unknowingly, but perhaps recklessly or negligently, violate federal weapons laws.

III. CONSEQUENCES OF THE CURRENT STATUTORY REGIME

The consequences of these shortcomings are stark. First, given the conduct criminalized in the federal code, the majority of gun crimes are merely paperwork violations. United States Attorneys’ Offices are less likely to accept cases and prosecute defendants accused of these types of violations.¹¹² Moreover, cases involving paper violations are generally much smaller and less likely to involve the persons directing straw purchasers. Between 2004 and 2009, these types of cases also generally involved one or just a few defendants; 83% of cases referred to U.S. Attorneys’ Offices during that time involved only one or two defendants and only 2% involved more than ten defendants.¹¹³ Prosecutors have told agents that they prefer to handle multidefendant conspiracies rather than

¹⁰⁹ See discussion *supra* Part I.A.

¹¹⁰ According to a fifty-state survey, all fifty states and the District of Columbia distinguish between different types of murder. Many contain intermediate stages, like second-degree murder or manslaughter as well. THOMPSON REUTERS/WEST, AGGRAVATING AND MITIGATING FACTORS FOR HOMICIDE (STATUTES) tbl.1 (2012) (report available via Westlaw search for “0030 SURVEYS 28”).

¹¹¹ *Id.*

¹¹² REVIEW OF ATF’S PROJECT GUNRUNNER, *supra* note 28, at 51–53.

¹¹³ *Id.* at 52–53.

cases involving a single buyer.¹¹⁴

The combination of a high *mens rea*, a low sentence, and cases with a small number of defendants results in many cases simply not being charged. Prosecutors must evaluate whether going forward with the prosecution is worth the time and resources involved. Although recordkeeping on the issue is sparse, the most common reasons given by prosecutors for declining to prosecute weapons cases are “lack of evidence of criminal intent” and “weak or insufficient admissible evidence.”¹¹⁵ Agents also screen weak cases because they only refer cases for prosecution that, given their experience, they believe can be prosecuted successfully.¹¹⁶ Some of these uncharged cases may simply indicate investigations that did not turn up violations, but some undoubtedly involve cases of weapons trafficking lacking the evidence to show “knowing” violations or otherwise deemed low priority within the office. Anecdotal evidence suggests that higher penalties would convince more prosecutors to follow through with these cases.¹¹⁷

Second, low and inflexible penalties make it more difficult for law enforcement to make deals with straw purchasers in exchange for information on others in the organization. There is no higher penalty that interrogators can use to threaten potential defendants. Facing probation or a short jail sentence makes it unlikely that a straw purchaser will give information on a dangerous cartel member.¹¹⁸ Probation is preferable to reprisal from a cartel enforcer. Charges that are stiff and inflexible also do not allow for reduced charges in exchange for information.

Finally, the current statutory regime invites cartels to fund firearms-trafficking organizations through a steady stream of straw purchasers that are interchangeable at the lowest levels. As long as the straw purchaser has a clean criminal record, weapons purchases are completely legal. Even if the purchaser gets caught, the organization merely needs to find another purchaser who has a clean criminal record and is willing to make the purchase.¹¹⁹ Given the lack of recordkeeping and oversight on the

¹¹⁴ *Id.* at 53.

¹¹⁵ *Id.* at 63.

¹¹⁶ *Id.* (describing the tactics of ATF Agents who “do not refer cases to the USAOs that they assume would be rejected”).

¹¹⁷ *Id.* at 65 (“[T]he lack of long sentences is also a key factor in their decisions about whether to accept these Project Gunrunner cases.”).

¹¹⁸ See, e.g., *OUTGUNNED*, *supra* note 39, at 9 (“[W]ith these types of cases, for somebody to testify against members of a cartel where the alternative is seeing a probation officer once a month, they’re going to opt toward, you know, not cooperating with the law enforcement authorities.” (quoting an ATF supervisor)).

¹¹⁹ Sari Horwitz, *A Gunrunning Sting Gone Fatally Wrong*, WASH. POST, July 26, 2011, at A1 (explaining that, when caught, “the buyer would get a light punishment, if any, and the

secondary market, straw purchasers can even obtain weapons without background checks.¹²⁰

A. CONTRASTING CASE STUDIES—*UNITED STATES V. HERNANDEZ* AND *UNITED STATES V. BOUT*

A recent case, *United States v. Hernandez*,¹²¹ presents a helpful case study in examining how the sentencing guidelines *can* be used, but are generally *not* used, to fight international weapons trafficking. In *Hernandez*, the defendant pleaded guilty to violating the lying and buying statute where the false statement was material to the legality of the purchase, pursuant to 18 U.S.C. § 922(a)(6).¹²² On appeal, Hernandez claimed that his ninety-seven-month sentence was procedurally and substantively unreasonable because the sentence was based on “judge-found facts” determined at the sentencing hearing rather than facts decided by the jury.¹²³

The sentence was based on facts established at Hernandez’s arraignment and contained in the presentencing report. Hernandez purchased two semiautomatic assault rifles at a sporting goods store and represented on the federal ATF form that the guns were for his own use, when in fact Hernandez purchased the weapons for another person who intended to smuggle the assault rifles into Mexico.¹²⁴ Over the course of a year, Hernandez purchased twenty-three additional weapons, many similar to the semiautomatic assault rifles involved in the murder of Agent Brian Terry, at a cost of \$24,800.¹²⁵ According to the presentencing report, Hernandez was a prolific member of an organization of around twenty-two members that purchased approximately 328 weapons with the intention of transporting them to Mexico to arm the Zetas Drug Cartel.¹²⁶

Even though the sentencing guidelines suggested a 51–63 month sentence for the corresponding offense level of 24,¹²⁷ the sentencing judge

cartel could just find another buyer”).

¹²⁰ THE BRADY CTR., *supra* note 12, at 10.

¹²¹ See *United States v. Hernandez*, 633 F.3d 370 (5th Cir. 2011), *cert. denied*, 131 S. Ct. 3006 (2011).

¹²² *Id.* at 371.

¹²³ *Id.* at 371, 373, 375.

¹²⁴ *Id.* at 371–72 (explaining that three of these weapons were recovered at scenes of violence in Mexico).

¹²⁵ *Id.* at 372.

¹²⁶ *Id.*

¹²⁷ The presentence report started with an offense level of 12, pursuant to U.S. Sentencing Guidelines Manual § 2K2.1(a)(7), added 8 levels for an offense involving between 100 and 199 firearms, added 4 levels for firearms trafficking, added 3 levels for a manager or supervisor role in the offense, and subtracted 3 levels for acceptance of

departed upward, taking into account the large number of firearms trafficked—by the entire group and not just Hernandez—and the fact that many of the firearms were “military type assault rifles.”¹²⁸ The presentence report also identified exceptional circumstances not specifically enumerated in the sentencing guidelines, such as “(1) that the firearms were used in the commission of eight murders, (2) that the sheer number of purchases indicated Hernandez likely knew they would not serve a law-abiding purpose, and (3) that the future harm of his firearms purchases was ‘immeasurable.’”¹²⁹

The Fifth Circuit, in holding that the district court’s decision to depart upward was reasonable, stated that the crime in question here was “more serious than the run-of-the-mill case of firearms trafficking, because military-type assault rifles are more likely to be used by criminal, military, or terrorist organizations that pose a threat to U.S. security.”¹³⁰ The Fifth Circuit further determined that the sentence was reasonable because over 100 weapons were implicated.¹³¹ According to the court, the sentencing guidelines’ marginal increase in penalties for high volumes of trafficking “may fail to account sufficiently for the seriousness of trafficking where it involves a large number of firearms.”¹³² Finally, the Fifth Circuit specifically found that the evidence was sufficient such that Hernandez could have reasonably foreseen that he was arming the Mexican drug cartels, even if he could not foresee the specific criminal activities for which the weapons were used.¹³³ In acting anyway, Hernandez was “facilitating organizations that pose a significant threat to U.S. and Mexican national security.”¹³⁴ Such an extreme case was sufficient to allow the district court to reasonably depart upward from the sentencing guidelines, even though another similar trafficker had only received a forty-six-month sentence.¹³⁵

Whereas *Hernandez* shows the way that the sentencing guidelines can be manipulated to increase sentencing for weapons traffickers, a second

responsibility. *Id.*

¹²⁸ Both of these factors also came from the sentencing guidelines. *Id.* at 372–73.

¹²⁹ *Id.* at 373.

¹³⁰ *Id.* at 378.

¹³¹ *Id.*

¹³² *Id.* The court notes that the enhancement for trafficking twenty-five firearms is 10 levels and the enhancement for trafficking 100 firearms 12 levels—just an increase of two when dealing with four times the number of trafficked firearms. *Id.*

¹³³ *Id.* at 378–79.

¹³⁴ *Id.* at 379.

¹³⁵ *Id.* (citing *United States v. Gutierrez*, 359 F. App’x 540, 541 (5th Cir. 2010) (affirming forty-six-month sentence for eight counts of making false, material statements in purchasing twenty-eight military-style firearms later recovered in Mexico)).

case study is more indicative of the difficulties in charging conduct using the current statutory regime. Viktor Bout, nicknamed the “Merchant of Death,” was a large-scale weapons dealer who has been accused of selling weapons to insurgency groups and terrorist organizations.¹³⁶ When he was finally captured in Thailand and extradited back to the United States to face trial, the charges focused on one main arms deal involving the Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia, FARC). During meetings with undercover DEA agents posing as middlemen for the FARC, Bout and his coconspirator discussed the potential sale of:

- (1) 700 to 800 surface-to-air missiles; (2) 5,000 AK-47 firearms; (3) millions of rounds of ammunition; (4) various Russian spare parts for rifles; (5) anti-personnel land mines and C-4 explosives; (6) night-vision equipment; (7) “ultralight” airplanes, which could be outfitted with grenade launchers and missiles; (8) unmanned aerial vehicles, which have a range of 200 to 300 kilometers; and (9) two cargo planes for arms deliveries.¹³⁷

However, when Bout was indicted in the Southern District of New York, only one of the four counts pertained to a violation of weapons laws.¹³⁸ Because no weapons-trafficking statute currently exists, AUSAs in the Southern District of New York had to charge the more complicated conspiracy to kill Americans, which required a showing both that Bout was trafficking weapons *and* that those weapons would be used to kill American citizens.¹³⁹ Ultimately, Bout was convicted on all four counts, but the absurdity remains: a defendant who allegedly trafficked weapons to a terrorist organization is only tangentially charged with violating any U.S. weapons laws.

B. A WORST-CASE SCENARIO REALIZED—OPERATION FAST AND FURIOUS

Faced with the constant stream of weapons traffickers along the border

¹³⁶ Noah Rosenberg, *Guilty Verdict for Russian in Arms Trial*, N.Y. TIMES, Nov. 3, 2011, at A23 (“Mr. Bout has been accused of furnishing weapons to Al Qaeda and the Taliban and into civil wars in Africa . . .”).

¹³⁷ *United States v. Bout*, No. 08 Cr. 365 (SAS), 2011 WL 2693720, at *2 (S.D.N.Y. July 11, 2011).

¹³⁸ The four counts charged “conspiracies to (1) kill United States nationals, (2) kill officers and employees of the United States, (3) acquire, transfer, and use anti-aircraft missiles, and (4) provide material support to a designated foreign terrorist organization, the *Fuerzas Armadas Revolucionarias de Colombia* (the ‘FARC’).” *Id.* at *1 (footnotes omitted).

¹³⁹ Bout attempted to dismiss the charges on the ground that there was no nexus between his activities and the United States, in violation of his Due Process rights. The motion was denied. *See id.*

and a constrictive statutory regime, ATF turned to extreme measures in order to turn the tide. Instead of interdicting weapons, ATF chose instead to track the weapons into Mexico in hopes of building cases against leaders of trafficking organizations.¹⁴⁰ In general, it is against ATF policy to allow illegal firearms to “walk” into the hands of criminals who would use them in acts of violence.¹⁴¹ Furthermore, ATF prodded weapons dealers to make sales to illegal purchasers that the dealers would not otherwise have made.¹⁴²

The length and breadth of Operation Fast and Furious only became known to the American public when two assault rifles that had been followed during the operation were found at the scene of the shooting death of Customs and Border Patrol Agent Brian Terry on December 14, 2010.¹⁴³ Agent Terry was patrolling the U.S.–Mexico border when he and his partner engaged two persons who were preparing to ambush and steal from illegal immigrants crossing the border.¹⁴⁴ The bandits fired on the agents and Terry was killed.¹⁴⁵ Whistleblowers within ATF contacted a U.S. Senator, explaining that ATF had allowed guns to “walk,” resulting in Terry’s death.¹⁴⁶ After a public outcry over the death of a U.S. law enforcement agent, Congress began an investigation into the matter.¹⁴⁷ As the information trickled out, it became clear that Operation Fast and Furious extended far beyond the two weapons found at the scene of Brian Terry’s murder. According to ATF, 1,765 guns were sold to suspected smugglers during the fifteen-month Fast and Furious operation.¹⁴⁸

The congressional investigation revealed that the weapons recovered on December 14 were a small part of a much larger operation intended to build cases against high-level members of DTOs, who often use U.S.-made weapons to secure passage of narcotics into the United States.¹⁴⁹ Arresting

¹⁴⁰ See ACCOUNTS OF ATF AGENTS, *supra* note 4, at 12.

¹⁴¹ *Id.* at 11–12 (discussing that agents may allow an illegal weapons transaction to continue “to further an investigation” but must interdict the weapons “at some point” if the agent has knowledge that the transfer was illegal).

¹⁴² See Richard A. Serrano, *Gun Seller in Sting Had Doubts*, L.A. TIMES, Sept. 12, 2011, at A1 (“To customers with phony IDs or wads of cash he normally would have turned away, [one dealer] sold pistols, rifles and semiautomatics.”).

¹⁴³ Grimaldi & Horwitz, *supra* note 1, at A4.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ James V. Grimaldi, *ATF Faces Federal Review over Tactics to Foil Gunrunning Rings*, WASH. POST, Mar. 10, 2011, at A4.

¹⁴⁸ Kim Murphy, *Border Effort Let Guns into Criminal Hands*, L.A. TIMES, Mar. 4, 2011, at A1.

¹⁴⁹ Grimaldi & Horwitz, *supra* note 26, at A1 (according to former United States

straw purchasers had not succeeded in stemming the tide of weapons flowing south into Mexico, so the ATF consciously decided to go after the heads of the hydra.¹⁵⁰ ATF explained “[t]hat was the shift in strategy . . . we recognized that unless we went after the head of the organization, the person ordering the guns, ordering the violence, we were going to have little to no success in stemming the violence down there.”¹⁵¹ In order to bring charges against kingpins in the Mexican DTOs, the agents needed proof that the weapons were going to the cartels to be used in furtherance of crimes.¹⁵² Of course, the obvious flaw in the operation was that closing the loop between straw purchasers and cartel leaders created the foreseeable risk that cartels would use the noninterdicted weapons in violent crimes.¹⁵³

The weapons logged and traced by ATF in Arizona began surfacing at scenes of violent crime in Mexico.¹⁵⁴ In March 2010, ATF recorded 958 killings in Mexico and 359 purchased guns that were traced as part of Operation Fast and Furious.¹⁵⁵ As of July 2011, law enforcement recovered 122 weapons directly traceable to Operation Fast and Furious at scenes of violent crimes in Mexico.¹⁵⁶ In one particularly heinous example, two Fast and Furious weapons were recovered in connection with the kidnapping and murder of the brother of the Attorney General of the Mexican state of

Attorney for the District of Arizona, Dennis Burke, “Mexican drug lords go shopping for war weapons in Arizona”).

¹⁵⁰ In October 2009, the Department of Justice, which oversees the ATF, sent an e-mail to border supervisors instructing ATF to “broaden its scope to ‘identify, investigate, and eliminate’ the cartels” by focusing on higher level targets. The memo did not, however, suggest the specific strategy of allowing firearms to “walk” across the Mexican border. Richard A. Serrano, *ATF Gun Operation Troubled Early On*, L.A. TIMES, Aug. 11, 2011, at A1.

¹⁵¹ Murphy, *supra* note 148, at A14.

¹⁵² *See supra* Part I.A (explaining that knowing violations of buying statutes must be shown).

¹⁵³ *See* ACCOUNTS OF ATF AGENTS, *supra* note 4, at 27 (“DOJ and ATF determined that the goal of making the big case was worth the risk of letting hundreds and hundreds of guns go to criminals in the process.”).

¹⁵⁴ *See id.* at 36.

¹⁵⁵ *See id.* at 36–37. This is not to say that the 359 guns traced by ATF in March 2010 were used in the 958 deaths, just that there was a high number of deaths in a month where ATF walked a high number of guns.

¹⁵⁶ JOINT STAFFS OF H. COMM. ON OVERSIGHT & GOV’T REFORM & S. COMM. ON THE JUDICIARY, 112TH CONG., THE DEPARTMENT OF JUSTICE’S OPERATION FAST AND FURIOUS: FUELING CARTEL VIOLENCE 8–9 (2011) [hereinafter FUELING CARTEL VIOLENCE]. Moreover, a member of the Mexican Chamber of Deputies, the lower house of the Mexican Congress, said that he knew of “150 cases of injuries and homicides with arms that were smuggled and passed illegally into our country” during Operation Fast and Furious. Kim Murphy & Ken Ellingwood, *Mexico Demands Answers on Guns*, L.A. TIMES, Mar. 11, 2011, at A1.

Chihuahua.¹⁵⁷ Fast and Furious weapons were also implicated in an incident where cartel members grounded a Mexican police helicopter.¹⁵⁸ ATF members even reported to Congress that they were concerned that Fast and Furious weapons were used in the shooting of Congresswoman Gabrielle Giffords in Arizona in January 2010, although this turned out not to be the case.¹⁵⁹

Despite contributing to the horrific proliferation of violence in Mexico, Operation Fast and Furious achieved some of its main objectives. ATF confirmed that weapons purchased by their targets in the southwest United States were ending up in the hands of narcotraffickers when the weapons were recovered at Mexican crime scenes.¹⁶⁰ Mexican law enforcement also recovered Fast and Furious weapons at the home of a known cartel enforcer.¹⁶¹ Finally, the United States Attorney's Office for the District of Arizona issued a 53-count indictment alleging that a number of persons were involved in a complex scheme to purchase and smuggle hundreds of weapons to the Mexican drug cartels.¹⁶² Yet even this success is marginal since those charged as a result of Operation Fast and Furious are largely minor straw purchasers, charged under the lying and buying provisions.¹⁶³

ATF made a conscious decision to employ incredibly dangerous investigative tactics because there is no other way, under the current regime, to adequately pursue bosses who organize gun trafficking rings. Further underscoring the inadequacy in the system, ATF agents still did not have the information or tools to prosecute cases, even after they had proof that the weapons were being smuggled into Mexico. The only real result of the massive operation was that ATF obtained more information on the low-level straw purchasers that ATF had already identified as targets.¹⁶⁴

¹⁵⁷ See FUELING CARTEL VIOLENCE, *supra* note 156, at 54.

¹⁵⁸ See *id.* at 57–59.

¹⁵⁹ Kim Murphy, *ATF Agents Describe 'State of Panic,'* L.A. TIMES, June 15, 2011, at A7.

¹⁶⁰ See ACCOUNTS OF ATF AGENTS, *supra* note 4, at 35–41.

¹⁶¹ Forty weapons were recovered in Ciudad Juarez at the home of Jose Antonio Torres Marrufo, a cartel leader and enforcer for the Sinaloa Cartel. Richard A. Serrano, *Fast and Furious Guns Turned up at Cartel Enforcer's Home,* L.A. TIMES, Oct. 9, 2011, at A27.

¹⁶² Grimaldi & Horwitz, *supra* note 26, at A1 (explaining further that more than a dozen persons charged in the indictment were arrested when the indictment was announced).

¹⁶³ See ACCOUNTS OF ATF AGENTS, *supra* note 4, at 46–47 (explaining that very little information gleaned from Operation Fast and Furious was even included in the indictment since ATF had already built cases on most of the indicted straw purchasers).

¹⁶⁴ See *id.* at 45 (“[W]e knew Jaime Avila [the purchaser of the weapon that was discovered at the scene of Brian Terry’s murder] was a straw purchaser, had him identified as a known straw purchaser supplying weapons to the cartel.”).

C. INTERNATIONAL IMPLICATIONS

Changing U.S. weapons laws to prevent trafficking would do more than just stem drug violence in Mexico—it could help improve relations with our southern neighbors and other countries around the world. First, the issue of weapons trafficking is a constant point of contention in the relationship between Mexico and the United States. On President Obama’s most recent trip to Mexico in 2009, he and Mexican President Felipe Calderón discussed the potential for an arms treaty signed by the other countries of the Western Hemisphere.¹⁶⁵ President Calderón repeated his call to Speaker of the House John Boehner during the Speaker’s recent January 2012 visit to Mexico to discuss security issues.¹⁶⁶ The Mexican government views the flow of weapons from the United States into Mexico as one of the key factors in the proliferation of drug violence in Mexico and has pressured the United States to do all it can to stop weapons trafficking.¹⁶⁷ The issue is clearly one that is important to the Mexican government, and cooperation could lend itself to reciprocation in other areas.

The issue of international weapons trafficking has also appeared on the world stage. In recent years, the United Nations has discussed the potential for a worldwide arms treaty that would attempt to regulate global trafficking.¹⁶⁸ In July 2012, the UN convened a worldwide conference “to elaborate a legally binding instrument on the highest possible common international standards for the transfer of conventional arms.”¹⁶⁹ Despite nearly one month of discussions, the parties could not agree to a treaty and instead decided to reinstate talks in 2013.¹⁷⁰ In the past, the United States has been skeptical of multilateral weapons treaties.¹⁷¹ The U.S.

¹⁶⁵ See Dudley Althaus, *Obama Pushes Latin Arms Treaty*, HOUS. CHRON., Apr. 17, 2009, at A1.

¹⁶⁶ *Mexico Presses U.S. House Speaker on Arms Traffic*, SEATTLE TIMES (Jan. 13, 2012, 7:31 PM), http://seattletimes.com/html/nationworld/2017234672_aplrmexicoushouse_speaker.html.

¹⁶⁷ See *Mexico Calls on UN to Help Control Flow of High-Powered Weapons to Drug Gangs*, UN NEWS CENTRE (Sept. 21, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39656> (“It is unjust and inhuman that the profits of the arms industry should decide the deaths of thousands of people,” Mexican President Felipe Calderón told the UN General Assembly.”).

¹⁶⁸ See generally *Arms Trade Treaty*, UNITED NATIONS OFFICE FOR DISARMAMENT AFFAIRS, <http://www.un.org/disarmament/convarms/ArmsTradeTreaty/> (last visited Feb. 16, 2013) [hereinafter *Arms Trade Treaty*].

¹⁶⁹ G.A. Res. 64/48, ¶ 4, U.N. Doc. A/RES/64/48 (Jan. 12, 2010).

¹⁷⁰ *Arms Trade Treaty*, *supra* note 168.

¹⁷¹ The United States is a signatory to but has not yet ratified the Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, negotiated by the Organization of American States.

representative to the conference delivered a statement that the United States “seek[s] a treaty that establishes high international standards for controlling the transfer of arms . . . to reduce illicit arms trafficking.”¹⁷² The United States also wanted to ensure that the treaty would not “in any way handicap the legitimate right of self-defense.”¹⁷³ The Secretary General to the United Nations stressed the “need for all States to ensure that their national systems and internal controls are at the highest possible standards” to prevent illicit trafficking.¹⁷⁴ It is hard to say that the United States is currently accomplishing this goal.

IV. ANALYSIS—PROPOSED LEGISLATION TO COMBAT WEAPONS TRAFFICKING AND OTHER SOLUTIONS

In response to the congressional inquiry into Operation Fast and Furious, on July 15, 2011, the House proposed legislation aimed to assist law enforcement in combating illicit weapons trafficking along the border. The legislation, entitled the Stop Gun Trafficking and Strengthen Law Enforcement Act of 2011,¹⁷⁵ was proposed by New York Democrat Carolyn Maloney and was cosponsored by twenty-nine additional Democratic legislators.¹⁷⁶ The bill was referred to the House Judiciary Committee and was subsequently assigned to the Subcommittee on Crime, Terrorism, and Homeland Security on August 25, 2011.¹⁷⁷ The bill has not moved from that stage.

A. A NEW STATUTE CRIMINALIZING WEAPONS TRAFFICKING

The proposed legislation does not change any provisions of the

Organization of American States: Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, Nov. 14, 1997, 37 I.L.M. 143.

¹⁷² Donald A. Mahley, U.S. Representative to the Arms Trade Treaty Conference, Statement at the U.N. Conference on the Arms Trade Treaty (July 12, 2012), *available at* http://www.un.org/disarmament/ATT/statements/docs/20120712/20120712_US_E.pdf.

¹⁷³ *Id.*

¹⁷⁴ U.N. Grp. of Governmental Experts, Rep., transmitted by letter dated Aug. 8, 2008 from the Chairperson of the Grp. of Governmental Experts established pursuant to resolution 61/89 to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms, addressed to the Secretary-General, ¶ 29, U.N. Doc. A/63/334 (Aug. 26, 2008).

¹⁷⁵ Stop Gun Trafficking and Strengthen Law Enforcement Act of 2011, H.R. 2554, 112th Cong. (2011).

¹⁷⁶ *Bill Summary and Status Search Results*, LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/R?d112:FLD003:@1%28Rep.+Maloney+Carolyn%29> (last visited Apr. 18, 2013) [hereinafter *Bill Summary and Status*].

¹⁷⁷ *Id.*

criminal code currently in force. Instead, it adds a new section to the criminal code that would make it illegal “to receive, or to transfer or otherwise dispose of to 1 or more individuals, 2 or more firearms . . . knowing or having reasonable cause to believe that such conduct will result in the disposing of 1 or more such firearms to an individual” whose possession of the weapon is unlawful or who intends to use or dispose of the weapon unlawfully.¹⁷⁸ The law would also explicitly criminalize involvement in a conspiracy to traffic firearms.¹⁷⁹

Finally, the new legislation would impose significant penalties for trafficking in firearms by altering 18 U.S.C. § 924. A maximum sentence of twenty years’ imprisonment would be imposed on those who traffic firearms as defined by the newly created 18 U.S.C. § 932(a) and (b).¹⁸⁰ The sentence would be increased to a maximum of twenty-five years for defendants acting in a management or supervisory role in an organization of five or more persons.¹⁸¹ Conspiring to violate the new law would also result in a maximum penalty of ten years’ imprisonment.¹⁸²

B. AN ANALYSIS OF THE WEAPONS-TRAFFICKING STATUTE—IS IT ENOUGH?

The proposed legislation is a significant step toward giving law enforcement the necessary tools to combat weapons trafficking. It does not alter any current provisions of federal law, however, and instead merely criminalizes additional conduct. As a result, only some of the problems in the present statutory regime are solved by the new legislation.

The most important aspect of the new legislation is that it officially criminalizes weapons trafficking by adding 18 U.S.C. § 932 to the criminal code. Instead of being charged with a mere paper violation for lying on a federal form, those who are involved in trafficking weapons can be charged with a crime that has an inherent severity equal to the underlying acts.¹⁸³ The additional weight given to these substantive violations could ensure that prosecuting offices and the public at large take the violations more seriously.¹⁸⁴ It may also ensure that media coverage of these issues becomes more proportionate to the seriousness of the problem. This statute

¹⁷⁸ H.R. 2554 § 2(a).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* § 2(b).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *See supra* Part II.B.

¹⁸⁴ During congressional testimony about the current lying and buying statutes, one ATF agent said that “[s]ome people view this as no more consequential than doing 65 in a 55.” *OUTGUNNED*, *supra* note 39, at 9.

thus gives law enforcement what they have been requesting for some time: “There is no gun-trafficking statute,” said James Cavanaugh, a retired ATF supervisor. “We’ve been yelling for years that we need a gun-trafficking statute, because these cases are so difficult to prove.”¹⁸⁵

Second, the new legislation provides much higher maximum penalties for those who violate the statute than can be levied under current law. The maximum penalties for violating the proposed weapons-trafficking statute are more than double the penalties currently used by law enforcement to combat trafficking.¹⁸⁶ Under the current regime, a person who purchased a weapon with the intention of selling or otherwise transporting it to a drug cartel could be convicted of lying and buying and face a maximum sentence of either five or ten years, but probably would receive something much lower.¹⁸⁷ Under the new weapons-trafficking statute, the same defendant could be convicted of trafficking so long as he purchased two or more firearms and could face a maximum sentence of twenty years, or up to twenty-five years if he was an organizer of the group.¹⁸⁸

Additionally, the new weapons-trafficking statute adds some flexibility to the charging of conduct related to weapons offenses. A person charged with weapons trafficking under the new statute has room to negotiate with prosecutors or law enforcement for a lower charge, such as a violation of the lying and buying provisions. This room for charge bargaining could give law enforcement more leverage when attempting to convince offenders to provide information on others in the trafficking organizations. The longer sentence also provides motivation for offenders to give information. A person facing probation is much less likely to cooperate with law enforcement and risk retribution from the cartel than is a person facing twenty-five years’ imprisonment. If law enforcement has this additional ability to negotiate, it could result in more information about the trafficking organizations without the danger of following guns across the U.S.–Mexico border or waiting for the weapons to turn up at a crime scene.

Finally, the new weapons-trafficking statute appears to give law enforcement the ability to pursue criminals operating in Mexico, equivalent to the Department of Justice’s pursuit of Mexican drug kingpins. Federal drug-trafficking statutes criminalize the importation of illegal drugs into the United States and, in so doing, criminalize actions that occur wholly outside of the United States, so long as prosecutors demonstrate a nexus to the

¹⁸⁵ Grimaldi, *supra* note 147, at A4.

¹⁸⁶ See H.R. 2554 § 2(b); *supra* Part II.B.

¹⁸⁷ See 18 U.S.C. § 922(a)(6), 924(a)(1)(A) (2006).

¹⁸⁸ See H.R. 2554 § 2(b).

United States.¹⁸⁹ Under these statutes, U.S. Attorneys' Offices have charged Mexican drug traffickers in the United States¹⁹⁰ and either arrested them in the United States or extradited them from Mexico to face trial in a United States court.¹⁹¹ Strong, coordinated actions by the United States Department of Justice have played a significant role in dismantling narco-trafficking organizations that once controlled significant supply lines into the United States.¹⁹²

Criminalizing weapons trafficking appears, on its face, to create the same possibility, because it would be illegal "to receive . . . 2 or more firearms . . . knowing or having reasonable cause to believe that such conduct will result in the disposing of 1 or more such firearms to an individual" whose possession of the weapon is unlawful or who intends to use or dispose of the weapon unlawfully.¹⁹³ Members of Mexican drug cartels, the ultimate recipients of the weapons, would seem to fall under this statute and could thus be charged and prosecuted by U.S. law enforcement.

Problems remain with the way the new statute would work in practice. The new legislation first creates an interesting issue as to how to define "unlawful."¹⁹⁴ For example, if the gun is transported to Mexico, is the mere fact that it passes into the hands of non-U.S. citizens, in contravention of

¹⁸⁹ See 21 U.S.C. § 952(a) (2006) (making it "unlawful to . . . import into the United States from any place outside thereof, any controlled substance in schedule I or II" or certain other controlled substances); see also 18 U.S.C. § 371 (containing federal conspiracy statute making it unlawful for "two or more persons [to] conspire . . . to commit any offense against the United States . . . and one or more of such persons [to] do any act to effect the object of the conspiracy").

¹⁹⁰ See, e.g., Richard Marosi & Tracy Wilkinson, *Mexico Is Under Siege: Drug Kingpin Is Sent to U.S.*, L.A. TIMES, Apr. 30, 2001, at A1 (describing the extradition of the former boss of the Tijuana cartel to face federal charges in San Diego); Kristina Sherry, *U.S. Indicts Reputed Mexican Drug Dealers*, L.A. TIMES, Aug. 21, 2009, at A24 (explaining major federal indictments in Chicago and Brooklyn for leaders of the Sinaloa and Juarez cartels).

¹⁹¹ Extradition between the United States and Mexico is governed by treaty and, while differences between the legal systems and foreign policy considerations complicate the process, the United States has been incredibly successful at extraditing fugitives to face justice in U.S. courts. Once a fugitive is before a U.S. judge on a valid indictment, the criminal process does not differ whether the fugitive was extradited or merely arrested in the United States. Some issues may arise, however, that are related solely to extradition cases. See, e.g., Roberto Iraola, *The Doctrine of Specialty and Federal Criminal Prosecutions*, 43 VAL. U. L. REV. 89 (2008).

¹⁹² See Mariano Castillo & Catherine E. Shoichet, *Former Mexican Kingpin Pleads Guilty*, CNN.COM (Jan. 4, 2012, 7:12 PM), <http://www.cnn.com/2012/01/04/justice/drug-trafficker-plea/index.html> (noting the recent guilty plea of the former leader of the once fearsome Tijuana cartel).

¹⁹³ H.R. 2554 § 2(a).

¹⁹⁴ The legislation does include some explanation as to what it intends by an "individual whose possession or receipt of the firearm would be unlawful," referring to those who are under indictment or who have been convicted of felonies or drug offenses. *Id.*

U.S. law, sufficient to count as unlawful possession?¹⁹⁵ Similarly, does the fact that possession of most of these weapons is illegal in Mexico mean that the weapon trafficked to Mexico is transferred to someone who illegally possesses it?¹⁹⁶ These questions are not answered in the legislation, but could create interesting arguments as federal prosecutors attempt to charge defendants under the proposed weapons-trafficking statute. It is unclear precisely what a prosecutor would have to prove to gain a conviction under this statute.

Moreover, any cartel leaders who conspire or plan the trafficking of weapons could also face criminal prosecution for their involvement, potentially facing very lengthy sentences for their leadership roles.¹⁹⁷ The new statute thus gives law enforcement and prosecutors an additional way to investigate and punish criminal conduct by those directing trafficking organizations in Mexico.

C. CAN THE LAW PASS?

Even with the benefits of a new trafficking statute, the proposed bill is unlikely to pass Congress. The main obstacle for passage is the strength of the National Rifle Association. The NRA has already pledged to oppose any bill that adds to the current cadre of weapons laws, stating that law enforcement should focus instead on complete enforcement of the laws already on the books.¹⁹⁸ Conservative politicians have also traditionally considered gun control a crucial issue and have attempted to cast themselves as the protectors of an absolute Second Amendment right.¹⁹⁹

The NRA has been remarkably successful at getting its desired policies enacted by Congress. In the last ten years, the NRA has prevented the

¹⁹⁵ See 18 U.S.C. § 922(d)(5)(A) (2006) (making it illegal for aliens illegally or unlawfully in the United States to possess weapons).

¹⁹⁶ See *supra* Part I.A.

¹⁹⁷ H.R. 2554 § 2(b).

¹⁹⁸ Christine Mai-Duc, *Amid Fast and Furious Probe, Democrats Push New Gun Control Bill*, L.A. TIMES (July 15, 2011), <http://articles.latimes.com/2011/jul/15/news/la-pn-gun-trafficking-20110715> (“‘The laws are already on the books,’ said Andrew Arulanandam, a spokesperson for the NRA, in an interview. ‘The problem is a lack of enforcement.’”).

¹⁹⁹ See Allen Rostron, *Cease Fire: A “Win-Win” Strategy on Gun Policy for the Obama Administration*, 3 HARV. L. & POL’Y REV. 347, 352 (2009) (demonstrating the way leading Republican presidential candidates in 2007 attempted to use their opposition to gun control as a way to prove their conservative bona fides). Notably, in light of the tragedy at Sandy Hook Elementary, Republican opposition to gun regulations has become less monolithic. Rachel Weiner, *Incoming GOP Congressman Open to Gun Control*, WASH. POST (Dec. 28, 2012, 10:25 AM), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/12/28/incoming-gop-congressman-open-to-gun-control/> (describing one Republican lawmaker who was endorsed by the NRA and some other colleagues as open to “new assault weapon restrictions”).

reenactment of the federal ban on assault weapons, successfully lobbied Congress to give the gun industry special immunity from tort liability, and managed to pass federal and state laws prohibiting the seizure of private weapons during times of emergency in the aftermath of Hurricane Katrina.²⁰⁰

Opponents of restrictions on gun ownership earned a huge victory in the 2008 Supreme Court decision of *District of Columbia v. Heller*.²⁰¹ The case involved a challenge to the District of Columbia's law prohibiting the possession of a handgun without a license issued by the chief of police.²⁰² In overturning the statute, the Court held that the Second Amendment conferred an individual right to keep and bear arms, although the right is "not unlimited."²⁰³ Instead, the right is maintained "in case of confrontation," or for the purpose of individual self-defense.²⁰⁴ In so ruling, the court fueled the arguments of those who oppose meaningful regulations on individual gun ownership.²⁰⁵ In fact, in arguing against reinstating the assault-weapons ban and other meaningful antitrafficking statutes, the NRA has framed the argument in terms of a right to defend oneself with the use of those weapons.²⁰⁶

The House of Representatives' Committee on the Judiciary is currently comprised of twenty-three Republicans and eighteen Democrats.²⁰⁷ The bill is cosponsored by thirty Democrats and zero Republicans, demonstrating where support and opposition are likely to fall.²⁰⁸ Republicans have also shown the direction in which they are likely to vote during the Fast and Furious congressional investigation. During the investigation, Republican Chair Darrell Issa (CA) repeatedly blocked questions on the deficiencies in the statutory regime and potential modifications that would help law enforcement, insisting that these were

²⁰⁰ Rostron, *supra* note 199, at 351.

²⁰¹ 554 U.S. 570 (2008).

²⁰² *Id.* at 574–75.

²⁰³ *Id.* at 595.

²⁰⁴ *Id.* at 592.

²⁰⁵ *But see id.* at 626–27 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons . . . or laws imposing conditions and qualifications on the commercial sale of arms.”).

²⁰⁶ See Jason Ryan, *Obama to Seek New Assault Weapon Ban*, ABC NEWS (Feb. 25, 2009), <http://abcnews.go.com/Politics/story?id=6960824&page=1#.TxryqW9STwA> (“‘A semi-automatic is a quintessential self-defense firearm owned by American citizens in this country,’ [the head of the NRA] said. ‘I think it is clearly covered under Heller and it’s clearly, I think, protected by the Constitution.’”).

²⁰⁷ See *Committee Members*, U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON THE JUDICIARY, <http://judiciary.house.gov/about/members.html> (last visited Feb. 16, 2013).

²⁰⁸ *Bill Summary and Status*, *supra* note 176.

outside of the scope of the congressional investigation.²⁰⁹ Issa insisted that the hearing was not called “to talk about proposed gun legislation.”²¹⁰

Yet even though any issue related to gun control raises “bitterly controversial political and cultural issues,”²¹¹ some believe that there is room for compromise and across-the-aisle agreement. For example, the NRA has stated that it distinctly opposes international trafficking of firearms.²¹² The NRA also has advocated since the Clinton era for a very strict enforcement of current weapons laws in order to best protect the Second Amendment right to bear arms that they vociferously defend.²¹³ The disagreement hinges largely on the scope of the trafficking problem and the best way to solve it.²¹⁴ There should be room for debate and room for compromise. The bottom line is that the issue should be approached with a view toward how to best solve the problem of international weapons trafficking that occurs daily along the U.S. border with Mexico, while maintaining the rights espoused in the United States Constitution.

D. REQUIREMENTS FOR CRAFTING A BETTER STATUTORY REGIME

The solution to the problem of international weapons trafficking along the border with Mexico must be comprehensive and involve a rearranging of current federal law. The new system must have a distinct focus on international trafficking. The current laws, promulgated in 1968 (the Gun Control Act) and in 1994 (the Brady Act), contemplate the problem of single purchasers gaining access to weapons and then using them to harm innocent civilians.²¹⁵ They do not contemplate full-scale organizations purchasing and funneling weapons for crime bosses. The new system must also be comprehensive in order to take into account the varied range of persons involved in weapons trafficking, from straw purchasers to middlemen to cartel bosses. While the history of weapons laws in the

²⁰⁹ Christine Mai-Duc, *Democrats Seek to Curb Gun Trafficking*, L.A. TIMES, July 1, 2011, at A9.

²¹⁰ See OUTGUNNED, *supra* note 39, at 7.

²¹¹ Rostron, *supra* note 199, at 348.

²¹² *Gun Trafficking to Mexico: Already Against the Law*, NAT'L RIFLE ASS'N-INST. FOR LEGISLATIVE ACTION (Apr. 1, 2009), <http://www.nraila.org/news-issues/fact-sheets/2009/gun-trafficking-to-mexico%2%A0already-agai.aspx?s=InternationalGunControlIssues&st=&ps=>.

²¹³ Rostron, *supra* note 199, at 358.

²¹⁴ Wayne LaPierre, the head of the NRA, asserts that there is sufficient evidence to conclude that the majority of weapons used in Mexico actually come from Russia and Central American countries such as Guatemala. Perez, *supra* note 19, at C1.

²¹⁵ See Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921–928 (2006)); Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified as amended in scattered sections of 18 U.S.C.).

United States has largely centered around solving a single, targeted problem, the new regime must encompass a broader, more complicated danger and should therefore be just as nuanced as the problem. Any new laws must first address the specific problem of international trafficking and, second, address the problem in a comprehensive manner by lowering the knowledge requirement to convict straw purchasers, increasing the penalties for trafficking violations, and helping ATF to track weapons sales to identify potential traffickers.

1. *Focus on International Trafficking*

Any new set of statutes must specifically focus on the problem of international weapons trafficking.²¹⁶ Up to this point, weapons laws passed in the United States have focused not on international trafficking but on preventing certain classes of individuals from obtaining weapons. The main structure of the current regulatory scheme was created with the passage of the Gun Control Act of 1968. The stated purpose of the Gun Control Act of 1968 was to “assist State and local governments in reducing the incidence of crime.”²¹⁷ The support was granted by provisions of the Act that banned certain individuals from possessing weapons²¹⁸ and forced sellers of weapons to register and obtain federal firearm licenses.²¹⁹ As discussed above, however, the Act does not criminalize trafficking and never contemplated this problem when it was enacted.²²⁰

A second major enactment added to the current regulatory scheme, but again did not focus on trafficking. The Brady Handgun Violence Prevention Act of 1994, much like the Gun Control Act of 1968, sought to give law enforcement the tools to prevent certain individuals from obtaining weapons, specifically handguns. The stated purpose of this Act was to “provide for a waiting period before the purchase of a handgun, and for the establishment of a national instant criminal background check system to be contacted by firearms dealers before the transfer of any firearm.”²²¹ This was accomplished by requiring background checks for individuals purchasing firearms from an FFL.²²² While this is helpful in the fight

²¹⁶ Trafficking is the movement of weapons into an illegal, unregulated market, which is distinct from smuggling or simple illegal purchases. *See supra* note 21 and accompanying text.

²¹⁷ H.R. REP. NO. 488, at 1 (1967).

²¹⁸ 18 U.S.C. § 922.

²¹⁹ *Id.* § 923.

²²⁰ *See id.* §§ 921–928.

²²¹ Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, pmb., 107 Stat. 1536, 1536 (1993) (codified as amended in scattered sections of 18 U.S.C.).

²²² § 102, 107 Stat. at 1536–41.

against trafficking because law enforcement can detect suspicious patterns of behavior, the background check will only prevent sales to those suspected classes established by the Gun Control Act of 1968. It therefore reinforces the scheme established in 1968 but does not alter the purpose of the legislation. Attempting to eliminate trafficking using a scheme that never contemplated the problem is clearly inefficient. The laws should instead be updated to solve the current problem.

2. *Comprehensive Changes*

In addition to being focused on trafficking, the new laws must be comprehensive in scope. The law cannot simply be a temporary fix to one part of the problem—it should address all stages and potential aspects of weapons trafficking. This approach is contrary to the history of federal weapons laws, which have often been shortsighted and ineffective.²²³ This can be blamed at least in part on Congress’s tendency to pass narrow laws as a reflexive response to a significant national tragedy.²²⁴ The result has created an “often incoherent patchwork of provisions . . . [as] [l]egislators pile new restrictions atop old ones, often in response to particular tragedies or narrow concerns.”²²⁵ Any reforms must not be merely a reflexive response to the Fast and Furious scandal—they should create a statutory regime that gives law enforcement the tools to prevent weapons trafficking at every possible stage.²²⁶

The first step should be to pass H.R. 2554. The new law will officially criminalize weapons trafficking and provide stiff penalties for those who violate the law. The new law also provides some flexibility for law enforcement and prosecutors who would have the discretion to charge an individual with trafficking or a more minor violation of lying and buying statutes that carry a lower penalty. Finally, the new weapons-trafficking statute could give law enforcement the ability to prosecute criminals operating in Mexico. The new statute makes it illegal to conspire with others to transfer firearms to those who intend to use the weapons

²²³ See Allen Rostron, *Incrementalism, Comprehensive Rationality, and the Future of Gun Control*, 67 MD. L. REV. 511, 561–62 (2008).

²²⁴ *Id.* at 562 (explaining that the National Firearms Act of 1934 was passed shortly after a failed attempt to assassinate President-elect Franklin Roosevelt amid “widespread fear of gangsterism, fueled by sensational media reports”; the Gun Control Act of 1968 was passed in response to the assassinations of Reverend Martin Luther King Jr. and Senator Robert Kennedy; and the Columbine shootings spurred efforts to expand background checks).

²²⁵ *Id.* at 512.

²²⁶ Given the way that Republican lawmakers have deflected attention away from inadequacies in the current laws in favor of a vociferous attack on Department of Justice personnel, it appears that the tragedy of Agent Terry’s death is unlikely to result in serious reform.

unlawfully.²²⁷ Thus, any part of the organization, operating in Mexico or abroad, should potentially be criminally liable under the new statute.

But does the statute go far enough to give law enforcement the necessary tools to stem the tide of weapons flowing south into Mexico? Unfortunately, the statute maintains aspects of the original statutory regime that prevents law enforcement from solving the problem. Most importantly, the new trafficking statute maintains the very high mens rea that is codified in the current weapons laws. The firearms-trafficking statute makes it unlawful to “transfer or otherwise dispose of . . . 2 or more firearms . . . knowing or having reasonable cause to believe” that their acts will result in possession of the firearms by someone whose possession is unlawful or who “intends to or will use, carry, possess, or dispose of the firearm unlawfully.”²²⁸ The mental state required for the action to be criminal remains “knowing or having reasonable cause to believe.”²²⁹

This is the same as the current requirement that a person may not “knowingly . . . make any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale” or “knowingly make[] any false statement or representation with respect to the information required . . . to be kept in the records of a person licensed” to sell firearms.²³⁰ Although the statute also includes the phrase “reasonable cause to believe,” this will be masked by the knowing requirement. Because it does not make logical sense to punish “knowing” violations the same as violations with a lower mens rea, courts might focus entirely on the “knowing” standard. Given the difficulties that prosecutors face in proving knowing violations of the current law, the problems are likely to remain with passage of a trafficking statute that maintains the same high standard of mens rea.

In fact, it may even be more difficult to prove a knowing trafficking violation. Under the current weapons laws, prosecutors must show that the individual knowingly made a false statement. For trafficking purposes, the most common violation is when the offender indicates that he is purchasing the weapon for himself when in reality he is purchasing the weapon for another party. Prosecutors can demonstrate that the buyer sold off the weapon after a short amount of time or that he accepted money from

²²⁷ Stop Gun Trafficking and Strengthen Law Enforcement Act of 2011, H.R. 2554, 112th Cong. (2011).

²²⁸ *Id.* § 932(2) (emphasis added).

²²⁹ *Id.* The reasonable cause language parallels language in 18 U.S.C. § 922 pertaining to restrictions on federal firearms licensees. For example, FFLs are prohibited from selling “any firearm or ammunition to any person knowing or having reasonable cause to believe that such person” is legally restricted from owning a firearm. *Id.* § 922(d).

²³⁰ *Id.* § 922(a)(6); *id.* § 924(a)(1)(A).

another person in order to make the purchase.²³¹ But how does a prosecutor show that a trafficker knowingly transported a weapon to a person who intended to use the weapon unlawfully? The law, as written, requires prosecutors to show that the ultimate recipient of a weapon intended to use the weapon illegally *and* that the trafficker knew or had reasonable cause to believe that he had this intention. The legislation therefore may again leave law enforcement in a position where they have to track weapons to Mexican crime scenes or otherwise risk that the weapons fall into the hands of criminals in order to show affirmatively that there is a knowing violation of the trafficking statute. This places law enforcement in the same situation that led to authorization of the Fast and Furious Operation. Given the present difficulties that prosecutors have just showing a knowing false statement by a purchaser, the standard is entirely too onerous to be effective in stopping weapons trafficking.

In addition to the weapons statute, Congress should consider criminalizing additional actions with lower standards of knowledge. For example, Congress could add provisions that make it unlawful for any person to receive, transfer, or otherwise dispose of two or more firearms that *recklessly* or *negligently* result in the disposing of one or more such firearms to an individual whose possession or receipt of the firearm would be unlawful or who intends to use or possess the firearm unlawfully. Reckless or negligent trafficking would carry lower maximum sentences than knowledgeable weapons trafficking. While the statute as it is provides prosecutors with some level of flexibility because they can choose between prosecuting for trafficking or for lying and buying, criminalizing actions with a lower mens rea standard creates an even greater amount of flexibility. Making it easier for prosecutors to charge and win cases would better allow law enforcement to combat weapons trafficking.

To give prosecutors additional discretion and law enforcement additional leverage, Congress should consider codifying certain aspects of the sentencing guidelines within the trafficking statute. As currently written in the U.S. Code, the maximum sentence is the same for trafficking two firearms as it is for two hundred firearms. Incorporating some aspects of the sentencing guidelines—such as number of weapons trafficked—into the criminal code could make the possibility for longer sentences more uniform. This would also provide more fairness for trafficking defendants because it would force prosecutors to prove additional elements, increasing their burden at trial. Law enforcement could be willing to bear this added burden since it could also increase the deterrent effect by making the

²³¹ See James C. McKinley, Jr., *Prosecutors Seek Appeal in Dismissal of Gun Case*, N.Y. TIMES, Mar. 20, 2009, at A13.

likelihood of higher sentences more generally known. Defendants would not face the uncertainty of increased sentences based on judge-found facts; instead, prosecutors would have to prove each of these elements beyond a reasonable doubt.²³² These changes would allow law enforcement to trade information for leniency with defendants.

Proponents of overcriminalization theory²³³ might argue that lowering mens rea requirements and increasing penalties on weapons traffickers would result in the criminalization of behavior that is not morally culpable. This is not the case. Those who decry the increased criminalization of conduct in the United States are concerned with imposing a criminal punishment for behavior that is more regulatory in nature, i.e., behavior that does not carry with it the same moral opprobrium that generally accompanies criminal convictions for actions like rape and murder.²³⁴ Such a concern is not at issue here. The bill before Congress and the additional measures suggested by this Comment would punish the distinct action of purchasing weapons on behalf of organizations that intend to use the weapons to inflict wide-scale harm on society.²³⁵ While the individual purchasers may not intend to harm others themselves, they are knowingly or recklessly providing others with the means to sow destruction.²³⁶ These conscious actions are enough to elicit the community's moral outrage, making it appropriate to deem the behavior criminal.

Finally, the new legislation also does nothing to improve reporting of firearms sales. Adjustments to reporting regulations could potentially provide more information for law enforcement, allowing them to better track FFLs who regularly sell weapons that are used in violent crimes. Additional reporting requirements can also help law enforcement find certain buyers who may purchase weapons in bulk on the open market with the intention of moving the weapons into the secondary market.²³⁷

²³² See, e.g., *United States v. Hernandez*, 633 F.3d 370, 371 (5th Cir. 2011), *cert. denied*, 131 S. Ct. 3006 (2011).

²³³ See, e.g., Ellen S. Podgor, *Overcriminalization: New Approaches to a Growing Problem*, 102 J. CRIM. L. & CRIMINOLOGY 529, 530 (2012) (explaining how "continuous multiplication of laws creates problems").

²³⁴ See John F. Stinneford, *Punishment Without Culpability*, 102 J. CRIM. L. & CRIMINOLOGY 653, 683 (2012) (explaining that a statute is "criminal if it exhibits a retributive purpose, that is, if it authorizes the state to impose sanctions to express the community's blame or condemnation for the commission of an unlawful act").

²³⁵ See Stop Gun Trafficking and Strengthen Law Enforcement Act of 2011, H.R. 2554, 112th Cong. § 2(a) (2011) (punishing those who pass weapons to another "who intends to or will use, carry, possess, or dispose of the firearm unlawfully").

²³⁶ See THE BRADY CTR., *supra* note 12, at 8 (describing approximately 6,000 cartel-related murders in 2008 and 2,000 law enforcement deaths the year before).

²³⁷ One ATF agent rhetorically asked, "Can someone tell me how I can find out if Joe Blow just bought 50 guns at a gun store? If they do, I'll be happy to sit outside the door and

However, a requirement promulgated in January 2011 by the Obama administration, which took effect in July 2011, requires FFLs to alert authorities when an individual purchases two or more .22-caliber rifles within five days.²³⁸ The new requirement applies to approximately 8,500 gun dealers operating in the border states of California, Arizona, New Mexico, and Texas.²³⁹ The new regulation has already been challenged by the NRA as beyond the statutory scope of the ATF, even though records of the collected information must be destroyed unless it results in an investigation.²⁴⁰ Moreover, the regulation is almost identical to a similar provision, in place since 1968, that requires dealers to report persons who purchase two handguns within a five-day period.²⁴¹ Congress could use this opportunity to clarify that this new regulation is within ATF's authority.

Congress could impose another regulatory requirement on gun purchases by making background checks universal for all weapons purchases. As it currently stands, weapons from a person's private collection can be sold without a federal firearm license and without any background check. Accordingly, these sales do not require any kind of recordkeeping under federal law. The resulting secondary market is almost impossible for law enforcement to track and provides a large source of weapons for traffickers.²⁴² Legislation requiring all firearms sellers to keep records of sales and run background checks on purchasers would aid law enforcement in gaining information about who is purchasing firearms.

V. CONCLUSION

The weapons laws in the United States are ineffective at combating international weapons trafficking along the southwest border with Mexico. The problems in the statutory regime led ATF and other factions of the Department of Justice into a reprehensible decision to allow weapons to "walk" across the border and into the hands of ruthless criminals. Yet, the aftermath of this scandal cannot be spent focused only on punishing those in power for lapses in judgment. Rather, given the violence in Mexico and the effect it has on both Mexicans and Americans living along the border, the time has come for an honest appraisal of our weapons laws. The only possible conclusion, given information provided by those who work within

ask him why he bought them. But otherwise, I won't know until they start showing up at crime scenes" Murphy, *supra* note 27 (internal quotation marks omitted).

²³⁸ Grimaldi & Horwitz, *supra* note 60, at A3.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Evan Perez, *New Rules on Border Gun Sales*, WALL ST. J., July 12, 2011, at A2.

²⁴² Some estimate that approximately 40% of weapons trafficked in the United States were purchased off the secondary market. THE BRADY CTR., *supra* note 12, at 11.

these laws every day, is to comprehensively reform the system to take into account the unique problems of international weapons trafficking.

Some solutions will be easier than others to implement. Creating a statute that criminalizes weapons trafficking, and carries with it an appropriate penalty, should not be controversial. Other solutions, like reducing the requisite mens rea for some weapons offenses, might require greater political will. But, the most important task is raising the specter of the problem and having an honest, national discussion about how best to balance crucial constitutional rights with the state's obligation to keep its citizens safe. Surely the United States Bill of Rights cannot be construed in a way that fundamentally weakens the security of the American public. Given the present political climate, this may require a Herculean effort, but this is why we elect a Congress—to make these difficult decisions. Congress owes it to the people to have a debate on the issue and come to a conclusion in a way that takes into account the facts as they are.