

THIS IS GUN COUNTRY: THE INTERNATIONAL IMPLICATIONS OF U.S. GUN CONTROL POLICY

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It's a terrible problem. They have to do something about it.

– The Honorable Robert Gottsfeld¹

INTRODUCTION

The rhetoric of “War on Drugs” has been familiar to many Americans since the days of President Nixon.² That language has taken on a more literal meaning in recent years according to the threat posed by Mexican drug cartels and distribution networks.³ The Mexican government now faces an opponent who outspends them in the fight, while utilizing a military and governmental task force that has been plagued with murders and defections to the cartels themselves.⁴ Governmental efforts to reduce drug trafficking and related violence have been met with a violent response from the cartels to include multiple executions and victim mutilations, as well as a drug-related killing rate that doubled between 2007 and 2008.⁵

The cartels are fueled by the U.S. demand for drugs, and many use profits earned to purchase firearms in the United States, utilizing lenient gun control laws in the border states to obtain weapons pro-

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¹ James V. Grimaldi & Sara Horwitz, *As Mexico Drug Violence Ruins Rampant, U.S. Guns Tied to Crime South of Border*, WASH. POST Dec. 15, 2010 (describing the inability to address arms trafficking to Mexico).

² See Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 797-98 (2004); (cite the speech as well).

³ Stephanie Erin Brewer, *Rethinking the Mérida Initiative: Why the U.S. Must Change Course in its Approach to Mexico's Drug War*, 16 NO. 3 HUM. RTS. BRIEF 10 (2009) (“... it reinforces the war-like mentality that has led Mexico to deploy its military and police in a territorial battle as the answer to drug trafficking.”).

⁴ Ronald F. Wright, *Mexican Drug Violence and Adversarial Experiments*, 35 N.C.J. INT'L L. & COM. REG. 363, 365-66 (2010); *The war next door: Horrific brutality of Mexican drug cartels 'makes al Qaeda look tame'*, Oct. 25, 2010 <http://www.dailymail.co.uk/news/article-1323458/Mexican-drug-cartels-horrific-brutality-makes-al-Qaeda-look-tame.html> (noting that a dozen Mexican Mayors had been killed in drug related violence).

⁵ Wright, *supra* note 4, at 367.

hibited for sale in Mexico.⁶ In an effort to combat the threat presented by the Mexican cartels, the United States offered an aid package which provides funding for military and police and joint intelligence operations.⁷ Yet by increasing support to the Mexican military in this fight, the United States has in essence, armed both sides of the conflict.⁸

The gun control policies in the United States and the Southwestern states are a factor in the increasing violence against both Mexican and American citizens, which includes both increased murders and kidnappings domestically as well as over 36,000 murders in Mexico since 2006.⁹ Mexican drug trafficking organizations ("DTOs") purchase firearms in the United States, where there is greater access to certain weapons and more lenient regulations on sales.¹⁰ Moreover, many of the relevant purchases are made in Arizona and Texas which have long recognized an individual right to own firearms, and are home to some of the more lenient gun control laws in the country.¹¹ These states are also host eleven of the top twelve dealers alleged to be arming the cartels.¹²

Arms trafficking is unlikely to decrease without increased cooperation between the United States and Mexico.¹³ Yet cultural factors in the states at issue suggest that domestic reform intended to heighten the restriction on the sale of firearms is unlikely.¹⁴ One commen-

⁶ *Id.* at 368-69; James C. McKinley Jr., *U.S. is Arms Bazaar for Mexican Cartels*, N.Y. TIMES Feb. 26, 2009.

⁷ U.S. DEP'T. OF STATE, *The Merida Initiative Fact Sheet*, Bureau of Int'l. Narcotics and Law Enforcement Affairs, <http://www.state.gov/p/inl/rls/fs/122397.htm>.

⁸ See Brewer, *supra* note 3 at 10 ("this strategy has not led to a decrease in drug-related violence but rather has seen a tripling of drug-related homicides in the past three years . . ."); McKinley, *supra* note 6 ("... A.T.F. officials estimate 90 percent of the weapons recovered in Mexico come from dealers north of the border").

⁹ *U.S. Ambassador to Mexico Resigns After Public Spat*, REUTERS (Mar. 20, 2011) <http://www.reuters.com/article/2011/03/20/us-mexico-usa-idUSTRE72J09F20110320>.

¹⁰ See James C. McKinley, *U.S. Is Arms Bazaar for Mexican Cartels*, N.Y. TIMES Feb. 26, 2009; MEX. STAT. § 2334 (****).

¹¹ See Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL'Y. 191, 193, 203 (2006) (nothing that Arizona and Texas have recognized a constitutional individual right to own firearms since 1912 and 1876 respectively).

¹² See James V. Grimaldi & Sari Horwitz, *As Mexico Drug Violence Runs Rampant, U.S. Guns Tied to Crime South of the Border*, WASH. POST Dec. 15, 2010.

¹³ See 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 3-4 (2009).

¹⁴ See Jerod E. Tufte, Comment, *Some Explicitly Guaranteed Rights Are More Fundamental Than Others: The Right to Bear Arms in Arizona*, 33 ARIZ. ST. L. J. 341, 342 (2001) (writing as

tator suggested that the relaxed regulations in Texas and Arizona “reflect both the libertarian traditions of the West and the anxious vigilance of firearms enthusiasts toward their Second Amendment rights.”¹⁵ Practically, domestic prosecution of those involved in selling firearms to Mexican cartels has also proved difficult, as demonstrated by the dismissal of a case against a prominent alleged arms dealer in Arizona state court after a judge found the sales to be legitimate.¹⁶ Furthermore, state law now finds support in the federal Second Amendment policy which was incorporated against the states as an individual right in *McDonald v. City of Chicago*.¹⁷

Arms trafficking has proliferated under this framework, operating either in accordance with gun control regulations or outside the reach of government action despite Mexican attempts to regulate the illicit arms trade.¹⁸ Mexico, which is known for its strict gun control laws, has only one operating gun store in the country, yet has seized drug crime weapons numbering five times greater than those which have legal permits.¹⁹ Government efforts to restrict access to weapons have thus far proven ineffective in the drug war.²⁰ Similarly, individual citizens will not be able to exert pressure on arms dealers under a private right of action due to the practical and financial circumstances associated with litigation in the United States.²¹ Moreover, the United States has not ratified the “Inter-American Convention Against the Illicit Manufacturing of and Trafficking in Firearms” (“CIFTA”), and therefore, there is no clear actionable claim under international law or the Alien Tort Claims Act that might provide an alternative route

an Arizonan resident and suggesting the “right to bear arms is sufficiently important that it deserves stronger protection from the courts . . .”).

¹⁵ Vick, *supra* note 66.

¹⁶ See Michel Marizco, *Toxicity in Arms Trafficking*, 36 L. ENFORCEMENT TECH. 9, ____ (2009); James V. Grimaldi & Sari Horwitz, *Roadblocks for the ATF*, WASH. POST BUS. SECT., Dec. 13, 2010 (“There certainly was evidence that Iknadosian was selling to people who were not buying the guns for themselves, and that’s a class one misdemeanor” (quoting Arizona Judge Robert Gottsfeld)). *But see* U.S. v. Hernandez, 2011 WL 438828 (5th Cir. 2011) (upholding a sentence imposed against a arms dealer convicted of supplying Mexican drug cartels).

¹⁷ 561 U.S. ____ (2010) (slip op).

¹⁸ Put in a Mexican statute as well here

¹⁹ David Kopel, *Mexico’s Federal Law of Firearms and Explosives*, U.Denver Legal Research Paper Series No. 10-12, 6 (April 15, 2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1588296

²⁰ *Id.* (check)

²¹ Marc Lacey, *Mexico Lawmen Outmatched by Violence*, N.Y. TIMES, Oct. 17, 2009 (noting that many citizens are afraid for their lives and do not cooperate with law enforcement efforts as a result, suggesting that they would be similarly unlikely to initiate litigation).

for providing redress to Mexican citizens affected by the drug violence.²²

This rise in international crime, or “crime that crosses international borders,”²³ has not been met with a coherent set of private international law which might be able to provide redress to individuals affected by the drug violence.²⁴ Yet the problem extends beyond the scope of denying reparation to an individual citizen.²⁵ Without a comprehensive international cooperative effort, any attempt to reduce the illicit arms trade and related violence in Mexico will be undermined by the current state of U.S. policy.²⁶ In order to combat both arms and drug trafficking to Mexico, the United States and Mexico should develop an international strategy, focused on combating the duel threat posed by drug and gun trafficking.²⁷

Part I of this note outlines the current state of relevant regulations at the federal and state level as they relate to firearms trafficking across the Southwestern border. Part II discusses the implications of those regulations, specifically noting that U.S. gun control regulations dominate the arms trafficking pattern, and for practical purposes are the only relevant authority in terms of regulating arms trafficking to Mexico. Finally, Part III argues that the effect of the emphasis on U.S. policy operates to foreclose Mexican attempts to restrict access to certain weapons or persons. Specifically, Part III suggests that the United States make a concerted effort to enter into an international agreement in order to assist Mexico in its fight against the cartels.

²² 28 U.S.C. § 1350; Alex Newman, *Obama Pushes Anti-Gun Treaty*, 25:14 NEW AMERICAN, July 6, 2009; see also Patrick M. McFadden, *Provincialism in United States Courts*, 81 CORNELL L. REV. 4, 5 (1995) (“... international law plays almost no part in the judicial business of the United States”).

²³ *Id.* at 584.

²⁴ See Bruce Zagaris, *Developments in the Institutional Architecture and Framework of International Criminal and Enforcement Cooperation in the Western Hemisphere*, 37 U. MIAMI INTER-AM. L. REV. 421, 425 (2005) (“The United States has dominated and exerted controlling influence over the efforts to evolve the hemisphere’s criminal just toward harmonization . . .”).

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²⁶ See Part III, *infra* notes *** to ***; see also Donald E. de Kieffer, *The Mexican Drug Connection: How Trade In Pharmaceuticals Has Wrecked the FDA*, 9 SW. J. L. & TRADE AM. 321, 328-29 (2002) (suggesting that domestic regulations become meaningless when undermined by a prevalent, illegal black market trading system).

²⁷ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-709, *supra* note **Error! Bookmark not defined.** (“... officials said they have not established other formal coordination mechanisms to facilitate high-level information sharing and integrate strategies for addressing arms trafficking to Mexico”); Sari Horwitz & James V. Grimaldi, *White House Delayed Rule Meant to Stop Gun Flow to Mexico*, WASH. POST Dec. 17, 2010 (noting that Obama pledged to assist Mexico in halting illicit gun trafficking).

I. Background

A. *Federal Gun Control and the Affirmed Individual Right to Keep and Bear Arms under District of Columbia v. Heller*

The United States operates under a strong policy favoring limited regulations on the ownership of firearms.²⁸ For example, one source of federal legislation, the Gun Control Act of 1968, permits a wide range of purchasing and sale rights to licensed dealers, including rights for interstate and foreign transfer of weapons.²⁹ The Gun Control Act regulates sales of firearms and places limits on who may own and purchase firearms.³⁰ Additionally, it regulates who can receive a federal permit to sell firearms, and permits those to transport an unlimited number of weapons in interstate and foreign commerce without reporting those sales to federal authorities in many instances.³¹ ³² In general, the regulations enacted, and accompanying policies toward leniency, are greatly influenced by the gun lobbying group, which wields enormous power to prevent heightened restrictions from being enacted.³³

In addition, nationwide gun control policy was redefined in two recent cases by the Supreme Court.³⁴ In both cases, the Court affirmed that the Second Amendment provides an individual right to

²⁸ See Sari Horwitz & James V. Grimaldi, *ATF's Oversight Limited in Face of Gun Lobby*, WASH. POST Oct. 26, 2010 ("Those who wonder what motivates American gun owners should understand that only one word in the English language so boils their blood as 'registration' and that word is 'confiscation'" (quoting an NRA fact sheet)); Jerod E. Tufte, Comment, *Some Explicitly Guaranteed Rights Are More Fundamental Than Others: The Right to Bear Arms in Arizona*, 33 ARIZ. ST. L. J. 341, 342 (2001) (suggesting the "right to bear arms is sufficiently important that it deserves stronger protection from the courts . . .").

²⁹ 18 U.S.C. §§ 922(a)(1)-(5). *But see* United States v. Lopez, 514 U.S. 549, 551 (1995) (holding that 18 U.S.C. § 922(q)(1)(A) was an unconstitutional exercise of congressional commerce clause power).

³⁰ 18 U.S.C. §§ 922

³¹ *Id.*

³² 27 C.F.R. §§478.96(b)-(c); 27 C.F.R. § 478.100(2)(c). (FIND YEARS)

³³ See Michael Isikoff, *Mexican Drug Violence Not An 'Emergency', White House Says*, NBC NEWS Feb. 10, 2011 available at http://www.msnbc.msn.com/id/41495274/ns/us_news-security ("It is certainly disappointing that politics trumps sound policy" (quoting Mexican Ambassador Arturo Sarukahn)); Sari Horwitz & James V. Grimaldi, *White House Delayed Rule Meant to Stop Gun Flow to Mexico*, WASH. POST Dec. 17, 2010 ("The plan – which officials knew would be strongly opposed by the National Rifle Association – was perceived as too volatile just before midterm elections . . .").

³⁴ McDonald v. City of Chicago, No. 08–1521, slip op *passim* (U.S. 2010); District of Columbia v. Heller, 554 U.S. 570 *passim* (2008).

keep and bear arms.³⁵ The Second Amendment provides, “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” and has been interpreted to provide for either a collective right of the people to form militia and bear arms for that purpose, or as an individual right to keep arms for personal self-defense.³⁶ The debate was seemingly resolved in *District of Columbia v. Heller*, in which Justice Scalia reasoned that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”³⁷ Only two years later, *Heller* was affirmed and the Second Amendment was incorporated against the states as an individual right in *McDonald v. City of Chicago*.³⁸

In *Heller*, the Court considered whether a District of Columbia prohibition on the “possession of usable handguns in the home” violated the Second Amendment.³⁹ The case arose after Dick Heller, a police officer in the District of Columbia, was denied a registration certificate for a handgun he desired to keep at home.⁴⁰ The District of Columbia had a general prohibition against the possession of handguns, and further required that any lawfully owned firearms be kept unloaded and inoperable when not being used for recreational activities.⁴¹ Heller filed suit in District Court, seeking to enjoin the city from enforcing the handgun restrictions on Second Amendment grounds.⁴² After engaging in a lengthy analysis of the linguistics and history of the Second Amendment, the Court held that the “District’s ban on handgun possession violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”⁴³

Two years later, *McDonald v. City of Chicago* incorporated the individual right to keep and bear arms outlined in *Heller* to all fifty states.⁴⁴ *Heller* addressed the issue within the confines of a federal enclave, and

³⁵ *McDonald*, No. 08–1521, slip op *passim*; *Heller*, 554 U.S. *passim*.

³⁶ See Eileen Kaufman, *The Second Amendment: An Analysis of District of Columbia v. Heller*, 25 *TOURO L. REV.* 703, 704-05 (2009).

³⁷ 554 U.S. at _____. (19 in the slip op)

³⁸ No. 08–1521, slip op at

³⁹ *Id.*

⁴⁰ *Id.* at ____ (2)

⁴¹ D.C. Code §7–2507.02; *id.* at ____ (1).

⁴² 554 U.S. at ____ (2).

⁴³ *Id.* at ____ (64).

⁴⁴ *McDonald*, No. 08–1521, slip op. at 1-2.

therefore did address state firearm regulations.⁴⁵ The case was filed against the city only hours after *Heller* came down, alleging that the ordinances were in violation of the Second and Fourteenth Amendments.⁴⁶ The Court rejected the petitioner's challenge under the privileges and immunities clause of the Fourteenth Amendment.⁴⁷ Instead, the Court engaged in a selective incorporation analysis, ultimately determining that the "right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty."⁴⁸ The Court thus agreed with the petitioner's contention that it forbid residents to defend themselves, leaving them more susceptible to injury and gun related crime.⁴⁹ In the end, the Court held that the Second Amendment as recognized in *Heller* would be incorporated through the Due Process clause of the Fourteenth Amendment.⁵⁰

While the individual right to keep and bear arms is not without limits, it is also without a clear category of exception.⁵¹ Both *Heller* and *McDonald* recognize the necessity of governmental regulations in certain circumstances.⁵² *Heller* stressed that the right would not extend to every manner and purpose, and included a list of exceptions where prohibitions on ownership would be reasonable.⁵³ The Court permits prohibitions for "presumptively lawful regulatory measures" without providing a standard for determining which regulations might fit into that category.⁵⁴ The Court did not elucidate a standard for evaluating gun regulations, instead reasoning "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if those exceptions come before us."⁵⁵

Yet in terms of arms trafficking to Mexican DTOs, federal gun control policy has operated to prevent effective regulation from being

⁴⁵ *Kaufman*, *supra* note 36, at 704.

⁴⁶ *McDonald*, No. 08–1521, slip op. at 3; *id.*, at 723

⁴⁷ *Id.* at 6 ("the privileges and immunities clause protects only those rights 'which owe their existence to the Federal government, its National character, its Constitution, or its laws.'" (quoting *Slaughter-House Cases*, 16 Wall. 36, 79 (1878))).

⁴⁸ *Id.* at 31. (note that the analysis takes place on the previous 20 pages)

⁴⁹ *Id.* at 2–3.

⁵⁰ *Id.* at 44 (citing *Heller*, 554 U.S. at ____).

⁵¹ *Kaufman*, *supra* note 36, at 711–712.

⁵² *McDonald*, No. 08–1521, slip op. at 39–40; *Heller*, 554 U.S. at 626–627.

⁵³ *Heller*, 554 U.S. at 626–627.

⁵⁴ *Id.* at 627 n.26.

⁵⁵ *Id.* at (do control f).

enacted.⁵⁶ Despite recognition that anti-trafficking efforts are hampered by the inability to trace weapons, there has so far been no response to create a more effective database.⁵⁷ This idea is attenuated from the personal use emphasis of *Heller* suggesting its constitutionality, yet has so far been intangible.⁵⁸ The Bureau of Alcohol, Tobacco and Firearms (“ATF”), is one the primary government agencies charged with implementing the Gun Control Act and combating arms trafficking along the Southwest border.⁵⁹ Additionally, it is the only government entity with authority to trace firearms recovered from crimes in Mexico.⁶⁰ Tracing data demonstrates that over ninety percent of the firearms recovered or seized in Mexico since 2006 originated in the United States.⁶¹ This data is incomplete in that it does not account for all weapons used in Mexico, instead addressing only weapons seized by authorities and submitted for trace.⁶² Nevertheless, it appears to be consistent with conclusions of both U.S. and Mexican authorities involved in combating illicit arms sales and trafficking.⁶³

*B. State Gun Control Regulations and the Permissive Transfer of Weapons
Across the Southwestern Border*

All states operate under federal gun control laws, yet it is within their discretion to supplement those regulations with state laws like requisite background checks, or dealer inspections by state officials.⁶⁴ Some states have opted against enacting additional regulations, and therefore have relatively weak gun control laws.⁶⁵ States along the Southwestern border are among those in this latter category perhaps not surprisingly, as many residents in those states seem to place spe-

⁵⁶ See Sari Horwitz & James V. Grimaldi, *ATF's Oversight Limited in Face of Gun Lobby*, WASH. POST Oct. 26, 2010 (“Those who wonder what motivates American gun owners should understand that only one word in the English language so boils their blood as ‘registration’ and that word is ‘confiscation’” (quoting an NRA fact sheet))

⁵⁷ *Id.*

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⁵⁹ See 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 10 (2009).

⁶⁰ *Id.*

⁶¹ *Id.* at 15.

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⁶³ *Id.* at 16.

⁶⁴ Mayors Against Illegal Guns, *The Movement of Illegal Guns in America Report*, 217 Practising Law Institute 401 (2009) (providing examples of regulations in states which require background checks for all weapons purchases).

⁶⁵ *Id.*

cial emphasis on a broad reading of the Second Amendment and encourage relaxed restrictions on firearms.⁶⁶ In fact, States including Arizona, Texas, and New Mexico have recognized an individual right to keep firearms in their own constitutions, long before the Court's decision in *Heller*.⁶⁷

In general, Arizona and Texas have done little to supplement federal regulations on selling weapons, and do not have explicit regulations on registration or bans on assault weapons.⁶⁸ For example, Arizona permits the sale of multiple military grade rifles to any American citizen upon presentment of identification, without requiring dealers to report those sales to the government.⁶⁹ Similarly, Texas code makes sales of handguns illegal only if the seller "knowingly" transfers the weapon to a person who intends to use that weapon unlawfully.⁷⁰

These relatively lenient regulations have encouraged Mexican DTOs to come to the United States to purchase weapons.⁷¹ In fact, the ATF has determined that approximately 87 percent of firearms seized by Mexican authorities in the last five years originated in the United States, with relevant purchases heavily concentrated in Texas, California and Arizona.⁷² Access to weapons, which Mexican authorities describe as increasingly "powerful and lethal," is facilitated by the existence of over 7,000 gun stores along the nearly 2,000 mile border.⁷³ It is estimated that the majority of weapons trafficked for members of

⁶⁶ See James C. McKinley, *U.S. Guns Flow Unchecked Into Mexico*, INT'L HERALD TRIBUNE Feb. 27, 2009 (noting an alleged arms dealer engaged in illegal trafficking moved to Arizona to take advantage of the more lenient laws); Karl Vick, *Gun-Smuggling Crackdown Collides With Western Ethos*, WASH. POST, April 18, 2009.

⁶⁷ 554 U.S. at 622; Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. L. & POL. 191, 193-203 (2006). (Should probably also cite to the Constitutions themselves...)

⁶⁸ See 27 C.F.R. § 481.11 (requiring some part of a private dwelling to be open to the public to constitute a business before needing a federal license) (Check this text); 13 ARIZ. REV. STAT. § 31 *passim* (no explicit ban on assault rifles or requirements for registration); 16 TEX. ADMIN. CODE § 36 *passim* (no requirements for registration or bans on assault weapons); Vick, *supra* note 15 ("No paperwork, nothing . . . Just an Arizona license. And proof you're over 21") (quoting Jacob Allerd, a private collector and firearm dealer in Arizona)).

⁶⁹ ARIZ. REV. STAT. § 13-3108(B) and (C).

⁷⁰ TEX. PENAL CODE § 46.06(a) (1) (1997).

⁷¹ James V. Grimaldi & Sara Horwitz, *As Mexico Drug Violence Runs Rampant, U.S. Guns Tied to Crime South of Border*, WASH. POST Dec. 15, 2010.

⁷² U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 13 at 3, 20. (I mean on page 3 and on page 20).

⁷³ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-709, *supra* note 13, at 14-20 (CHECK).

the DTOs.⁷⁴ Moreover, the United States does not require gun dealers to report “bulk sales” of the semiautomatic rifles preferred by drug cartels, despite the existence of a similar restriction for handguns.⁷⁵

Furthermore, prosecuting those involved in arms trafficking is difficult because many of the sales are technically legal under state and federal law.⁷⁶ Straw purchasers act as middlemen between arms dealers and DTOs, and can be difficult to identify.⁷⁷ These buyers present U.S. identification and pass any background check required for the purchase, and there is little recourse against an arms dealer who was unaware of the fact that the buyer was serving another’s interest.⁷⁸ The ATF has identified a few shop owners and dealers who were complicit in straw purchases, but is not aware of what percentage of firearms trafficked to Mexico could be attributed to illegal action on the part of gun shop personnel.⁷⁹

C. *Private Action Against Arms Dealers Under the Alien Tort Claims Act*

Private law provides an additional measure for regulating social conduct.⁸⁰ Private action, including tort claims, are an effective means of providing redress to individuals harmed by social circumstances or wrongful actions by others.⁸¹ On a greater scale, private action also may be used to incentivize or discourage actions in a way to modify public behavior.⁸²

⁷⁴ *Id.* at 22.

⁷⁵ Michael Isakoff, *Mexico Drug Violence Not An ‘Emergency,’ White House Says*, NBC NEWS, Feb. 10, 2011, available at http://www.msnbc.msn.com/id/41495274/ns/us_news-security; Sari Horwitz & James V. Grimaldi, *White House Delayed Rule Meant to Stop Gun Flow to Mexico*, WASH. POST Dec. 17, 2010.

⁷⁶ See TEX. PENAL CODE § 46.06(a)(1) (imposing a “knowingly” standard on the sale of guns to potential unlawful users); Ariz. Rev. Stat. § 13-3102 (check); see also Marizco, *supra* note 16 (summarizing the attempted prosecution of suspected arms dealer, George Ikna-dosian).

⁷⁷ U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 59, at 21 (noting that ATF officials have been tipped off when older women made a purchase of several AK-type semiautomatic rifles or when the buyer seemed to know very little about firearms).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 HARV. INT’L L. J. 471, 474 (2005).

⁸¹ *Id.*

⁸² See Eric L. Kintner, *Bad Apples and Smoking Barrels: Private Actions for Public Nuisance Against the Gun Industry*, 90 IOWA L. REV. 1163, *Id.*

U.S. district courts have limited jurisdiction to hear cases brought by foreign nationals.⁸³ This would permit a citizen affected by the drug violence to bring a claim under tort against an arms dealer in the United States.⁸⁴ Yet even where jurisdiction is established under diversity, the court still may utilize tools to avoid hearing the case if it determines for example that the U.S. forum is inconvenient or the claim is more appropriately addressed by the legislature.⁸⁵

U.S. law also provide access to the courts for non citizens in tort under the Alien Tort Claims Act (ATCA).⁸⁶ The ATCA provides for jurisdiction in federal district courts “of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁸⁷ Thus, the requirements under the statute are that: 1) the plaintiff is an alien; 2) the cause of action sounds in tort; 3) the tort violates international law or a U.S. treaty.⁸⁸ Courts have construed the scope of the law of nations very narrowly, requiring that any claim “based on the present-day law of nations to rest on a norm of international character accepted by the civilized world.”⁸⁹ The Supreme Court suggested that the ATCA would permit private causes of action for torts in violation of the law of nations for three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.⁹⁰ Therefore, it is likely that a private action brought against a U.S. arms dealer under the ATCA would be dismissed in federal court for being outside the intended scope of the statute.⁹¹

Furthermore, for the purposes of a claim under the ATCA, the United States has not ratified the Inter-American Treaty on Illicit Arms Manufacturing (“CIFTA”), despite signing it in 1997.⁹² CIFTA

⁸³ 28 U.S.C. §1332(a)(2).

⁸⁴ *See id.*

⁸⁵ *See e.g.*, *United States v. Alvarez-Machain*, 504 U.S. 655, 669 (1992) (check suggesting that issues concerning general international law principles were more appropriately addressed by the executive branch); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 259-60 (granting a motion for forum non conveniens based on location of evidence, witnesses and injury).

⁸⁶ 28 U.S.C. § 1350

⁸⁷ *Id.*

⁸⁸ *Id.*; *Kadic v. Karadzic*, 70 F.3d 232, 238 ().

⁸⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2008); *see also Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F.Supp. 343 (S.D. Tex. 1989) (“The mere fact that many or even all nations consider an act a violation of their domestic law does not suffice to create a principle of international law”).

⁹⁰ *Id.* at 724.

⁹¹ *See id.*

⁹² Alex Newman, *Obama Pushes Anti-Gun Treaty*, 25 New American 14

would criminalize illegal manufacture of as well as the import or export of weapons.⁹³ In addition, and more importantly, it would make it illegal to sell a gun to a country where it is illegal.⁹⁴ In many ways, the United States already complies with the provisions of the treaty, but without ratification it provides no potential cause of action under the ATCA.⁹⁵

II. DISCUSSION

The regulatory atmosphere of the United States has permitted extensive arms trafficking to Mexican DTOs over the last decade, despite Mexican attempts to restrict access to the types of weapons used in drug crimes.⁹⁶ Mexico, which is known for particularly strict gun control laws, has been unable to enforce its laws prohibiting civilians from owning many of the weapons used in the current drug war.⁹⁷ Instead, it must endure the growing violence with the knowledge that the weapons are available just outside its reach.⁹⁸ Further, regional policy in the Southwestern United States suggests that domestic reform in state gun control is unlikely.⁹⁹ If there is to be any reduction in the number of firearms used in drug crimes in Mexico, there must be a coordinated international effort between the United States and Mexico.¹⁰⁰

⁹³ CIFTA (get this source – just print it); Mary Beth Sheridan, *Treaty to Curb Gun Smuggling Remains Stalled*, WASH. POST OCT. 22, 2010.

⁹⁴ *Id.*

⁹⁵ See 28 U.S.C. § 1350; Sheridan, *supra* note 93.

⁹⁶ See Stephanie Erin Brewer, *supra* note 3, at 11 (“Tough law enforcement, even if it achieved increased numbers of arrests, would not stop new drug traffickers from emerging . . .”); see also deKieffer, *supra* note 25, at 329 (“The FDA regulatory scheme is quickly becoming irrelevant. If “gray market” brokers and consumers can find cheaper drugs by evading this regulatory umbrella, they will”).

⁹⁷ Cite Mexican statute

⁹⁸ See Mary Beth Sheridan, *Treaty to Curb Gun Smuggling to Mexico Remains Stalled*, WASH. POST OCT. 22, 2010 (“I am urging the Senate in the United States to ratify an inter-American treaty known as CIFTA, to curb small-arms trafficking that is a source of so many of the weapons used in this drug war” (quoting Mexican President Felipe Calderón)

⁹⁹ Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 UCLA L. REV. 1233, 1240-41 (2009); James v. Grimaldi & Sari Horwitz, *As Mexico Drug Violence Runs Rampant, U.S. Guns Tied to Crime South of Border*, WASH. POST DEC. 15, 2010.

¹⁰⁰ See Poul F. Kjaer, *The Metamorphosis of the Functional Synthesis: A Continental European Perspective On Governance, Law, and the Political in Transnational Space*, 2010 WIS. L. REV. 489, 533 (2010).

The problem of arms trafficking and drug violence is no small issue.¹⁰¹ In 2009 alone, there were estimates of between 6,500 and 8,000 individuals killed as DTOs battled for control over smuggling corridors.¹⁰² Those murdered include over 2,000 police officers and Mexican soldiers since 2006.¹⁰³ Much of the violence is concentrated in Mexico, yet the Department of Justice's National Drug Intelligence Center still identified Mexican DTOs as the greatest organized crime threat facing the United States today.¹⁰⁴ In addition to establishing drug distribution networks in over 200 U.S. cities, Mexican DTOs have been associated with shootings, kidnappings and assaults in the United States.¹⁰⁵

In this current climate, a restriction on the exportation of weapons to Mexico, or heightened restrictions on sales to persons involved with DTOs would likely withstand Constitutional challenge.¹⁰⁶ In *District of Columbia v. Heller*, the Court held a Chicago statute prohibiting handguns in the home to be unconstitutional, and reasoning that restrictions which amount to a complete ban are impermissible.¹⁰⁷ Yet the Court provided an exception for "presumptively lawful measures" suggesting that a hypothetical state restriction on exportation of weapons to Mexico would not be struck down as an unconstitutional violation of an individual's Second Amendment Rights.¹⁰⁸ Such a measure may be sufficiently limited in scope so as to withstand challenge in a lower court.¹⁰⁹ In fact, a district court in Texas declined to read *Heller* as imposing a strict standard on gun control review, and

¹⁰¹ DEP'T. OF JUSTICE NAT'L DRUG INTELLIGENCE CTR., No. 2010-Q0317-001, NATIONAL DRUG THREAT ASSESSMENT 2010 15 (2010).

¹⁰² *Id.*

¹⁰³ See Astorga and Shirk, *supra* note full cite ; Elisabeth Malkin, *Lawmakers in Mexico to Debate Drug Fight*, N.Y. TIMES Aug. 18, 2010.

¹⁰⁴ *Southern Border Violence: Homeland Security Threats, Vulnerabilities, and Responsibilities; Hearing Before the Senate Committee on Foreign Relations*, 111th Cong. ____ (2009) (statement of Joseph M. Arabit, Special Agent in Charge El Paso Div. DEA/DOJ and William McMahon, Deputy Assistant Dir. Field Operations ATF/DOJ).

¹⁰⁵ Randal C. Archibold, *Mexican Drug Cartel Violence Spills over; Alarming U.S.*, N.Y. TIMES March 23, 2009.

¹⁰⁶ 554 U.S. 570, 626-27 (2008); Mark Tushnet, *Permissible Gun Regulations After Heller: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1436 (2009).

¹⁰⁷ 554 U.S. at 626-27; Tushnet, *supra* note 102, at 1436 .

¹⁰⁸ See 554 U.S. 570 at 626 n.26 (suggesting placing conditions or restrictions on the industrial sale of firearms is a valid exercise of state legislative power).

¹⁰⁹ See *McDonald*, No. 08-1521, slip op. at 39-40; *Heller*, 554 U.S. at 626-27; Erwin Chemerinsky, *The Court and Guns*, 46-SEP TRIAL 48, 51 (2010).

upheld a restriction prohibiting individuals under twenty one years of age from purchasing handguns from licensed dealers.¹¹⁰

Exportation restrictions are likely sufficiently attenuated from the personal use emphasis on gun ownership outlined in *Heller*.¹¹¹ Yet, it is unlikely that states along the Southwestern border would enact a measure specifically addressing sales bound for export, as enforcement of such a measure would likely require more complete transaction records and registration requirements; an initiative that has been strongly opposed by Second Amendment supporters.¹¹² Furthermore, it is unlikely that states along the border, where there is a strong regional policy favoring gun ownership, would enact prohibitive legislation which threatened to interfere with individual ownership rights.¹¹³

The inability to address this problem under Arizona state regulations was made apparent in the attempted prosecution of alleged arms trafficker, George Iknadosian.¹¹⁴ Iknadosian was accused of selling over 700 “weapons of choice,” including those held to be illegal in Mexico, with the knowledge that the weapons were bought on behalf of drug trafficking organizations.¹¹⁵ In addition, evidence suggested rifles from Iknadosian and X-Calibur were found at a gunfight that left eight Mexican police officers dead.¹¹⁶ In fact, his sales were allegedly so regular that the ATF believed they had established a “direct pipeline from Iknadosian to the Sinaloa cartel.”¹¹⁷

The ATF brought the case to Arizona attorney general Terry Goddard, who investigated Iknadosian for over a year with the Phoenix Police Department.¹¹⁸ The case against Iknadosian never made it

¹¹⁰ See *U.S. v. Bledsoe*, 2008 WL 3538717 at 4 (W.D. Texas 2008).

¹¹¹ See 554 U.S. at 628-29; see also Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1462 (2008) (noting that Congressional power to extend the reach of domestic regulations outside U.S. borders is subject to little restriction).

¹¹² See Horwitz & Grimaldi, *supra* note 27.

¹¹³ See Grimaldi & Horwitz, *supra* note 239.

¹¹⁴ See Dennis Wagner, *Trial of Phoenix gun seller to start: Prosecutors say guns reach Mexico gangs*, THE ARIZONA REPUBLIC, Mar. 9, 2009.

¹¹⁵ *Phoenix gun seller goes on trial today*, ARIZONA REPUBLIC, March, 9, 2009 (noting the type of weapons sold included AK-47s, SKS rifles, and .50 caliber rifles).

¹¹⁶ Marizco, *supra* note 2 (Similarly, Arizona prosecutors believe that a narcotic crime boss had an Iknadosian pistol tucked into his belt when he was arrested which included a \$35,000 diamond studded map of Sinaloa on the butt of the gun).

¹¹⁷ McKinley, *supra* note 2. **Error! Bookmark not defined.** (quoting Thomas G. Mangan, spokesman for the federal ATF).

¹¹⁸ James V. Grimaldi and Sari Horwitz, *Roadblocks for the ATF*, WASH. POST. BUS. SECT., Dec. 13, 2010; Vick, *supra* note 66 (noting the U.S. Attorney's office was overwhelmed with immigration cases and so declined the case (quoting Arizona Attorney General Terry Goddard)).

to a jury, however; as an Arizona state judge threw the case out finding the firearm sales were legitimate.¹¹⁹ Concerning the allegations that the guns were headed directly south to Mexico after purchase, Judge Gottsfeld stated, “It’s a terrible problem. They have to do something about it.”¹²⁰

The Iknadosian case demonstrates that state law is ill equipped to convict arms dealers engaged in illegal trafficking.¹²¹ Those laws make it similarly difficult for law enforcement to police those suspected of arms trafficking as well.¹²² Federal law permits the sale of multiple weapons, at times through transfer between unlicensed individuals, yet does not provide a way for ATF to even monitor that sale.¹²³ In addition, tracing a weapon recovered in Mexico takes fourteen days on average, despite the fact that the information obtained from a trace is most valuable in the first few days following the seizure.¹²⁴ Studies concerning gun trafficking rates do not conclusively confirm that a high percentage of crime guns have been trafficked, and cannot be supported by the ATF’s the indistinct tracing data.¹²⁵ Thus, the current regulations impede the U.S. ability to police the dealers, suggesting that increasing law enforcement efforts without an accompanying legal reform to combat arms traffickers may not be entirely justified.¹²⁶ In fact it may bring an opposite result, as recent increases in violence between drug cartels have been accompanied U.S. and Mexican law enforcement efforts to reduce drug trafficking, leaving splintered groups to fight over market share and trafficking routes.¹²⁷

Yet, even without inhibitive laws in place, domestic policing of arms dealers would be a challenge.¹²⁸ Currently the border states are home to nearly 7,000 arms dealers, and policing them under state and

¹¹⁹ Marizco, *supra* note 2; see Grimaldi, *supra* note 8 (quoting Arizona state Judge Robert Gottsfeld “There certainly was evidence that Iknadosian was selling to people who were not buying the guns for themselves, and that’s a class one misdemeanor.”).

¹²⁰ Grimaldi, *supra* note **Error! Bookmark not defined.** (quoting Judge Robert Gottsfeld).

¹²¹ *See id.*

¹²² *See* U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 13, at 24.

¹²³ *Id.* at 25-26.

¹²⁴ *Id.*

¹²⁵ Kleck & Wang, *supra* note 239, at 1240-41.

¹²⁶ *Id.* at 1240.

¹²⁷ Trans-Border Institute, *Drug Violence in Mexico: Data and Analysis from 2001-2009*, Justice in Mexico Project 3 (2010); U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 59, at 7; Brewer, *supra* note 3, at 10.

¹²⁸ *See* Marizco, *supra* note 16 (noting that only 200 ATF agents are permanently stationed in the border area where there are over 7,000 gun stores).

federal law has proved difficult.¹²⁹ Studies suggest that cases like Ikna-dosian are rare, and that straw purchasers and dealers heavily engaged in illegal trafficking are few.¹³⁰ Without enacting some higher level reform, increasing law enforcement efforts to arrest those engaged in low-level trafficking might be insufficient to reduce the number of arms trafficked to Mexico.¹³¹

It is likely, therefore, that arms trafficking will continue under the current U.S. regulations.¹³² An alternative to governmental reform could be a sort of self policing through imposing tort liability against arms dealers in private action.¹³³ Presumably, a citizen could bring suit against an arms dealer or employee for negligence related to illegal use of a firearm or resultant injury or death.¹³⁴ In fact, *McDonald* suggests that statutes imposing tort liability in cases involving guns will be upheld because they fall short of a total ban on possession of firearms.¹³⁵ Yet the practical and financial circumstances of Mexican families involved in the violence suggest that initiating legal action is unlikely.¹³⁶ In many instances, those who work with Mexican law enforcement are threatened or killed, leaving people to doubt whether any money gained through action or cooperation would be worth the risk.¹³⁷ Assuming a citizen decided to initiate a tort action, a Congressional amendment would likely prevent public access to a government database tracing guns back to their original dealers.¹³⁸ Furthermore, such information may not be used by cities or interest groups in litigation against the firearms industry, further demonstrating the hurdles present in bringing a negligence claim against a dealer to fruition.¹³⁹ Thus, not only will individuals be unable to address

¹²⁹ See *id.*; McKinley, *supra* note **Error! Bookmark not defined.**

¹³⁰ Kleck & Wang, *supra* note 239, at 1241 ("Thus while many crime guns are supplied by black market or street sources, almost all of these are casual low volume suppliers rather than high-volume point sources").

¹³¹ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 21; *id.* at 1237-38.

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¹³⁴ See *Ileto v. Glock*, 565 F.3d 1136, 1157-58 (9th Cir. 2009) (finding that a federal statute preempted plaintiff's state tort claims of negligence and public nuisance); *Peek v. Oshman's Sporting Goods, Inc.*, 768 S.W.2d. 841, 843-44 (Tex. App. 1989) (upholding decision that gun shop owner's sale was non-negligent).

¹³⁵ No. 08-1521, slip op. at 44-45; Erwin Chemerinsky, *The Court and Guns*, 46-SEP TRIAL 48, 51 (2010).

¹³⁶ (Find a basic civil suit costs analysis): Marc Lacey, *Mexico Lawmen Outmatched by Violence*, N.Y. TIMES, Oct. 17, 2009.

¹³⁷ Lacey, *supra* note 136.

¹³⁸ Tiahart Amendment.

¹³⁹ *Id.*; see Grimaldi & Horwitz, *supra* note **Error! Bookmark not defined.**

the merits of their own case, there will be no pressure on individual arms dealers to shield themselves from liability and thus no incentive to refrain from engaging in illicit arms trafficking.¹⁴⁰

It is not only the law itself that would likely bar successful action, the U.S. courts general aversion to applying international law, or considering international implications in cases would also serve to undermine the interests of Mexican citizens.¹⁴¹ In general, the Court has been reluctant to even consider international scholarship or practice in informing how to apply domestic law where international concerns are implicated.¹⁴² The international aversion extends to entering into multilateral treaties which might address the issue to avoid creating international obligations that might conflict with domestic concerns.¹⁴³ In place of treaties, there has been an increased focus on extraterritoriality of U.S. laws, accompanying a greater use of domestic courts for international disputes.¹⁴⁴ This permits courts to address international issues in a way that serves domestic interests.¹⁴⁵ Where there is a demonstrated strong interest in a certain policy, as there is in Second Amendment rights in the United States, there will likely be a heightened focus on the application of U.S. laws.¹⁴⁶ This is likely to be particularly true in gun control cases, where there is a strong preference to protect citizens' ownership rights.¹⁴⁷

This analysis similarly applies to claims under the ATCA.¹⁴⁸ Again, a citizen would face the conflict in policy between protecting domestic concerns related to possession of firearms and decreasing arms

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¹⁴¹ See McFadden, *supra* note 22, at 5.

¹⁴² See, e.g., *United States v. Alvarez-Machain*, 504 U.S. 655 *passim* (1992) (declining to cite international authority or custom in a case involving the kidnap of a Mexican national at the request of a United States official); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 *passim* (1991) (ignoring international practice in analyzing the reach of U.S. legislation); see also, McFadden, *supra* note 22, at 22-24.

¹⁴³ See Austen L. Parrish, *Reclaiming International Law*, 93 MINN. L. REV. 815, 840 (2009) ("The American resistance often manifested itself in attempts to limit obligations flowing from treaties through the frequent use of reservations").

¹⁴⁴ See *id.* at 846 ("Instead of turning to international treaties or international institutions to solve international challenges, parties increasingly see domestic litigation as a more immediate and effective means of obtaining redress for global harms").

¹⁴⁵ *Id.* ("Use of extraterritorial domestic law is also a way to exert American influence without having to worry about the constraints and mutual obligations that international treaties impose . . .").

¹⁴⁶ See *id.*

¹⁴⁷ See *id.* at 14; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 24.

¹⁴⁸ See 28 U.S.C. § 1350;

trafficking to Mexico.¹⁴⁹ Often, this balancing exercise will be resolved in favor of U.S. interests and thus comparatively lenient gun purchasing restrictions.¹⁵⁰ Moreover, in light of the tendency by the court to ignore the international element of cases, relevant international law will probably not be invoked, meaning the case would be instead decided according to federal statute.¹⁵¹

Within the context of the illicit arms dealing dilemma, it is thus apparent that U.S. law is controlling from a variety of perspectives.¹⁵² It operates to permit a practice of arms trafficking that Mexican law is ill-equipped to prevent.¹⁵³ The practice of avoiding international custom and practice in U.S. courts effectively crumbles the authority of other laws on point.¹⁵⁴ This removes a different level for enforcement in cases where U.S. law might not apply.¹⁵⁵

An analysis of federal, state and private tort law demonstrates the fact that there is no genuine opportunity for Mexican citizens to address the problem of arms trafficking from U.S. dealers.¹⁵⁶ Furthermore, the fact that citizens will not be able to impose pressure on the United States government to change its policies suggests that domestic regulations will continue to follow a strong pro-ownership policy that has perpetuated the extensive illicit arms dealing to date.¹⁵⁷

III. ANALYSIS

Despite the existence of extensive regulations in the United States and Mexico, efforts to reduce access to weapons will continue

¹⁴⁹ See Luciana Reali, *Alvarez-Machain v. United States: How Should the Ninth Circuit Determine Which Torts Are Actionable Under the Alien Tort Claims Act*, 17 N.Y. INT'L L. REV. 51, 52 (2004).

¹⁵⁰ See *id.*; see also Shirley v. Glass, 241 P.3d 134, 155 (Kan. App. 2010) (refusing to impose a higher standard of care for firearms dealers in a negligence claim not brought under the ATCA).

¹⁵¹ See McFadden, *supra* note 22, at 29; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2008) (defining the ATCA as providing jurisdiction to a very narrow set of claims).

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¹⁵⁴ See McFadden, *supra* note 22, at 33.

¹⁵⁵ See *id.*; Grimaldi & Horwitz, *supra* note 1 (noting the interest in imposing liability on arms dealers involved in arms trafficking).

¹⁵⁶ See Stephanie Erin Brewer, *supra* note 3, at 11; see also deKieffer, *supra* note 27, at 329 (“The FDA regulatory scheme is quickly becoming irrelevant. If “gray market” brokers and consumers can find cheaper drugs by evading this regulatory umbrella, they will”).

¹⁵⁷ See James V. Grimaldi & Sara Horwitz, *As Mexico Drug Violence Runs Rampant, U.S. Guns Tied to Crime South of Border*, WASH. POST Dec. 15, 2010.

to be undermined by the illicit arms trafficking trade.¹⁵⁸ Given the recent bolstering of lenient firearm ownership regulations, the United States may be less inclined to engage in multilateral efforts which would require concessions in domestic policy to promote extraterritorial interests.¹⁵⁹ Yet the very nature of the relevant transactions, a cross border trade of drugs for guns, suggests that there can be no solution without bilateral cooperation between the two effected jurisdictions.¹⁶⁰

Practically, operating under the current, U.S. dominated framework deprives either country of an opportunity to effectively address the problem.¹⁶¹ Within that framework is an emphasis on internal concerns, and a general aversion to those international.¹⁶² For example, there is no real emphasis on inspecting southbound traffic along the border, leaving Mexican law enforcement alone to deal with the influx of firearms from the north.¹⁶³ Further, U.S. law enforcement has had difficulty reaching a suspected arms dealer, in fact the Department of Justice has no data on prosecutions specifically related to arms trafficking, and admits that there is no particular charge to address arms trafficking to Mexico.¹⁶⁴ Thus, the emphasis on U.S. regulations is reinforced circumstantially as well, seemingly at the expense of a potentially beneficial cooperative effort.¹⁶⁵ Accordingly, reform in any area will be futile without a coherent cooperative effort between the United States and Mexico that specifically addresses the arms trafficking problem within the context of Mexican drug cartels.¹⁶⁶ An international agreement would provide for clear directives that accommodate the interests of both parties.¹⁶⁷ In general, treaties provide

¹⁵⁸ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 7 (noting that efforts by the Mexican governments seem to have intensified conflicts and violence).

¹⁵⁹ See *McDonald v. City of Chicago*, No. 08-1521, slip op *passim* (U.S. 2010); *District of Columbia v. Heller*, 554 U.S. 570 *passim* (2008); Zagaris, *supra* note 24, at 465.

¹⁶⁰ See Herbert V. Morais, *Fighting International Crime and Its Financing: The Importance of Following A Coherent Global Strategy Based on the Rule of Law*, 50 VILL. L. REV. 583, 618-19 (2005).

¹⁶¹ See notes *** to *** and accompanying text. (Part A).

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¹⁶³ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 34.

¹⁶⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 43.

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¹⁶⁷ See Andrew T. Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REV. 1823,1845 (2002) ("This implies that the best possible rule, both for individuals in the domestic context and for states in the international context, is one in which the parties have complete freedom of contract, including the ability to make irrevocable commitments").

clarity in state obligations, dispute resolution mechanisms and means of enforcement of their terms.¹⁶⁸ In contrast, a reliance on customary international practice or forms of “soft law” may prove effective, but only if accompanied by a renewed commitment by the United States to respect and honor international law principles.¹⁶⁹

A. *Unilateral Attempts to Solve an International Problem*

The circumstances surrounding the problem of arms trafficking to Mexico, as well as the framework of U.S. law demonstrates that there is no opportunity for redress for Mexican citizens, and further shows that Mexican regulations will continue to be undermined and ineffective.¹⁷⁰ Current gun-control regulations at the state and federal level have proven to be permissive of arms trafficking, and policing has been relatively ineffective.¹⁷¹ Private law has similarly been prevented from use as a tool for compensation for citizens, or more broadly, as a way of providing governance outside the regulatory framework.¹⁷² Thus, the current system provides no opportunity for effectual government reform, much less redress for an individual citizen affected by the violence.¹⁷³ In order to effectively diminish the illicit arms trade, Mexico and the United States must address the problem in a bilateral measure.¹⁷⁴

Evidence of the importance of international cooperation has already been demonstrated in the problem of cross-border trade of pharmaceutical drugs.¹⁷⁵ American citizens are able to purchase pharmaceuticals in Mexico, or online from Mexican distributors, at a much lower cost and are not required to report those purchases under U.S. law.¹⁷⁶ The market has adapted in a remarkably parallel fashion, as Mexican cities near the border host nearly ten times as many

¹⁶⁸ *Id.* at 1873.

¹⁶⁹ *See id.* at 1878-79; McFadden, *supra* note 21, at 13 (“In American practice, only treaties are reliable generators of international rules; custom and general principles of law are virtually ignored in the fact-finding process”).

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¹⁷² *See* Robert Wai, *Transnational Private Law*, 46 Harv. Int'l L.J. 471, 475 (2005).

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¹⁷⁵ *See* deKieffer, *supra* note 156, at 322 (“The volume of undocumented prescription drug imports from Mexico . . . [has] severely damaged the regulatory regime of the Food and Drug Administration”).

¹⁷⁶ *Id.* at 321-22.

pharmacies as exist in comparably sized cities to the north.¹⁷⁷ The importation of pharmaceuticals through unregulated channels has grown to an enormous size, and threatens to compete with drugs available in the legitimate prescription market.¹⁷⁸ The Food and Drug Administration ("FDA") has extensive regulations designed to protect people and markets from illegal or counterfeit drugs, but those rules operate under the presumption that parties involved will abide by them.¹⁷⁹ In other words, the regulatory scheme is not equipped to address the growing market of drugs imported across the border.¹⁸⁰ Regardless of what the United States does to combat the problem, the wide availability of drugs in Mexico suggests that the "grey market" of pharmaceutical drugs will continue to proliferate, undermining the efforts of the FDA.¹⁸¹ The extensive regulatory scheme prohibiting the importation of pharmaceuticals is thus likely to become extraneous as consumers will be able to avoid domestic rules by purchasing drugs at a lower cost abroad.¹⁸²

The pharmaceutical trade affected more than simply U.S. citizens ability to access drugs.¹⁸³ Pricing mechanisms in individual countries reflect the internal regulatory attitude, as some systems impose higher prices to facilitate research while others offer drugs at lower prices to improve access.¹⁸⁴ There is a concern, then, that the impact on drug companies will be in the form of a reduction in financial support for research and development that may in turn impact those companies ability to provide new, low cost drugs to benefit low income countries.¹⁸⁵ In other words, the deliberate attempt to create a regulatory structure to promote domestic and international interests may be rendered irrelevant by the flowering grey market of pharmaceutical drugs.¹⁸⁶

¹⁷⁷ *Id.* at 322.

¹⁷⁸ *Id.* at 325.

¹⁷⁹ *Id.* at 327-28.

¹⁸⁰ *See id.* at 328.

¹⁸¹ *See deKieffer, supra* note 156, at 327-29.

¹⁸² *See id.* at 329.

¹⁸³ *See* Kevin Outterson, *Pharmaceutical Arbitrage: Balancing Access and Innovation in International Prescription Drug Markets*, 5 Yale J. Health Pol'y & Ethics 193, 195-96 (2005).

¹⁸⁴ *Id.* at 195.

¹⁸⁵ *Id.* at 196.

¹⁸⁶ *See id.* ("So long as R&D costs continue to be partially funded by sales revenues, conventional wisdom holds that pharmaceutical arbitrage is a major threat to both differential pricing and innovation. Preventing pharmaceutical arbitrage from low income markets to high income markets is generally viewed as the linchpin of this analysis").

In the present instance, Mexican attempts to restrict access to weapons will be similarly undermined.¹⁸⁷ Mexico has attempted to address the problem of gun use in its country by adopting particularly strict gun control laws.¹⁸⁸ Currently, there is only one firearm store in the entire country, located in Mexico City and operated by the military.¹⁸⁹ In order to obtain a permit to own a firearm, a person must apply at a military base, and must demonstrate that: 1) he lives an honest life; 2) has completed any required military service; 3) has not been convicted of any crimes involving weapons and; 4) does not use any drugs.¹⁹⁰ When applying for a permit, a person must also show that he has a justifiable reason for owning a weapon.¹⁹¹ Moreover, a permit must be reissued every two years, unless the permit relates to official employment.¹⁹² Lastly, private ownership is restricted to smaller firearms, primarily those smaller than a .22 caliber.¹⁹³

Yet the restrictions on access to firearms have proven somewhat irrelevant.¹⁹⁴ Mexican officials have described the illicit arms market as a primary threat to the security of their country, and the most important domestic crime problem.¹⁹⁵ Over 20,000 guns were traced to the United States between 2004 and 2008 despite the prohibitive Mexican firearm laws.¹⁹⁶ In contrast, the Mexican government has permitted very few citizens to own weapons, granting only 4,300 licenses allowing persons to carry firearms outside their home.¹⁹⁷ Additionally, those individuals whom Mexico aims to exclude from permitted gun

¹⁸⁷ See deKieffer, at 329; Chris Hawley, *Mexico: Gun Controls Undermined by U.S.*, USA Today (April 1, 2009), http://www.usatoday.com/news/world/2009-03-31-mexicoguns_N.htm. ADD MORE HERE

¹⁸⁸ Hawley, *supra* note 173; David Kopel, *Mexico's Federal Law of Firearms and Explosives*, U.Denver Legal Research Paper Series No. 10-12, 6 (April 15, 2010) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1588296

¹⁸⁹ Hawley, *supra* note 173; Kopel, *supra* note 173, at 6.

¹⁹⁰ Cite Mexican statute Art. 26

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See Kopel, *supra* note 189, at 6.

¹⁹⁴ See Hawley, *supra* note 188 ("I would dare say that Mexico has some of the strictest regulations about gun ownership in all the world, and we're right next to a country . . . that has some of the easiest ones That creates a huge vacuum between the countries and feeds weapons trafficking" (quoting Lt. Col. Raúl Manzano Vélez, director of civilian gun sales in Mexico)).

¹⁹⁵ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 10.

¹⁹⁶ *Id.* at 15; see Hawley, *supra* note 188 ("It is necessary to reduce the sale of weapons, particularly high-powered weapons, in the United States" (quoting Mexican President Felipe Calderón)).

¹⁹⁷ Kopel, *supra* note 189, at 6; Hawley, *supra* note 188.

ownership, specifically those involved in drugs and crime, are those most likely to obtain a weapon illegally from the United States.¹⁹⁸ In the same way the United States has so far been unable to restrict access to imported pharmaceuticals despite heavy regulation in the area, so has Mexico been incapable of enacting a successful regulatory scheme of firearms.¹⁹⁹

Outside the context of government regulations, the inability to address the problem privately serves to negate another source of potential international regulation.²⁰⁰ Facilitating access to the court system for Mexican and U.S. citizens might allow the arms industry to be self regulated without need for government intervention.²⁰¹ In this regard, conflicting state policies are pushed to the background, as private parties seeking their own justice and restoration effectuate influence on the market.²⁰² On a larger level, private law is commonly regarded as an effective method of regulating behavior by incentivizing and deterring that which society sees as important.²⁰³ Yet in this case, litigation occurring in the United States will operate under the strong preference for gun ownership, with an understanding that many of the contested weapons and sales are technically legal.²⁰⁴ Moreover, circumstances related to Mexican citizens affected by drug violence, like poverty and death threats, mean that civil litigation in the United States or Mexico is extraordinarily unlikely.²⁰⁵ Similarly, the lack of tracing data greatly restricts any ability to locate an arms dealer for the purposes of extradition to Mexican courts.²⁰⁶ Lastly, litigation in the United States is subject to the court's reluctance to consider international implications.²⁰⁷ Thus, regardless of a viable claim of negligence or wrongful death, the circumstantial and legal barriers

¹⁹⁸ U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at ____

¹⁹⁹ See Hawley, *supra* note 184; deKieffer, *supra* note ____

²⁰⁰ See Wai, *supra* note 172, at 475 ("... private law may be a necessary tool of regulation and governance in a transnational order that resembles the fragmented regulatory authority of the U.S. domestic order ...").

²⁰¹ See *id.*

²⁰² See *id.* at 474.

²⁰³ See *id.*

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²⁰⁵ *Mexican Government Outmatched* (heavy prosecutorial delays and lack of crime reporting)

²⁰⁶ See *id.* at 15; McFadden, *supra* note 22, at 6 ("Because our courts apply international rules so infrequently, those rules become largely irrelevant ...").

²⁰⁷ *ee* Childress, *supra* note **Error! Bookmark not defined.**, at 39 (reciting prior case law in the history of the U.S. application of the doctrine of comity).

to civil litigation are serious and will likely operate to deny redress to citizens affected by the violence.²⁰⁸

Mexico is further limited in implementing reform in that there is no route to encourage the United States to adapt its own policy to the problem of arms trafficking to Mexican DTOs.²⁰⁹ Gun lobby aside, the United States justice system has repeatedly demonstrated the focus on domestic laws at the expense of international law considerations.²¹⁰ For example, the Iknadosian case demonstrates that a court will not always consider the international implications of an issue, even where they are admittedly obvious.²¹¹ The United States has engaged in a general avoidance of international obligations over the past twenty years including refusing to sign treaties, or enter into multilateral conventions.²¹² Moreover, because our courts rarely employ international rules or considerations, it is doubtful that those considerations will make their way into legislative planning either.²¹³

In essence, what has occurred has been an inappropriate convergence of laws, in favor of the dominant U.S. regulations.²¹⁴ Mexican law has been shown to be unsuccessful in effectuating its own policies, and there is no real international treaty on point, thus U.S. law governs gun control in both countries for practical purposes.²¹⁵ This has important consequences in Mexico as there is question in the United States as to whether firearms can be successfully regulated at all.²¹⁶ Measures intended to address black market gun sales, or to prevent a felon's access to weapons operate according to assumptions of illicit arms dealers engaged in high volume smuggling operations.²¹⁷ In the context of Mexican arms trafficking, these claims have so far been un-

²⁰⁸ *Public Nuisance against the Gun Industry*

²⁰⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 57 ("... there has not been a coordinated U.S. government effort to combat the illicit arms trafficking to Mexico that the U.S. and Mexican government officials agree is fueling much of the drug related violence"); see also *supra* notes 127-128 and accompanying text.

²¹⁰ See McFadden, *supra* note **Error! Bookmark not defined.**, at 6.

²¹¹ See Grimaldi & Horwitz, *supra* note 1.

²¹² See Parrish, *supra* note 143, at 818.

²¹³ See *id.*

²¹⁴ See Parrish, *supra* note 143, at 849.

²¹⁵ See *id.* ("In some contexts, domestic law as an instrument of international governance is beginning to replace international law").

²¹⁶ James B. Jacobs & David Kairys, *Can Handguns Be Effectively Regulated?*, 156 U. Pa. L. Rev. (PENumbra) 188, 191-92 (2007) ("Firearm prohibition would be harder to enforce than alcohol or drug prohibition").

²¹⁷ See *id.* at 200-01; Kleck, *supra* note 99, at 1240-41 (summarizing two models of suspected illicit arms trafficking patterns, neither of which presumes retailers engage in significant numbers of illicit sales).

substantiated, and thus arms trafficking will continue because of the faulty assumption underlying the intended reform.²¹⁸

This problem is growing such that it is no longer a simply Mexican one, and the United States could theoretically justify their involvement based on domestic interests.²¹⁹ In 2007 alone, nearly 24,000 Americans died in drug related incidents.²²⁰ Violence associated with the drug wars has crossed the border as well, resulting in the deaths of U.S. civilians as well.²²¹ It is estimated that the cartels bring in somewhere between 18 and 35 million dollars of wholesale cocaine to the United States each year, the proceeds of which fuel both the gun and drug trade.²²² In addition, U.S. gang members have gotten involved, operating as enforcement mechanisms for the cartel of their choice, armed similarly with military grade weapons.²²³ Moreover, the Obama administration pledged 1,200 troops to the Southwest Border to combat the drug smugglers, which may further encourage cartel operators to utilize military grade weapons to protect their own interests.²²⁴

Thus, in the same way that the FDA was forced to adapt to an influx of drugs purchased abroad, so must Mexico accommodate the influence of U.S. gun control laws.²²⁵ The difference, of course, is in effect. Mexico has dealt with consequences amounting to 36,000

²¹⁸ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, at 21-22 ("ATF officials told us they have not estimated what percentage of firearms trafficked to Mexico result from such illegal actions on the part of the gun shop owners or staff . . ."); see also Jacobs, *supra* note 216, at 200.

²¹⁹ See *Crime, Terrorism, and Homeland Security: Border Violence and the Drug Trade Part I: Congressional Testimony Before the Subcomm. on Crime, Terrorism, and Homeland Security and the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Stuart G. Nash, Assoc. Deputy Att'y Gen., and Dir. Dep't. of Justice).

²²⁰ Steven A. Hendrix, *The Mérida Initiative For Mexico and Central America: The New Paradigm for Security Cooperation, Attacking Organized Crime, Corruption and Violence*, 5 LOY. U. CHI. INT'L L. REV. 107, 107 (2008).

²²¹ *Id.*; Randal C. Archibold, *Mexican Drug Cartel Violence Spills Over, Alarming U.S.*, N.Y. Times (March 23, 2009).

²²² *Crime, Terrorism, and Homeland Security: Border Violence and the Drug Trade Part I: Congressional Testimony Before the Subcomm. on Crime, Terrorism, and Homeland Security and the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Stuart G. Nash, Assoc. Deputy Att'y Gen., and Dir. Dep't. of Justice).

²²³ *Id.*

²²⁴ See Randal C. Archibold, *Obama to Send Up To 1,200 Troops to Border*, N.Y. Times, (May 25, 2010).

²²⁵ See Outterson, *supra* note 183, at 290 ("The government's regulatory power should not be used to force consumers into grey markets"); Hawley, *supra* note 188.

deaths associated with the incoming weapons.²²⁶ Another parallel to the pharmaceutical drug trade is the fact that the impact of the practice extends beyond the sphere of criminal activity.²²⁷ The arms trafficking trade has affected political relations between the two countries, threatening future bilateral relations.²²⁸ Considering that there is approximately one billion dollars traded legally across the border each day, and that the countries have agreed on the need for a stronger intelligence sharing relationship, it is important that these matters are resolved, not only to halt the illicit arms trade, but to ensure that the countries maintain strong diplomatic ties.²²⁹

B. *Recommended Approach*

In order to reduce the number of guns smuggled across the border, the United States and Mexico ought to enter into a cooperative agreement specifically aimed at reducing the amount of drugs and guns traded along the border.²³⁰ Such a measure would allow the parties to address their own interests without violating the policies of the other.²³¹ Furthermore, continuing to act without a comprehensive strategy may eventually result in greater pressure on gun ownership in the United States, a result that would seriously offend many U.S. citizens.²³² Similarly, any individual effort at the border may in fact cause greater tension between the two countries as they work to effectuate their own goals, each more concerned about what is coming into the country rather than what is going out.²³³ Accordingly, a continuation

²²⁶ Rosenberg, *supra* note 201; see also *Heading Toward Reform of the F.D.A.*, N.Y. Times (May 11, 2007) (noting Congressional support for legalizing the import of lower-cost drugs from other countries).

²²⁷ See Outterson, *supra* note 171, at 195 (noting that there are implications beyond pricing, including effects on intellectual property laws, research and development, and corporate business strategies); Rosenberg, *supra* note 201 (describing the “soured” political relationship between the United States and Mexico as a result of the Wikileaks leak related to U.S. Ambassador to Mexico Carlos Pascual).

²²⁸ See *US Mexico Envoy Carlos Pascual Quits After Wikileaks Row*, BBC NEWS (March 20, 2011) <http://www.bbc.co.uk/news/world-latin-america-12798622> (“Pascual questioned whether President Calderón could win his war on drugs, saying the various security agents were often at odds”).

²²⁹ See Rosenberg, *supra* note 201;

²³⁰ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 59, at 58.

²³¹

²³² Parrish

²³³ See *id.* at 441.

of current unilateral policing efforts will be insufficient in reducing the number of firearms crossing the border.²³⁴

As suggested, much of the potential for successfully regulating the black market for small weapons rests on U.S. law and policy.²³⁵ The United States has implemented many programs intended to address the issue, but admitted that there has been little success in reducing the number of weapons transported across the border.²³⁶ The United States has spent over a billion dollars on programs for the ATF and Immigration and Customs Enforcement (“ICE”) to combat the arms trafficking, but has admitted that these efforts have been unsuccessful in light of legal constraints and lack of coordination.²³⁷ The ATF program, Project Gunrunner, has inherent flaws based on the overriding legal restrictions, including an inability to meet its own goals or to analyze the success, if any, of the program overall.²³⁸ The focus of both of these programs is policing, thus merely increasing law enforcement efforts without a facilitating legal reform may be inadequate to address the arms trafficking problem.²³⁹

Short of a cooperative initiative, a consideration of international implications within domestic policy will not adequately resolve the problem.²⁴⁰ As an initial matter, the use of foreign law in domestic policy has been questioned as to whether it is a valid practice by the Courts.²⁴¹ Accordingly, it is rightfully questioned in an area with a strong national preference for rights of gun owners.²⁴² At the legisla-

²³⁴ See Zagaris, *supra* note 24, at 438 (noting that the U.S. emphasis on policing and narcotics both overlooks and exacerbates the underlying issues related to the drug war).

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²³⁶ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 18, at 58 (“U.S. and Mexican official in locations we visited told us that, while they have undertaken some efforts to combat illicit arms trafficking, they are concerned that without a targeted, comprehensive, and coordinated U.S. governmental effort, their efforts could fall short”).

²³⁷ Project Gunrunner; Ginger Thompson & Marc Lacey, *U.S. and Mexico Revise Joint Antidrug Strategy*, N.Y. TIMES March 23, 2010 (noting that the United States and Mexico revised the strategy against drug trafficking because prior efforts were showing little effect).

²³⁸ See U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., No. I-2009-006, INTERIM REVIEW OF ATF’S PROJECT GUNRUNNER 30-31 (2009).

²³⁹ Gary Kleck & Shun-Yung Kevin Wang, *The Myth of Big-Time Gun Trafficking and the Overinterpretation of Gun Tracing Data*, 56 UCLA L. Rev. 1233, 1240-41 (2009); James v. Grimaldi & Sari Horwitz, *As Mexico Drug Violence Runs Rampant, U.S. Guns Tied to Crime South of Border*, WASH. POST Dec. 15, 2010.

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²⁴¹ See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J. dissenting).

²⁴² See Parrish, *supra* note 197, at 825 (“Plenty of scholarship questions whether international law and institutions are consistent with the U.S. constitution and principles of democratic sovereignty”); Frederick Kunkle, *Gun-Toting Soccer Moms a Scary Thought in D.C.*

tive level, there is a concern that considering foreign laws or principles weakens the territorial boundaries of the country, and threatens American sovereignty.²⁴³ Similarly, courts fear that consideration and application of international law threatens separation of powers by encouraging the judiciary to enter into foreign affairs or other areas traditionally vested in the other two branches.²⁴⁴ In fact, Justice Antonin Scalia has discouraged the Court's application of international practices, noting that "views of other nations . . . cannot be imposed upon Americans through the Constitution."²⁴⁵ Thus, it is not clear that mere consideration of international principles, or an application of Mexican law would be employed at all, much less survive challenge in a U.S. court.²⁴⁶ Further, even if the courts of either country were to consider the laws of the other, conflicting national interests suggest that recognition of international principles might not even prove successful in ameliorating the problem.²⁴⁷

Another alternative to an explicit initiative between the United States and Mexico is to increase the utilization of inter-governmental organizations devoted to international criminal efforts.²⁴⁸ Across the globe, many regulatory and policy based efforts are enacted by inter-governmental organizations.²⁴⁹ The Organization of American States ("OAS") has operated as the primary regional organization with regard to international criminal issues.²⁵⁰ The OAS has exerted signifi-

Area, But Not Out West, WASH. POST. (Aug. 18, 2010) ("Even Arizona's flag . . . symbolizes the way guns are woven into the state's politics and culture. . .").

²⁴³ See Parrish, *supra* note 197, at 822-23 (summarizing an interpretation of international law which fears the impact on sovereignty and American exceptionalism).

²⁴⁴ See Donald Earl Childress, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11, 15 (2010)

²⁴⁵ *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J. dissenting).

²⁴⁶ See McFadden, *supra* note 22, at 15 ("Yet the Supreme Court almost wilfully minimized the effect of international law. Not once did international law provide the rule of decision. Not once did it provide the framework of analysis");

²⁴⁷ See Zagaris, *supra* note 24, at 439 (" . . . the United States and Mexico often put forth different (and even incompatible) 'interpretations of their national interests to the formulation of national security policies.' Each government adopts strategies and rules that can (and often does) become a source of conflict with the other, due in large part to the fact that they are often made without considering the other country's possible construal of its own national interests" (quoting John Bailey & Sergio Aguayo Quezada, *Strategy and Security in U.S.-Mexico Relations*, Strategy and Security in U.S.-MEXICAN RELATIONS BEYOND THE COLD WAR I, 1 (John Bailey & Sergio Aguayo Quezada eds., 1996)).

²⁴⁸ See Zagaris, *supra* note 23, at 454.

²⁴⁹ Jenia Iontcheva Turner, *Transnational Networks And International Criminal Justice*, 105 MICH. L. REV. 985, 991 (2007) (describing the trend to utilize inter-governmental agencies in the European Union).

²⁵⁰ See Zagaris, *supra* note 23, at 454.

cant effort in combating drug smuggling from Latin America, but its attempts to create regional harmonization have been largely undermined by the United States' internal focus.²⁵¹ The United States' general rejection of multilateralism has encouraged refrain from efforts like the OAS in order to protect the ability to focus on domestic concerns.²⁵² For example, in its report concerning the arms trafficking dilemma, the U.S. Government Accountability Office made no mention of OAS collaborative efforts, instead focusing entirely on ATF and ICE measures.²⁵³ It is, again, unlikely that any initiative spearheaded by an inter-governmental organization would be truly effective because the United States is reluctant to enter into or cooperate with these types of organizations for political reasons.²⁵⁴

In many ways, the failure of most current efforts to reduce gun smuggling demonstrates that a bilateral initiative may be the only remaining option.²⁵⁵ Mexican regulations and efforts have been rendered effectively irrelevant in the current circumstances.²⁵⁶ A purely U.S. initiative, while likely constitutionally viable, would likely conflict with regional attitudes toward gun control, and the tendency for the federal branch to side with the gun lobby.²⁵⁷ In contrast, a coherent strategy would simultaneously embrace the growing trend toward globalization while encouraging both parties to clearly assert their national interests as they move forward.²⁵⁸ Moreover, the general U.S. aversion to multilateral treaties suggests that an agreement with a more regional focus may appropriately address its concerns in the

²⁵¹ See *id.* at 463.

²⁵² *Id.* at 465.

²⁵³ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 59, *passim*.

²⁵⁴ See Parrish, *supra* note 137, at 818.

²⁵⁵ See Zagaris, *supra* note 23, at 511 ("Until national governments establish effective regional organizations, the mandate and resources to intensively and regularly work on criminal justice planning at the international level, individual states will react in a disorganized and inefficient manner to crime").

²⁵⁶ See Hawley, *supra* note 173; Kopel, *supra* note 173, at 6.

²⁵⁷ See *McDonald v. City of Chicago*, No. 08–1521, slip op at 39 (U.S. 2010) (noting that not all state gun control laws are presumptively unconstitutional); Horwitz & Grimaldi, *supra* note 27; Kunkle, *supra* note 225 ("Hell, if you're going to believe in free love and drugs and all that stuff from the 1960s, you've got to believe in guns" (quoting Arizonan citizen Jeff Smith)).

²⁵⁸ See Hendrix, *supra* note 203, at 120 (describing the benefits of international cooperation).

drug war without violating any political concerns about extensive international obligations.²⁵⁹

A bilateral initiative focusing on international crime is not a new idea.²⁶⁰ The growth of international crime in accordance with globalization and regional integration, has encouraged governments worldwide to adopt international procedures in order to be capable of response.²⁶¹ Recent efforts to create an international standard for criminalization in areas of terrorism and money laundering have proven to be well received by the international community.²⁶² Similarly, as the international community trends toward harmonization and coherence, a continual disregard of international law and cooperation threatens the reputation and respect of the U.S. legal system, and may undermine future efforts to obtain assistance on U.S. initiatives.²⁶³

While there has been no clear agreement to date, several factors suggest that a concerted effort in the future is not unlikely.²⁶⁴ The United States has initiated several programs, some in cooperation with Mexico, in effort to combat the problem that have been similarly ineffective without a broader view of the problem.²⁶⁵ One is the Mérida Initiative, a one billion dollar initiative aimed at improving Mexico's law enforcement capacity and mutual interests including intelligence, prosecution and extradition by strengthening public institutions in both the United States and Mexico.²⁶⁶ This agreement

²⁵⁹ See Parrish, *supra* note 137, at 818 ("In the last two decades, the United States has disengaged from the traditional sources of international law, declining to enter into multilateral conventions or undertake new international legal obligations").

²⁶⁰ See Turner (largely has been a focus on the international aspects of antitrust etc, but not crime).

²⁶¹ See Morais, *supra* note 154, at 586.

²⁶² See *id.* at 643 ("The international legal framework to combat international crime, especially money laundering, the financing of terrorism and corruption, is now well-established . . .").

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²⁶⁴ See *id.* at 3-4 (noting that while U.S. law enforcement has assisted their Mexican counterparts, but does not suggest it is part of an overall prohibitive scheme); see also Brewer, *supra* note 3, at 9 (outlining the Mérida Initiative, a cooperative effort between the United States and Mexico to combat drug trafficking); Morais, *supra* note 160, at 586 (suggesting new international criminal concerns have encouraged governments to adopt international criminal law despite the fact that it is traditionally within national regulation).

²⁶⁵ See Zagaris, *supra* note 24, at 440-43.

²⁶⁶ *Southern Border Violence: Homeland Security Threats, Vulnerabilities, and Responsibilities; Hearing Before the Senate Committee on Foreign Relations*, 111th Cong. ____ (2009) (statement of Joseph M. Arabit, Special Agent in Charge El Paso Div. DEA/DOJ and William McMahon, Deputy Assistant Dir. Field Operations ATF/DOJ).

has been criticized for not going far enough, and for promoting a U.S. focus on militarization in place of less violent alternatives.²⁶⁷ The plan underwent revision in 2010 after acknowledgement that the war against the DTOs had made little headway, suggesting that the United States recognizes the importance of its role moving forward.²⁶⁸ Unfortunately, this recognition has come in the way of increasing existing programs and policing on the border, measures shown to be generally unsuccessful in addressing the problem.²⁶⁹

A refusal by the United States to enter into any international agreement, may in fact result in a greater violation to American citizen's Second Amendment rights.²⁷⁰ Efforts toward harmonization of laws and cooperative treaties have been hampered somewhat by a reliance on the ability to exert domestic policy beyond a state's territorial borders.²⁷¹ Extraterritoriality, or the ability to apply domestic law to citizens outside the borders, has been used in an increasing number of transnational cases. This trend, which has grown in parts of Europe in response to U.S. may in fact threaten the United States

²⁶⁷ See Brewer, *supra* note 3, at 10 (suggesting that the Mérida Initiative "has led to a tripling of drug-related homicides"); Bruce Zagaris, *U.S.- Mexico Hold High-Level Meeting on Mérida Initiative and Improving Cooperation Against Transnational Organized Crime*, 26(6) Int'l Enforcement. L. Rep. 246, ____ (2010) (suggesting that the Mérida Initiative is simply a continuation of existing law enforcement policy); see also Morais, *supra* note 154, at 588 ("... the use of military strategies to fight international crime is inappropriate and likely to fail").

²⁶⁸ Ginger Thompson & Marc Lacey, *U.S. and Mexico Revise Joint Antidrug Strategy*, N.Y. TIMES (Mar. 23, 2010).

²⁶⁹ See U.S. DEP'T OF JUSTICE OFFICE OF THE INSPECTOR GEN., No. I-2009-006, INTERIM REVIEW OF ATF'S PROJECT GUNRUNNER 10 (noting that ATF policing measures are inefficient, and insufficient in many instances); Press Release, White House, Administration Officials Announce U.S.-Mexico Border Security Policy: A Comprehensive Response & Commitment (Mar. 24, 2009) available at http://www.whitehouse.gov/the_press_office/Administration-Officials-Announce-US-Mexico-Border-Security-Policy-A-Comprehensive-Response-and-Commitment/; Zagaris, *supra* note 239, at ____ ("... the real problem is the absence of a strong regional framework and institutions for criminal justice and law enforcement").

²⁷⁰ See Parrish, *supra* note 137, at 855 ("Over time, the United States' broad application of its own law extraterritorially has created a precedent (if not a sense of righteousness) in other countries, 'who would apply their laws and their versions of international law to Americans whose actions they do not like'" (quoting Alfred P. Rubin, *Can the United States Police the World?*, 13 FLETCHER F. WORLD AFF. 371, 374 (1989))).

²⁷¹ See *id.* at 833 ("Legal consciousness has changed over time so that nonstate actors, policymakers and attorneys turn first and instinctively toward extraterritorial domestic remedies, rather than international ones, when faced with an international challenge"); Zagaris, *supra* note 24 at 425 ("The United States has dominated and exerted controlling influence over the efforts to evolve the hemisphere's criminal justice toward harmonization and improve international criminal cooperation")

in a retaliatory measure, if Mexico attempts to apply its own regulations in the United States.²⁷² Theoretically, Mexico could use its own laws to impose liability on individuals or industries in the United States, as courts have been more permissive in recognizing applications of extraterritorial law.²⁷³ Moreover, the extensive trading relationship between the U.S. and Mexico presumes a significant amount of U.S. assets in Mexico, meaning Mexico may have means of enforcement as well.²⁷⁴ In many ways, this would negate the Second Amendment rights that the U.S. government has fought to protect by subjecting them to interpretation by foreign courts.²⁷⁵

On the other hand, if the United States and Mexico entered into an arranged, negotiated agreement concerning arms trafficking there would be less risk of unfairly applying foreign law.²⁷⁶ Entering into a self-executing treaty would establish rules and obligations for each party that would respect their individual interests, while providing clarity to obligations and goals.²⁷⁷ In contrast, current practice of employing entirely domestic laws to international conflicts is generally uncertain and may lead to larger political and economic consequences by deepening conflict.²⁷⁸ Accordingly, international cooperation represents a more secure and mutually beneficial solution to the problem of illicit arms trafficking in a long term, sustainable context.²⁷⁹

As suggested by scholars, the United States has avoided entering into treaty obligations in recent history.²⁸⁰ This fear may be compounded in the area of arms trafficking and border patrol, as the United States sees a serious threat from immigration and drug traf-

²⁷² See Parrish, *supra* note 143, at 857.

²⁷³ See *id.*

²⁷⁴ See *id.* at 859-60 ("But extraterritorial laws force foreigners to bear the costs of domestic regulation, even though foreigners . . . are nearly powerless to change those regulations").

²⁷⁵ See Austen Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 Vand. L. Rev. 1455, 1459-60 (2008) ("Indeed, as exterritorial laws are more frequently applied worldwide, the very purpose of legislative jurisdiction—to avoid conflicts between countries and the harms that conflicts inevitably cause—is threatened").

²⁷⁶ See *id.* at 820 (noting that international agreements actually protect national sovereignty by avoiding problems of extraterritoriality).

²⁷⁷ See

²⁷⁸ See Parrish, *supra* note 248, at 1490 (describing the dangers of extraterritoriality).

²⁷⁹ See Zagaris, *supra* note 23, at 464-65 ("While states can act on collective interests without institutions or formal organizations, institutionalization can strengthen collaboration that is more sustainable and dependable than under ad hoc measures, with a view towards consistent cooperation and collaboration").

²⁸⁰ Parrish, *supra* note 137, at 818.

ficking, as well as a strong need to protect gun ownership rights.²⁸¹ Yet as demonstrated, this effort must go beyond increasing policing at the border, or a delegation to a third party for enforcement.²⁸² Circumstances have eliminated inter-governmental organizations, international soft law, domestic reform, and interpretation of foreign law within the domestic judicial system as potential sources for resolution.²⁸³ Yet the United States can no longer merely recognize that Mexico has “born the brunt” of the drug violence, which is primarily funded by users in the United States, it ought to take affirmative action to recognize its role in the growing conflict.²⁸⁴

CONCLUSION

Arms trafficking is illegal on both sides of the border already. Yet the wide availability of assault, military grade weapons in a unregulated atmosphere has rendered those laws irrelevant. Not only are criminal syndicates able to obtain these weapons en masse, they aren’t required to report their purchases to anyone. It is only after another mass murder in a border town associated with drugs does it become apparent that another shipment of guns moved Southward. It is unfortunate that the United States legal system operates in ways that both permits this activity to occur, and prevents it from getting involved in any real way to provide redress. If the United States continues to act as a global leader in economics and policy, it must consider the implications of its policies and take steps to amend them where necessary. Considering the arms trafficking problem now amounts to nearly 40,000 deaths, the United States must do something to recog-

²⁸¹ See Guzman, *supra* note 163, at 1874 (“Treaties that implicate issues of national security and other issues of central importance to states are less likely to succeed in tipping the scales in favor of compliance”).

²⁸² See U.S. DEP’T OF JUSTICE OFFICE OF THE INSPECTOR GEN., No. I-2009-006, INTERIM REVIEW OF ATF’S PROJECT GUNRUNNER 10; U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 59,

²⁸³ See McFadden, *supra* note 21, at 13 (describing the monolist practice of U.S courts in finding treaties to be the only source of enforceable international law); Zagaris, *supra* note 23, at 463 (suggesting the U.S. tendency to act unilaterally damages the effectiveness of inter-governmental relations); Hawley, *supra* note 173 (describing the ineffectiveness of Mexican gun regulations)

²⁸⁴ Thompson & Lacey, *supra* note 262 (“Yes, we accept our share of the responsibility” (quoting Sec. of State Hillary Rodham Clinton)) see Turner, *supra* note 244, at 1000 (“But in most instances, these effects [of conflict] are regional, rather than global, and they rarely affect the more powerful, developed countries directly At the same time, the heinous nature of these crimes provokes unparalleled moral outrage”);

nize its impact in the situation. No longer can it provide money to purchase, guns to fight with, and soldiers to fight. Despite the strong preference for gun ownership in the United States, it ought to consider the impact those rights have elsewhere.