

BULLETS AND BOOKS BY LEGISLATIVE FIAT: WHY ACADEMIC FREEDOM AND PUBLIC POLICY PERMIT HIGHER EDUCATION INSTITUTIONS TO SAY NO TO GUNS

SHAUNDRA K. LEWIS*

*We recoil in horror and search for explanations, but we never face up to the obvious preventive measure: a ban on the handy killing machines that make crimes so easy.*¹

TABLE OF CONTENTS

I. INTRODUCTION	2
II. BACKGROUND ON CAMPUS CARRY LAWS	4
III. EDUCATIONAL INSTITUTIONS' RIGHT TO ACADEMIC FREEDOM	10
A. Constitutional Academic Freedom.....	12
B. Campus Carry Laws Forcing Guns on Campuses Violate Academic Freedom	13
IV. STRICT SCRUTINY APPLIES	17
V. THE LEGISLATION CANNOT WITHSTAND STRICT SCRUTINY	19
A. Reasons the Legislation is Not Narrowly Tailored.....	20
1. Undetected Mental Illness Is the Real Source of Rampage Shootings and Not the Lack of Gun Power	20
2. Concealed Handgun License Holders Can Be Bad Guys Too	21
3. CHLs and Handguns Are Too Easy To Obtain	22
4. It Is Unlikely a Shooter Will Stop a Crazy Gunman	23
5. The Presence of Firearms Will Increase the	

* Assistant Professor of Law, Thurgood Marshall School of Law; J.D. 1998, St. Thomas University School of Law; B.A. 1995, Stetson University. This article was supported by a 2011 summer research grant from Texas Southern University Thurgood Marshall School of Law. The author thanks Danyahel Norris, Esq. and research assistant Corwyn Davis for their research assistance. The author also thanks Associate Dean L. Darnell Weeden, Professor Constance Fain, Professor Njeri Rutledge, Professor Cassandra Hill, and Vernon Lewis, Esq. for their helpful suggestions and support. Finally, the author appreciates the helpful comments provided by the participants at the 2011 Lutie A. Lytle Faculty Writing Workshop.

1. Josh Sugarmann, Editorial, *Seattle and Honolulu Shootings More Reasons to Regulate Guns*, N.Y. TIMES, Nov. 4, 1999, [http://www.saf.org/pub/rkba/general/Sugarmann Editorial.htm](http://www.saf.org/pub/rkba/general/Sugarmann%20Editorial.htm).

Risk of Injury or Death	24
6. CHL Heroes May Confuse the Police in an Emergency Situation	24
7. Most People Oppose the Legislation	25
8. More Guns More Problems	25
B. Less Restrictive Alternatives	26
VI. CONCLUSION	27

I. INTRODUCTION

The highly controversial debate over whether students with a concealed handgun license (CHL) should be permitted to carry firearms on post-secondary campuses for protection has been ongoing for the past several years. And in the aftermath of the deadly January 8, 2011, shooting rampage in Tucson, Arizona, the issue has been thrust back into the forefront.

On January 8, 2011, Jared Loughner unceremoniously walked up to U.S. Congresswoman Gabrielle Giffords at a grocery store meet-and-greet event and shot her point-blank in the head.² Loughner then opened fire on nineteen other people, slaying six, including an innocent nine-year-old girl and an unsuspecting federal judge.³

While the nation was stunned, Pima Community College was not. Pima had suspended Loughner months earlier for exhibiting mentally disturbing behavior including asking a professor if he believed in mind control,⁴ making outbursts about “blowing up babies,”⁵ and walking around the campus at night with a video camera while discussing “the torture of students.”⁶ Everyone, however, was shocked to learn that af-

2. *US Congresswoman Gabriel Giffords Shot in Arizona*, BBC NEWS, (Jan. 9, 2011, 1:36 ET), <http://www.bbc.co.uk/news/world-us-canada-12143774>. Miraculously, Congresswoman Giffords survived and recently returned to Congress on August 1, 2011, to cast her vote in favor of increasing the debt ceiling. *Gabrielle Giffords Returns to House to Cast Debt Ceiling Vote But Her Political Future Remains Uncertain*, WASH. POST, Aug. 2, 2011, http://www.washingtonpost.com/politics/gabrielle-giffords-returns-to-house-to-cast-debt-ceiling-vote-but-her-political-future-remainsuncertain/2011/08/02/gIQAN0FJqI_story.html.

3. Shailaugh Murray & Sari Horwitz, *Rep. Gabrielle Giffords Shot in Tucson Rampage; Federal Judge Killed*, WASH. POST (Jan. 9, 2011, 12:00 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/08/AR2011010802422.html>.

4. Jack Gillum & Peter Eisler, *Suspect Jared Loughner Known for Bizarre Behavior*, USA TODAY (Jan. 10, 2011, 5:50 PM), http://www.usatoday.com/news/washington/2011-01-10-suspect10_ST_N.htm.

5. *Man Accused of Arizona Shooting Showed Signs of Mental Illness in College*, IDAHO STATE JOURNAL (Jan. 14, 2011, 2:20 AM), http://www.idahostatejournal.com/news/online/article_c8cccd18-1fbf-11e0-9c2b-001cc4c002e0.html.

6. *Loughner on YouTube: ‘This is My Genocide School’*, MSNBC.COM (Jan. 15, 2011, 1:30 PM), http://www.msnbc.msn.com/id/41088221/ns/us_news-crime_and_courts/t/loughner-youtube-my-genocide-school/ [hereinafter MSNBC.COM]. After these incidents, the college gave Loughner “an ultimatum—seek mental treatment or leave school.” James B. Jacobs & Jennifer Jones, *Keeping Firearms Out of the Hands of the Dangerously Mentally Ill*, 47 CRIM. L. BULL. 388, 388 (2011). Loughner opted to leave. *Id.*

ter being suspended from college for mental instability, Loughner *legally* purchased a firearm.⁷

The possibility that this tragedy could have unfolded on the Pima college campus did not go unnoticed.⁸ State legislators began ruminating over what could be done to protect those on college campuses from a rampage shooter.⁹ An old solution resurfaced—arming students with firearms.¹⁰ Specifically, as of April 2011, at least twelve states are considering legislation that would allow persons with CHLs to carry firearms to class.¹¹ Since 2001, the state of Utah has had laws forbidding higher educational institutions from banning guns.¹²

7. Jana Winter, *Arizona Suspected Gunman Passed FBI Background Check*, FOXNEWS.COM (Jan. 9, 2011), <http://www.foxnews.com/us/2011/01/09/arizona-suspected-gunman-no-stranger-to-trouble/>.

8. Since 1990, there have been seven shootings at higher educational institutions committed by students. Helen Hickey de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case For Institutional Liability*, 35 J.C. & U.L. 503 (2009) (providing an excellent description of all the student rampage shootings on college campuses). To date, the most deadly post-secondary shooting occurred at Virginia Tech on April 16, 2007, when a student shot and killed 32 people and injured 17. Mary A. Lentz, LENTZ SCH. SEC. § 2:9 (2010); VA. TECH REVIEW PANEL, MASS SHOOTINGS AT VIRGINIA TECH (Aug. 2007), available at <http://www.governor.virginia.gov/TempContent/techPanelReport.cfm>. Students are not the only ones, however, who have opened fire on campus. In 2010, an Alabama professor shot and killed three of her colleagues and seriously wounded three others after being denied tenure. Sarah Wheaton & Shaila Dewan, *Professor Said to Be Charged After 3 Killed in Alabama*, N.Y. TIMES (Feb. 12, 2011), <http://www.nytimes.com/2010/02/13/us/13alabama.html>. However, for the most part, these rampage shootings have been committed by disgruntled students.

9. See, e.g., *Making Various Changes Relating to Concealed Firearms: Hearing Before the Subcomm. of Gov't Affairs on S.B. 231*, 2011 Leg., 76th Sess. (Nev. 2011), [hereinafter *Nevada Hearing*] (reporting minutes from a hearing on legislation to permit CHL holder-students to carry firearms on campus). This is exactly what happened after the Virginia Tech massacre when, as one scholar put it, “[b]efore a single funeral was held for any of the victims of the Virginia Tech tragedy, and before anyone even knew the identities of the victims or the perpetrator, the gun lobby began pushing for college campuses to be turned into armed camps.” Brian J. Siebel, *The Case Against Guns on Campus*, 18 GEO. MASON U. C.R. L.J. 319, 319 (2008).

10. States have considered this legislation before. In 2008, after the 2007 Virginia Tech shooting rampage, seventeen states considered loosening the prohibition of firearms at higher learning institutions, but most of this legislation failed. Derek P. Langhauser, *Gun Regulation On Campus: Understanding Heller and Preparing for Subsequent Litigation and Legislation*, 36 J.C. & U.L. 63, 64–65, 100 n.1 (2009). In 2009, twenty states considered reforming campus carry laws. *Id.* at 64. The Virginia Tech shootings also spawned a new student organization, Students for Concealed Carry on Campus (SCCC), that has been on a campaign to arm campuses ever since. See generally SCCC, *About Us*, CONCEALED CAMP US.COM, <http://concealedcampus.org/aboutus.php> (last visited Oct. 23, 2011). The organization claims to have 43,000 members, including professors, college employees, college students, their parents, and concerned citizens. *Id.* However, I have yet to meet a professor who supports the legislation. The student organization against guns is called Students for Gun Free Campuses. See generally STUDENTS FOR GUN FREE SCHOOLS, <http://www.studentsforgunfreeschools.org/> (last visited Oct. 23, 2011).

11. See *infra* notes 74–88 and accompanying text.

12. See *infra* notes 65–69 and accompanying text.

This article submits that legislation like Utah's, that in effect *requires* post-secondary schools that want to remain gun-free to arm those on campus, unconstitutionally intrudes upon those institutions' academic freedom.¹³ The Supreme Court has strongly intimated that academic freedom is a constitutionally protected First Amendment right. The Court has also clearly stated that one of the academic freedoms higher educational institutions possess is the right to decide how its students should be taught. Implicit in the right to decide how to teach students is the right to determine how to best keep students safe. Most colleges and universities have already concluded that the presence of concealed firearms in the classroom unquestionably jeopardizes student safety. Therefore, they should not be forced to turn their campuses into "armed camps."¹⁴

Accordingly, Part II of the article provides an overview of the current state laws regarding firearms on college campuses and discusses the only case to come close to addressing the academic freedom issue. Part III explains the academic freedom doctrine and how Utah's law and other similar proposed legislation violate the academic freedom of a college wanting to ban firearms. Part IV argues why academic freedom should be considered a constitutionally protected right under the First and Fourteenth Amendments subject to strict scrutiny. Part V addresses why legislation forcing guns on campus cannot survive strict scrutiny review. Finally, Part VI concludes with the realization that the best solution for minimizing gun violence on campus is the solution already adopted by the overwhelming majority of colleges and universities—banning guns altogether except for law enforcement or those with prior authorization. At the very least, each college and university should be allowed to decide its own firearm policies.

II. BACKGROUND ON CAMPUS CARRY LAWS

Before explaining why the legislation in question is constitutionally offensive, it is necessary to provide an overview of the different types of laws regarding firearms on college and university campuses. These laws go by the nomenclature "campus carry laws." Currently, campus carry laws fall into three basic categories: (1) legislation completely banning guns on the premises of post-secondary schools without prior authorization, irrespective of whether someone has a CHL license; (2) legislation leaving it up to the public institutions to establish firearm policies; and (3) legislation requiring colleges and universities to permit CHL holders to carry firearms. The latter is the focus of this article and, as will be shown later, is constitutionally objectionable.

13. This is not the first article to make this claim. *See also* Kathy L. Wyer, *A Most Dangerous Experiment? University Autonomy, Academic Freedom, and the Concealed-Weapons Controversy at the University of Utah*, 2003 UTAH L. REV. 983 (2003). However, this article analyzes the issue from the analytical framework of strict scrutiny.

14. Siebel, *supra* note 9, at 319.

Prior to the January 8, 2011 Tucson shootings, approximately twenty-nine U.S. jurisdictions expressly proscribed firearms. Those jurisdictions included Arizona,¹⁵ Arkansas,¹⁶ California,¹⁷ Delaware,¹⁸ Florida,¹⁹ Georgia,²⁰ Illinois,²¹ Kansas,²² Louisiana,²³ Maryland,²⁴ Massachusetts,²⁵ Michigan,²⁶ Mississippi,²⁷ Nebraska,²⁸ Nevada,²⁹ New Hamp-

15. ARIZ. REV. STAT. ANN. § 13-2911 (LexisNexis, LEXIS through 1st Regular Sess., 50th Legis.) (authorizing a higher education institution to seize and dispose of any deadly weapon brought on campus).

16. ARK. CODE ANN. § 5-73-306(14) (LEXIS through 2011 Regular Sess.) (“No license to carry a concealed handgun . . . authorizes any person to carry a concealed handgun into . . . [a]ny school, college, community college, or university campus building or event, unless for the purpose of participating in an authorized firearms-related activity.”).

17. CAL. PENAL CODE § 626.9(h) (Deering, LEXIS through 2011 Sess., urgency Ch. 745 & Extraordinary Sess. Ch. 16) (criminally penalizing anyone who brings or possesses a loaded firearm upon college or university grounds).

18. DEL. CODE ANN. tit. 11, § 1457 (LEXIS through 78 Del. Laws, Ch. 200) (making it unlawful to possess a deadly weapon in a “Safe School and Recreation Zone,” which includes colleges and universities).

19. FLA. STAT. ANN. § 790.06(12) (LexisNexis, LEXIS through Act 2010-283) (explicitly stating handgun carry permits are invalid on college and university property).

20. GA. CODE ANN. § 16-11-127.1 (LEXIS through 2011 Extraordinary Sess.) (preventing anyone from bringing a firearm in a “school safety zone” and defining a “school safety zone” to include “any public or private technical school, vocational school, college, university, or institution of postsecondary education”).

21. 720 ILL. COMP. STAT. 5/24-1(c) (LexisNexis, LEXIS through 2011 Legis. Sess., Pub. Act 97-602) (making it unlawful to possess a firearm in a school and defining a “school” to include public and private colleges and universities).

22. KAN. STAT. ANN. § 75-7c10(14) (LexisNexis, LEXIS through 2010 Supp.) (prohibiting CHL holders from bringing firearms on “any community college, college, or university facility”).

23. LA. REV. STAT. ANN. § 14:95.2 (LexisNexis, LEXIS through 2011 Reg. Sess.) (providing it is unlawful to carry a firearm on school property and defining a “school” as “any elementary, secondary, high school, vocational-technical school, college, or university in this state”)

24. MD. CODE ANN., CRIM. LAW § 4-102 (LexisNexis, LEXIS through 2011 Special Sess.) (prohibiting deadly weapons, including firearms, on public school property).

25. MASS. GEN. LAWS ANN. ch. 269, § 10(j) (LexisNexis, LEXIS through 2011 Legis. Sess., Act 139) (prohibiting every non-police officer, including CHL holders, from carrying a firearm on the grounds of a college or university without prior written authorization).

26. MICH. COMP. LAWS ANN. § 28.425o(h) (LexisNexis, LEXIS through 2011 Pub. Acts 130) (prohibiting a CHL holder from bringing a concealed handgun to a “dormitory or classroom of a community college, college, or university”).

27. MISS. CODE ANN. § 45-9-101(13) (LEXIS through 2011 Regular Sess. & 1st Extraordinary Sess.) (disallowing anyone to bring a concealed firearm on “any junior college, community college, college or university facility unless for the purpose of participating in any authorized firearms-related activity”).

28. NEB. REV. STAT. § 28-1204.04(1) (LexisNexis, LEXIS through 2011 102d 1st Sess.) (making it unlawful to possess a firearm on a college or university campus except in conjunction with a rifle team or agriculture or natural resource program).

29. NEV. REV. STAT. ANN. § 202.3673 (3)(a) (LexisNexis, LEXIS through 26th Special Sess.) (prohibiting a concealed license permittee from carrying a concealed handgun into a “public building” which includes any building occupied by the “Nevada System of Higher Education”).

shire,³⁰ New Jersey,³¹ New Mexico,³² New York,³³ North Carolina,³⁴ North Dakota,³⁵ Ohio,³⁶ Oklahoma,³⁷ South Carolina,³⁸ Tennessee,³⁹ Texas,⁴⁰ Vermont,⁴¹ Wyoming,⁴² and Guam.⁴³

Approximately nineteen states fell into the second category, leaving it up to the institutions to determine its own gun policies. These states accomplished this by either: (1) expressly conferring upon higher education institutions the authority to determine its own weapons policies by statute; or (2) implicitly granting this authority by remaining silent on

30. See SCCC, *State-by-State*, CONCEALED-CAMPUS.COM, <http://concealedcampus.org/state-by-state.php> (last visited Oct. 23, 2011) (listing New Hampshire as a state that expressly prohibits firearms on college campuses).

31. N.J. STAT. ANN. § 2C:39-5(e) (LexisNexis, LEXIS through 214th Legis., 2d Ann. Sess.) (banning guns on college and university property without prior authorization).

32. N.M. STAT. ANN. § 30-7-2.4(A) (LexisNexis, LEXIS through 50th Legis., 1st Sess.) (criminalizing carrying a firearm on university premises unless engaged in a university-approved program).

33. N.Y. PENAL LAW § 265.01(3) (LexisNexis, LEXIS through 2010 released Chapters 1-59, 61-568) (stating that a person who possesses a firearm at any school, college, or university is guilty of criminal possession of a weapon).

34. N.C. GEN. STAT. § 14-269.2 (LexisNexis, LEXIS through 2010 Regular Sess.) (criminalizing possessing or carrying a firearm on any educational or school property, including community colleges, colleges, and universities).

35. N.D. CENT. CODE ANN. § 62.1-02-05(1) (LexisNexis, LEXIS through 2011 Legis. Sess.) (forbidding the possession of a firearm at a “public gathering,” which includes “schools or school functions”); see also SCCC, *supra* note 30 (listing North Dakota as a state prohibiting concealed firearms on campus).

36. OHIO REV. CODE ANN. § 2923.126(B)(5) (LexisNexis, LEXIS through file 49 of legislation of 129th Gen. Assembly). Ohio statute prohibits firearms on “[a]ny premises owned or leased by any public or private college, university, or other institution of higher education, unless the handgun is in a locked motor vehicle or the licensee is in the immediate process of placing the handgun in a locked motor vehicle.” *Id.*

37. OKLA. STAT. ANN. tit. 21, § 1277(D) (LEXIS through Chapters effective Aug. 26, 2011 of the 53d Legis., 1st Regular Sess.) (prohibiting concealed handguns on campus unless authorized by college or university policy).

38. S.C. CODE ANN. § 16-23-420(A) (LEXIS through 2010 Sess.) (making it “unlawful for a person to possess a firearm of any kind on any premises or property owned, operated, or controlled by a private or public school, college, university, technical college, other post-secondary institution . . . without the express permission of the authorities in charge of the premises or property,” but allowing CHL holders to leave firearm in car).

39. TENN. CODE ANN. § 39-17-1309(b)(1) (LEXIS through 2011 Reg. Sess.) (providing “[i]t is an offense for any person to possess or carry, whether openly or concealed . . . any firearm . . . in . . . any public or private . . . college or university”).

40. TEX. PENAL CODE ANN. § 46.03(a)(1) (LexisNexis, LEXIS through 2011 1st Called Sess.) (banning firearms on the premises of educational institutions).

41. VT. STAT. ANN. tit. 13, § 4004(a) (LEXIS through 2011 Sess.) (prohibiting anyone from bringing a deadly weapon into a “school building”); see also SCCC, *supra* note 30 (listing Vermont as a state prohibiting concealed firearms on campus).

42. WYO. STAT. ANN. § 6-8-104(t)(x) (LEXIS through 2010 Legis. Budget Sess.) (prohibiting concealed firearms on college or university premises without permission from the security office of the institution, including at athletic events not related to firearms).

43. 9 GUAM CODE ANN. § 71.50(b) (LEXIS through Pub. L. 31-074, June 6, 2011) Guam statute provides that “[i]t shall be unlawful for any person to bring or possess a loaded firearm upon the grounds of a campus of, or buildings owned or operated for student housing, teaching, research, or administration by, a public or private university or college, that are contiguous or are clearly marked university property” without permission from the university president or equivalent authority. *Id.*

the issue. These states included Alabama,⁴⁴ Alaska,⁴⁵ Colorado,⁴⁶ Connecticut,⁴⁷ Idaho,⁴⁸ Indiana,⁴⁹ Iowa,⁵⁰ Kentucky,⁵¹ Maine,⁵² Minnesota,⁵³ Missouri,⁵⁴ Montana,⁵⁵ Oregon,⁵⁶ Pennsylvania,⁵⁷ Rhode Island,⁵⁸ South

44. SCCC, *supra* note 30 (noting Alabama does not have a law prohibiting campus carry, but permits the local sheriff's office to preclude campus carry as a condition of granting a CHL).

45. ALASKA STAT. ANN. § 18.65.755 (LexisNexis, LEXIS through 2011 1st Regular Sess., 27th Legis. & 2d Special Sess.) (permitting a CHL holder to carry their concealed handgun anywhere that is not prohibited by federal or state law; no federal or Alaskan law prohibits concealed weapons at colleges and universities); *see also* SCCC, *supra* note 30 (including Alaska as one of the states that permits public universities to decide its own weapons policies).

46. COLO. REV. STAT. ANN. § 18-12-214 (LEXIS through 1st Regular Sess., 68th Gen. Assembly) (permitting CHL holders to carry guns in all areas of the state except for K-12 schools and certain public buildings). At least one Colorado appellate court has construed this provision to permit students to challenge the University of Colorado's ban on guns. *See Students for Concealed Carry on Campus, LLC v. Regents of Univ. of Colo.*, --- P.3d ---, 2010 WL 1492308 (Colo. App. Apr. 15, 2010), *cert. granted*, No. 10SC344, 2010 WL 4159242 (Colo. Oct. 18, 2010).

47. SCCC, *supra* note 30 (noting Connecticut does not have a law prohibiting campus carry, but permits the local sheriff's office to preclude campus carry as a condition of granting a CHL).

48. IDAHO CODE ANN. § 18-3302J(5)(c) (LEXIS through 2011 Regular Sess.) (vesting the authority to regulate firearms with the board of regents or trustees for the public colleges and universities).

49. SCCC, *supra* note 30 (listing Indiana as one of the discretionary states).

50. *Id.* (including Iowa as one of the states that permits public universities to decide its own weapons policies, but permits the local sheriff's office to preclude campus carry as a condition of receiving CHL).

51. KY. REV. STAT. ANN. § 237.110(16)(f) (LexisNexis, LEXIS through 2011 1st Extraordinary Sess.) (making it unlawful to possess a firearm on school property, but expressly excluding "institutions of postsecondary or higher education" from the provisions of that act).

52. ME. REV. STAT. ANN. tit. 20-A, § 10009(2) (LEXIS through Ch. 447 of the 2011 1st Regular Sess., 125th Legis.) (providing colleges and universities have the power to regulate the possession of firearms on campus).

53. MINN. STAT. § 624.714(18) (LexisNexis, LEXIS through 2010 2d Special Sess.) (permitting public colleges and universities to establish policies to restrict the possession or carry of firearms, but prohibiting institutions from banning guns in parking areas).

54. SCCC, *supra* note 30 (including Missouri as one of the states that permits public universities to decide its own weapons policies).

55. MONT. CODE ANN. § 45-3-111(3) (LexisNexis, LEXIS through 2011 Regular & Special Sess.) (stating that the law permitting qualified individuals to openly carry firearms does not "limit the authority of the board of regents or other postsecondary institutions to regulate the carrying of weapons . . . on their campuses").

56. OR. REV. STAT. ANN. § 353.050(1) (LEXIS through 2009 Legis. Sess.) (vesting university officials or the board of trustees the authority to "[d]etermine or approve policies for the organization, administration and development of the university").

57. 18 PA. STAT. ANN. § 20.303(c)(12) (LEXIS through 2011 Regular Sess., Act 75) (authorizing higher education institutions to develop their own weapons policies).

58. R.I. GEN. LAWS ANN. § 11-47-60.2(e) (LEXIS through Jan. 2011 Sess.) (expressly excluding junior colleges, colleges, and universities from the prohibition of weapons on school grounds).

Dakota,⁵⁹ Virginia,⁶⁰ Washington,⁶¹ and West Virginia.⁶² Notably, in these discretionary states, nearly all of the colleges and universities elected to be “gun-free.”⁶³

Utah was the only state that fell into the third category—states that, in effect, force colleges and universities to permit CHL holders to carry firearms on campus.⁶⁴ Utah accomplished this through two statutes: The Uniform Firearms Law⁶⁵ and its Concealed Firearm Act.⁶⁶ The Uniform Firearms Law preempts firearm regulation by explicitly forbidding any local authority or state entity (which would include public colleges and universities) from enforcing any rule dealing with firearms.⁶⁷ Utah’s Concealed Firearm Act provides that a person who meets the qualifications for a CHL may carry a concealed gun for self-protection throughout the state “without restriction,” except for those places expressly prohibited by statute.⁶⁸ There is no Utah statute proscribing the carrying of guns at colleges and universities.⁶⁹ Consequently, the statutes, read in *pari materia*,⁷⁰ have the effect of compelling colleges and universities to allow CHL holders to carry firearms on campus.

59. See S.D. CODIFIED LAWS § 23-7-8.1 (LexisNexis, LEXIS through 2011 legislation passed at 86th Regular Sess.) (permitting CHL holders to carry firearms anywhere in the State except establishments that derive more than half of their income from alcohol); see also SCCC, *supra* note 30 (including South Dakota as one of the states that permits public universities to decide its own weapons policies).

60. VA. CODE ANN. § 18.2-308(D) (LexisNexis, LEXIS through 2010 Regular Sess., 2010 Acts cc. 1–87) (providing for concealed handgun licensing); Op. Va. Att’y Gen. 05-078 (2006) (“[C]olleges and universities may regulate the conduct of students and employees to prohibit them from carrying concealed weapons on campus.”).

61. WASH. REV. CODE ANN. § 28B.10.569(3)(a)(ii)(B) (LexisNexis, LEXIS through 2011 Regular & 1st Special Sess.) (authorizing each institution of higher learning to set its own weapons policies).

62. W. VA. CODE ANN. § 61-7-11a(b)(1) (LexisNexis, LEXIS through 2011 2d Extraordinary Sess.) (prohibiting deadly weapons at primary and secondary public and private schools, but silent as to post-secondary schools); see also SCCC, *supra* note 30 (including West Virginia as one of the states that permits public universities to decide its own weapons policies).

63. Langhauser, *supra* note 10, at 65; see also SCCC, *supra* note 30 (noting most post-secondary schools prohibit firearms at schools).

64. *Id.*

65. UTAH CODE ANN. § 76-10-523 (LexisNexis, LEXIS through 2011 2d Special Sess.).

66. *Id.* § 53-5-701. This was previously known as the “Concealed Weapon Act.” See H.R. 214, 59th Leg., 1st Gen. Sess. (Utah 2010) (amending name of the Act).

67. UTAH CODE ANN. § 76-10-500(2) (“All authority to regulate firearms . . . [is] reserved to the state except where the Legislature specifically delegates responsibility to local authorities or state entities,” and any “local authority or state entity” is prohibited from “enact[ing] or enforc[ing] any ordinance, regulation, or rule pertaining to firearms.”).

68. *Id.* § 53-5-704(1)(a)–(b).

69. See generally *id.* §§ 53-5-701 to -711.

70. “In *pari materia*” is a canon of construction providing that statutes regarding the same subject matter should be construed together “so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.” BLACK’S LAW DICTIONARY 862 (9th ed. 2009).

In 2003, the University of Utah challenged the validity of these statutes, in light of the Attorney General's opinion that the university's then ban-on-firearms policy was illegal.⁷¹ Specifically, the university sought a declaration that it had the academic freedom right, guaranteed by the U.S. Constitution's First and Fourteenth Amendments, "to create and maintain, free from government interference, an atmosphere that is the most conducive to the uninhibited exchange of ideas among teachers and students."⁷² However, before the district court could address the issue, the university withdrew its suit.⁷³ Thus, the question remains whether a law requiring a college or university to permit CHL holders to carry firearms on campus against that university's wishes is unconstitutional under the academic freedom doctrine.

The time for resolving this issue has come. Since the January 8, 2011 Arizona shootings, a litany of states have pending legislation permitting CHL holders, including students, to carry firearms on collegiate premises.⁷⁴ These states include Arizona,⁷⁵ Arkansas,⁷⁶ Florida,⁷⁷ Michigan,⁷⁸ Mississippi,⁷⁹ Nebraska,⁸⁰ Nevada,⁸¹ New Mexico,⁸² Oklahoma,⁸³

71. *Univ. of Utah v. Shurtleff*, 252 F. Supp. 2d 1264, 1266–67 (D. Utah 2003).

72. *Id.* at 1267.

73. Initially, the University filed suit in federal court and, in addition to the academic freedom constitutional claim, it argued that Utah's state constitution conferred upon it institutional autonomy to determine its own firearm policy. *Id.* at 1266–67. Based on the latter state law claim, the federal district court dismissed the state claim so that the state court could decide the state issue, but retained jurisdiction over the federal constitutional academic freedom claim. *Id.* at 1286. In state court, the Utah Supreme Court held that the University's policy did contravene Utah's Uniform Firearms Law and nothing in the state constitution gave it the institutional autonomy to ignore it. *Univ. of Utah v. Shurtleff*, 144 P.3d 1109, 1120 (Utah 2006). Subsequently, the university withdrew its federal suit because the state legislature appeased it by passing a bill permitting students to choose a roommate who did not have a firearm. David B. Kopel, *Pretend "Gun-Free" School Zones: A Deadly Legal Fiction*, 42 CONN. L. REV. 515, 529 (2009).

74. Kate Rogers, *States Consider Allowing Guns on Campus*, FOXBUSINESS.COM (Feb. 23, 2011), <http://www.foxbusiness.com/personal-finance/2011/02/23/states-consider-allowing-guns-campus/>.

75. H.R. 2479, 50th Leg., 1st Reg. Sess. (Ariz. 2011) ("[A]n educational institution shall not adopt or enforce any policy or rule that prohibits the possession of a concealed weapon by a person who possesses a valid permit . . .").

76. H.R. 1479, 88th Gen. Assemb., Reg. Sess. (Ark. 2011) (proposing permitting CHL holders who are full-time employees, including professors, to carry a concealed handgun on public university and college campuses, but forbidding students).

77. S.B. 234, 2011 Leg., 30th Reg. Sess. (Fla. 2011) (permitting concealed handgun licensees who are students, faculty, or employees, to carry concealed stun guns and non-lethal electric weapons on college and university campuses) (codified at FLA. STAT. § 790.053).

78. Rogers, *supra* note 74.

79. S.B. 2469, 2011 Leg., 126th Sess. (Miss. 2011) (removing prohibition of concealed firearms on colleges and universities, except they are still precluded in "secured areas" of the university). This bill subsequently died in committee. *Id.*

Tennessee,⁸⁴ Texas,⁸⁵ and West Virginia.⁸⁶ Arizona and Texas are considering Utah's model,⁸⁷ and West Virginia has proposed denying state funding to post-secondary schools banning firearms.⁸⁸ Thus, there appears to be a frightening legislative movement toward preventing college campuses from being gun-free.⁸⁹ According to one Senator's estimate, seventy-one colleges and universities now permit students with CHLs to carry guns.⁹⁰ This is nearly three times an earlier estimate of twenty-five.⁹¹ All of the higher-education institutions that permit guns are confined to campuses in four states: Colorado, Michigan, Utah, and Virginia.⁹² As explained in the next section, Utah's law and any other proposed legislation that, in effect, forces higher-education institutions to have firearms on campus are unconstitutional as applied to colleges and universities desiring gun-free premises.

III. EDUCATIONAL INSTITUTIONS' RIGHT TO ACADEMIC FREEDOM

There are two types of academic freedom: professional academic freedom and constitutional academic freedom.⁹³ As defined by the American Association of University Professors (AAUP), professional academic

80. Leg. B. 512, 102nd Leg., Reg. Sess. (Neb. 2011) (permitting CHL holders to carry firearms in their cars in the parking area of a college or university or on their person while riding in a car) (codified at NEB. REV. STAT. § 28-1204.04).

81. S.B. 231, 76th Leg., Reg. Sess. (Nev. 2011) (permitting CHL holders to carry concealed firearms on the property of the Nevada System of Higher Education, except at athletic events).

82. H.R. 136, 50th Leg., 1st Sess. (N.M. 2011) (allowing CHL holders to carry concealed handguns on university campuses).

83. H.R. 2087, 53rd Leg., 1st Reg. Sess. (Okla. 2011) (permitting CHL holders to carry concealed guns in vehicles and any areas authorized by college or university policy).

84. S.B. 1768, 107 Gen. Assemb., 1st Reg. Sess. (Tenn. 2011) (removing ban of concealed weapon possession by CHL holders on college and university campuses).

85. S.B. 354, 82nd Leg., Reg. Sess. (Tex. 2011) (introducing a bill that prohibits public higher education institutions from adopting "any rule, regulation, or other provision prohibiting license holders from carrying handguns on the campus of the institution," but permitting it to enact rules for storage of handguns in campus dormitories or residential areas).

86. S.B. 543, 80th Leg., Reg. Sess. (W. Va. 2011) (failed to pass).

87. See H.R. 2479, 50th Leg., 1st Reg. Sess. (Ariz. 2011); S.B. 354.

88. See S.B. 543.

89. *Nevada Hearing*, *supra* note 9 (statement of Senate Chair John J. Lee) ("There are over 40,000 people nationally supporting this movement through the grassroots organization known as Students for Concealed Carry on Campus.").

90. *Id.*

91. Richir Outreach, *Number of Colleges That Allow Guns on Campus*, ARMED CAMPUSES, <http://www.armedcampuses.org/content/number-colleges-allow-guns-campus> (last visited Oct. 23, 2011) ("Of the 4,314 colleges and universities in the United States, only 25 (0.6%) currently allow concealed handgun permit holders to carry guns on campus.").

92. *Colleges and Universities That Allow Guns on Campus: A Guide for Students and Parents*, ARMED CAMPUSES, <http://www.armedcampuses.org/> (last visited Oct. 23, 2011).

93. Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 CALIF. L. REV. 1061, 1065 (2003).

freedom is the freedom of individual professors to teach, research, and publish without interference from the administration so long as their actions are consistent with professional norms.⁹⁴ It is based on “purely a professional norm of ethics.”⁹⁵

In contrast, constitutional academic freedom is based on the First Amendment’s purpose “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”⁹⁶ Although academic freedom is not a specifically enumerated right under the First Amendment, it epitomizes a right that is specified—the right to free speech.⁹⁷ As the Supreme Court has explained, the First Amendment right to freedom of speech “includes not only the right to utter or to print, but the right to . . . freedom of inquiry, freedom of thought, and freedom to teach—*indeed the freedom of the entire university community.*”⁹⁸ Without these “peripheral rights” the specific First Amendment right of freedom of speech “would be less secure.”⁹⁹ Thus, the Supreme Court has emphasized that academic freedom (1) is a “special concern of the First Amendment, which”¹⁰⁰ (2) “does not tolerate laws that cast a pall of orthodoxy over the classroom,”¹⁰¹ and (3) “is nowhere more vital than in the community of American schools.”¹⁰² Pursuant to the Fourteenth Amendment, no state may impinge this First Amendment right.¹⁰³ Thus, for constitu-

94. Am. Ass’n of Univ. Professors, 1940 Statement of Principles on Academic Freedom (1940), *available at* <http://www.aaup.org/AAUP/pubsres/policydocs/contents/1940statement.htm>.

95. Lynch, *supra* note 93, at 1067.

96. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

97. The First Amendment provides “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. As the Supreme Court so eloquently stated,

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents’ choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

Griswold v. Connecticut, 381 U.S. 479, 482 (1965). Likewise, the First Amendment has been construed to contain a right to academic freedom. *Id.*

98. *Griswold*, 381 U.S. at 482 (internal citations omitted) (emphasis added).

99. *Id.* at 482–83.

100. Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 603 (1967).

101. *Id.*

102. Shelton v. Tucker, 364 U.S. 479, 487 (1960).

103. See McDonald v. City of Chi., 130 S. Ct. 3020, 3034–35 (2010) (noting the U.S. Supreme Court has held that the due process clause of the Fourteenth Amendment has incorporated nearly all the provisions of the Bill of Rights, including the First Amendment right to free speech); see also U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor

tional academic freedom to be implicated, some state action or regulation must be involved.¹⁰⁴ This article is only concerned with constitutional academic freedom.

A. Constitutional Academic Freedom

Constitutional academic freedom has two dimensions: (1) individual academic freedom which “involves the freedom of an individual faculty member to teach, to research, and to speak as a citizen”¹⁰⁵ and (2) institutional academic freedom, which is the freedom of the institution to pursue its mission without outside governmental interference.¹⁰⁶ Jurists are divided over whether constitutional academic freedom should belong to only the institution, the individual academician, or both.¹⁰⁷ The most recent authority indicates that the prevailing view is that it belongs to educational institutions.¹⁰⁸ It is unnecessary to distinguish between individual or institutional academic freedom in the context that academic

shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

104. Linda S. Lovely, *Beyond “The Freedom To Do Good and Not To Teach Evil”: Professors’ Academic Freedom Rights in Classrooms of Public Higher Education*, 26 WAKE FOREST L. REV. 711, 713 n.16 (1991).

105. James D. Gordon III, *Individual and Institutional Academic Freedom at Religious Colleges and Universities*, 30 J.C. & U.L. 1, 1 (2003).

106. *Id.* at 2 (defining “institutional academic freedom [as] the freedom of [the institution] to pursue its mission and [to be free] from outside control”); *see also* Rubin v. Ikenberry, 933 F. Supp. 1425, 1433 (C.D. Ill. 1996).

107. *Compare* Urofsky v. Gilmore, 216 F.3d 401, 409–10 (4th Cir. 2000) (en banc) (concluding “the right inheres in the University, not individual professors”), *cert. denied*, 531 U.S. 1070 (2001), *and* Richard Fossey & Joseph C. Beckham, *University Authority Over Teaching Activities: Institutional Regulation May Override A Faculty Member’s Academic Freedom*, 228 Ed. Law Rep. 1, 1 (2008) (opining “academic freedom appears vested in institutional authority rather than faculty prerogative”), *with* Emergency Coal. to Defend Educ. Travel v. U.S. Dep’t of Treasury, 545 F.3d 4, 12 (D.C. Cir. 2008) (assuming that if a constitutional right to academic freedom exists and can be asserted by an individual professor, “the right can be invoked only to prevent a governmental effort to regulate the *content* of a professor’s academic speech”) (emphasis in original), *and* Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?*, 30 J.C. & U.L. 531 (2004) (arguing that academic freedom should be understood as a speech right of individual professors only).

108. *See* Borden v. Sch. Dist., 523 F.3d 153, 172 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 1524 (2009); Urofsky, 216 F.3d at 414–15; Lauren Jones, *Straddling the Wall: Academic Freedom in Religious Universities and How Institutions May Engage in Self-Regulation*, 30 REV. LITIG. 319, 330 (2011) (“Insofar as the Supreme Court has ‘constitutionalized’ a right of academic freedom, it ‘appears to have recognized only an institutional right of self-governance in academic affairs.’”); Patrick M. Garry, *Assessing the Constitutional Autonomy of Such Non-State Institutions As the Press and Academia*, 2010 UTAH L. REV. 141, 159 (2010) (“[T]he institutional autonomy component of higher education entities is the one most often recognized in the scholarly literature on the constitutional principle of academic freedom.”); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 39 (2008); Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1500–01 (2007); Frederick Schauer, *Is There A Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 919–20 (2006); J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 257–58 (1989).

freedom is being invoked here (to challenge a state law), however, because, as used here, the term “institution” encompasses both.¹⁰⁹ That is, “institution” not only refers to the college or university itself, but to the faculty as a whole.

B. Campus Carry Laws Forcing Guns on Campuses Violate Academic Freedom

Institutional academic freedom consists of “four essential freedoms”: “who may teach, what may be taught, *how it shall be taught*, and who may be admitted to study.”¹¹⁰ University safety policies are well within the purview of “how it shall be taught.” As one leading scholar on academic freedom explained, the essential freedom of “how it shall be taught” recognizes that the educational institution’s right to academic freedom goes beyond the freedom of ideological speech and encompasses a duty to create an “atmosphere which is most conducive to speculation, experiment and creation.”¹¹¹ Obviously, to create this atmosphere “requires security.”¹¹²

As the University of Utah argued in *Shurtleff*, a fundamental component of a university’s educational mission is to “foster a safe academic environment for learning and the exchange of ideas free of coercion, intimidation, and the risk of physical violence.”¹¹³ The presence of concealed firearms in the classroom will significantly increase the risk of violence.¹¹⁴ For example, an ordinary argument between two people in a dormitory can quickly escalate to a deadly shooting if firearms are present.¹¹⁵ A heated exchange during a faculty meeting can turn fatal.¹¹⁶

109. This is because a higher educational institution is not a corporate entity that can run itself. Rather, it is governed, in part, by the faculty who vote on important academic decisions and matters germane to the school’s mission. See Judith Areen, *Government As Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945, 947 (2009) (arguing that university professors’ constitutional academic freedom is more than freedom in research and teaching, but “the freedom . . . to govern their institutions in a way that accords with academic values”).

110. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (emphasis added) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (Albert van de Sandt Centlivres et al. eds., Witwatersrand Univ. Press 1957) (a statement of a conference of senior scholars from the University of Cape Town and the University of Witwatersrand)) (internal quotation marks omitted).

111. Byrne, *supra* note 108, at 339–40 (quoting *Sweezy v. New Hampshire*, 354 U.S. 324, 263 (1957) (Frankfurter, J. concurring)).

112. *Id.* at 340.

113. Complaint at 1, *Univ. of Utah v. Shurtleff*, 252 F. Supp. 2d 1264 (D. Utah 2003) (No. 2:02CV-0212K) [hereinafter Complaint].

114. *Id.* at 6.

115. *Allow Concealed Handgun Licensees to Carry Weapons on College Campuses: Notes of Hearing on H.B. 1893 Before Public Safety Comm.*, 81st Leg., 2009 Reg. Sess. (Tex. 2009) [hereinafter *Texas Hearing*] (opponents’ statement) (pointing out that “[a]nrgy words

Finally, a student conference with a disgruntled and hostile student can turn into a mortal meeting.¹¹⁷ A policy banning firearms minimizes these risks.¹¹⁸

Law professors should be even more concerned about the presence of firearms on campus since most law schools have a mandatory curve, which means the professor must assign a certain number of failing grades.¹¹⁹ As some opponents to the proposed campus carry laws have pointed out, “professors may be afraid to challenge students or give out failing grades if they fear that members of the class might be armed.”¹²⁰ A failing grade could result in a student falling below the minimally required grade point average and being dismissed from school. To state that law school is extremely competitive is an understatement. As Professor Darren Bush at the University of Houston Law Center commented, “people are struggling for grades in a recession environment. I’ve personally nearly come to blows with a student over an *A minus*, and I’m not really sure a gun would add anything to that mix, except perhaps incline me to change that person’s grade.”¹²¹ Notably, the Tucson shooter, Loughner, lamented about a grade he received at his college before shooting Giffords and others, stating in a YouTube video “[t]his is my genocide school, where I’m going to be homeless because of this school. I haven’t forgot the teacher who gave me the B for freedom of speech.”¹²² Thus, anyone who dismisses the idea that the presence of firearms threatens academic freedom or free speech has likely never had to deal with a serious grade challenge.

Another reason universities may desire to ban firearms is because they can be held liable for violent acts committed by or upon students and faculty.¹²³ Specifically, a university has a duty to protect students

in dormitories or in student centers could escalate into deadly encounters” if firearms are allowed on campus).

116. See Wheaton & Dewan, *supra* note 8 and accompanying text.

117. Hickey de Haven, *supra* note 8, at 527–35 (describing how a law student shot his professor and Dean after flunking out of law school and getting into an “acrimonious” shouting match with his professor about his grades).

118. Complaint, *supra* note 113, at 6.

119. Lynn M. Daggett, *All of the Above: Computerized Exam Scoring of Multiple Choice Items Helps to: (A) Show How Exam Items Worked Technically, (B) Maximize Exam Fairness, (C) Justly Assign Letter Grades, and (D) Provide Feedback on Student Learning*, 57 J. LEGAL EDUC. 391, 399 (2007) (“At most law schools, grade curves require law teachers to assign grades with a certain average, and/or a certain distribution.”).

120. *Texas Hearing*, *supra* note 115.

121. *Texas Preps Bill for Guns on College Campuses*, FOXNEWS.COM (Feb. 22, 2011), <http://www.foxnews.com/us/2011/02/22/texas-preps-guns-college-campuses/> (emphasis added).

122. MSNBC.COM, *supra* note 6.

123. See, e.g., *Estate of Butler ex rel. Butler v. Maharishi Univ. of Mgmt.*, 589 F. Supp. 2d 1150 (S.D. Iowa 2008) (denying University’s motion for summary judgment on negligence claim for student’s death caused by another student who displayed mental illness); *Hash v. Univ. of Ky.*, 138 S.W.3d 123, 127–28 (Ky. Ct. App. 2004) (suggesting dean of law school properly considered a law student’s clinical depression in assessing his qualifications for readmission since any harm done by the law student “to himself, the faculty, or other

and employees from foreseeable criminal actions by a third party within its control, including a student or faculty member.¹²⁴ Prof. Hickey de Haven has even opined that, in the wake of these rampage school shootings, educational institutions can no longer argue that such violence is unforeseeable, and thus, have a duty to protect students against it.¹²⁵ She has also proposed a tort model for institutional liability.¹²⁶ If an institution of higher learning can be held financially responsible for campus violence, should it not decide how to best protect its campus?¹²⁷

Moreover, each campus is unique. Distinctive characteristics include: (1) the school's demographics,¹²⁸ (2) the area where the college or university is located,¹²⁹ (3) the distinctive pressures at that college,¹³⁰ and (4) the college's affiliations.¹³¹ Any of these factors may be incompatible with a policy permitting firearms on campus. In sum, the University

students might expose the University to legal liability for knowingly permitting such exposure").

124. *Nero v. Kan. City Univ.*, 861 P.2d 768, 780 (Kan. 1983).

125. *See generally* Hickey de Haven, *supra* note 8.

126. Helen Hickey de Haven, *The Academy and the Public Peril: Mental Illness, Student Rampage, and Institutional Duty*, 37 J.C. & U.L. 267 (2011) (proposing a tort model for institutional liability).

127. Siebel, *supra* note 9, at 323 ("Colleges should have the authority to decide how to fulfill their legal duty to provide a safe environment without being undercut by the gun lobby's campaign to take away individual campus administrations' discretion over this crucial safety issue.").

128. It is significant to note that in the only state to prohibit gun bans on campuses, Utah, approximately 62.4 % of the population is Mormon. Ezekial Johnson & James Wright, *Are Mormons Bankrupting Utah? Evidence From the Bankruptcy Courts*, 40 SUFFOLK U. L. REV. 607, 618 (2007). Mormons tend to be peaceful as the Church of Jesus Christ of Latter-Day Saints encourages its members to be good citizens by participating in politics and community service. *Good Citizenship*, MORMON.ORG, <http://mormon.org/citizenship/> (last visited Sept. 26, 2011).

129. If an educational institution is in a high crime area, students with guns can become a bigger target for thieves. Worse, if it is known that some students carry guns on a campus, thieves will be more aggressive and may opt to shoot their victims out of fear that they may have a gun.

130. As previously mentioned, some schools have more competitive and pressurized atmospheres than others. One scholar has noted that professors in professional schools such as law and medical schools are *more* likely to be the target during a school shooting rampage than their undergraduate counterparts. Hickey de Haven, *supra* note 8, at 508, 534 (detailing how a law student shot and killed one of his professors after receiving failing grades and having an "acrimonious shouting match" with another professor).

131. For instance, some public colleges and universities may have religious ties, and thus, having firearms on campus may be inconsistent with its religious beliefs. In such a case, not only would a university's First Amendment right to academic freedom be infringed by the presence of deadly weapons, but the right to religious freedom as well. *See Texas Hearing*, *supra* note 115 (opponents' statement) (stressing campus carry laws create an unnecessary tension between universities' First Amendment rights to freedom of speech, religion, and academic freedom since most have religious roots, affiliations, student organizations, or religious buildings on site).

is in the best position to decide what firearm policy is best for its particular institution and the government should not intrude upon its domain.

Even the Supreme Court has held that post-secondary institutions are entitled to a certain degree of autonomy in making decisions that are integral to one of the four essential freedoms of academic freedom. For example, in *Grutter v. Bollinger*,¹³² the Supreme Court used academic freedom to uphold the University of Michigan Law School's admissions policy that considered race, among other factors, in determining who should study at the University. Specifically, in concluding the law school had a "compelling interest in attaining a diverse student body," the Supreme Court reiterated that academic freedom has "a constitutional dimension, grounded in the First Amendment, of educational autonomy."¹³³ In keeping with the Supreme Court's "tradition of giving a degree of deference to a university's academic decisions," the Court reasoned that, absent a showing to the contrary, it is presumed that a university acts in "good faith" in determining what is "at the heart of [its] institutional mission."¹³⁴ In light of *Grutter*, a college or university can easily make the case that the decision not to have concealed firearms on campus is grounded in good faith and should be respected. Significantly, in *Grutter*, the court implicitly concluded that the university's right to academic freedom outweighed the individual's claim of race discrimination.

In other situations, the Supreme Court has come down on the side of a school's academic freedom when faced with a complaint that a school policy violated an individual's constitutional right. For example, the Court has upheld a school's random drug testing of its athletes against the students' Fourth Amendment right to be free from unreasonable searches on the ground that "Fourth Amendment rights . . . are different in public schools than elsewhere."¹³⁵ Accordingly, a court should not hesitate to conclude that a university can prohibit guns on campus, notwithstanding the individual's right to bear arms for protection as recognized in *District of Columbia v. Heller*,¹³⁶ because even in that case, the Supreme Court emphasized that nothing in its ruling should be construed to "cast doubt . . . on laws forbidding the carrying of firearms in sensitive places such as schools."¹³⁷ Therefore, even if a student were to challenge a college's policy banning firearms on the ground that it violates their Second Amendment right to bear arms, the college should prevail under academic freedom.¹³⁸ This is because a postsecond-

132. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

133. *Id.* at 329.

134. *Id.* at 328–29.

135. *Bd. of Educ. v. Earls*, 536 U.S. 822, 829–30 (2002) (internal citation omitted).

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

137. *Id.* at 626.

138. See Langhauser, *supra* note 10, at 65 (opining that *Heller* poses "little threat" to higher education institutions that regulate firearm possession on campus and suggesting steps attorneys can take to thwart judicial or legislative efforts to regulate firearms on campus).

ary institution is responsible for considering what is best for the entire student body and not what is best for a few gun enthusiasts.

In sum, the Supreme Court has long recognized that institutional academic freedom “guarantees a public university a degree of independence in educational decisionmaking.”¹³⁹ It has “never denied a university’s authority to impose reasonable regulations compatible with [its educational] mission.”¹⁴⁰ Thus, there is no question that post-secondary institutions can challenge a state statute on academic freedom grounds. Having established that institutions of higher learning should have a certain degree of educational autonomy under the academic freedom doctrine, the next question becomes what level of scrutiny should apply. As explained in the next section, strict scrutiny is applicable.

IV. STRICT SCRUTINY APPLIES

Legislation requiring post-secondary schools that want to remain gun free to have firearms should be reviewed under strict scrutiny for two reasons. First, despite arguments to the contrary, academic freedom is a constitutionally protected First Amendment right and not a defense as some have suggested.¹⁴¹ Second, academic freedom stems from the First Amendment right to free speech, and free speech cases are analyzed under strict scrutiny review.¹⁴²

Academic freedom is a distinct and independent First Amendment right. Although the Supreme Court has yet to expressly state this, it has strongly suggested in its jurisprudence that academic freedom is something that must be constitutionally protected under the First Amendment.

For example, as mentioned earlier, in *Grutter*, the Supreme Court observed that academic freedom has a “constitutional dimension,

139. Wyer, *supra* note 13, at 986–87.

140. *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981).

141. Courts and scholars disagree over whether academic freedom is a constitutional right or defense. Compare *Asociación de Educación Privada de P. R., Inc. v. García-Padilla*, 490 F.3d 1, 11 (1st Cir. 2007) (referring to academic freedom as a First Amendment “right”), and David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227, 236 (1990) (recognizing some Supreme Court decisions “identified academic freedom as a distinctive right within the first amendment”), with *Rubin v. Ikenberry*, 933 F. Supp. 1425, 1433 (C.D. Ill. 1996) (holding that “[w]hile academic freedom is protected, it is not an independent *First Amendment* right”), and Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 150 (2007) (arguing that the Supreme Court has never recognized a First Amendment right to academic freedom for institutions or professors, but rather has just given institutions a special judicial deference so that they can use academic freedom as a “shield” instead of a “sword”). As explained in this section, academic freedom is a constitutionally protected right under the First Amendment, and as will be argued in a later article, it is a fundamental right.

142. See *infra* note 152 and accompanying text.

grounded in the First Amendment, of educational autonomy,” and colleges and “universities occupy a special niche in our constitutional tradition.”¹⁴³ In *Minnesota State Board of Community Colleges v. Knight*, Justice Brennan reiterated how “the First Amendment safeguards the free exchange of ideas at institutions of higher learning.”¹⁴⁴ In *Sweezy v. New Hampshire*, the Supreme Court stated that “[t]he essentiality of freedom in the community of American universities is almost self-evident,” and the “government should be extremely reticent to tread” in the “areas of academic freedom.”¹⁴⁵ In *Keyishian v. Board of Regents*, the Court proclaimed “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us.”¹⁴⁶ In *Regents of University of California v. Bakke*, the Court stressed how “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.”¹⁴⁷

Accordingly, it is evident that educational autonomy in institutions of higher education plays a critical role in our democracy and in our advancement as a country. For instance, law schools, which are the pinnacles of the vigorous exchange of ideas, have become “the training ground for a large number of our nation’s leaders.”¹⁴⁸ Specifically, more than a third of U.S. Representatives, more than half of U.S. Senators, and more than half of all state governors have earned law degrees.¹⁴⁹ Additionally, according to one scholar, since the 1930s, sixty percent of the world’s Nobel Prize winners graduated from American colleges or universities.¹⁵⁰ American colleges and universities are responsible for discoveries that have led to eighty percent of the leading new U.S. industries.¹⁵¹ Clearly, academic freedom is integral to higher education. Therefore, academic freedom should be recognized unambiguously as an independent constitutional right, and any law impinging upon it should be strictly scrutinized.

Strict scrutiny should also apply because, as previously mentioned, the right to academic freedom stems from the right to free speech. Statutes burdening or restricting the right to free speech must undergo strict scrutiny analysis.¹⁵² Thus, laws burdening or restricting the right

143. *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

144. *Minn. State Bd. Cmty. Colls. v. Knight*, 465 U.S. 271, 296 (1984) (Brennan, J. dissenting).

145. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

146. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

147. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (alteration in the original) (internal citations omitted) (internal quotations omitted).

148. *Grutter*, 539 U.S. at 332.

149. *Id.*

150. Judith Areen, *Justifying America’s Universities: A Review of the Great American University: Its Rise to Preeminence, Its Indispensable National Role, Why It Must Be Protected*, 37 J.C. & U.L. 195, 195 (2010).

151. *Id.*

152. *See, e.g., Republican Party v. White*, 536 U.S. 765, 774–75 (2002) (recognizing that the proper test for a law restricting speech is strict scrutiny); *see also United States v.*

to academic freedom should likewise be strictly scrutinized. It is obvious how the presence of guns could chill or burden the freedom of speech and academic thought in the university context. The prevalence of firearms on campus might make students less likely to challenge controversial ideas of their peers, professors may be afraid to hand out failing grades or criticize students, and university administrators may be frightened to discipline employees.

In sum, any law threatening constitutional academic freedom should be strictly scrutinized.¹⁵³ Moreover, this conclusion is consistent with Supreme Court dicta indicating that strict scrutiny should apply to academic freedom cases.¹⁵⁴ As explained in the next section, the gun laws in question cannot survive strict scrutiny.

V. THE LEGISLATION CANNOT WITHSTAND STRICT SCRUTINY

To survive strict scrutiny, a state must show that the law in question “furthers a compelling state interest and is narrowly tailored to further that interest.”¹⁵⁵ If a less restrictive alternative exists that would serve the government’s purpose, the legislature must employ that alternative.¹⁵⁶ While the State unquestionably has a compelling interest in providing a safe and secure environment at public institutions of higher education,¹⁵⁷ the gun legislation is not narrowly tailored to achieve this objective. Moreover, there are less restrictive alternatives.

Playboy Entm’t Grp., Inc., 529 U.S. 803, 813 (2000); *Sable Commc’ns v. FCC*, 492 U.S. 115, 126 (1989) (same).

153. Another argument for why strict scrutiny is applicable is because the laws in question implicate an individual’s Second Amendment right to bear arms. Recently, the Supreme Court has held that the Fourteenth Amendment incorporates the right to bear arms for self-defense, and this right is fundamental. *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3042, 3050 (2010). At least one author has argued that strict scrutiny should apply to a state law that infringes upon an individual’s right to bear arms on college and university campuses. See Lindsey Craven, *Where Do We Go From Here? Handgun Regulation In a Post-Heller World*, 18 WM. & MARY BILL RTS. J. 831, 849–50 (2010). According to Mr. Craven, state laws requiring colleges and universities to be gun free will not survive strict scrutiny. *Id.* I disagree. If a student or faculty member were to challenge a ban on firearms promulgated by an institution of higher learning, the school could raise its right to academic freedom as a defense. In response, a court would have to conduct a balancing test. In my opinion, the institution’s right to academic freedom outweighs the individual’s right to bear arms.

154. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (“Political power must abstain from intrusion into this activity of [academic] freedom, pursued in the interest of wise government and the people’s well-being, except for reasons that are *exigent and obviously compelling*.”) (emphasis added).

155. 16C C.J.S. *Constitutional Law* § 1510 (2011).

156. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000).

157. See, e.g., *J.M. v. Webster Cnty. Bd. of Educ.*, 534 S.E.2d 50, 55–56 (2000) (“The state has a compelling interest in providing a safe and secure environment to the school children of this State.”).

A. Reasons the Legislation is Not Narrowly Tailored

A state statute is only “narrowly tailored if it targets and eliminates no more than the exact source of ‘evil’ it seeks to remedy.”¹⁵⁸ The precise evil that Utah’s law and similar proposed legislation is aimed to prevent is a campus shooting massacre like the one that occurred at Virginia Tech. This is most evident by the timing of the legislation and the legislative history; such legislation is usually proposed after a rampage shooting and the legislative history nearly always references the Virginia Tech shootings.¹⁵⁹ However, as explained in the following subsections, the legislation does not target the exact *source* of the evil it seeks to remedy.

1. Undetected Mental Illness Is the Real Source of Rampage Shootings and Not the Lack of Gun Power

The evil the legislation seeks to eliminate is a massive shooting rampage on a college campus; however, this occurrence is extremely rare.¹⁶⁰ There have only been seven shooting massacres in the 235-year history of the United States,¹⁶¹ all of which occurred after 1990.¹⁶² Thus, the chance of one occurring at your college or university is relatively “infinitesimal.”¹⁶³ College campuses are much safer than public places in the state where CHL holders are permitted to carry guns.¹⁶⁴ Indeed, a U.S. Department of Justice study revealed that ninety-three percent of crimes committed against college students between 1995 and 2002 were committed off campus.¹⁶⁵ Another study, conducted in 2001, revealed that the murder rate at U.S. post-secondary institutions was 0.07% per 100,000 persons, in comparison to the 5.7% overall murder rate in 1999.¹⁶⁶ According to the U.S. Department of Education’s most recent statistics, in 2009 there were only seventeen murders committed on the campuses of the over 4,300 colleges and universities in the United

158. *Frisby v. Shultz*, 487 U.S. 474, 485 (1988); *see also* 328 AM. JUR. 2D *Constitutional Law* § 403 (2011).

159. *See, e.g., supra* notes 74–87; *see also Texas Hearing, supra* note 114 (stating that the purpose of the bill was to make students and faculty less vulnerable to the deadly shooting massacres like the one that occurred at Virginia Tech).

160. *Texas Hearing, supra* note 115 (noting the “low-probability” of a campus massacre like Virginia Tech and noting that such occurrences “remain extremely rare, albeit extremely tragic, events”).

161. As of July 4, 2011, the United States turned 235 years old if you consider the birth of the United States to be on the date it declared its independence from England on July 4, 1776.

162. Hickey de Haven, *supra* note 8, at 505.

163. *Texas Hearing, supra* note 115.

164. *See, e.g., Nevada Hearing, supra* note 9 (statement of Adam Garcia, University of Nevada, Reno Chief of Police Services) (explaining the number of violent crimes on campus was “very low” compared to surrounding community).

165. *Texas Hearing, supra* note 115.

166. *Why Our Campuses Are Safer Without Concealed Handguns*, STUDENTS FOR GUN FREE SCHOOLS, <http://www.studentsforgunfreeschools.org/SGFSWhyOurCampuses-Electronic.pdf> [hereinafter STUDENTS FOR GUN FREE SCHOOLS].

States.¹⁶⁷ Therefore, arming concealed handgun licensees is a blatant overreaction to a nearly non-existent problem.

The real source of the evil the mandatory campus carry laws should target is the inadequate gun laws that do not prevent mentally ill persons from acquiring firearms. Most, if not all, of the deadly school shootings were committed by mentally ill persons, and neither the federal government nor any state has an effective methodology for tracking or reporting mentally ill persons to a national database.¹⁶⁸ Rather, when it comes to qualifying for CHL licenses, the majority of states rely on the applicant's bare assertion that they do not suffer from any mental defect. This is not a reliable method to check someone's mental stability since a truly insane person does not know he or she is insane. Thus, if state legislators want to address this problem, they need to tighten gun possession laws, not arm college-aged students, who researchers have found have the highest rate of mental health problems.¹⁶⁹

2. Concealed Handgun License Holders Can Be Bad Guys Too

It is a fallacy to believe that all concealed handgun licensees are law-abiding citizens and pose no threat to other students or faculty. While it may be true that they commit fewer crimes than the non-carrying-concealed-firearms populace,¹⁷⁰ it is significant to note that several of the shooters in the high-profile campus shootings legally purchased firearms and could have obtained a concealed handgun license since they had no criminal background.¹⁷¹ Indeed, as mentioned in the introduction, Loughner—the Tucson shooter—lawfully purchased his firearm.¹⁷² Additionally, some persons with CHL licenses have commit-

167. *The Campus Safety and Security Data Analysis Cutting Tool*, DEP'T OF EDUC. (2010), <http://ope.ed.gov/security/Index.aspx> (click the link for "Download data files," then click "Aggregated Data for calendar years for 2007-09," under collection year 2010. In the downloaded archive file, open on the "Criminal Offenses" spreadsheet, then click on the "Murder" tab at the bottom left-hand side of the workbook); see also Outreach, *supra* note 91 (noting there are 4,314 colleges and universities in the United States).

168. See generally Jacobs & Jones, *supra* note 6, at 389–98 (describing the federal laws preventing dangerous mentally ill individuals from purchasing or possessing firearms and their inadequacies).

169. See Siebel, *supra* note 9, at 327 ("Researchers have found that youths ages eighteen to twenty-five experience the highest rate of mental health problems.").

170. *Nevada Hearing*, *supra* note 9 (statement of Senator John Lee) ("It is important to know CCW permit holders are responsible and law-abiding citizens."). "CCW" stands for "carrying concealed weapon" and is the same as a "CHL" license.

171. *Texas Hearing*, *supra* note 115 ("Both Seung-Hui Cho, the Virginia Tech mass killer, and Charles Whitman, the UT tower gunman, were older than 21 years, and bought their weapons legally.").

172. Winter, *supra* note 7 (reporting that Jared Loughner, the 2011 Tucson, Arizona, shooter, also was over 21 and legally purchased his gun).

ted violent crimes in the past, including capital murder.¹⁷³ According to one scholar, “thousands of people with [CHL] licenses have committed atrocious acts of gun violence.”¹⁷⁴ Thus, having a CHL license does not make one immune from exercising poor judgment, losing his or her temper, or committing a crime.

3. CHLs and Handguns Are Too Easy To Obtain

You can have little-to-no knowledge about a firearm and obtain a CHL. To prove this point, I applied for a CHL in Texas, having never touched a handgun in my life. In fact, I did not even own one. Despite knowing very little about a firearm, including how to load or fire one, I passed the multiple-choice and shooting proficiency tests required to obtain a CHL.¹⁷⁵ In Mississippi, a person need only pass a criminal background check, “vouch” that they do not suffer from substance abuse or mental illness, and pay a fee to obtain a CHL.¹⁷⁶ No gun-handling or safety class is required.

It is even easier to acquire a gun. To avoid a criminal background check, one can purchase a gun from a private citizen at a gun show.¹⁷⁷ Thus, it is impossible to keep firearms out of dangerous hands.¹⁷⁸ A testament to this fact is a recent FBI report showing that, in 2010, 247 people on the United States Terror Watch List passed a federal background check and legally purchased a firearm.¹⁷⁹ If the federal government, with all of its resources, cannot keep guns out of the wrong hands, how can a university? Tracking who is permitted to carry firearms and who is not would create an administrative nightmare that higher educational institutions do not need. Moreover, the presence of firearms makes it more difficult to make dormitory assignments. Religious parents might not want their child rooming with a gun-toting student. Even

173. *Texas Hearing, supra* note 115 (noting that a 2007 Texas Department of Safety Report showed that four CHL holders were convicted of committing murder, two of which were capital murders).

174. Siebel, *supra* note 9, at 320.

175. Before taking the shooting proficiency test, I sat through a three-hour Power-Point presentation about where one can legally carry a firearm and non-violent ways to resolve conflicts. I was taught nothing about the operation, safe handling, or storage of a firearm. At the shooting range, the instructor loaned me her semi-automatic weapon and told me to fire. After firing the first shot, I told the instructor that I felt uncomfortable and did not want to continue. She shoved me back into the shooting booth and insisted that I finish. Despite the fact that I had my eyes closed during most of the shooting proficiency exam, I passed. Approximately one month later, I received my state of Texas CHL license in the mail, since I had no criminal record or history of mental illness.

176. MISS. CODE ANN. § 45-9-101 (LEXIS through 2011 Regular Sess. and 1st Extraordinary Sess.).

177. See Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837, 875–76 (2008).

178. *Texas Hearing, supra* note 115 (where opponents of proposed concealed campus carry laws argued “[d]angerous people can slip through the system”).

179. *FBI: 247 People on Terror Watch List Bought Guns in U.S. in 2010*, FOXNEWS.COM (April 28, 2011), <http://www.foxnews.com/politics/2011/04/28/fbi-247-people-terror-watch-list-bought-guns-2010/>.

more disconcerting, a firearm can fall into the hands of a student with a felony record, drug problem, or mental illness,¹⁸⁰ exposing the school to more liability.

4. It Is Unlikely a Shooter Will Stop a Crazy Gunman

A public researcher found that “[g]un use in self-defense is rare.”¹⁸¹ A firearm is no more likely to reduce the chance of someone being injured or killed than other protective action, such as fleeing the scene or hiding.¹⁸² Indeed, it was not an armed citizen who stopped Jared Loughner’s murderous rampage in the 2011 Tucson, Arizona shootings. Rather, it was several brave and unarmed people who tackled him to the ground with their bare hands, including a 61-year-old woman and a 74-year-old man.¹⁸³ Also, notably, “trained police officers, on average, hit their intended targets less than 20% of the time.”¹⁸⁴ Can we expect a terrified college student to have better aim? Indeed, it is difficult for trained and seasoned police officers to stop a crazy and suicidal shooter bent on committing mass murder.¹⁸⁵ Thus, the expectation that a student will prevent a mass shooting is an unrealistic and unfair expectation.

Furthermore, knowing that persons may be armed on campus will not deter a person suffering from mental illness, as evidenced by the fact that several persons across the country have entered police stations and opened fire, knowing the officers would be armed.¹⁸⁶ “Ten percent of law enforcement officers killed in the line of duty are disarmed and killed with their own weapon.”¹⁸⁷ Can we expect college students to fare any better, when they are not trained to protect themselves from this possibility?¹⁸⁸

180. *Nevada Hearing*, *supra* note 9 (statement of Adam Garcia, University of Nevada, Reno Chief of Police Services) (“The storage and securing of weapons in a college dormitory environment would make it difficult to ensure that these weapons would not fall into the hands of individuals who are not permitted to have them and who might engage in high-risk situations.”).

181. DAVID HEMENWAY, *PRIVATE GUNS: PUBLIC HEALTH* 78 (2004).

182. *Id.*

183. Jessica Hopper, Kevin Dolak & Lauren Sher, *Heroes of Tucson Shooting: “Something Had to Be Done,”* ABC NEWS (Jan. 10, 2011), <http://abcnews.go.com/US/heroes-rep-gabrielle-giffords-shooting-tucson-arizona-subdued/story?id=12580345>.

184. *Help Stop the Gun Lobby’s Effort to Push Guns into Colleges and Schools*, BRADY CAMPAIGN TO PREVENT GUN VIOLENCE, <http://www.bradycampaign.org/legislation/publicplaces/gunsoncampus> (last visited Oct. 23, 2011).

185. *See Texas Hearing*, *supra* note 115 (recounting how an insane shooter killed and wounded highly trained and well-armed police officers wearing bullet proof vests).

186. *Nevada Hearing*, *supra* note 9 (statement of Chuck Callaway, Police Director, Las Vegas, Nevada).

187. *Id.*

188. *Nevada Hearing*, *supra* note 9 (statement of José Elique, Nevada Director of Public Safety and Police Chief).

5. The Presence of Firearms Will Increase the Risk of Injury or Death

According to the International Association of Campus Law Enforcement Administrators, laws permitting concealed campus carry “have the potential to dramatically increase violence on college and university campuses.”¹⁸⁹ Statistically, handguns are more likely to be used in a suicide than a homicide.¹⁹⁰ Young adults in college suffer from increased stress and depression and, therefore, have an elevated risk for suicide.¹⁹¹ Approximately 24,000 college students attempt suicide every year, and 1100 are successful.¹⁹² If a gun is used, the success rate exponentially increases to 90% as compared to 3% for a suicide attempt by drug overdose.¹⁹³ To put these numbers in perspective, the University of Nevada reported having sixteen suicide attempts in the past five years, only one of which was fatal.¹⁹⁴ If guns were permitted on the campus during that time, that number of fatalities would have been fourteen.

Additionally, the risk of accidental shootings will dramatically increase. “[T]he potential for accidental discharge or misuse of firearms” is greater at large “student gatherings where alcohol or drugs are being consumed.”¹⁹⁵ Most state legislators recognize the high risk of violence when firearms and alcohol are present; thus, most states, if not all, prohibit CHL holders from carrying firearms into establishments where alcohol is served.¹⁹⁶ Also, in a college setting, where students are often rushing to class with books, satchels, laptops, or purses in hand, a firearm can easily fall from their person or personal bag and expel a bullet that could strike an unsuspecting student or faculty member.¹⁹⁷

6. CHL Heroes May Confuse the Police in an Emergency Situation

The presence of guns may interfere with the police’s response to a shooting emergency. As one university police chief explained, the police

189. Lisa A. Sprague, *IACLEA Position Statement: Concealed Carrying of Firearms Proposals on College Campuses* (Aug. 12, 2008), http://www.iaclea.org/visitors/PDFs/ConcealedWeaponsStatement_Aug2008.pdf.

190. *Texas Hearing*, *supra* note 115.

191. *Nevada Hearing*, *supra* note 9 (statement of Adam Garcia, Chief of Police Services, University of Nevada, Reno).

192. Siebel, *supra* note 9, at 327.

193. *Nevada Hearing*, *supra* note 9 (statement of Adam Garcia, Chief of Police Services, University of Nevada, Reno).

194. *Id.*

195. Sprague, *supra* note 189.

196. *See, e.g.*, S.D. CODIFIED LAWS § 23-7-8.1 (LexisNexis, LEXIS through 2011 legislation passed at 86th Regular Sess.) (prohibiting concealed handguns at any establishment that drives over one-half of its total income from the sale of alcohol); TEX. PENAL CODE ANN. § 46.035 (LexisNexis, LEXIS through 2011 1st Called Sess.) (same and prohibits CHL holder from possessing firearm while consuming alcohol or having it in his or her system).

197. *See* Courtney Zubowski, *Man Who Accidentally Shot Woman in Restaurant: I’m Totally Distraught*, KHOU 11 NEWS (Jan. 25, 2011, 10:54 PM), <http://www.khou.com/news/local/Man-who-accidentally-shot-woman-in-restaurant-Im-totally-distraught--114619149.html> (reporting how a gun fell out of a CHL holder’s pocket at a public restaurant, went off, and struck an elderly woman in the buttocks).

department is trained to respond to critical situations, and “[a]n essential element of our critical incident response plan is to prohibit firearms on campus except by trained police officers.”¹⁹⁸ An officer responding to the scene may have a difficult time deciphering who is the aggressor. As one police representative explained, “[i]n an active shooter situation, officers are trained to shoot anyone with a gun who is not an officer” because “[a] person with a gun is a threat.”¹⁹⁹ Thus, a police officer could mistakenly kill or wound the hero with the concealed weapon.²⁰⁰

7. Most People Oppose the Legislation

The majority of people both inside and outside the university community vehemently oppose the idea of guns on campus. According to one national study, ninety-four percent of the people who were asked whether regular citizens should be permitted to carry firearms on campus answered “No.”²⁰¹ The vast majority of colleges and universities shares this sentiment.²⁰² Even more compelling, a survivor of one of the most deadly school shootings in history, the 2007 Virginia Tech massacre, opposes the legislation.²⁰³

8. More Guns More Problems

As for the argument that students should be able to carry concealed weapons to protect themselves against other violent crimes such as rape or assaults, there are more commonsensical ways to protect oneself on campus, such as (1) not walking around late at night alone and calling a campus security officer to escort you to your car, (2) avoiding inviting strangers to your dormitory room or apartment, and (3) being aware of your surroundings. Moreover, as previously mentioned, the number of violent crimes is very low on some campuses in comparison to that of the surrounding community.²⁰⁴

198. *Nevada Hearing*, *supra* note 9 (statement of Adam Garcia, Chief of Police Services, University of Nevada, Reno).

199. *Id.* (statement of Frank Adams, representative for Nevada Sheriffs’ and Chiefs’ Association).

200. *Texas Hearing*, *supra* note 115.

201. Siebel, *supra* note 9, at 322; *see also* STUDENTS FOR GUN FREE SCHOOLS, *supra* note 166.

202. *See, e.g.*, Associated Press, *Texas Preps Bill for Guns on College Campuses*, FOXNEWS.COM (Feb. 22, 2011), <http://www.foxnews.com/us/2011/02/22/texas-preps-guns-college-campuses/> (where all the colleges and universities in Oklahoma publicly denounced legislation).

203. Colin Goddard, *Virginia Tech Survivor: Keep Guns Off Campus*, CNN NEWS (Jan. 3, 2011, 12:49 PM), <http://www.cnn.com/2011/OPINION/01/03/goddard.college.guns/index.html?iref=allsearch>.

204. *Nevada Hearing*, *supra* note 9 (statement of Adam Garcia, Chief of Police Services, University of Nevada, Reno).

The argument that criminals do not follow the rules banning firearms, so law-abiding citizens should not be disarmed by school bans, is also unconvincing.²⁰⁵ As one college student intimated, there are better solutions than allowing “other students to bring guns to campus so we can have gunfights.”²⁰⁶

B. Less Restrictive Alternatives

There are more sensible ways to prevent or minimize the risk of shootings by mentally ill individuals on college campuses. First, state legislators can enact tougher legislation requiring the state to report potentially dangerous mentally ill persons to a federal national database, which would prevent them from legally obtaining a CHL or gun.²⁰⁷ The duty to report should not be restricted to those who have been adjudicated mentally incompetent, since very few dangerous mentally ill persons fall into this category.

Second, schools could train faculty and staff how to identify students displaying signs of mental illness. Once the students are identified, they should be offered free mental health services by a professional,²⁰⁸ and the school should track their progress.²⁰⁹ If they refuse treatment or a mental professional determines they are dangerous, the school should act quickly, just as Pima Community College did, to dismiss the student until they have been cleared by a mental health professional.²¹⁰ After all, this arguably helped Pima avert a shooting massacre by Loughner on its premises.

Third, other precautionary measures can be taken, such as having metal detectors at all public entrances to educational institutions. Security cameras can be installed in every classroom and hallway. The school could restrict student access to the dean and faculty suites by having a glass bullet proof door that separates that area from the student waiting area. To gain access, students would have to be “buzzed in”

205. Cf. Kopel, *supra* note 73, at 518 (“[C]omplete prohibition of armed defense on school campuses by all faculty and by all adult students is irrational and deadly.”); *Nevada Hearing*, *supra* note 9 (statement of Senator John J. Lee, Committee Chair) (arguing that Nevada’s “gun-free zones” are really “defenseless-victim zones” because they take away the ability for citizens to protect themselves).

206. John Burnett, *Texas Lawmakers Aim for Guns on College Campuses*, NPR NEWS (Feb. 4, 2011), <http://www.npr.org/2011/02/04/133466058/texas-lawmakers-aim-for-guns-on-college-campuses>.

207. See, e.g., H.R. 48, 146th Gen. Assemb., 1st Reg. Sess. (Del. 2011) (requiring state agencies to report mentally ill persons to the National Instant Criminal Background Check System).

208. See, e.g., *Univ. Counseling Ctr.*, TEX. S. UNIV., http://www.tsu.edu/Life_at_TSU/Student_Services/University_Counseling_Center/default.php (last visited Oct. 23, 2011) (Thurgood Marshall School of Law offers mental health services through its main campus at Texas Southern University).

209. Granted, this might raise some privacy concerns, but the dean of students could limit the inquiry regarding the student’s mental health to whether or not the student is dangerous. The dean of students or school does not need to know the student’s precise mental ailment.

210. See *supra* notes 4–6 and accompanying text.

by an administrative assistant, such as at a doctor's office, or be escorted by a faculty member, staff, or administrator. Additionally, schools could install silent panic buttons underneath every professor's and administrator's desk that would summon the police immediately in an emergency situation, like the silent panic buttons in banks. A panic button could also be installed in the lectern in every classroom. Last but not least, all institutions, whether public or private, can be required to instantly report every criminal incident that occurs on campus.²¹¹

Finally, the state could pass a law that would permit, but not require, post-secondary institutions to allow students and employees to carry concealed stun guns or other electrical non-lethal weapons on campuses, just as the state of Florida passed.²¹² This is a better alternative than requiring institutions to permit firearms because these weapons are usually not deadly. Also, this solution would probably best balance the institutions' academic freedom concern to provide a safe environment conducive to the robust exchange of ideas, and the individual's right to bear arms for self-protection.

In sum, because the legislation in question is not narrowly tailored to its stated purpose and there are other less restrictive alternatives, the legislation will fail strict scrutiny review.²¹³ Accordingly, Utah's law should be repealed and similar legislation forcing guns on college campuses should not be enacted.

VI. CONCLUSION

We cannot ignore the fact that the world is a perilous place. Just recently, an eight-year-old child who stopped to ask a man for directions on a New York public street in broad daylight was abducted, murdered,

211. The Jeanne Clery Act requires institutions to timely notify students and employees of any threat to their safety. Jeanne Clery Act, 20 U.S.C. § 1092(f)(1)(J)(i) (Supp. III 2010) (requiring institutions to "immediately notify the campus community upon the confirmation of a significant emergency or dangerous situation involving an immediate threat to the health or safety of students or staff occurring on the campus, . . . unless issuing a notification will compromise efforts to contain the emergency"). In April of 2011, Virginia Tech was the first school to be fined for not timely notifying its campus of the Seung Hui Cho shootings in 2007 that resulted in 32 deaths. Leischen Stetler, *Virginia Tech First School Fined for Failure to Notify Campus in Timely Fashion*, SECURITY DIRECTOR NEWS (Apr. 5, 2011), <http://www.securitydirectornews.com/?p=article&id=sd201104TZb2IX>. Although the University was aware there was an active shooter on campus at 8:11 a.m., it did not issue a campus-wide alert for two hours, and the notification did not mention that anyone had been murdered. *Id.* The amount of the penalty was \$55,000. *Id.*

212. See *supra* note 77 and accompanying text.

213. For more policy reasons against permitting guns on campus, see Siebel, *supra* note 9. But see Riley C. Massey, *Bull's-Eye: How the 81st Texas Legislature Nearly Got it Right on Campus Carry, and the 82nd Should Still Hit the X-Ring*, 17 TEX. WESLEYAN L. REV. 199 (2011) (espousing the opposing viewpoint); Kopel, *supra* note 73 (discussing the empirical evidence and policy arguments for both sides of the issue, but leaning in favor of campus carry laws).

and dismembered.²¹⁴ In our violent society, the Second Amendment right to bear arms for protection has never been more vital. But even the U.S. Supreme Court has recognized that this right is not absolute.²¹⁵ There are certain “sensitive places” where guns have no place.²¹⁶ Colleges and universities are such a location. After all, institutions of higher education are our nation’s intellectual sanctuary. It should not be defiled by the most recognizable symbol of violence and oppression—a firearm.

As most colleges and universities have already concluded, the best solution to campus violence is to ban firearms altogether. At the very least, colleges and universities should be able to decide their firearm policies for themselves under the constitutional banner of academic freedom. States should not be permitted to set safety policies by legislative fiat. Guns are incompatible with fostering an environment that encourages the exchange of robust ideas and experimentation. Firearms should be commonplace in the military and police departments, not in our colleges and universities. A spokesperson for the University of Nevada said it best, “[l]eave the job of protecting people on campuses to trained police officers and allow the presidents of each college campus to decide who can carry weapons on their campuses.”²¹⁷ After all, academic freedom protects their right to do so.

214. *Brooklyn Boy Leiby Kletzky, 8, Murdered and Dismembered*, NEW YORK DAILY NEWS (July 15, 2011), http://www.nydailynews.com/news/ny_crime/galleries/brooklyn_boy_8_murdered_and_dismembered/brooklyn_boy_8_murdered_and_dismembered.html.

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

216. *Id.*

217. *Nevada Hearing*, *supra* note 9 (statement of Adam Garcia, Chief of Reno, Nevada Police Services).